

Constitutionalism in the Streets

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ABSTRACT: This Article works at the border of constitutional history and constitutional law. It embarks on a reconstruction of constitutionalism in the early American Republic through a microhistorical case study, an analysis of the fascinating United States v. Peters (1809), the first Supreme Court decision to strike down a state law. In the last half century, the Supreme Court has repeatedly asserted that it is the “ultimate expositor of the constitutional text.” From Cooper v. Aaron to United States v. Morrison, the Court has invoked no less than the authority of Chief Justice John Marshall and his opinion in Marbury v. Madison to burnish its claim of judicial supremacy. Several legal scholars have recently come to question this assertion, arguing that judicial supremacy deviates from the path of the Founders and is of a more recent vintage. This essay both extends and questions the important project of these critics.

Both the Court and its scholarly critics rely heavily on what they take to be the Founders’ understanding of the proper role of the judiciary, and they have accordingly excavated the meaning of various Founding-era texts. This essay seeks to show, through a detailed analysis of the controversy that led to and followed the under-examined Peters decision, that such an analysis is incomplete because the role of the Court was unsettled and deeply contested in the early Republic. This paper uses archival, newspaper, and published sources in order to recount the remarkable travails of Gideon Olmsted, a sailor and American Revolutionary privateer, who spent over three decades attempting to collect money that a Continental Congress appellate court had awarded him in a suit against Pennsylvania in the late 1770s. Pennsylvania defied the court's judgment, and Olmsted took his case to the new federal court system in 1803, and ultimately to John Marshall's Supreme Court in 1809, in what became the Peters case. Pennsylvania refused to comply with the Supreme Court’s enforcement order, and an armed clash between federal and state forces in the streets of Philadelphia ensued.

It is a mistake, the paper suggests, to treat John Marshall’s nationalistic rhetoric in the Peters opinion as decisive (as the Court did in Cooper v. Aaron) without looking at the intense dispute and nuanced maneuvering outside the courtroom that surrounded Peters. John Marshall was but one player among many in a tense stand-off, and the Court was of

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but limited effect in settling a major, lingering controversy concerning the boundary between the federal and state governments -- a controversy that dated to the days of the Continental Congress and that had once helped make the original case for a national Constitution. To the extent the Court's position ultimately prevailed, it did so only because *Olmsted* enjoyed broad support, both in public opinion and in the Executive Branch.

It follows from this examination of the *Peters* controversy that *Marbury* cannot bear the weight that the Court and its supporters have placed on it. The surprising events that surrounded the Court's decision in *Peters* should tell us something about the difficulty of resolving Founding era constitutional disputes, given the competing models of federalism and divergent understandings of the Court's role that disputants invoked. Moreover, both sides of the controversy utilized a myriad of nonjudicial devices, including petitioning and appealing to other states, which were at least as important in the controversy's ultimate resolution as the Court's decision. The article thus makes the case for the importance of studying actual constitutional practice instead of simply focusing on court decisions and official legal texts. By calling attention to the seemingly foreign ways that constitutionalism operated in the early American Republic, it urges scholars to treat the period as one of uncertainty, experimentation, and contingency, rather than attempting to mine it for precedents and traditions that support or contradict contemporary practices.

The strangeness of the past is easy to underestimate. As the historian S.F.C. Milsom has observed, "people never state their assumptions or describe the framework in which their lives are led."¹ Their most basic operating premises, therefore, can only be gleaned obliquely. And yet history is full of moments that appear, in hindsight, as harbingers of powerful, seemingly ineluctable trends. As a result, it is difficult to avoid reading these critical moments in light of the assumptions and premises of the world in which we live -- assumptions and premises whose weight we scarcely feel. What emerges is a picture of the past that, as Milsom suggested, appears obvious and yet is wrong. Thus Magna Carta, which

¹ S.F.C. Milsom, *The Legal Framework of English Feudalism* (1976). Milsom criticizes the greatest of English legal historians, F.W. Maitland, for overestimating the ability of Henry II to see beyond the premises of feudalism when he extended the reach of royal court jurisdiction.

tenuously ended a stalemate between the king and his barons, became in subsequent generations' eyes the origin of English liberty. Closer to home, Justice Oliver Wendell Holmes' dissenting opinions in maximum hour and minimum wage cases early this century, though thoroughly idiosyncratic when written, appeared so self-evident after the New Deal that two generations of scholars and jurists denied that his opponents even had coherent premises.² The significance we attach to instances such as these says more about our own experience than that of the historical actors to whom we are drawn.

The same need to read our own ways and understandings into the past helps to explain the central, mythical status that Marbury v. Madison enjoys in contemporary constitutional law. Marbury was rarely cited in its time; when mentioned at all, it was for the opinion's now-forgotten discussion of the mandamus remedy, not for its arguments concerning judicial review. And that should ultimately not surprise us. After all, when they enacted the Judiciary Act of 1802, Congress and the President effectively fired an entire cadre of circuit judges, thereby raising the mother of all constitutional questions -- which John Marshall and his brethren duly declined to engage seriously.³ Only when a case came along presenting far less danger, involving not Article III judges, but a Georgetown justice of the peace, did Marshall deploy strong rhetoric to assert the power of the judiciary

² For an effort to recover that jurisprudence, and account for its earlier loss, see G. Edward White, The Constitution and the New Deal: A Reassessment (Harvard Univ. Press 2001), chapters 8-10; Gary D. Rowe, "Lochner Revisionism Revisited," 24 *Law and Social Inquiry* 221 (1999).

to review the constitutionality of legislative acts. Yet a century and a half later, the once-uninvoked pipsqueak that was Marbury stood on a far larger footing. In the Supreme Court's rendering in the case of Cooper v. Aaron (1958), Marbury represented "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution," a principle that "has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."⁴ The Warren Court has, to be sure, given way to the Rehnquist Court, but the one thing that has endured amid profound doctrinal change is the iconic status of Marbury. The Cooper rendering of Marbury has, of late, become a staple of the Supreme Court's jurisprudence. In voiding the Violence Against Women Act in United States v. Morrison, the Court's majority confidently identified as the "cardinal rule of constitutional law" Marbury's assertion that "it is emphatically the province and duty of the judicial department to say what the law is" and insisted that "ever since Marbury this Court has remained the ultimate expositor of the constitutional text."⁵ Thus the bare assertion of judicial review, issued by Marshall only when it was safe to do so, has been transformed into a timeless notion of judicial supremacy -- an equation not surprising given that Marbury had, beginning in the 1880s, become a text, a collection of canonical statements, separated from their context, through which the battles of the Lochner

³ See Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).

⁴ Cooper v. Aaron, 358 U.S. 1, 18 (1958).

⁵ United States v. Morrison, 120 S.Ct. 1740, 1753 n.7 (2000).

era could be fought. The case was constructed and reconstructed until it was no longer about the constitutional meaning of Thomas Jefferson's electoral victory in 1800, but rather about the philosophical foundations of the judiciary's claim to legitimacy in troubled times. Moreover, the framework and assumptions that made judicial review (courts may disregard unconstitutional legislative acts) something dramatically different than judicial supremacy (only courts may say what the constitution means) had come to vanish. Constitutionalism, once a popular idiom, as this essay demonstrates, spoken through petitions and parades, had become a technical language spoken by lawyers.⁶ No wonder that the parts of Marbury that appeared puzzling or unworthy of comment in its time managed to speak directly to us, across two centuries.

The pull that the Cooper-Morrison understanding of Marbury continues to exert on even the most sophisticated lawyers, political scientists, and historians today is unmistakable. Celebrating the bicentennial of Marbury, Solicitor General Theodore Olson recently announced that "[t]hat decision, more than any other, defined the Court as a co-equal partner in our remarkable tripartite system of

⁶ On the importance of parades in the early Republic, see Susan G. Davis, Parades and Power: Street Theatre in Nineteenth-Century Philadelphia (1986); Simon P. Newman, Parades and the Politics of the Street: Festive Culture in the Early American Republic (1997); David Waldstreicher, In the Midst of Perpetual Fetes: The Making of American Nationalism 1776-1820 (1997). On the salience of petitioning, see Richard John, "Rites of Passage: Postal Petitioning as a Tool of Governance in the Age of Federalism," in Kenneth R. Bowling and Donald R. Kennon, eds., The House and Senate in the 1790s: Petitioning, Lobbying, and Institutional Development (2002). These practices, I submit, had a constitutional dimension that has been thus far neglected by historians and legal scholars.

separated and balanced governmental powers and the ultimate protector of citizens from abuses of authority by the political branches."⁷ Though less enamored of what she takes to be Marbury's consequences, political theorist Jennifer Nedelsky nonetheless finds them profound: "Judicial review was . . . the consolidation of the Federalist solution outlined in the Constitution. The Court successfully placed the very structure of government in the category of law and thus in the domain of the Court."⁸ And historian Jack Rakove, for his part, insists that, on the basis of Marbury and existing scholarship, when it comes to explaining constitutionalism and judicial power, "once the story reaches 1800, its main outlines seem fairly clear."⁹

To be sure, the traditional understanding of Marbury has attracted revisionists and critics, both friendly and hostile. Some scholars, seeking to shore up the case for vigorous contemporary judicial review, have claimed that Marbury's importance inheres not in its innovativeness, but rather in the way it simply rehashed and confirmed ideas about the judicial role clearly established at the Founding.¹⁰ Critics of judicial review, by contrast, have quibbled with the reading

⁷ Theodore B. Olson, "Remembering Marbury v. Madison," 7 *The Green Bag* (2d series) 35, 35-36 (2003).

⁸ Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy 196-97 (1990).

⁹ Rakove, "The Origins of Judicial Review: A Plea for New Contexts," 49 *Stanford L. Rev.* 1031, 1063 (1997). Rakove continues: "Marbury and McCulloch, Horwitz's and Nelson's studies of the judicial transformation of legal doctrine, and Richard E. Ellis's equally valuable exposition of the politics of legal reform, all provide an interpretive framework with which the development of the judiciary can be examined and expounded." Id.

¹⁰ See Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," 70 *U. Chi. L.*

of Marbury that the Justices advanced in Cooper. They have thus read the text of Marshall's decision in such a way as to minimize the scope and sweep of his statements, suggesting in the end that Marshall is best read as not having asserted the supremacy of the judiciary at all.¹¹ Another approach identifies a dissenting tradition, running from James Madison through Abraham Lincoln, that rejects judicial supremacy and instead embraces "departmentalism," in which each branch of government has the authority to interpret the Constitution for itself.¹² This approach therefore denies judicial supremacy's permanence and indispensability. And yet for all their differences, each of these revisions of the standard account remains in Marbury's thrall, replicating the notion that in 1803 John Marshall established or confirmed something both foundational and enduring. By failing to dwell on the framework and peculiar operating assumptions in which Marbury was initially embedded, they substitute one abstract, timeless, version of a text for another, and one abstract, timeless, and presently-useful tradition for a second. Marbury remains just as central and generative to these critics as to their traditionalist opponents. Yet instead of inventing traditions, it would behoove us to

Rev 887 (2003). Randy Barnett, "The Original Meaning of Judicial Review," *Supreme Court Economic Review* (forthcoming).

¹¹ See, e.g., Mark V. Tushnet, Taking the Constitution Away from the Courts (Princeton, N.J.: Princeton UP, 1999), 6-8.

¹² See Michael Stokes Paulsen, "The Irrepressible Myth of Marbury," 10 *Michigan L. Rev* 601 (2003). Robert A. Burt, The Constitution in Conflict (1994). Edward S. Corwin coined the term departmentalism, as well as judicial review itself. On departmentalism, see Corwin's Court over Constitution (1938).

focus on the actual contests and practice that gave early American constitutionalism its shape.¹³ That way, we can begin to view the early republic on its own terms-- less as a source of stable founding precedent and tradition than as a period of constitutional experimentation, negotiation, adaptation, and rather surprising instability.¹⁴ We have seen, thanks to the originalist turn in recent scholarship, many arguments about what the Founders thought. Yet scholars have all too readily assumed that Framers' thoughts, to the extent they are discoverable, had the capacity to control the constitutional practices of their contemporaries and the next generation. But did their ideas concerning judicial review and the judicial role in fact exert such hegemony?

In this Article, I suggest that they did not -- that, indeed, the triumph of judicial role we now read into Marbury was a contingent matter, established through a confluence of shifting forces, by no means foreordained or influenced by the kinds of textual justifications made in Marbury or any similar case. I pursue this claim through an "on the ground" microhistory or case study examining a controversial instance of early republic constitutional practice. I explore the case of United States v. Peters, a nationalistic Marshall Court decision and the first case to strike down a

¹³ As Larry Kramer has quipped, "The American people learned a great deal during the early years of their Republic -- including that many of their most cherished beliefs and firmly held ideas were either wrong or unworkable (which makes one wonder why any sensible person, even a lawyer, would privilege the speculative writings of the 1780s over the hard-earned experience of subsequent decades.)" Larry D. Kramer, "Forward: We the Court," 115 Harv. L. Rev. 4, 12 (2001).

¹⁴ On the importance of treating the early republic on its own terms, see Joanne B. Freeman, "The Election of 1800: A Study in the Logic of Political Change," 108 Yale L. J. 1959 (1999).

state statute, in some detail.

Peters is particularly important for our purposes because it figures prominently in Cooper v. Aaron. Peters, in fact, is cited in the paragraph that follows the Court's famous invocation of Marbury – a one-two punch, if you will. If Marbury was to the Cooper Court the foundation of the Supreme Court's uncontested power to "say what the law is," Peters was made to stand for a related truism-- that states must bend to the dictates of the federal courts:

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgements of the courts of the United States, and destroy the rights acquired under those judgements, the constitution itself becomes a solemn mockery..." *United States v. Peters*.¹⁵

And yet, despite a billing in Cooper nearly identical to that of Marbury, Peters remains relatively obscure. Indeed, when it is discussed at all, it is treated in a way that thoroughly bolsters the Cooper Court's conception of a long-standing, uncontested, supremacist judicial role. In his recent magisterial biography of John Marshall, for example, R. Kent Newmyer devotes just two sentences to case, concluding that thanks to the Chief Justice's opinion in Peters, "The Court's claim to

¹⁵ 358 U.S. 1, 18. Justice Brennan, who drafted the Cooper opinion, included the quotation from Peters in order to show that the Court's claim to have the final word was an "elementary constitutional proposition" going back to the early days of the Republic. See Brennan, "Notes from the Conference," Box I:15, Folder 2, *Cooper v. Aaron* Case File, No. 58-1.

interpretive authority seemed on solid ground at last."¹⁶ This article shows that, to the contrary, rather than inaugurating the Marshall Court's "golden age,"¹⁷ as is sometimes thought, Peters underscored the judiciary's fragile dependence not only on Executive support, but on even more fragile public opinion as well. The Court was but one player, and litigation was but one method, among many in shaping constitutional meaning.

Peters deserves our attention, then, partly because of the role it played, and continues to play, in the construction of judicial supremacy over the last half century. It is a source for modern mythmaking, yet has not been subject to anything like the obsessive visions and revisions that Marbury has endured But Peters also deserves investigation because, when finally understood on its own terms, it offers a window into the nature of constitutionalism and federalism in the early Republic as it was actually practiced -- a window into a legal world in which the Court lacked uncontested interpretive authority; a legal world, indeed, that operated according to practices that have long disappeared, and that is consequently almost unrecognizable to us Much can be gleaned if we go beyond Chief Justice Marshall's

¹⁶ R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court 207 (2001). This essay suggests, by contrast, that Peters highlights not the Court's interpretive authority, but rather the extremely fragile dependence of the Court, at this point in our history, on public opinion.

