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FROM "CONFLICT" TO "CONSTITUTIONAL QUESTION": TRANSFORMATIONS IN EARLY AMERICAN PUBLIC DISCOURSE

David Zarefsky and Victoria J. Gallagher

AMERICANS recently celebrated the bicentennial of the United States Constitution. Despite the scholarly books, popular literature, and television documentaries the event occasioned, by and large the bicentennial did not engage the public mind or stimulate broad national discussion of Constitutional issues. For the most part, we celebrated the spectacle and pageantry of the Philadelphia convention, rather than the text and its underlying ideas. In this regard the bicentennial repeats the experiences of 1837, 1887, and 1937. The great paradox of the Constitution, as revealed by the manner in which we celebrate it, is that it is highly revered yet little understood.[1]

Understanding this paradox may be easier if the Constitution is seen from a particular perspective—as an invitation to public controversy and a resource for public argument. Our thesis is that the document plays an inherently paradoxical role. First, it serves as the secular equivalent of a sacred text for American politics. Its terms and statements express, in a general sense, values which are nearly universal. In this respect the Constitution functions as a condensation symbol[2] and is revered for what it represents, more than for what it says. To function in this way, the text must remain ambiguous. Competing advocates in a given dispute seek support for their opposed views in the common values of the Constitution, and the document serves as an authoritative text to legitimize claims which are in dispute. Questions of expediency are transformed into Constitutional conflicts.

The other side of the paradox, though, is that the ambiguity of the text makes Constitutional conflicts ultimately incapable of resolution. In this sense the document contains "essentially contested concepts,"[3] dialectical terms which gain meaning only in relation to their opposites. If the meaning of the Constitution is always in dispute, it cannot well serve the unifying function of a condensation symbol. Moreover, because Constitutional values are so prominent in the national hierarchy, a dispute about the Constitution is a contest with high stakes. Opponents are relatively unlikely to compromise; positions tend to harden and polarize. The dialectical features of the Constitution enable it to create and sustain a community while permitting lively disagreement about its "meaning," but when the Constitution is invoked in public controversy, positions harden and the result is counterproductive to public deliberation.

Since the Civil War, this paradox has been largely resolved by assigning to the Supreme Court the role of Constitutional arbiter. The task of determining what the document "means" has been removed from the public realm and made into an assignment for experts. To describe Constitutional interpretation as "technicalized" is not to deny that Supreme Court Justices are influenced by political, social, and

cultural forces. It is, however, to suggest that the public has "delegated" the task of interpretation to an expert body. The public sphere is the place for venerating the Constitution and reaffirming its values. When the Court renders controversial judgments—in cases such as abortion, school prayer, or flag burning, for example—these decisions become political issues. But the remedies sought by the disaffected—Constitutional amendment or Presidential appointment of Justices of a different Constitutional ideology—implicitly acknowledge the authority of the Court to be the ultimate Constitutional interpreter. Decisions may be unpopular, but they are legitimate and authoritative.

But it was not always this way. Although it was probably understood by staunch Federalists such as Alexander Hamilton, the power of judicial review is nowhere mentioned in the Constitution itself. It was asserted by the Supreme Court in *Marbury vs. Madison,* but only in the course of an act of judicial self-denial. The *Dred Scott* case of 1857 was the first instance in which the Court held an act of Congress to be unconstitutional, and its authority to do so was by no means clear.[4] In early America, then, the paradoxical nature of the Constitution was an influence on public discourse. The Constitution was invoked as a unifying value even though doing so made disputes hard to resolve. Our goal is to understand the rhetorical resources and implications of "Constitutional transformation" in light of this paradox.

Our argument proceeds in three steps. First, we explore the Constitution's nature as a text, its controversial status during the ratification debates, and its subsequent deification. This exploration provides the context for the transformation in public debate from matters of expediency to matters of Constitutional law. We then trace the process of transformation in three case studies of early American public discourse: the controversy over the Alien and Sedition Acts, the nullification crisis of the 1830's, and the events leading to secession in 1860. Finally, we will suggest approaches to the paradox and will speculate about what our discussion implies for the relationship between the technical and the public sphere of discourse.