¹⁷ Mark A. Graber, "Federalist or Studies in American Political Development Friends of Adams: The Marshall Court and Party Politics," 12 229, 233 (1998). Graber, a political scientist who is critical of the notion that Marbury firmly established judicial review, nonetheless dates the "real test for a more independent judicial power," to Chief Justice Marshall's decision to order Pennsylvania to honor Olmsted's claims in United States v. Peters. Mark A. Graber, "Establishing Judicial Review? Schooner Peggy and the Early

assertions and beyond the standard theoretical statements about how federalism was to operate under the Constitution. However bold Marshall's rhetoric may have been, the Peters case shows that the Marshall Court enjoyed anything but the uncomplicated power to say what the law was. And it belies as well the premise of originalists, who assume that the Founding coherently resolved the most critical issues of American constitutionalism. It highlights instead the crazy-quilt ways in which constitutional matters were resolved (or, perhaps it is more accurate to say, allowed to fester) in the early Republic and reveals just how deeply contested and fragmented legal authority was. It highlights as well the yawning gap that existed between theories of American federalism and its actual practice.

What follows, then, is the story of a early American controversy that seemingly would not die. It is, specifically, the story of Gideon Olmsted, an American Revolutionary privateer who, for patriotism and profit, linked his fate to that of American nationalism. Olmsted's travails began on the high seas and continued long after he disembarked, taking him to the drier confines of the courtroom and the legislative chamber in his quest to enforce a claim he had against the Commonwealth of Pennsylvania.

The "Olmsted Affair" began in 1779, following Olmsted's seizure of a British sloop. It pitted Olmsted, a native of Connecticut, against the Commonwealth of Pennsylvania. It ultimately outlasted the Confederation and lingered in legal limbo until the U.S. district court, in 1803, and the U.S. Supreme Court, in 1809, issued

Marshall Court," 51 Political Research Quarterly 221, 224&n.7 (1998).

definitive rulings against Pennsylvania. Those rulings, in turn, generated a tense dispute between the government of Pennsylvania, which had stubbornly resisted every court order in the case, against the brand new Madison Administration, which delicately sought to enforce the Supreme Court's decision. An armed stand-off in the streets ensued -- and ended only when a wily United States Marshal arrested two elderly women, hopping fences and sneaking into a heavily-guarded house through an open back window in order to do so. The militia officers who defended Pennsylvania and resisted the United States were then subject to a trial for their defiance of the national government, convicted by a very reluctant jury, and ultimately pardoned by President Madison, who feared their continued incarceration was undermining the lesson about resistance to the national authority that he had sought to teach. Meanwhile (and astoundingly), Gideon Olmsted continued to petition the Pennsylvania legislature, seeking in vain a significant portion of the money that was never turned over to him, despite the Court's judgment. In the end, the Olmsted Affair served up a host of legal questions that raised fundamental questions about the nature of American government: when, if ever, could an appellate court reverse a jury's finding of fact; what was the nature of the Continental Congress's authority -- specifically, did it possess any inherent powers, not derived from express delegations from the colonies-turned states; how broadly was the newly-minted Eleventh Amendment to be construed; could a state judge entertain a habeas corpus action brought against a federal officer; were state officers who obeyed

unconstitutional official orders subject to federal criminal penalties? In the last analysis, the Olmsted Affair changed the shape of Pennsylvania politics and spurred the development of two highly divergent visions of nationalism and federalism. Although the case took place in the North and involved a Revolutionary War-era dispute, and although John Marshall's brand of nationalism won the day in Peters, thanks to strong Executive backing, it at the same time generated a fierce backlash in which was forged a retooled states rights creed that would resonate in the South in the decades leading up to the Civil War.

Olmsted's audacity and his antics, not to mention the tragicomic constitutional crisis they spawned, are little short of breathtaking. But though mesmerizing in its own right, the story sheds light on the nature of early American constitutionalism. For this crafty, tenacious litigant and petitioner, in his zeal to vindicate his honor and line his pocket at Pennsylvania's expense, exploited virtually every device, in and out of the courtroom, the constitutional culture allowed. And Pennsylvania, seeking to defend its dignity against what it viewed as continuous judicial oppression, not only developed a new theory of states rights, but also exploited additional nonjudicial devices to vindicate its position. In the end, the tactical efforts of Olmsted and Pennsylvania to reclaim their honor help illustrate the extent to which early Republic constitutional battles took place in significant measure in the public sphere rather than in the courtroom. Olmsted's story, then, is both a narrative worth rediscovering in its own right, and a case study that may

help to shed light on the larger problem of how constitutionalism operated in the years after the Constitution's ratification.

In the sections below, I first introduce Gideon Olmsted, describe his ordeal, and analyze his motivation for devoting his life to a lawsuit against a hostile state. I then turn to the events surrounding and following the Marshall Court's decision in Olmsted's favor, highlighting the fragility of the Court's authority and the extent to which the Court was but one player among many in the tentative, uneasy resolution of Olmsted's case and the crisis that surrounded it. I briefly conclude by examining the solace that Justice William O. Douglas took from Peters in the mid-1950s, in the wake of the South's "massive resistance" to desegregation, and I speculate as to how the case made its way into Cooper v. Aaron and, thus rendered into something useful for the times, became a supporting member of our contemporary constitutional canon.

I. Gideon Olmsted's Ordeal

No case prior to the adoption of the federal Constitution brought home the need for a more robust national government and system of federal courts than that of Gideon Olmsted. A federal admiralty court created by the Continental Congress had awarded him a money judgment against Pennsylvania, but Pennsylvania refused to comply, and the Continental Congress proved unable to do anything about it.

That was typical of Olmsted's luck. His long ordeal began on April 7, 1778, when a British warship captured the Sunflower, a 75-ton sloop that the twenty-eight year resident of East Hartford, Connecticut, along with his brother Aaron and a friend, had purchased using the proceeds from a year of privateering. The Sunflower was returning to Connecticut from its maiden voyage to the West Indies. After being released in Jamaica (without the Sunflower, which was condemned in British occupied New York as a British prize), Olmsted set sail aboard another ship, only to be captured, taken again to Jamaica, and freed once more. Ever adventurous, Olmsted promptly joined a French privateer and, after a gun battle at sea, wound up this time in a Haitian jail. In exchange for his release, Olmsted agreed to work aboard the British sloop Active, which was bound for New York to resupply the city's British occupiers.¹⁸

On August 11, 1778, the Active set sail from Port-au-Prince with thirteen people aboard: Captain John Underwood, his first mate, two British seamen (one age 17, the other 60), three infirm "gentlemen" passengers, two free blacks, and four

¹⁸ The account in this subsection is, unless specifically noted otherwise, drawn from The Journal of Gideon Olmsted: A Facsimile (1978) (reproducing Olmsted's Journal) and two secondary sources: Henry J. Bourgyuignon, The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775-1787 (1977) and Mary E. Cunningham, "The Case of the Active," 12 Pennsylvania History 229 (1946). Depositions and exhibits for the case appear in Richard Peters, ed., The Whole Proceedings in the Case of Olmstead v. Rittenhouse (1809) (Shaw-Shoemaker No. 18368); The Case of the Sloop Active (Matthew Carey, printer, 1809) (Shaw-Shoemaker No. 17163); The Active Case (1779) (Evans No. 16220); Sundry Documents Relative to the Claim of Gideon Olmsted (1811) (Shaw-Shoemaker No. 24001) (prepared by Olmsted to accompany petition to Pennsylvania General Assembly); Sundry Documents Relative to the Claim of Gideon Olmsted (1808) (earlier, shorter selection of documents accompanying earlier petition) (Library of Congress, Rare Books Division).

captured Americans: Olmsted, Artemas White, Aquilla Ramsdale, and David Clark. Word on the sea was that the Continentals had retaken Philadelphia and that the Jersey coast was crawling with American privateers. The captain consequently adjusted his course northeastward in order to stay further from danger. What he did not realize was that the danger lay on his own planks. Near midnight on September 6, 1778, as the Active approached Cape May, the four Americans mutinied. While the captain and his mate slept, they hauled up the ladder connecting the quarters to the deck and sealed off the passageway by coiling a cable around the entrance, thereby trapping all but one of the British crew members below deck. The distraught captain, to the horror of his fellow prisoners, particularly the three ailing gentlemen, began a gun-battle, wounding Olmsted's leg slightly and then, after being talked out of blowing up the entire ship, wedged the rudder in an effort to prevent the Americans from steering the vessel. On September 8, as the Americans began removing planks from the deck in order to fire into the cabin below, the captain agreed to un wedge the rudder, and an uneasy truce was reached.

As Olmsted approached Little Egg Harbor, New Jersey that same day, the brigantine Convention, owned and outfitted by the state of Pennsylvania and accompanied for protection by the sloop Le Gerard, stopped the Active and boarded it. Olmsted and the Convention's captain, John Houston, argued vehemently over the legitimacy of Houston claiming the Active as a prize. Olmsted contended that he and his cohorts had subdued the vessel and could carry it to port without

assistance. Houston, on the other hand, took the narrow, legalistic view that Olmsted, lacking a commission, had no right to claim the Active as his prize. His argument almost certainly lacked merit, in light of Continental Congress resolutions permitting captures of British vessels without commissions, but possessing more firepower than Olmsted, the captain prevailed and took the seized vessel into the port at Philadelphia. There both parties libeled the ship and its cargo in the state Admiralty Court.

There was thus but a single, factual issue for the court to adjudicate: was Olmsted in full control of the Active at the time the Convention arrived on the scene? If so, Captain Houston was but an officious intermeddler, entitled to nothing; if not, he was a sine qua non of the successful capture, meriting the bulk of the proceeds from the condemned vessel. It was now the British Captain Underwood's turn to have his revenge on Olmsted and to save what remained of his honor. In a deposition, the Captain claimed that he unwedged the rudder only in exchange for the four Americans' promise to depart from the ship via a small rowboat once it sailed closer to land. Olmsted, it followed, was not in full control of the sloop and could not have successfully hauled the vessel into port on his own. Two of the Active's crew members sharply contradicted their Captain's versions of events, insisting in their depositions not only that Olmsted and his compatriots fully intended to take the ship to port to claim it as their prize, he could have done so, using the oars and sails, even with the rudder wedged.

Unfortunately for Olmsted, the Pennsylvania Packet, a leading Philadelphia newspaper, ran a long story before the trial describing the capture, based entirely on the disgruntled Captain Underwood's version of events.¹⁹ What made such pre-trial publicity so devastating for the Connecticut sailor (litigating in Pennsylvania against the Commonwealth of Pennsylvania) was that his case would be tried by jury. Both before and after the Revolution, trial by jury in prize cases was "basically unheard of"²⁰: admiralty derived from the jury-less civil law, and the judge traditionally adjudicated maritime cases alone. Antipathy to colonial Vice-Admiralty courts challenged this basic principle, however. When General Washington urged the Continental Congress in 1775 to create prize courts, the Congress responded with a series of resolutions recommending that each colony establish its own court to adjudicate cases of capture, and that all trials in such courts be by jury. At the same time, the Congress articulated substantive rules for state courts to follow concerning the circumstances in which ships could be condemned. Importantly for our purposes, it reserved to itself the right to hear appeals in all cases.²¹

Ten of the colonies met Congress' 1775 request that they create jurored admiralty courts, but not all were willing to acknowledge Congress's plenary power to hear appeals. Massachusetts and New Hampshire limited congressional appeals to cases involving congressionally outfitted ships. Pennsylvania, which created an

¹⁹ Pennsylvania Packet, September 15, 1778.

²⁰ Bourgyuignon at 35-36.

²¹ Bourgyuignon at 35-36, 44-47.

admiralty court in 1776 pursuant to Congress's guidelines, amended its admiralty court's enabling act on September 9, 1778 -- the day after the Convention subdued the Active -- to provide that "the finding of the jury shall establish the facts, without reexamination or appeal." With these thirteen words, Pennsylvania simply extended the Congress' own common law logic in recommending jury trials; for at common law, facts found by juries were never subject to appellate review.²² In so doing, Pennsylvania made plain how poorly Congress's endorsement of juries meshed with its reservation to itself of appellate jurisdiction. A potent blend of federalism and revolutionary ideology were thus working their complications -- so much so that, thanks in large part to the difficulties of Olmsted's case, which I describe below, both the Congress and Pennsylvania repealed their jury trial provisions in 1780.

Just whose enactment trumped, that of Congress or of Pennsylvania, became the critical question in the Olmsted case after a jury returned its verdict, which was adverse to Olmsted, in November 1778. The jury awarded only a quarter of the proceeds to the four mutinous Americans, giving the remaining three quarters to the Convention. (Captain Houston of the Convention had an agreement with both the captain of the Le Gerard and the state of Pennsylvania that each would receive a third of his take.) Lacking the 2,000 pound deposit necessary to secure his appeal,

²² At common law, superior courts reviewed the work of lower courts through writs of error, which precluded review of factual determinations. Appeal was the civil law process, and because it did not insulate jury findings, it was widely feared. See Gerhard Casper, Separating Power: Essays on the Founding Period (1997).

Olmsted turned to General Benedict Arnold, Philadelphia's military commander, who along with the merchant Stephen Collins purchased a fifty percent share in the four Americans' cases.²³ Retained to represent the four American sailors were two of the most talented lawyers in Pennsylvania: James Wilson, who was to play a large role at the Constitutional Convention and would shortly thereafter become a United States Supreme Court justice, and his law partner, William Lewis, who, with increasing exasperation, represented the four Americans for the next thirty years. On December 12, 1778, the Congress' Committee of Appeals for Cases of Capture, composed of William Henry Drayton, John Henry, William Ellery, and Oliver Ellsworth, reversed the judgment of the Pennsylvania Admiralty Court and awarded the sloop and its cargo entirely to Olmsted, White, Ramsdale, and Clark.

Unfortunately for the sailors, the Pennsylvania admiralty judge, George Ross, refused to comply with the Congress' decree, on the grounds that doing so would violate Pennsylvania's statute precluding reconsideration of facts found by juries. Hearing that the items on board the Active were about to be sold and the proceeds deposited in the state Court of Admiralty, Arnold complained to the congressional Commissioners, who issued an injunction to the state judge.²⁴ The injunction

²³ On Arnold's machinations, see in addition to Bourgyuignon, Mons. Holker to President Reed, March 26, 1781, Pennsylvania Archives 1st ser., vol 7., p. 31, 33-34 (declining Arnold's "propositions" with respect to the Sloop Active). Articles of indictment were later brought against Arnold in the Pennsylvania General Assembly for, among other things, taking advantage of the four American sailors. Arnold was acquitted of this charge.

²⁴ For Arnold's letter to the court, see J.C. Bancroft Davis, Appendix to volume 131 of United States Reports (1889), page xxx. The injunction appears in 13 Journals of the Continental

notwithstanding, Judge Ross ordered the clerk of the court, Matthew Clarkson, to sell the sloop and its cargo and to deposit the proceeds in the court. Clarkson dutifully sold the cargo for \$98,000 Pennsylvania currency. (The sale of the sloop, however, does not appear to have ever taken place. According to a statement made by Philadelphia's mayor in 1811, before its intended condemnation and sale, the Active was used to clear an obstruction in the Delaware River and, remarkably, disappeared without ever being returned to the court for a judicial sale.²⁵) The Congressional Admiralty Commissioners, while noting that Pennsylvania "was bound to pay obedience" to its orders, nonetheless were "unwilling to enter into any proceedings for contempt lest consequences might ensue at this juncture dangerous to the public peace of the United States. . . ." ²⁶

The Continental Congress spent the next fourteen months searching in vain for a way to compel Pennsylvania to honor the Committee on Appeals' judgment. The four sailors received their one-fourth share in June 1779 and petitioned Congress furiously for the rest.²⁷ While Congress deliberated and attempted to negotiate with the state, the Pennsylvania General Assembly passed an act on

Congress 90-91 (January 19, 1779).

²⁵ The mayor's statement was made in an 1811 deposition and appears in Sundry Documents Relative to the Claim of Gideon Olmsted (1811) (Shaw-Shoemaker No. 24,001). I have found nothing else about what became of the ship. The statement may well be correct, however, as I have not seen a primary source stating that the ship itself was ever sold.

²⁶ 13 Journals of the Continental Congress 92 (January 19, 1779).

²⁷ I have found ten petitions, memorials, and letters to Congress from Olmsted, Wilson, or Lewis through March 1780.

November 29, 1779 authorizing Judge Ross to distribute the remaining proceeds to the two ship captains and the state treasurer. A careful lawyer nervous about personal liability, Ross instead turned over Pennsylvania's portion of the money (which had been invested in continental certificates) to David Rittenhouse, the state treasurer, in exchange for a certificate of indemnity absolving Ross of any liability should the sum ever have to be repaid. Exasperated members of Congress proposed, pursuant to a suggestion of Wilson and Lewis, that the Congress itself pay the amount owed to the four sailors and charge the sum to Pennsylvania. After eleven months of putting the question off, Congress voted the resolution down by an overwhelming majority on March 21, 1780. Among the majority was the new 29-year old congressman, James Madison.²⁸ At the Constitutional Convention seven years later, Madison implored the delegates to establish federal inferior courts, without which, he feared, interjurisdictional appeals would proliferate "to a most oppressive degree." When the Virginian asked the delegates rhetorically, "What is to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury?", he almost certainly had the Continental Congress's sorry experience with the Olmsted

²⁸ See 16 Journals of the Continental Congress 274 (March 21, 1780). Irving Brandt found Madison's later decision, during his Presidency, to support Olmsted inconsistent with his earlier vote. See Brandt, 2 James Madison at 22. It is more likely, however, that Madison opposed charging Pennsylvania in 1780 not out of a zealous concern for states' rights, but because he understood all-too-well the weaknesses of the Continental Congress. He zealously sought to enforce the judgment of the Supreme Court twenty-one years later because the idea of the new Republic not being able to overcome the vices that had plagued the confederation was anathema to him.

case in mind.²⁹

And yet the very same Olmsted case lingered in limbo for the next three decades. John Marshall's strong rhetoric affirming Olmsted's rights against Pennsylvania in 1809 notwithstanding, it hardly took a student of government as astute as Madison to wonder if the Constitution would prove any more effective than the Articles of Confederation it replaced in resolving state-federal conflicts. Which is especially revealing, for it suggests that some of the Constitution's most basic objectives, which grew out of particular disputes the Confederation was unable to resolve, were nonetheless subject to foundational debate and even revision in the years following the Constitution's ratification. Those foundational debates in the early Republic, in which everything we today take as settled was up for grabs, ought to attract more of constitutional scholars' attention.

II. Olmsted's Motivation

By the spring of 1780, Olmsted's cause seemed futile. Even a soothsayer would have been hard pressed to see the Constitution, and then John Marshall, emerging in the years and decades ahead. Yet Olmsted's efforts had just begun. What induced Gideon Olmsted to spend his thirties, forties, and fifties in a seemingly vain struggle for the fruits of his heroism? Not only did he move his family from Connecticut to Philadelphia and abandon his fledgling business in the

²⁹ 1 Farrand, The Records of the Federal Convention 124 (June 5, 1787).

process, but according to his own calculations, he spent nearly as much money litigating his case as he ultimately recovered. The Philadelphia newspaper The Aurora, a staunch Olmsted supporter, was scarcely exaggerating when it lamented that he had "wasted" his life seeking his due.³⁰

Unfortunately, our current understanding of Olmsted has not changed since the first historian to study him and the controversy he provoked wrote over a century ago:

It displays all the inherent qualities of a romance, and its scenes are crowded with the most distinguished personages, who are arrayed against each other in situations which are highly dramatic. It opens with a tale of heroism cheated of its reward by jealousy and chicane, contending with indomitable perseverance against great odds, until at the end of the struggle of thirty years an old man of ninety receives the fruits of his valor, and Justice prevails over the plots which had been devised to entrap her.³¹

Such a David versus Goliath narrative, though it makes for a delicious after dinner speech, is not wholly accurate. Indeed, when all the evidence is considered, the interminable struggle of landscape architect Frederick Law Olmsted's great uncle for his money resembles less a romance than a shameless soap opera.

There are, I think, two principal reasons why Gideon Olmsted invested his life in his claim. Olmsted left behind a fascinating document, a 101-page narrative describing his ordeal from the time he first set sail on the Seaflower to the moment

³⁰ Philadelphia Aurora, April 6, 1809.

³¹ Hampton L. Carson, "The Case of the Sloop Active," 16 Pennsylvania Magazine of History and Biography 385, 386 (1892). Other articles that adopt the same point of view include: Edward Dumbault, "Olmsted's Claim," 1977 Supreme Court Historical Society Yearbook 52; Mary E. Cunningham, "The Case of the Active," 12 Pennsylvania History 229 (1946).

he learned that Judge Ross would not honor the Congress' judgment in his favor.³² Found among his great nephew Frederick Law Olmsted's papers in the mid-1970s and published in 1978, Olmsted's journal makes clear just how deeply affected he was by the incident that gave rise to his interminable lawsuit. A reading of this document suggests that a good part of his persistence can be attributed to the honor and dignity that he, a Connecticut sailor from the lower rungs of the social order, thought had been wrongly withheld from him at sea, by Captain Houston. The story of Olmsted is thus in part yet another illustration of the American Revolution spawning a powerful new sense of equality among society's less well-off. Olmsted's future was in part defined by the arrogant denial of equality he suffered while at sea.

How had Captain Houston mistreated Olmsted, and why did it sear the young sailor so deeply? The crux of Olmsted's complaint was that Houston honored class distinctions over those of nationality and loyalty. Not only did Houston wantonly take from Olmsted the fruits of his bravery, but he did so because of Olmsted's social status. Houston treated the enemies, Captain Underwood and the other British prisoners, like "gentlemen" and the four American captors like "pirates." In so doing, the Captain had inappropriately created distinctions in the new, level world ushered into existence by the Revolution.

³² The Journal of Gideon Olmsted: Adventurers of a Sea Captain During the American Revolution: A Facsimile, Gerard W. Gawalt, ed. (Washington, D.C.: Library of Congress, 1978). This narrative was originally discovered in Frederick Law Olmsted's papers at the Library of Congress.

Although Olmsted's sentences sometimes become difficult to understand, and although his narrative occasionally becomes contradictory when read closely, his keen sense of outrage pulses unmistakably through his ungainly prose.

In Olmsted's account, after the Captain insisted upon claiming the Active as his own prize, he placed his prize-master aboard the ship and removed its crew and prisoners to the Convention. After the ships reached the Delaware River, about two hours later, according to Olmsted, "The brig hoisted out her boat to carry Capt. Underwood and the other passengers aboard the sloop [the Active]." Olmsted asked Houston if he too could board the Active, since he possessed aboard the Convention "but a shirt and a pair of trousers that I had on and it was very cold."³³ The captain brusquely refused Olmsted's request, telling him that he "could not go with them gentlemen" -- gentlemen, that is, "as he called them but we called them prisoners."³⁴ There are hints in the narrative that Captain Houston wished to keep Olmsted and the British crew apart in order to avoid violent confrontation, a sensible proposition given Captain Underwood's violent hatred of his four American captors, but Olmsted subordinates these concerns in order to present a picture of naked favoritism. Thus Olmsted writes that while the British party was permitted to return to its quarters aboard the Active, Olmsted and company were forced to sleep aboard the Convention, without their belongings, "in the hold among

³³ Journal at 89.

³⁴ Id. at 89, 97.

a passel [of] people that was very lousy." When the ships arrived at port, the "gentlemen" were permitted to disembark, but their virtually imprisoned American captors were ordered to remain aboard for a time. Indeed, Olmsted complained that "Capt. Underwood and the passengers was allowed all the liberty that any gentleman wanted as then he was arowing them ashore with their best clothes on, and we was not allowed to come at our clothes though the best of mine was bad enough. . . ."35 Olmsted, in fact, was never permitted to retrieve his clothes, "[a]nd if I had not found an American that made me a present of a suit of clothes I should not have any then."36

The saving grace for Olmsted was Benedict Arnold. With no apparent difficulty, Olmsted managed to approach the Major General the night he arrived in Philadelphia and relate his tale of "how I was used by Capt. Houston and that we had no friends that we know of nor no money."37 Arnold functions in Olmsted's narrative as the perfect antithesis of Captain Houston. Where Houston behaved capriciously, responding to Olmsted's protestations by brusquely declaring that "he should do as he pleased,"38 Arnold affirmed the rule of law, telling the young sailor that "if it was as I told the story, by the laws of congress the prize belonged to us."39

³⁵ *Id.* at 93.

³⁶ *Id.* at 93.

³⁷ *Id.* at 97.

³⁸ *Id.* at 86.

³⁹ *Id.* at 98.

And where Houston emphasized class distinctions, Arnold pronounced them irrelevant, assuring Olmsted that he and his fellows "should not lose our right for the want of money."⁴⁰

The rhetoric of Olmsted's narrative does not wholly live up to the reality of his experience. He curiously does not mention that Arnold purchased half of his claim for a pittance and thus effectively exploited the now-penniless sailor and his comrades. In one sense, the omission reflects a strange decision on Olmsted's part, since Olmsted's association with and praise for Arnold could easily have subjected his character to subsequent attack.⁴¹ Yet as we will see, Olmsted had good reason to be loathe to disclose the underside of Arnold's assistance.

As Olmsted's own tale suggests, the persevering Connecticut sailor made for a remarkably sympathetic plaintiff. Newspapers throughout the country questioned the point of Pennsylvania's defiance at the expense of this poor sailor. In Pennsylvania, Olmsted's crusade for justice and vindication became a staple in the debates that surrounded Governor Snyder's resistance to the Supreme Court. William's Duane's Aurora, when not excoriating the Snyder Administration for jeopardizing the embargo, placing the military power before the civil, or causing "two widow ladies" to suffer "in mind all the feelings which the delicacy of their sex,

⁴⁰ Id. at 97-98.

⁴¹ I gather from a few stray comments in the Aurora that John Binns' Democratic Press did attack Olmsted for his association with Arnold sometime between 1806 and 1808. See the issues of the Aurora cited below.

and the unparalleled nature of the case must naturally produce,"⁴² dwelled upon the wrong done to Olmsted. "The object" of the state Executive's tactics, the paper printed in italics, "was to wear out the life of Olmstead, which had been already wasted in pursuit of his property."⁴³

By 1809, Olmstead was accorded in public pronouncements some of the dignity denied to him at sea. The Aurora gushed that "Mr. Olmstead appears in a new and a more estimable light, when his conduct in pursuit of his right, is considered."⁴⁴ Amazingly, Olmsted had moved to Philadelphia after the Revolution, "abandon[ing] a lucrative concern in trade, five and twenty years since, to a brother, in another state, in order to pursue his right at law to secure the fruit of his sufferings and his toil." While Olmsted's brother Aaron had "retired ten years ago with an ample fortune, acquired in the business abandoned to him," Olmsted, now "in the decline of his life, with scarcely a dollar to sustain him," had chosen to pursue justice over profit. He was to the Aurora, indeed, a paean to virtue:

Any man who has encountered peril, and acquired and merited honor, in any situation, becomes from the inherent character of virtue itself, the more attached to that cause and to the source of that honor; his soul delights to dwell upon the virtues which he has exhibited; and the wealth of the earth, obtained by indifferent means, afford no joys compared with the little acquired with honor and the consolations of a generous and noble spirit. Mr. Olmstead pursued that which he had acquired after suffering, and secured by a noble magnanimity. He abandoned the more enlarged pursuits of

⁴² Aurora, April 13, 1809.

⁴³ Id.

⁴⁴ Aurora March 3, 1809.

commerce in which he had before been engaged. . . .⁴⁵

Olmsted's odd career, his self-sacrifice in pursuit of a chimera, seems almost too good to be true. In fact, the Aurora overstated his selflessness, accepting uncritically the image that Olmsted had meticulously fashioned for himself.⁴⁶ Olmsted wanted vindication, to be sure, but not at the expense of his financial well-being. He wanted to make money -- lots of it -- even as he redeemed his honor.

For all his bumpkinish pretensions, Gideon Olmsted was a man on the make. The image he built for himself as a simple, unpretentious supplicant for justice was designed precisely to mask his financial sophistication. Although he did not choose to have his own cause hitched inextricably to that of American federalism, he wished to make the best of it. He consequently took the fact that he and his three compatriots were unlikely ever to see the spoils of their nautical triumph and turned it into a high-risk speculative venture. On May 12, 1779, when his case appeared bleak, Olmsted (taking a lesson, perhaps, from Benedict Arnold, who lost his half interest in Olmsted's judgment when forced to flee the country) purchased the claims of his compatriots White and Clark.⁴⁷ I have not found the any evidence of the purchase price, but two years later, on July 16, 1781, Gideon Olmsted's brother

⁴⁵ Id.

⁴⁶ See The Aurora, March 2, 3, 4, 28, 29, 30; April 6, 11, 13, 17, 18, 19, 20, 27, 1809.

⁴⁷ See Carlisle Gazette, May 26, 1809 (discussed in epilogue); Sundry Documents Relative to the Claim of Gideon Olmsted (1811) (Shaw-Shoemaker No. 24001).

Aaron purchased Ramsdale's claim for \$1,000 Pennsylvania currency.⁴⁸ Since the Active's mutineers had already received \$24,700 of the \$98,800 the ship's cargo commanded,⁴⁹ White, Clark, and Ramsdale sold to Olmsted claims worth \$18,525 each in Pennsylvania money -- which means that Olmsted purchased Ramsdale's claim, at least, at an 18.5 to one discount. Seeing to it that Pennsylvania made good on its obligation, then, was Olmsted's way not only of maintaining his honor, but also of managing his investment.

Olmsted, in short, speculated on the ultimate triumph of American nationalism. His image as a war hero and a selfless man was the one resource under his control that could improve the odds of his receiving a substantial return, and accordingly he cultivated it with diligence. Indeed, he was a veritable self-publicity machine. (There is a reason, after all, why it's called the Olmsted, and not the Ramsdale or the White or the Clark Affair -- even if some deposition evidence suggests that Artemis White was a tougher, shrewder sailor.⁵⁰) In viewing Olmsted through virtually the same mythopoeic lens as the Aurora, historians have too readily bought into the image Olmsted shrewdly created for himself.

⁴⁸ Id. By 1809, the unpaid claims, worth about \$74,000 in 1779 Pennsylvania currency, were worth \$28,000 in United States money. This last figure includes accrued interest.

⁴⁹ These numbers are based on a petition Olmsted filed in 1810 with the Pennsylvania legislature. See Sundry Documents Relative to the Claim of Gideon Olmsted (1811) (Shaw-Shoemaker No. 24001).

⁵⁰ The deposition of George Robson, the 60-year old British crew member aboard the Active, credits White with coaxing the British captives to unwedge the rudder and enter into total submission. See Mary E. Cunningham, "The Case of the Active," 12 Pennsylvania History 229 (1946).

Olmsted's journal, for all that it reveals about him, was hardly an ordinary diary. It was written not episodically, with periodic entries, but as a single narrative, beginning conveniently with the voyage of the Seaflower and ending with Judge Ross refusing, for inexplicable reasons, to give Olmsted and his three friends their due. Even though the narrative never saw its way into print (at least until 1978), it was obviously written in anticipation of litigation -- the original number, perhaps, in the I Want to Tell You genre.⁵¹

Olmsted's dealings with the state legislature suggest a similar slickness. I have found records of Olmsted petitions to the Pennsylvania General Assembly in every year between 1806 and 1816. The contents change year by year according to political fashions. In 1806, the emphasis is on his bravery and suffering. In 1808, he similarly writes of "privations, wants, and distresses, which the restoration of his property by the public might have averted." But he goes on to add that renewed war with England is likely, and a continued failure to pay him would offer "a sad discouragement to men to enter into public service." He continues by placing himself right in the middle of legislature's recent efforts to reform the legal system: "When the delays of law and its snail-paces progress, have become proverbs -- will the respectable and upright Representatives of the Pennsylvania People, suffer their respectable Bodies to exhibit an example that renders the proceeding of courts of

⁵¹ Remember O.J. Simpson's jailhouse memoir?

law comparatively moral and benignant to its suitors."⁵²

This was in part good lawyering on the part of William Lewis, most certainly. But there is more to the story. Olmsted's 1807 petition met with some success when the state legislature offered him \$1000 for his heroism.⁵³ Olmsted rejected the offer, telling the General Assembly not that it was too insubstantial, but that he wanted "justice," not a monetary settlement:

I am poor, it is true, and that or any money would be of service to me; but I am come to the house of representatives, not to ask anything from them but justice. I wish the house to examine into the merits of my claim. If I am entitled to anything, I am entitled to the whole. If my claim is not just, I ought not to get anything.⁵⁴

The Aurora extolled Olmsted for the virtues that this letter to the legislature revealed.⁵⁵ Yet the same Olmsted who insisted upon all or nothing had already settled with the captain of the Le Gerard for \$8,000, slightly over half of what the captain was to receive from the Pennsylvania Admiralty Court.⁵⁶ Thus it was in fact the money he was after; the line of reasoning he offered to the legislature was an unmistakably false way of saying that the proffered sum was simply not enough. It

⁵² Both petitions appear in Sundry Documents Relative to the Claim of Gideon Olmsted (1808) (available in Library of Congress, Rare Books Division).

⁵³ See Journal of the Pennsylvania House of Representatives, January 5, 1807, January 9, 1807, February 7, 1807; Aurora, April 6, 1809.

⁵⁴ Quoted in Lewis F. Middlebrook, Captain Gideon Olmsted: Connecticut Privateersman, Revolutionary War 147 (1933).

⁵⁵ Aurora, April 6, 1809.

⁵⁶ See Middlebrook at 148-50. Middlebrook's book contains on these pages Olmsted's list of expenses in pursuit of his claim [double check numbers].

was also entirely consistent with the image he was assiduously cultivating and that the Aurora was soon to endorse.

It is, to be sure, no sin to claim the fruits of one's labor, nor is there anything profoundly disturbing about a person who affects a nonchalance about money in order to receive his due more easily. Economists might even tell us that Olmsted acted efficiently by buying up his compatriots' claims, for otherwise it would have been worth no one's while to keep the petitions and pleadings flowing. All this may be true, but it says little about Olmsted's economic outlook. More telling in that regard is Olmsted's personal account book, in which Olmsted included a list of expenses he accrued in pursuing his claim. Olmsted's record indicates that he incurred \$22,873.44 in costs. Lawyer's fees and printing charges (for petitions and documents) can be rather expensive, but they do not account for the bulk of the costs listed in Olmsted's record. Over \$12,000 worth are assigned to a startlingly different source -- personal time and effort spent seeking his money, which Olmsted valued at \$80 per month.⁵⁷ Olmsted was not the kind of person, then, who simply passed the time; he billed it.

III. The Constitution in the Streets of Philadelphia

In the Thirty-Ninth Federalist, James Madison confidently defended the new Constitution as being neither "wholly national, nor wholly federal." The jurisdiction

⁵⁷ See Expense account reprinted in Middlebrook at 148.

of the national government, he argued, extended to "certain enumerated objects only," leaving the states "a residuary and inviolable sovereignty." To be sure, the system was not, even in theory, perfectly bounded. "It is true," Madison conceded, "that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide," the United States Supreme Court, "is to be established under the general Government." He assured his more uneasy readers, however, that this arrangement was in the last analysis no vice at all:

But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than the local Governments; or to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.⁵⁸

Combated it was, however -- with splendid irony, during the first month of Madison's own presidency twenty-one years later -- when the decision of the Supreme Court in the case of United States v. Peters set in motion precisely the kind of "appeal to the sword" that Madison had envisioned that institution as preventing.⁵⁹

In the spring of 1809, at the northwest corner of Philadelphia's Seventh and Arch Streets, federal and state forces clashed for the first time in the young

⁵⁸ The Federalist No. 39.

⁵⁹ United States v. Peters, 9 U.S. (5 Cranch) 115 (1809). The decision in the federal district court is reported under the name Olmstead v. The Active, 18 F. Cas. 680 (D.D.Pa. 1803).

republic's history. The incident began when John Smith, the United States Marshal for the District of Pennsylvania, set out to serve judicial process on two widows. Elizabeth Sargeant and Esther Waters, daughters and executrices of David Rittenhouse, the late state treasurer, held on behalf of Pennsylvania approximately \$14,000 that the state had obtained from the condemnation and sale of the British Sloop Active. Pennsylvania's refusal to comply with the decrees of the Continental Congress in 1779, the federal district court in 1803, and the Supreme Court in 1809 had left Rittenhouse and then his heirs in possession of the disputed funds. When the Marshall Court in February 1809 ordered the reluctant district court judge, Richard Peters, to execute his judgment without delay, on the ground that permitting states to "annul the judgments of the courts of the United States" would render the "constitution itself . . . a solemn mockery," Pennsylvania became defiant.⁶⁰ The governor, Simon Snyder, called out the militia "to protect and defend the persons and property" of the two women "against any process founded on" the court's decree and from "any officer under the direction of any court of the United States." Finding such orders "painful . . . to issue," Snyder nonetheless directed the state militiamen to injure no one -- "unless the most imperious necessity compels you to do it in the execution of the orders it has become my duty to issue."⁶¹

At noon on March 25, 1809, the marshal and his two deputies approached the

⁶⁰ United States v. Peters at 136.

⁶¹ Snyder to General Michael Bright, February 27, 1809, Poulson's American Daily Advertiser (Philadelphia), March 23, 1809.

house of one of the Rittenhouse daughters, Elizabeth Sergeant, located at Seventh and Arch Streets. Ten to fifteen feet from the doorway, a militiaman stopped the federal agents at bayonet point. Asked if he knew who the marshal was, the sentry indicated that he did not care, given his orders to keep everyone out of the house. Marshal Smith asked to speak to his superiors and, while General Michael Bright, a state senator and the head of the militia, was summoned, obtained the names of the militiamen guarding the woman's house, in preparation for the treason trial that the Madison Administration was contemplating. General Bright soon arrived on the scene and, rather than easing the tension, as Smith had hoped, instead directed an entire line of his men to point their bayonets at the marshal. Philadelphia newspapers described the ensuing confrontation in a report widely reprinted in the rest of the nation:

The [federal] marshal against whose breast the bayonets were charged and who could not have advanced six inches without danger to his life, demanded of Gen. Bright, if he knew that he was the Marshal of the United States, of this district--General Bright replied yes. The Marshal then read aloud his writ and declared he would execute it at the peril of his life, at the same time made an attempt to move forward--Bright said 'at the peril of your life do it,' and immediately a bayonet was charged at him so close as to touch his breast.

Calmly, the marshal read his commission and stressed to the militiamen their duties as citizens not just of Pennsylvania, but of the United States as well. Conflicting commands to the militia followed which, whether reported accurately or embellished, capture the essence of the confrontation between the state and federal governments almost epigrammatically:

In the name and by the authority of the United States, said the Marshal addressing the soldiers, I command you to lay down your arms and permit me to proceed. In the name and by the authority of the Commonwealth of Pennsylvania, I command you to resist him, replied Gen. Bright, in which he was obeyed.⁶²

The theoretical differences between Pennsylvania and President Madison were as sharp as the bayonet that extended from the arm of a Pennsylvania militiaman to the chest of the shocked federal marshal. As the standoff continued, the state legislature prepared increasingly strident drafts of a report both defending Pennsylvania's position and calling for an amendment to the Constitution that would create an "impartial tribunal" to resolve disputes between states and the federal government.⁶³ In the process, Pennsylvania questioned (although no evidence suggests that it knew it was doing so) each one of Madison's premises from the *Thirty-Ninth Federalist*. "[I]t is to be lamented," Pennsylvania declared in one of its six resolutions, "that no provision is made in the Constitution for determining disputes between the General and State Governments by an impartial tribunal, when such cases occur." Another resolution asserted: "To suffer the United States'

⁶² This entire paragraph is based on the report appearing in *Poulson's American Daily Advertiser* (Philadelphia), March 29, 1809. It was attributed in the newspaper to the Philadelphia *True American*. I suspect that the report is embellished slightly because several other newspapers printed a similar story in which General Bright failed to deliver so sharply parallel an answer to the federal marshal. These differences may be purely stylistic, however.

⁶³ The final report and the accompanying resolutions, enacted April 2, 1809, appears in 21 *Annals of Congress* 2253-2266 (11th Cong., 1st session, 1809). In the Pennsylvania House of Representatives, the early drafts of the report's preamble admitted more doubt that the version finally enacted. See *Journal of the Pennsylvania House of Representatives* at 616 (March 10, 1809) ("future times must judge of our wisdom, or our weakness").

courts to decide on State rights will, from a bias in favor of power, necessarily destroy the Federal part of our Government, and whenever the Government of the United States becomes consolidated, we may learn from the history of nations what will be the event."⁶⁴ Rather than the neutral, authoritative arbiter of federalism that Madison had envisioned, the Supreme Court was to Pennsylvania just another interested appendage of a rapidly consolidating federal government; rather than preventing a dissolution of the constitutional compact, the Court, it seemed, only encouraged it.

If Governor Snyder's critics saw his resistance as "tantamount to withdrawal of the state of Pennsylvania from the confederacy and a declaration of war against the Union,"⁶⁵ his supporters emphasized with equal fervor the distinction in a republic between treasonously levying war against the nation and appropriately resisting an unconstitutional court order.⁶⁶ Pennsylvania claimed for itself the right to interpret the constitution and determine the appropriate scope of federal authority. In so doing, it not only threatened to vitiate the understanding of federalism that Madison had articulated in The Federalist No. 39, but also raised the disquieting possibility that the Constitution would be no more able than the

⁶⁴ From Second and Fourth Resolutions of the Pennsylvania General Assembly, enacted April 2, 1809 (emphasis added), 21 Annals of Congress 2265-2266 (11th Cong., 1st session, 1809).

⁶⁵ Remarks of Rep. Todd, in Debates in Legislature of PA on the Case of Gideon Olmsted, reported by William and Hugh Hamilton (1810) at 72 [Shaw-Shoemaker No. 21021].

⁶⁶ Id. at 89 (remarks of Rep. Tarr).

Confederation to put to bed controversies that had arisen out of Revolutionary zeal.⁶⁷

* * *

And yet, notwithstanding Pennsylvania's assault, Publius-Madison's vision of federal-state relations was far from dead. On April 16, 1809, just three weeks after the marshal and General Bright first met, "the affair of Olmstead . . . passed off without the threatened collisions of force," as an anxious President Madison put it.⁶⁸ Order had been restored, and no blood had been shed. "It is bad eno' as it is," Madison wrote to his Attorney General, "but a blessing compared with such a result."⁶⁹ General Bright and several other militiamen were prosecuted and convicted of obstructing the service of federal process, a misdemeanor, and then pardoned a week later by the President.⁷⁰ Pennsylvania's proposed constitutional

⁶⁷ The historiography of the Olmsted is sparse and not terribly analytical. The most complete account appears in Sanford Higginbotham, Keystone in the Democratic Arch (1952), chapters 7 and 8. Higginbotham's narrative emphasizes factional politics within Pennsylvania. There is a (hagiographic) biography of Olmsted, Lewis Middlebrook, Captain Gideon Olmsted: Connecticut Privateersman, Revolutionary War (Salem, MA: Newcomb & Gauss Co., 1933), which contains much useful information.

⁶⁸ Madison to Caesar A. Rodney, April 21, 1809, in 1 the Papers of James Madison: Presidential Series 131.

⁶⁹ Id.

⁷⁰ Bright's trial is reported in a pamphlet by Thomas Lloyd, in 1809 a follower of William Duane. In fact, because Duane's Aurora was so busy covering foreign affairs, Duane established another newspaper in Philadelphia edited by Lloyd which covered domestic affairs. Unfortunately, this newspaper appears not to have survived. Lloyd was also a pioneer in shorthand, although his severe alcoholism may have impinged upon his accuracy. His pamphlet is entitled A Report of the Whole Trial of Gen. Michael Bright and Others; Before Washington & Peters, in the Circuit Court of the United States, in and for the District of Pennsylvania, in the Third Circuit, on an Indictment for Obstructing, Resisting,

amendment was similarly vanquished. Congress, after languid debate, refused to print the state's resolutions.⁷¹ The proposal received an equally icy response from around the country, garnering not a single endorsement from a state legislature.⁷² Virginia, which would breed arguments strikingly similar to Pennsylvania's a decade later, sent to Pennsylvania the most engaged reply, arguing in orthodox Madisonian fashion that "a tribunal is already provided by the constitution of the United States, to-wit: the supreme court, more eminently qualified from their habits and duties . . . to decide disputes aforesaid in an enlightened and impartial manner, than any other tribunal which could be erected."⁷³ Pennsylvania had carried resistance too far, causing public opinion across the nation to turn against it.

IV. The "Siege" of "Fort Rittenhouse"

Pennsylvania itself scarcely understood what it was doing and what it was up against. Pennsylvania's difficulties began with the very people on whom it relied to carry out the resistance. Many militiamen voted with their feet against the

and Opposing the Execution, of the Writ of Arrest, Issued out of the District Court of Pennsylvania, in the Case of Gideon Olmstead and Others, Against the Surviving Executrices of David Rittenhouse, Deceased. [Hereinafter "Trial of Bright"].

⁷¹ 20 Annals of Congress 258-60 (11th Cong., 1st Session, June 4, 1809).

⁷² The one endorsement from a newspaper that I have found outside of Pennsylvania came from the National Intelligencer, which was never more than lukewarm to Pennsylvania's resistance. See its article in the March 31, 1809 issue, which attempted to sketch how an "impartial tribunal" would be constituted and how it would work. I have found no examples of anyone else attempting to put flesh on the bare bones of Pennsylvania's proposal.

governor. General Bright complained in a seemingly endless refrain, beginning the day after his units were posted at the Sergeant house, that inducing men to carry out his orders "has been with the utmost difficulty."⁷⁴ Whole companies refused to serve, and in one company whose head was at least willing to mobilize, "a requisition of fourteen was made," but "only five would comply."⁷⁵

The Governor's lack of support extended far beyond the militia, however. His political enemies were outraged, and even his friends were taken aback. A leading Federalist newspaper, after two weeks of hesitation, declared the governor's show of force treasonous.⁷⁶ The Philadelphia Aurora, already in the process of parting ranks with the Governor and his administration complained that "infatuation and folly" were spreading from Boston, the home of resistance to the

⁷³ Pennsylvania Archives, 4th Ser., vol. 4, p. 720-21.

⁷⁴ Bright to Boileau, March 25, 1809, in Pennsylvania Archives, 9th series, v. 4, at 2773. (All references to the Pennsylvania Archives are to volume four in the 9th series unless otherwise noted.) Bright reiterated his point and wrote of additional defections on March 31 and April 13. See Id. at 2774-5, 2780.

⁷⁵ Richard Bache, Jr. to Walter Franklin, March 27, 1809, Society Collection, HSP. On April 13, Bright wrote to the Governor, asking him to write to "General Steele and Major Rush . . . requesting them to inspire their Men," who had indicated that they "were tired of Service" and insisted upon being relieved. Archives at 2781. Few were as pliant as General Bright who nauseously indicated, "I shall at all times be ready to execute any orders which I may receive on this subject relying on the support of the Executive of this State." Bright to Boileau, March 25, 1809, in Archives at 2773. See also Bright to Boileau, March 31, 1809, in id. at 2774 ("believe me ever ready to execute the orders of the Governor"). Boileau, for his part, continually flattered Bright by assuring him of pleasure the governor took in his "firm and manly conduct in defending the rights of this state." Boileau to Bright, March 29, 1809, in Journal of the Pennsylvania House of Representatives, 1808-9 session, at 281-2; Boileau to Bright, April 14, 1809 (misdated March 29, 1809), in Archives at 2773-74.

⁷⁶ The United States Gazette, described in Higginbotham, Keystone at 196.

Jeffersonian embargo, to Pennsylvania.⁷⁷ The Carlisle Gazette, ordinarily sympathetic to the Snyderite movement, regarded "a paltry sum of 13,000 dollars" as "not a consideration sufficient to induce the state of Pennsylvania . . . to throw her weight in the scale of revolt; and to give irresistible force and effect to" the enemies of the embargo.⁷⁸ Prominent Philadelphians such as Richard Bache agreed, expressing similar dismay that "Members of the Legislature" would be unwilling "to pay 14,000 dollars, when the refusal is likely to produce such bad consequences. . . ."⁷⁹ Toward the end of the standoff, William Tilghman summed things up when he wrote to a private correspondent, "It is generally thought that the Governor was wrong in calling out the militia. . . ."⁸⁰

Less respectable residents of the city, to the great embarrassment of the hyper-democratic "clodhopper" state government, took to frequent rioting to make their views known, creating according to General Bright "much alarm in the City" and inducing additional militiamen to refuse further service.⁸¹ Commonwealth

⁷⁷ Aurora, March 2, 1809. The embargo involved a series of laws to limit trade with Britain and France in order to maintain American neutrality during the conflict between the two European powers. The embargo hurt New England commerce and was fiercely resisted by some New Englanders.

⁷⁸ Carlisle Gazette, March 10, 1809.

⁷⁹ Richard Bache, Jr. to Walter Franklin, March 27, 1809, Society Collection, HSP.

⁸⁰ Tilghman to Jaspas Yeates, April 11, 1809, Yeates Papers, HSP.

⁸¹ Richard Bache, Jr. to Walter Franklin, March 27, 1809, Society Collection, HSP (describing riot on Sunday, March 26, in which the mayor and several constables were called and managed to disperse the people only with difficulty); John Sergeant to Simon Snyder, April 5, 1809, in Pennsylvania Archives, 9th series, vol. 9, at 2775-6 (describing mob-induced chaos surrounding Mrs. Sergeant's home); Adjutant of the 25th Regiment Carl W. Westphal,

Secretary Boileau, ironically given his democratic track record, excoriated the "ignorant mob" for "prostrat[ing]" the "rights of this state and its sovereignty." Ordinary citizens, his constituency, "urged on by a set of designing men," were in his eyes threatening to humiliate the Snyder Administration; Boileau had "no doubt" that "if the citizens would be quiet, the matter would be adjusted to the honor of the state." Boileau even suggested to Bright that if common Philadelphians were "mad enough to interfere, and sustain personal injury, it will be of their own seeking."⁸² Boileau's uncharacteristic elitism stood in sharp contrast, as we will shortly see, to the Madison Administration's democratic strategy for putting pressure on Pennsylvania to end its insurrection.

The prospect of treason indictments, which the marshal had emphasized from the beginning, took a toll on the morale of Bright's men. On April 7, Bright and six of his men were arrested "and compelled to give security for our appearance," the example of which made service in the militia all the less desirable.⁸³ On April 12, actual grand jury indictments (which Dallas had obtained with the President's blessing and which were handed down with only two dissenting votes) for obstructing the service of federal process further "damped the Spirits of the

Evening Report, April 14, 1809, in Archives at 2781 (indicating that two militia divisions were necessary to quell a riot that night). The phrase "much alarm in the City" comes from Bright to Boileau, March 25, 1809, Archives at 2773.

⁸² Boileau to Bright, March 29, 1809, in Journal of the Pennsylvania House of Representatives, p. 281-282 (January 18, 1810).

⁸³ Bright to Snyder, April 13, 1809.

Militia . . . owing to their being liable to prosecution."⁸⁴

By April 13, Bright confided to the governor his fears "that we shall not be able, to continue our guard after this week. . . ." ⁸⁵ Defection and demoralization continued apace, particularly as foreign-born citizens who had taken an oath to support the United States Constitution refused to fulfill their obligations to the militia.⁸⁶ The marshal, for his part, had arranged to summon four thousand local citizens as a posse comitatus to "subdue the armed force which has opposed him in the duty of office."⁸⁷ In so doing, he deliberately sought to exploit the dual nature of national/state citizenship, calling for service from the very people, as General Bright lamented, "on whom we have placed our whole dependence."⁸⁸

The hostility of Philadelphia's citizenry may have made a federal victory inevitable, but another factor rendered the ultimate triumph bloodless. The Governor failed to realize that the people he ostensibly called the militia out to protect were real people, not simply rhetorical tropes.⁸⁹ As the militia grew weary,

⁸⁴ Bright to Snyder, April 13, 1800, in Archives at 2780. Because no federal officials were injured or killed, an indictment for treason, which requires the levying of war against the United States, would have been virtually impossible to sustain. According to Dallas, there was some sentiment on the grand jury for indicting Governor Snyder. See Dallas to Caesar Rodney, April 17, 1809, Rodney Papers, Library of Congress.

⁸⁵ Bright to Snyder, April 13, 1800, in Archives at 2780.

⁸⁶ Bright to Boileau, March 31, 1809, in Archives at 2774.

⁸⁷ Bright to Snyder, April 13, 1809, in Archives at 2780.

⁸⁸ Id.

⁸⁹ It is interesting to note in this regard that Boileau praised Bright for his "firm and manly conduct" in protecting Rittenhouse's daughters. Boileau to Bright, March 29, 1809, in

so too did "the Ladies," as the Rittenhouse daughters were known during the crisis. Virtual prisoners in their own homes, their liberty hitched to a cause they literally inherited, they told General Bright less than a week into the crisis that they would "not bear it any longer let the consequence be what it May."⁹⁰ And they were not simply posturing. Their lawyer, Mrs. Sergeant's step-son John, complained bitterly to the Governor a week later that his step-mother and Mrs. Waters had been placed in a most unladylike situation. "Disorder and tumult, in their Neighborhood," occasioned by the militia and anti-militia rioters, had "exposed them to mortifications, more severe than any thing that a second payment of the Sum in dispute or a submission to the process of the Marshal could have inflicted."⁹¹ Indeed, by subjecting them to "imprisonment, riot, affliction and alarm," the governor's chosen means of defending "the rights of the State," Sergeant indicated,

Journal of the Pennsylvania House of Representatives.

⁹⁰ Bright to Boileau, March 31, 1809, in Archives at 2774.

⁹¹ John Sergeant to Simon Snyder, April 5, 1809, in Archives at 2775-76. The governor's resistance to the federal judiciary was ostensibly conducted pursuant to an April 2, 1803 statute promising indemnification and protection to the Rittenhouse daughters in exchange for their turning over the disputed funds to the state treasury. See Statutes at Large of Pennsylvania 625-36 (1803). Under the law of agency at the time, government officials almost always retained possession of disputed funds because they remained personally liable to a victorious claimant if it was ultimately determined that the government did not have a right to the money. See John Gibbons, 83 Columbia Law Review 1889, 1943 (1983). An 1801 Pennsylvania statute had required the Rittenhouse heirs to turn the money over to the state treasury, but they refused to do so on the advice of counsel, on the ground that payment to the state would not extinguish their liability to Olmsted should he prove victorious in the end. See Statutes at Large of Pennsylvania 578 (1801). They complied with the 1803 statute, however, because the Legislature played hardball with them. It required the state Attorney General to sue them if they failed to turn the money over voluntarily, and it promised to indemnify them from having to pay the sum a second time only if they turned the money over to the treasury without first being sued for it.

was seriously interfering with their own "fair and perfect protection in liberty and property."⁹² Citing a vaguely worded statute, enacted two days earlier, that appropriated \$18,000 to meet the commonwealth's expenses in the standoff, Sergeant urged the governor to use these funds to pay Olmsted, and to "assert and maintain" the state's "own rights" in a way other "than by making" his clients "the victims of the contest."⁹³

After Sergeant received an icy reply, not from the Governor but from his aide Boileau, stating that the state's "sovereignty and independence" took precedence over that of the Sergeant and Waters, the two women issued a de facto ultimatum, telling General Bright that they themselves would go to Lancaster, then the state capital, "and there wait the event."⁹⁴ John Sergeant, meanwhile, instructed the militia to withdraw from the back door of the house, pledging upon his honor that he would keep the door closed and admit no one.⁹⁵ Honor notwithstanding, Sergeant appears to have leaked word to the nimble and indefatigable federal marshal who, disguised in a new set of clothes and a hat, climbed through the back yards and alleyways between Cherry and Arch streets, entering Mrs. Sergeant's

⁹² Id.

⁹³ Id.

⁹⁴ Boileau to Sergeant, April 7, 1809, in Archives at 2777; Bright to Snyder, April 13, 1809, in Id. at 2780.

⁹⁵ 25th Regiment Adjutant Carl W. Westphal, "Evening Report," April 14, 1809. Mrs. Sergeant told Westphal the same day that "'she wished that the Marshall would take Me, and the whole of the guards, and put us in jail.'"

home through the now-unguarded back door on Saturday, April 15, around six in the morning, in order finally to arrest Mrs. Sergeant and fulfill his duty.⁹⁶ The call for the posse comitatus, scheduled to assemble just three days later, was consequently revoked.⁹⁷ The state's strength fully sapped, the Pennsylvania attorney general urged the governor to withdraw the militia and pay Olmsted his money if a last-ditched habeas corpus proceeding to liberate Mrs. Sergeant from the marshal's arrest failed to bear fruit. Snyder agreed and on Saturday, April 16, 1809, two days before the federal marshal's posse comitatus was to gather, ordered the guard withdrawn.⁹⁸ The clever disguise of a marshal, not to mention the fatigue of two elderly women, thus resolved a major constitutional dispute.

V. President Madison versus Governor Snyder

Governor Snyder's decision to call out the militia had a scant prayer of success. It was also, in light of New England's flirtation with resistance to the Jeffersonian embargo, stunningly ill timed. What is striking is not that the Governor's resistance failed, but that he and his aides fully expected to prevail. They presumed that Jeffersonians of all stripes would support their resistance and

⁹⁶ See *The Aurora*, April 17, 1809, page 2, col. 3; Adjutant Westphal's "Morning Report," April 15, 1809. Note that because Olmsted's judgment was in an admiralty action, arresting the body of the person holding the money was the ordinary way of enforcing the judgment.

⁹⁷ *Aurora*, April 17, 1809 (reprinting marshal's notice of April 15, 1809).

⁹⁸ Walter Franklin to Boileau, April 15, 1809; Snyder to Bright, April 16, 1809, both in *Archives*, at 2782-83.

that the newly inaugurated Madison Administration would simply acquiesce in Pennsylvania's resistance, just as the Continental Congress had done in 1779 and the federal district court had done in 1803. In the process, they made clear just how sharply Jeffersonian thought was fragmenting, and just how fundamental differences of opinion concerning how to resolve constitutional conflict had become.

Pennsylvania's refusal to honor federal district judge Richard Peters' 1803 ruling in favor of Olmsted helps illustrate the assumptions under which the Snyder Administration operated. Upon learning of Peter's ruling, Governor Thomas McKean (who as Pennsylvania's Chief Justice had ruled against Olmsted in 1795⁹⁹) sent a message to the legislature informing it that he could not "in duty to the commonwealth silently acquiesce in some of the former or late proceedings therein."¹⁰⁰ The legislature responded with a law that, after rehearsing Pennsylvania's side of the controversy and resolutions, (1) ordered the Rittenhouse daughters to pay the disputed funds into the Treasury, and (2) "authorize[d] and require[d]" the Governor "to protect the just rights of the state, in respect of the premises, by any further means and measures that he may deem necessary for the purpose, and also to protect the persons and properties of the said Elizabeth Sergeant and Esther Waters from any process whatever, issued out of any federal

⁹⁹ Ross v. Rittenhouse, reported at 2 Dallas 160 (1792) and 1 Yeates 443 (1795). Dallas and Yeates assign different dates to the case, but a comment by one of the judges in the Yeates report, to the effect that judgment was delayed by the Whiskey Rebellion, suggests that Yeates date is the accurate one.

¹⁰⁰ See Journal of the Pennsylvania House of Representatives January 31, 1803, p. 244-45.

court. . . ."¹⁰¹ By requiring the Rittenhouse daughters to pay the disputed money into the Treasury, the state sought to bolster its argument that it was a party to the lawsuit and that the Eleventh Amendment consequently required the suit to be dismissed.¹⁰² But it had a second and more important purpose as well. In 1810, one member of the Assembly recalled the unanimously-passed 1803 bill, commenting that no one had taken much interest in it. The person who framed the bill, it was asserted, did so in order to scare Judge Peters, so that he would not enforce his decree.¹⁰³ The tactic worked. Judge Peters refused to execute his judgment because of the resolutions, and Gideon Olmsted himself temporarily gave up on his claim. Only when Simon Snyder, an "honest farmer and republican governor, [took] the place of a lawyer," did Olmsted renew his "great hopes of obtaining justice."¹⁰⁴

¹⁰¹ See Statutes at Large of Pennsylvania, Chapter CLXXVII, April 3, 1803, p. 626-636.

¹⁰² The argument is particularly weak because (1) the suit was originally between Captain Houston and Olmsted and (2) Treasurer Rittenhouse held the money personally, not in the treasury itself. To the extent Pennsylvania was involved in the admiralty proceeding at all, it was as a plaintiff, asking the court to condemn the Active on its behalf.

¹⁰³ Debates in Legislature of PA on the Case of Gideon Olmsted, reported by William and Hugh Hamilton (1810) at 50 (remarks of Rep. Thompson) [Shaw-Shoemaker No. 21021].

¹⁰⁴ Id. at 61; McKean, this speaker stated in 1810, "now reprobates and scouts the power exercised as madness, wickedness, and infuriated ignorance; bordering on treason against the union." Id. at 50. By 1807, McKean's attitude toward the federal judiciary appears to have changed. In that year, he vetoed a resolution denying the jurisdiction of the federal courts over a land scandal in Western Pennsylvania. In doing so, he stated that the union would no longer exist if states could control the powers of the federal government and indicated that "a sense of law an order, would seem to prescribe an acquiescence" in the judgment of the United States Supreme Court." Pennsylvania Archives, series 4, vol. 4, p. 605-06.

McKean's changing views on states rights are worthy of mention. Let me focus here on one of the foundational texts for Jeffersonians, especially in Pennsylvania, is McKean's

By calling out the militia, Governor Snyder anticipated not a clash of forces, but a quick retreat on the part of the federal government. Indeed, several pieces of evidence suggests that Snyder, like the 1803 legislature of which he was a part, was originally bluffing, hoping that his strong measure would deter the federal government from attempting to enforce Olmsted's judgment. As one newspaper dispatch from Lancaster (the state capital) put it, "It had been supposed that the Marshal, 'good easy man,' would make but a faint attempt to enforce the service of process. The active attempt made by him has awakened the most serious apprehension . . ." among the Cabinet Council.¹⁰⁵ Moreover, on March 16, 1809, the Legislature considered several resolutions pertaining to the Olmsted Affair. It handily voted down a number of measures that would have required the state to

opinion in the case of *Respublica v. Cobbet*, 3 Dallas 467 (1798). In that opinion, in which the famous printer was charged with criminal libel, McKean (who wished to silence Cobbet) rejected the defendant's plea that the case was cognizable in the federal circuit court because it involved a suit between a state and an alien. The opinion is interesting for two reasons of immediate concern to us. (1) First, McKean distinguished between the jurisdiction of the federal circuit court and the U.S. Supreme Court, stating that in civil cases between states and aliens, the later may exercise jurisdiction, but not the former for reasons "founded in a respect for the dignity of a State." *Id.* at 476. McKean expressed a similar appreciation for the United States Supreme Court in *Ross v. Rittenhouse*, cited above, which concerned the legitimacy of Olmsted's claim. In dicta arguing against Olmsted's right, McKean expressed a desire that the United States Supreme Court review the case to set aside all doubt. One important difference between the states' rights positions of Snyder and McKean, therefore, concerns respect for the Supreme Court. (2) Snyder and McKean, one might say, had little in common. Yet in *Cobbet*, McKean expressed the view that there was no institution set out in the Constitution to resolve disputes between the federal government and a state. McKean consequently recommended a constitutional amendment. *Cobbet* at 474. This position, of course, is precisely the one Pennsylvania adopted in its April 2, 1809 resolutions. One suspects that positions on constitutional issues changed with political fortunes and circumstances.

¹⁰⁵ Poulson's Daily American Advertiser, March 29, 1809.

pay Olmsted's claim. But when one representative offered a resolution declaring that "the state of Pennsylvania, will resist the execution of the decree of the court of the United States . . . at every hazard," the measure failed, picking up but one vote.¹⁰⁶ Just nine days before the standoff described previously, then, Pennsylvania's officials did not anticipate the clash of forces that was to follow, and did not appear fully anticipate the crisis they were precipitating.

Even when matters heated up on the streets of Philadelphia, the Snyder Administration continued to believe that the federal government would quickly back down. After the United States Attorney, Alexander J. Dallas, threatened to prosecute General Bright and his men for treason, Commonwealth Secretary Boileau expressed his confidence "that Dallas dare not attempt what he has threatened."¹⁰⁷ Boileau and Snyder, in fact, put their full faith in Madison. In two letters to General Bright, Boileau expressed confidence that the Governor, who was in the process of drafting a letter to the President asking for support, would receive a favorable reply. They woefully misunderstood the outlook of the Madison Administration.

How could they have done so? We should not yield to the temptation to view Governor Snyder's miscalculation as that of a madman. His vision of

¹⁰⁶ Journal of the Pennsylvania House of Representatives, March 16, 1809, p. 696.

¹⁰⁷ Boileau to Bright, March 29, 1809, in Journal of the Pennsylvania House of Representatives, 281-2. Dallas reiterated his position in no uncertain terms during the following week. According to a National Intelligencer dispatch dated April 5, "Mr. Dallas, declared it to be the intention of the government of the United States, to support and maintain the power of their courts and enforce their process, and that the late outrage against the laws of the United States should not pass unnoticed." National Intelligencer, April 7, 1809.

constitutionalism derived from another, competing strand of American constitutional thought -- one that can, ironically, be traced to no less an authority than James Madison himself. To be sure, as we have seen, in the 39th Federalist Madison had suggested that "controversies relating to the boundary between" the state and federal governments would be resolved by a "tribunal . . . established under the general Government."¹⁰⁸ But in two subsequent essays, The Federalist Nos. 45 and 46, Madison endorsed, in sharp, piercing sentences, a rather different constitutional approach. "Ambitious encroachments of the Federal Government on the authority of the State governments," he suggested, "would be signals of general alarm. Every Government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerned. One spirit would animate and conduct the whole."¹⁰⁹ The Synderite plan was drawn, then, from the rich Madisonian playbook. Indeed, this particular play had proven its utility, in Jeffersonian eyes at least, in last years of the 18th century, when the Jeffersonians had attempted to use state legislatures to resist what they viewed as a grossly unconstitutional set of federal laws -- the Alien and Sedition Acts of 1798. The Virginia and Kentucky legislatures enacted resolutions, drafted by James Madison and Thomas Jefferson respectively, declaring those laws unconstitutional and

¹⁰⁸ The Federalist 39.

¹⁰⁹ The Federalist No. 46.

void.¹¹⁰ These resolutions were then sent to other state legislatures, in the (ultimately vain) hope of attracting additional state support, much as Madison's 46th Federalist had suggested.

In the eyes of Governor Snyder and his supporters, the "Principles of '98," as the Virginia and Kentucky ideology became known, justified resistance to a judiciary that claimed the sole authority to interpret the Constitution. They saw themselves fulfilling the role that Virginia and Kentucky had earmarked during the Sedition Act crisis.¹¹¹ And so, having sounded the "general alarm," they expected their fellow Jeffersonians in states throughout the nation to rally to their cause.

The salience of the Virginia and Kentucky Resolutions to Pennsylvania's position is all the more apparent when we turn to the text of United States v. Peters. Marshall's opinion is self-consciously aimed as much at the Virginia and Kentucky vision of constitutionalism as at Pennsylvania's particular resistance to the district

¹¹⁰ For recent discussions of the Virginia and Kentucky Resolutions and their significance, see K.R. Constantine Gutzman, "The Virginia and Kentucky Resolutions Reconsidered: 'An Appeal to the *Real Laws* of Our Country,'" 66 *Journal of Southern History* 473 (2000); Wayne D. Moore, Constitutional Rights and the Powers of the People, 239-74 (1996); H. Jefferson Powell, "The Principles of '98: An Essay in Historical Retrieval," 80 *Va. L. Rev* 689 (1994)

¹¹¹ For evidence of this Virginia/Kentucky posture, see Journal of the Pennsylvania Senate at 381, March 3, 1810 (arguing in a draft report that Pennsylvania called out the militia not to resist federal authorities, but to induce Congress to take up the subject and to alert "their fellow-citizens of the union" to "the motives of the judges"); see also Resolutions enacted April 2, 1809, reprinted in 21 Annals of Congress 2253-2266 (11th Cong., 1st session, 1809): [W]hereas the causes and reasons which have produced this conflict between the General and State Governments should be made known, not only that the State may be justified to her sister States, who are equally interested in the preservation of the State rights, but to evince the Government of the United States that the Legislature, in resisting encroachments on their rights, are not acting in a spirit of hostility to the legitimate powers of the United States court, but are actuated by a disposition to compromise, and to guard against

court's order. Technically speaking, the case turned on whether the Eleventh Amendment deprived the federal district court of jurisdiction to enforce the Continental Congress' judgment in *Olmsted's* favor. In due course, Marshall holds that the Eleventh Amendment does not apply here because state treasurer Rittenhouse and his daughters, rather than the state treasury, held the disputed funds. Thus stripped of its sovereign immunity shield, "the state of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause."¹¹²

But Marshall has far more than this to say, and the preliminary section of his opinion reveals his deeper concerns more clearly. At its core, the case in Marshall's view concerned the "universal right of the state to interpose" -- the word "interpose" is language drawn directly from the Virginia and Kentucky Resolutions -- in cases involving the jurisdiction of the federal courts. Marshall presents the choice starkly: "If the ultimate right to determine the jurisdiction of the courts of the union is placed by the constitution in the several state legislatures," then Pennsylvania wins and the Court has no business even interpreting the Eleventh Amendment. If, on the other hand, "that power necessarily resides in the supreme judicial tribunal of the nation," then the judiciary alone must decide the question of the district court's jurisdiction. Marshall chose to resolve this dichotomy briskly and rhetorically: "If the legislatures of the several states may, at will, annul the

future collisions of power, by an amendment to the Constitution. . . .

¹¹² *United States v. Peters*, 9 U.S. (5 Cranch) 115, 141 (1809).

judgments of the courts of the United States," the Chief Justice wrote, "and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentalities of its own tribunals." Curiously, rather than rely upon authority to support this conclusion, Marshall chose instead to launch an appeal directly to the people, as if campaigning for their support when Pennsylvania inevitably solicited their aid: "So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves."¹¹³ Marshall, the opinion suggests, recognized that his efforts in this dispute would have to be more persuasive than authoritative. The contest between Marshall and Snyder was, on both sides, an appeal to public opinion.

What ultimately undermined Snyder and his supporters, then, was not that they had attempted to challenge the Supreme Court. Rather, it was the dismal spectacle that depriving a Revolutionary privateer of the fruits of his bravery and keeping two widows imprisoned in their home, created. Moreover, as tempting a target as John Marshall might have been, the Snyder Administration failed to understand that that their fellow Democratic-Republicans -- ranging from the author of the Virginia Resolutions himself to the more radical Philadelphians who organized themselves behind William Duane's newspaper The Aurora -- had no

¹¹³ Peters, 9 U.S. (5 Cranch) 115, 136 (1809).

wish in 1809 to generalize and expand the principle of multiplicity in matters of constitutional interpretation that they had promoted during the Sedition Act crisis. In particular, President Madison and those in his Administration, facing discontent and disunionist sentiment in New England, despaired increasingly for the future of the nation's republican experiment. Pennsylvania's abstract claim to sovereign immunity could not begin to carry for the Madisonians anything near the weight that the oppressive Sedition Act had. They viewed federalism less as an end in itself than as a means to secure liberty -- something which *Olmsted's* case certainly did not implicate. This was a case, for Madison, far closer to the ideal behind the 39th Federalist than that of the 46th Federalist and the Virginia and Kentucky Resolutions of 1798. It was, indeed, a case that suggested the danger that capacious readings of the 1798 Resolutions could underwrite.

But Governor Snyder and his circle did not sense as much. Rather, they took the Virginia and Kentucky Resolutions at their word, believing the interpretative autonomy of state legislatures, as articulated in the Resolutions, as being a core element of the Jefferson's succession to the presidency in 1801. Thus Governor Snyder, confidently expecting vindication from the Virginia Resolutions' author, sent an obsequious letter to President Madison praising him for being " so intimately acquainted with the principles of the Federal constitution" and asking him for support in the *Olmsted* crisis. When it arrived at the White House, members of the Administration found it "Curious," and the President prepared an intentionally "dry

answer" in response.¹¹⁴ In it Madison noted that "the Executive of the U. States, is not only unauthorized to prevent the execution of a Decree sanctioned by the Supreme Court of the U. States, but is expressly enjoined by Statute, to carry into effect any such decree, where opposition may be made to it."¹¹⁵

Madison's strategy was anything but what Snyder expected. How surprised the Governor must have been to learn that the Madison Administration itself wished the "good easy" marshal "not to retreat an inch," and to "take every measure to ensure complete success."¹¹⁶ The Administration would settle for no half-measures. Had things gone less smoothly for the marshal, the Madison Administration was prepared to mobilize the "militia of other states" or if necessary "Regular troops." "Be the consequences what they may," Secretary of State Robert Smith told United States Attorney Dallas, "government must be supported." Else "in the estimation of the American people," Smith feared, government would "appear unworthy of attachment," thereby causing society to suffer "all the ills of a Revolution."¹¹⁷

The Administration wished not simply to see federal law carried out, but also to harness the hostility of the citizenry as a democratic check on the "intemperate

¹¹⁴ See Secretary of State Robert Smith to U.S. Attorney Alexander J. Dallas, April 13, 1809, Rosenbach Museum and Library, Philadelphia, MSS No. 1186/17.

¹¹⁵ Madison to Simon Snyder, April 13, 1809, in 1 the Papers of James Madison: Presidential Series 114.

¹¹⁶ Caesar Rodney to Madison, April 17, 1809, in id. at 120.

¹¹⁷ See Secretary of State Robert Smith to U.S. Attorney Alexander J. Dallas, March 31, 1809, Rosenbach Museum and Library, Philadelphia, MSS No. 1186/17, folder 3, letter 2.

folly of a few."¹¹⁸ For this reason Madison personally insisted upon bringing Bright and his men to trial even after the standoff had otherwise been completely settled in favor of the national government.¹¹⁹ The "prosecution & conviction of some of the principal offenders" was perceived within the Administration "as a safe & effectual mode of restoring the authority of the laws."¹²⁰ It was "desirable," as Secretary of State Robert Smith later put it, "that the good people of Pennsyla. should have an opportunity, not only by their Grand Jury, but by their petty jury, to evince their marked disapprobation" of the militia's conduct. "The stain" that Snyder and his militia had placed on Pennsylvania, Smith continued, "may thus, in a great degree, be removed."¹²¹

Madison and his cabinet were gripped, as the quotations in the previous paragraphs should suggest, by a strong sense of the fragility of republican institutions. Pennsylvania's disproportionate actions, along with the rise of

¹¹⁸ Robert Smith to Alexander J. Dallas, April 23, 1809, Rosenbach Museum and Library, Philadelphia, Mss. No. 1186/17, folder 3, letter 4.

¹¹⁹ See Madison to Attorney General Caesar A. Rodney, April 14, 1809, in 1 Papers of James Madison: Presidential Papers at 114, in which Madison rejects the idea of forbearing to prosecute General Bright and his men ("The Secy. of S. will have informed you of the intimation to Mr. Dallas that a Nol. Pros: was not thought an eligible course."). See also Robert Smith to Dallas, April 23, 1809; Robert Smith to Walter Franklin, April 24, 1809, enclosed in Smith to Dallas, April 23, 1809 (rejecting presidential intervention in the trial of Bright "until after conviction, and not even then, unless there shall have been presented to him a statement of circumstances, which, in substance, and in form will fully justify his interposition in a case of so very serious a character). Both letters are in the Rosenbach Museum and Library, Philadelphia, Mss. No. 1186/17.

¹²⁰ Rodney to Madison, in 1 Madison Papers: Presidential Series at 121.

¹²¹ Robert Smith to Alexander J. Dallas, April 23, 1809, Rosenbach Museum and Library, Philadelphia, Mss. No. 1186/17, folder 3, letter 4.

disunionist sentiment in New England, had convinced them that the Republic as they understood it was in danger of coming apart.¹²² Governor Snyder and his faction in Pennsylvania were, in their view, trivializing a core episode in the Jeffersonian experience and, in the process, heaping contempt upon the rule of law. Here lay the danger: the citizenry, though hostile to Snyder for the time being, could all too easily be seduced by the siren song emanating from Lancaster, Pennsylvania.¹²³ At stake was nothing less than the hearts and minds of ordinary people, their reverence for law -- the stuff, indeed, which republican virtue was made on. United States Attorney Alexander Dallas underscored this theme when he colorfully invoked Shakespeare in his opening argument for the prosecution at General Bright's trial for resisting the authority of the United States, which he hoped would serve

to evince the capacity of the government to resist every shock, domestic or foreign; and to rescue the people of Pennsylvania, by the verdicts of her juries, from all participation in the reproach, that has unhappily fallen upon her. If such shall be the effects of this day's trial, we have nothing to apprehend for the constitution, that monument of worth and talents; but if the opportunity to produce these effects should be lost, or perverted, the

¹²² On this theme, see Roger H. Brown, *The Republic in Peril: 1812* (1964). Caesar Rodney explicitly linked the two when he candidly acknowledged that his response to Pennsylvania's resistance was shaped in part by the fact that the "conduct in congress last winter, on the subject of disunion, has made an impression on my mind not to be effaced." Rodney to Madison, April 17, 1809, in 1 *the Papers of James Madison: Presidential Series* 114.

¹²³ Again, consider Rodney: "Public sentiment, it is evident, is strongly in favor of the authority of the Union. But what in the present state of things in Pennsylvana. may possibly be the result of such a proceeding [the use of a federal posse comitatus to quell the militia], is not to be calculated by the arithmetic of common events." *Id.*

foundations of republicanism (after the short lapse of twenty years) will be rent, and all the boasted superstructures of federal and state governments, dissolving "like the baseless fabric of a vision, will leave not a wreck behind."¹²⁴

Thus even as the Madison Administration defended the authority of the judiciary, it too recognized that marshalling public opinion lay at the heart of resolving constitutional matters.¹²⁵ At the same time, we should understand the extent to which the dire threat the Madison Administration perceived in Pennsylvania's resistance was the product of a particular republican ideology that saw the republic's survival as beleaguered. It was an outlook that not all of Snyder's critics shared. William Tilghman, Pennsylvania's Chief Justice and a moderate Federalist, for example, was appalled by the Governor's conduct, but he nonetheless thought that "it will be imprudent in the President, to attempt to punish the Militia

¹²⁴ Thomas Lloyd, ed. A Report, of the Whole Trial of Gen. Michael Bright, and Others; Before Washington & Peters, in the Circuit Court of the United States, in and For the District of Pennsylvania in the Third Circuit; on an Indictment for Obstructing, Resisting, and Opposing the Execution, of the writ of Arrest, Isued Out of the District Court of Pennsylvania; In the Case of Gideon Olmsted and Others, Against the Surviving Executrices of David Rittenhouse, Deceased (1809) at 19 [Shaw-Shoemaker No. S18495].

¹²⁵ The vital role that the Madison Administration assigned to ordinary citizens ought to give pause to those inclined to view Madison and his aides as hostile to popular, democratic politics. Historians expressing this point of view include Richard Matthews, If Men Were Angels: James Madison and the Heartless Empire of Reason (1995) and Christopher Tomlins, Law, Labor, and Ideology in the Early Republic, chapter 3 (1993). Moreover, the contrasting ways the Madison and Snyder Administrations handled the Olmsted Crisis offers one small example of the tenuousness of equating localism with democracy and an extended republic with elitism, and of regarding the "rule of law" as the antithesis of "public happiness. See Tomlins, Law, Labor, and Ideology in the Early American Republic (1993), chapters 2 and 3.

who only obeyed orders."¹²⁶

VI. States' Rights Transformed

"In this way ends a farce . . .," the Philadelphia Aurora declared as it announced the marshal's success in evading the militia and arresting Mrs. Sergeant. "Never did imbecility, combined with folly, and egged on by ignorance," it continued, "exhibit any thing in which the serious and the ludicrous were so strangely intermixed."¹²⁷ Snyder had, indeed, made himself into a national laughing stock.¹²⁸ And yet Snyder's ill-fated decision and the clash it produced ought not be dismissed as but an entertaining bit of sound and fury. In the repetitions of history,

¹²⁶ William Tilghman to Jaspar Yeates, April 11, 1809, Yeates Papers, HSP.

¹²⁷ Aurora, April 18, 1809. Actually, farcical activities continued for the next month. Not fully trusting the governor's assurances and good faith, the marshal, to the mortification of the governor and state attorney general, kept Mrs. Sergeant under house arrest until the \$14,378.75 needed to satisfy the judgment, interest, and costs was actually paid. See Franklin to Boileau, April 17, 1809; Franklin to Snyder, April 23, 1809; Franklin to Snyder, April 26, 1809, in Archives at 2783-2786. Attorney General Franklin blamed the marshal's action on William Lewis, counsel for Olmsted and the three other sailors for the entire thirty years in which the dispute lasted. At the habeas corpus proceeding in which the legality of the marshal's arrest of Mrs. Sergeant was tested and approved, the cantankerous Lewis indicated that he "would not waive a single advantage" in the case. He fully believed that Pennsylvania would go back on its word and continue its resistance. He said in court, "I wish it to be understood, that I will trust the Commonwealth no more. I understand guards are still kept at the house, and most probably after the Chief Justice has decided [the habeas petition], the Marshal will be resisted." David Hogan, ed., Report of the Case of the Commonwealth of Pennsylvania versus John Smith, esq. . . . (1809) [Shaw-Shoemaker No. 18494].

¹²⁸ See, e.g., The Connecticut Courant, June 5, 1809: "Gov. Snyder has been mentioned as a candidate [for President in the next election], but it is generally tho't that altho' he has by no means too much sense, he has too little nerve, as he did not carry on the war against the United States with sufficient energy." Of course, the Courant, a Federalist newspaper, was making fun of extreme Democrat-Republicans as much as it was Governor Snyder.

as Marx famously quipped, tragedy precedes farce. In this apparent farce, however, tragedy was aborning. The Madison Administration's self-conscious attempts to use the crisis to cement the bonds between individuals and the national government, which as we have seen proved so effective in defusing Pennsylvania's resistance, in the end generated a fierce backlash in Pennsylvania. Chief Justice Tilghman was right; Madison pushed too hard.

Debate over the Olmsted affair did not die quickly after Olmsted received his money. Newspapers that had originally questioned the wisdom of calling out the militia, such as the Carlisle Gazette, came to support Snyder unequivocally even as his defeat proved their initial inclination correct. Lines of division, further, hardened in the state legislature, which, along with the newspapers, stridently debated the Olmsted Affair for nearly another year.

One critical problem for Snyder's opponents was the trial of General Bright. After impassioned arguments from United States Attorney Dallas and from state Attorney General Walter Franklin and his co-counsel Jared Ingersoll, the jurors were unable to return a verdict. They agreed that Bright had done the acts of which he had been accused but believed that he was only following orders. They therefore requested that they be allowed to return a special verdict -- something highly unusual in criminal cases. The court, consisting of Justice Bushrod Washington and Judge Richard Peters, agreed to accept a special verdict and, after applying the law to the jury's findings of fact, found General Bright guilty of obstructing the service of

federal process. They sentenced the General to a fine and three months imprisonment. Further, although a juror had wandered away from the courtroom at some point during the day of the trial, the judges decided not to grant the prisoners a new trial.¹²⁹ Immediately after the trial, fresh controversy began to brew.

Supporters of Pennsylvania's position had since 1779 spilled much ink over the fact that the Continental Congress had reversed the original jury verdict in the Olmsted admiralty proceeding. The special verdict and non-sequestered juror problems thirty years later added at least rhetorical support to the contention that Pennsylvania's juries were under systematic attack -- effectively vitiating in the process much that the Madison Administration had hoped to achieve through the prosecution. Worse still, General Bright's imprisonment quickly became a rallying point for the Snyderites, and he aroused much sympathy. Following his release from prison, Bright was made into a state hero, the subject of Fourth of July toasts throughout Pennsylvania. His popularity was such that he was even appointed chairman of Philadelphia's own Fourth of July celebration the following year, fourteen months after his conviction.¹³⁰ When Thomas Jefferson congratulated his successor on the handling of the Olmsted Affair, he could not help but point out how he was "much mortified to see the spirit manifested by the prisoners

¹²⁹ See Trial of Bright.

¹³⁰ Information on toasts and Bright's appointment come from the Philadelphia Democratic Press, July 7 & 13, 1810.

themselves as well as by those who participated in the parade of their liberation."¹³¹ The public out of doors, which had been so critical in resolving the crisis in the first place, appears to have changed sides.

Bright, in fact, served only a few days in prison before receiving a pardon from the President, who publicly justified his decision by stating that the General acted "rather from a mistaken sense of duty, than from a spirit of disobedience to the authority and laws of the United States."¹³² Privately, however, other considerations seem to be at work. Michael Leib, a United States Senator from Pennsylvania and a leader of the Duane faction of the Jeffersonian party in the state, wrote to Madison the day after Bright's conviction to urge a pardon, noting that "[t]he public sensation on this event is considerable, and is transferring itself from the outrage upon the law, to those who are now suffering under it."¹³³ This concern appears to have influenced Madison. On May 5, Secretary of State Robert Smith suggested to United States Attorney Alexander Dallas that a pardon would not be forthcoming. Yet the next day, he enclosed the signed pardon with a letter to Dallas. Smith sheepishly explained that the President had been influenced not only by what he took to be the prisoners' state of mind, but also by the "impression that the continuing of these deluded people in Confinement might have the unhappy tendency of exciting a

¹³¹ Thomas Jefferson to James Madison, May 22, 1809, in Papers of James Madison: Presidential Series, at 198.

¹³² Pardon of Bright and others, in Madison Papers, Presidential Series, vol. 1, at 173-74.

¹³³ Leib to Madison, May 3, 1809, in id. at 159.

certain State Sympathy in their favor."¹³⁴

By 1810, the Snyderite's line of argument appears to have changed its form. From 1780 to 1809, the substantive debate between the national government and Pennsylvania's hinged on the extent and legitimacy of the Continental Congress' power over admiralty law. In the aftermath of the militia's defeat and Bright's conviction, however, supporters of Governor Snyder came increasingly to question the very idea of inherent congressional power, associating it with the doctrine of "implication."¹³⁵ If Snyder walked into the Olmsted Crisis, as I have suggested, with neither a strong sense of purpose nor a well-developed theory of states rights, he and his followers emerged from it, thanks in no small part to the Madison Administration's victorious tactics, having begun to forge a retooled, radical, and ultimately prescient states' rights vision -- one explicitly debated, cited, and relied upon during the debates over South Carolina's nullification of federal law in 1832.¹³⁶

VII. The Past is Prologue: Gideon Olmsted After the Olmsted Affair

Virtually every existing account of the Olmsted Affair ends the story on May 6th, 1809, when President Madison pardoned General Bright after the latter's conviction. But the story by no means ended there, and the traditional decision to

¹³⁴ Smith to Dallas, May 6, 1809, Rosenbach Museum and Library. The May 5th letter does not survive but is alluded to in the May 6th letter.

¹³⁵ For such a view, see especially the remarks of State Representative Tarr in Debates in Legislature of PA on the Case of Gideon Olmsted, reported by William and Hugh Hamilton (1810) [Shaw-Shoemaker No. 21021].

end the story at that point indicates a bias toward the view that only courtroom activities can produce legality. By exploring what Olmsted did in the weeks, months, and years after Pennsylvania agreed to pay him his \$14,000, we can, I think, get a sense of the importance of petitioning to the determination of legal meaning in the early Republic.¹³⁷

In the May 26, 1809 issue of the Carlisle Gazette there appears a transcript of a brief but bizarre May 12th hearing before Judge Richard Peters, the federal district court judge in charge of Olmsted's case since 1803.¹³⁸ On April 28, 1809, at the trial of General Bright, Judge Peters had assumed a stoical posture, telling the courtroom as he waited for the tardy defendant to arrive: "I am content for my own part to wait still longer on this business, though God knows it has been so long before me that I am tired of it."¹³⁹ On May 12, 1809, he displayed the same basic disposition as the Olmsted affair presented him with a fresh fiasco. Somewhat cryptically, and with a hint of sadness "Judge Peters said, that this discussion was very painful to him, but that he would, as he had done throughout this business, take care of

¹³⁶ See, e.g., 8 Register of Debates in Congress 452 (22d Congress, 1st Session).

¹³⁸ Carlisle Gazette, May 26, 1809, page 3, right two columns. I did not find the hearing described in the three leading Philadelphia newspapers, the Aurora, the Democratic Press, and Poulson's Daily American Advertiser. Nor is it included in any of the many pamphlets on the subject that were printed as the Olmsted Affair came to a close. Note that on May 26, the Carlisle Gazette published two issues, the regular one and an extra. The report from court appears in the regular issue.

¹³⁹ Trial of General Bright, at 4.

himself. . . ."140

The source of Peters' pain was his own son, Richard Peters, Jr., whom the ever-resourceful Olmsted had hired to perform a bit of chicanery. On April 14, 1809 -- the day before the marshal had arrested Mrs. Sergeant -- Olmsted sensed which way the wind was blowing and began to worry about whether William Lewis, the attorney representing all four Active claimants since 1778, would honor the agreements that Olmsted had made with White, Ramsdale, and Clark. To alleviate any doubt, Olmsted hired Peters, Jr. The young lawyer approached Lewis to ask if he could receive the money from the marshal on Olmsted's behalf. Lewis refused the request. Rather than yield to Lewis, Peters, Jr. told Olmsted to approach the marshal and collect the money himself. The marshal subsequently paid Olmsted, who turned the money over to Peters, Jr., who in turn deducted a fee before paying the rest back over to Olmsted.¹⁴¹

The May 12 hearing before Judge Peters concerned the propriety of this transaction. Lewis objected to the unorthodox method by which Olmsted had been paid. He made a motion to have all of the money turned over to the court and divided up from there as appropriate. His argument was a combination of bitterness and outrage:

The Court, I hope, will not mistake my object: Thirty years ago I originally brought this suit, and recovered one quarter of the money, which was paid

¹⁴⁰ Carlisle Gazette, May 26, 1809.

¹⁴¹ Id.

over without deducting one single cent: reserving the recovery of this money to pay myself for my expenses and professional labor, I have pursued the suit throughout all the courts, and have not yet received either fee or reward. This is the first cause in the course of my long practice, in which any person has stepped in between me and my client, which is the more remarkable, as in the cause I had recovered and paid 24,000 [pounds] continental currency 6 for 1.

Peters, Jr. attempted to worm out from under Lewis' accusations, offering what amounted to a hemming and hawing "the client made me do it" defense. In the process, Peters Jr. revealed lucidly Olmsted's state of mind -- how determined Olmsted was to receive all of the money himself:

When Olmsted first employed me, I did not know whether it was as his counsel or his agent; he had a delicacy as to employing another counsel, so he employed me as his agent, and as such brought me the money. Olmsted made it a point that the money should come into his hands and was very anxious on the subject. (emphasis added).¹⁴²

Judge Peters agreed wholeheartedly with Lewis; the money should have been paid into the court, not directly to Olmsted. Embarrassed by his son's behavior, Peters declared that it "was incumbent on Olmsted to show by legal evidence" his own and his late brother's right to receive the money that would otherwise belong to Olmsted's three compatriots. Peters, Jr., however, could not produce the documents proving the Olmsteds' purchases. Without ruling on Lewis' request, Judge Peters quickly adjourned the court, declaring that he must "take care of" the marshal, whom he feared faced personal liability for the disputed funds if matters were not

¹⁴² Id.

straightened out promptly.¹⁴³

I have found no evidence of further court proceedings in this matter, although, given the obscurity of the hearing just described, some might well have taken place. Court records indicate, however, that on November 24, 1809, Gideon and Aaron Olmsted's agreements with the three co-claimants were filed with the district court clerk, and Richard Peters, Jr. acknowledged receipt (on behalf of all four Active captors!) of \$14,175.¹⁴⁴ Olmsted's account records indicate that he had paid Lewis \$1,400 in May, 1809, suggesting that the cantankerous and now elderly lawyer received his fee and had no more to do with his former client.¹⁴⁵

Olmsted, however, was by no means through. He had received \$8,000 from the Le Gerard. He had received \$14,000 from Pennsylvania. What historians have overlooked is that an additional \$14,000 -- the quarter share originally earmarked for Captain Houston and the crew of the Convention -- remained in Pennsylvania's treasury. Why hadn't the money been released to Olmsted by the Rittenhouse daughters? The answer hinges on the way the proceeds from the Active were originally held, and in the process indicates the significance of technical legal details. Recall that David Rittenhouse, as state treasurer, personally held onto the Pennsylvania's share of the money. He did so because of the law of agency: he and

¹⁴³ Id.

¹⁴⁴ See Sundry Documents Relative to the Claim of Gideon Olmsted (1811) (Shaw-Shoemaker No. 24001); Pennsylvania Archives, 9th series, v. 4, at 2786.

¹⁴⁵ Account records in Middlebrook at 148.

his heirs faced personally liability if Olmsted prevailed; that is why Mrs. Sergeant was arrested and held until she turned over the disputed money. Holding onto the sum thus served to prevent Rittenhouse from having to make good on Olmsted's claim out of his own pocket. However, it appears that Rittenhouse never took possession of the entire amount at issue. The original verdict in the Pennsylvania Admiralty court, after all, gave one quarter to the four American sailors, one quarter to the Le Gerard, one quarter to the Convention, and one quarter to the state. Apparently, only the state's quarter was turned over to Rittenhouse. The captain of the Le Gerard received his share in exchange for an indemnity bond. The Convention's share, however, was never distributed, as the Captain was unwilling or unable to give an indemnity bond.¹⁴⁶ Case files in the National Archives indicate that Olmsted sued the executors of the Captain's estate¹⁴⁷ but was unable to prove that the money had actually been paid to the Captain. The money, an audit by the Commonwealth later claimed, was neither given to Captain Houston nor deposited not with Rittenhouse, but rather placed "in the office of the receiver general of the land office in payment for lands."¹⁴⁸

¹⁴⁶ See Sundry Documents Relative to the Claim of Gideon Olmsted (1811) (Shaw-Shoemaker No. 24001); The Case of Gideon Olmsted, pamphlet in the collection of The American Philosophical Society (1816); Olmsted's Case (1815), in the collection of The Library Company of Philadelphia (containing an 1815 petition for The Convention's share of the proceeds.)

¹⁴⁷ Gideon Olmsted et al v. the Executrix and Executors of Robert Knox et al., National Archives, Admiralty Case Files of the U.S. District Court for the Eastern District of Pennsylvania, 1789-1840, Record Group 021, Microfilm M988, Roll 8.

¹⁴⁸ The Case of Gideon Olmsted 13 (1816), American Philosophical Society.

Olmsted's federal court judgment was against the Rittenhouse heirs only; he had not sued Pennsylvania directly. (Had he done so, the state would have had a stronger, but not airtight defense of immunity from suit under the Eleventh Amendment.) Olmsted therefore had no court order entitling him to the funds held by the state of Pennsylvania itself and could collect only the \$14,000 for which the Rittenhouse daughters were liable.¹⁴⁹ Fearing no doubt that a return to court would be a bit too inflammatory, and fearing that he might lose this time, he sought to rectify this difficulty by petitioning the legislature. Petitioning was not just a legitimate way of having claims against the state adjudicated; it was often the preferable way. As we will see, matters of equity could be taken into account -- and without raising the specter of the uncontrollable chancery judges that so irritated early Americans.¹⁵⁰ Thus on December 3, 1810, State Senator Nicholas Biddle (later to become the famous president of the Second Bank of the United States) presented his colleagues with a memorial from Gideon Olmsted.¹⁵¹ The Senate referred the

¹⁴⁹ They had paid the money over to the state treasury in 1803 in exchange for a promise on the part of the state to indemnify them should Olmsted ever collect from them. See *supra* note ?.

¹⁵⁰ The facts in the case of Pennhallow v. Doane (1794) were nearly identical to those in Peters, and interestingly, the lawyer for the state subsequently appeared before the legislature urging it to pay money to one of claimants who did not recover in court. He too suggested that equitable considerations, not applicable in the judicial arena, could and should be taken into account by the legislature. See "Samuel Dexter's Address to the New Hampshire Legislature," New Hampshire Gazette, December 11, 1795, reprinted in Maeva Marcus, ed. Documentary History of the Supreme Court, vol. 6, pp.507-12.

¹⁵¹ Journal of the Pennsylvania Senate, December 3, 1810, p. 18. The petition itself, which I have not yet located, appears to be housed at the American Antiquarian Society under the heading, "Olmsted's Case. To the Honorable Senate and House of the General Assembly. . .

matter to a committee, which issued a lengthy report recommending that Olmsted be given leave to withdraw the petition. The Committee argued first that Olmsted had no right to the money for all the reasons that Pennsylvania had asserted during its standoff with the national government: the Continental Congress lacked authority to reverse a jury verdict in the Pennsylvania admiralty court, and the Eleventh Amendment prevented an individual from recovering against the state. Pennsylvania, it was abundantly clear, had not changed its constitutional position a bit, was completely indifferent to the Supreme Court's determination, and was, indeed, willing to go to the mat yet again if the federal government were to force it to pay yet another Olmsted claim. The Committee went on, however, to note that while Olmsted was in no way entitled to the money by law, his petition should be granted if he was deserving as a matter of equity. The Committee analyzed the depositions that the jury had considered in 1778 and concluded (like the jury) that Olmsted had never been in full control of the Active, that the Convention's assistance was therefore necessary, and that Olmsted had promised Captain Underwood that he would disembark from the ship as soon as it approached land. The Committee placed particular emphasis on this last fact, declaring that Olmsted was not, in equity, entitled to recover if he had made such a promise merely as a ruse. While acknowledging Olmsted's heroism, the Committee indicted that his bravery was its own reward, and that he had in fact already received more than

of Pennsylvania. 31 p. (1810). The report rejecting the petition, however, is in the Pennsylvania legislative journal.

adequate compensation for his service during the Revolution.¹⁵²

Olmsted was not yet ready to give up. The following December, he prepared another petition, replete with supporting documents. The petition is virtually a response to the Committee's negative report. First, while Olmsted expressed his reverence for the state notwithstanding his late difficulties with Pennsylvania, he invoked the Supreme Court's Peters decision like a mantra. Second, he included a new deposition of the prize master from the Convention who had steered the Active into Philadelphia's harbor.¹⁵³ In it, the prize master stated that when he first boarded the Active, Olmsted told him that his assistance was neither needed nor desired, as the four American mutineers were fully in control of the ship. Olmsted's petition was referred to a committee, where notwithstanding the new evidence (and the Supreme Court's decision in Peters), it died.¹⁵⁴

Additional petitions were submitted through 1815-16.¹⁵⁵ Thereafter they

¹⁵² Sundry Documents Relative to the Claim of Gideon Olmsted (1811) (Shaw-Shoemaker No. 24001) at 115.

¹⁵³ Id. The deposition, taken on April 2, 1811, is included in this collection of documents, which survive because Olmsted compiled them and submitted them to the legislature along with his petition. The petition was presented before the Senate by its speaker on December 8, 1812. See Journal of the Pennsylvania Senate, December 9, 1811, p. 28.

¹⁵⁴ The index to the Journal of the Senate for the 1811-1812 session indicates that Olmsted's petition never came to the full Senate for a vote. The Committee's report does not survive.

¹⁵⁵ See Olmsted's Case (1815), in the collection of The Library Company of Philadelphia (containing an 1815 petition for The Convention's share of the proceeds); The Case of Gideon Olmsted, an anonymous pamphlet in the collection of The American Philosophical Society (1816), which defends Olmsted's petition against some doubts expressed by members of the Pennsylvania legislature.

stopped. The indefatigable Olmsted had retired from his life's crusade, and this fact is striking. Why did he never file suit to compel Pennsylvania to hand over the money? He had, after all, a strong case arguably controlled by the 1809 precedent, and his suit directly against the captain of the Convention had failed. True, since Pennsylvania held the money directly in its treasury, sovereign immunity under the Eleventh Amendment was more of a barrier than it had been in his suit against the Rittenhouse daughters. It is not clear from reading Chief Justice Marshall's oracular, strongly-worded but ambiguity-studded opinion in United States v. Peters how the Court would have treated money lodged directly in the state treasury. However, in his charge to the jury at General Bright's trial, Justice Bushrod Washington advanced the hypothesis that the Eleventh Amendment did not apply in admiralty cases. The full Court, given its aversion to claims of sovereign immunity and states rights, would likely have adopted Washington's view¹⁵⁶ -- assuming of course that it felt that it could marshal public opinion to its side yet again. Perhaps Olmsted feared that Judge Peters would be thoroughly disgusted with him if he returned to court. But Olmsted, as we know by now, was nothing if not persistent in the face of adversity. Or perhaps he and his new lawyer, Richard Peters, Jr., wished to avoid a reprise of the 1809 clash, given that the legislature, as its response to the 1810 petition and its annual rejection of his petitions through 1816, makes clear, was

¹⁵⁶ Commentators such as Joseph Story endorsed Washington's holding. The Supreme Court did not rule on it definitively until 1921, when it was finally repudiated in Ex Parte New York, 256 U.S. 490 (1921). See John V. Orth, The Judicial Power of the United States: The Eleventh Amendment in American History 33-37, 165 (1987).

unwilling to give an inch of ground. Whatever Olmsted's reason, the salient point is that, the Supreme Court notwithstanding, Olmsted had failed to generate sufficient support within Pennsylvania -- support that undergirded his success in the armed standoff between Pennsylvania and the United States, and support he surely recognized as ultimately essential for his legal claims to be worthwhile. Olmsted thus never received all the money that was due him. And this fact is telling in evaluating claims that the Supreme Court enjoyed judicial supremacy in the Republic's early years, a supremacy confirmed by Marbury. The ever-clever Olmsted knew he could not get his due via a friendly Supreme Court, and so was forced to supplicate before the legislature, a posture that belies the claims of established judicial authority in the early republic that scholars and judges so often advance.

Olmsted soon moved from Philadelphia back to East Hartford, Connecticut, where he lived until his death at age 95 in 1845. If he had given up physically, his mind still longed for complete justice. In his will, which was drafted in 1833, Olmsted made mention of the debt Pennsylvania owed him (which he calculated to be worth \$30,000 given the interest that had accrued). He bequeathed \$15,000 of it to three cousins and appointed Richard Peters, Jr. as their guardian (presumably he meant guardian for their claim, since Peters did not live in Connecticut and had by this point become the Supreme Court's reporter). The rest of the Active proceeds he donated, ever so graciously, and with a welcome bit of irony, to the Commonwealth

of Pennsylvania.¹⁵⁷

VIII. Transformation and Postscript: 1956

In 1956, two years after Brown v. Board of Education, Supreme Court Justice William O. Douglas gave a speech before the judges of the Ninth Circuit Court of Appeals.¹⁵⁸ His concern was massive resistance to school desegregation; his text, United States v. Peters. For Douglas, Peters offered a nearly perfect parable for the dilemma the nation presently faced. He portraying Pennsylvania's resistance as an illegitimate denial of the supremacy of federal law -- a supremacy that the controversy demonstrated as operating even under the Articles of Confederation.

The moral of Douglas's story was hardly subtle: the supremacy of the federal government over the states, as enforced through its courts, was not now and never had been debatable. It was part of the fabric of our system, crystallized by John Marshall. Massive resistance was as foolish and doomed to defeat in the 1950s, Douglas implied, as Pennsylvania's had been a century-and-a-half earlier. Douglas circulated his speech to his Brethren that summer,¹⁵⁹ and he saw to it that his decision was published in both West Publishing Company's Federal Rules Decisions

¹⁵⁷ Last Will and Testament of Gideon Olmsted, Misc. Mss. Collection, Library of Congress (copy; original located in Connecticut Historical Society, Hartford).

¹⁵⁸ William O. Douglas, "Interposition and the Peters Case, 1778-1809," 9 Stanford Law Review 3 (1956). Most drafts of the speech carry an even punchier title: "Interposition: 1809." See Box 735, Folders 1 and 2, William O. Douglas Papers, Library of Congress.

¹⁵⁹ See Letters from Justice Sherman Minton to Douglas, June 22, 1956, and from Justice John M. Harlan to Edith Allen (Douglas' secretary), June 27, 1956, in Id.

reporter *and* the Stanford Law Review.¹⁶⁰ It is hardly surprising, then, that Peters found its way into Cooper v. Aaron three years later. If Marbury came by the 1950s to legitimate the Court's exclusive authority to say what the law was, Peters stood as a parable of how the Court, by dint of its determination, would overcome massive resistance. Plucked from its context, stripped of the surrounding constitutional practices that had become unfathomably obscure, Peters was readied for insertion into the twentieth century constitutional canon. Now the case was not about the ambiguities inherent in American constitutionalism and federalism. Nor was it about the Court being simply a player in a multi-faceted struggle over constitutional meaning in the early Republic. Nor, certainly, did it exemplify the extent to which, in the early Republic, even controversies about whether scheming, acquisitive men got paid – the essence of what Bruce Ackerman calls “normal politics”¹⁶¹ – became the stuff of constitutional controversy; constitutional controversy that, in so protean a Republic, was widely perceived as posing nothing less than a threat to national survival. It was instead a source of solace for a Court facing troubled times, a case

¹⁶⁰ The Stanford Law Review was reluctant to publish Douglas' speech because of its appearance in West's Federal Rules Decisions Reporter. Although he had received proofs from West prior to publication (see letter from West's Editorial Counsel to Douglas, August 31, 1956, in Id.), Douglas nonetheless informed the Stanford Law Review, through a former law clerk, that West had published the speech "without my knowledge or approval." See Douglas to William A. Norris, October 8, 1956, in Id. Douglas put it even more strongly in a letter to the Review's president: "I was chagrined that the Federal Rules Decisions published my Palo Alto speech. Only the Stanford Law Review had my permission. I was never approached by anyone else." Reaching a broad audience, it appears, was more important to Douglas at this point than complete candor.

¹⁶¹ Bruce Ackerman, We the People: Foundations (1991).

that transcended generations and spoke to the present in soothing tones. It was in the end a warning to "partisans" that the "fourteenth amendment modifies the tenth, not vice versa,"¹⁶² as well as a vindication of Holmes dictum that "the Union would be imperiled if we could not" pass on the constitutionality of "the laws of the several states."¹⁶³

Douglas and his Brethren had written Whiggish history, history in which the past serves as both a source of lessons for and a reflection of or way station to the present. Constitutional law continues to depend upon such a narrative. It neglects entirely, I have suggested, what in the early nineteenth century was the more urgent, foundational constitutional question: how radical and capacious an understanding of the Virginia and Kentucky Resolutions, with their reliance on state legislatures to debate constitutional questions, would govern once the Jeffersonian Republicans had become firmly entrenched in power. In so doing, our confident, contemporary constitutional narrative deprecates the utter contingency of American constitutional development.

Indeed, my retelling of the seemingly endless events that collectively constitute the Olmsted Affair suggest that even (or especially) in cases involving federalism, John Marshall's claim to authority *was* questioned, continually, and was

¹⁶² Douglas, "Interposition" at 4.

¹⁶³ *Id.* at 3. Douglas' speech embodies, in its willingness to interpret fundamentally ambiguous evidence so robustly, what Richard Fallon has identified as the ideology of nationalism that during the Warren Court years dominated the Court's understanding of federalism. See Richard H. Fallon, Jr., "The Ideologies of Federal Courts Law," 74 Va. L. Rev

deeply contingent upon his ability to persuade and generate support both of the executive and of the broader populace. In that regard, Marshall succeeded only partially, and only then because fears of disunion were preoccupying Madison and his cabinet. Moreover, the Chief Justice triumphed, to be sure, in the immediate battle, but he was ultimately unable even to deliver complete relief to Olmsted. In the last analysis, I am convinced that neither side ultimately won the standoff. Rather, each side continued to promote its position in print and in banquet toasts. Constitutional discourse continued to inundate the public sphere, suggesting how premature it would be to attribute a settlement function to the judiciary in 1809. The authority of the judiciary in the early Republic needs to be measured, then, not in the abstract, but rather as part of a continuum of numerous forms and types of constitutional activity. Courts could persuade, as both Marshall and the Madison Administration knew. But petitioning, parading, toasting, arguing to juries, printing newspaper invective and other uses of the public sphere to win the hearts and minds of the people to a particular constitutional position lay at the core of American constitutionalism. Such activities together constituted not a sideshow, but the main event -- an event which the Marshall Court could not hope to ignore and, indeed, had to participate.

It is time to recover our early constitutional history on its own messy, elusive terms -- terms that will have little to say to us about our present constitutional struggles, but which may ultimately help us make constitutional choices without the

false support of ready-made traditions. Rather than attempting to find in the surprisingly bitter controversies of the early Republic prescient arguments that foreshadow or mirror contemporary debates, we should recognize the seemingly foreign ways constitutionalism operated and, in so doing, accept it as a period of profound uncertainty, experimentation, and contingency. Much was up for grabs; few outcomes were certain. The constitutional disputes that took place in the nation's early years did not merely put flesh on the bare bones of an original understanding; in profound ways, they altered that understanding.¹⁶⁴ Once we recognize as much, coming to terms with the theoretical insights of the Constitution's Framers, and making sense of their critical documents and texts, can only be but a part, and perhaps just a small part, of the task of constitutional law and constitutional history.

¹⁶⁴ For this reason, I find recent efforts to understand what the Founders thought about judicial review deeply misguided. See, for example, Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," 70 U. Chi. L. Rev 887 (2003). Even if the Framers of the Constitution had a clear position on issues such as judicial review, they were powerless to shape the balance of judicially-centered and non-judicially-centered constitutionalism in the ensuing years. The notion that the Founding generation's influence was short-lived is, of course, now standard among historians. See, e.g., Gordon Wood, *The Radicalism of the American Revolution* (1992). Yet that understanding of the Founders has anything but penetrated constitutional law scholarship.