The Evolution of the Text

As a text, the Constitution is addressed to an unusual audience. According to Kenneth Burke, it is addressed by our present selves to our future selves, and our future selves cannot be known.[5] Continuity is implicit (the authors and audience are the same) yet time changes, distancing the audience's perspective from that of the authors. Therefore, what we say in the present must be meaningful to an unknown future. Otherwise the document will not survive, and it is clear that its authors wished it to outlast them. Mindful of the political chaos of the Articles of Confederation, they wanted a document that would be venerated and seen as permanent.[6]

James Boyd White points to the future voice implicit in the Constitution by comparing the document to a trust created in the process of estate planning. Since the future cannot be known, one cannot set down specific directions in advance. Instead, what one does, "not out of foolish optimism about human nature but out of necessity, is to repose great confidence in the good will and competence of another while subjecting him to the discipline of a general law."[7] The framers illustrated just this ambivalence in trusting yet distrusting the citizens of the future; much of the debate

between federalists and antifederalists turned on whether trust or distrust would predominate.

Writing for the future, however, required the framers to discuss certain ideas quite abstractly. Inherent in such abstraction is ambiguity. Even a cursory inspection of the text reveals terms and clauses which might easily stimulate controversies. What is meant by "general" welfare as distinct from the well-being of individuals? Is the "territory" referred to in Article IV a political or only a geographical unit? What is involved in the guarantee to the states of a "republican" form of government? Is judicial review intended according to Article III? What is one to make of such inexact terms as "necessary and proper"? Perhaps most fundamental, where does the authority for the Constitution itself reside? Who are "we the people" and in what capacity do we act?

Not surprisingly, these ambiguities made the proposed Constitution highly controversial when it emerged from the Philadelphia convention, and ratification by the states was very much in doubt. Much of the opposition developed worst-case scenarios of how, in light of its own imprecision and the vagaries of human nature, the document could be used to suppress liberty. While we tend to understate the struggle for ratification and treat the antifederalists as spokesmen for a lost cause, analysis indicates that *both* sides articulated solid, constructive arguments.[8]

Yet, ironically, after ratification, the Constitution quickly became an object of national veneration. Several reasons can be offered as to why that was so. Perhaps most basic, after ratification the cause of the antifederalists was moot but their interests were not. Since the document was in place, it would do them no good to continue their worst-case thinking—particularly if it was as hard to amend the Constitution as they had claimed. Rather than *fight* it, better to *capture* it and read their own interests into it, using its ambiguous language to identify it with their own point of view and, incidentally, to portray their opponents (the federalists) as transgressors against the very instrument those opponents had worked so hard to pass.

Additionally, the public's veneration of the framers, particularly Washington, carried over into judgment of the Constitution. The *ethos* of the key founders became a rallying point for the Constitution and the very closeness of the vote for ratification contributed to its deification. Coming through such a severe test, by such a close vote, was little short of miraculous. But if it was a miracle it had to be divinely inspired. The hand of God was in it. In this fashion did the Constitution receive what the federalists had hoped for it: "that veneration, which time bestows on everything."[9] It became the secular equivalent of a sacred text, something to be fought *for*—in the name of—rather than *about.*

As James Boyd White puts it, the ambiguity almost mandates a conception of the Constitution as sacred text: "The original source of authority being forever gone, the instrument must be expounded as a kind of sacred text and testamentary trust, with a recognition that it is not subject to revision by its Author and hence with an eye to purpose and structure and value, not particular terms and details."[10] Especially in a pluralistic society, the Constitution provides a communal grounding that allows flux yet assures an anchor of stability. If the Constitution is the grounding for American political life, it is also the ultimate authority to which disputants can appeal. Its abstract language allows almost everyone to agree with the document, each reading

into the ambiguity his or her preferred meaning. As Chemerinsky explains, "Areas of agreement are at the center of society, so that disagreements occur in the context of consensus as to the nature of the government and basic values . . . disagreement is over the specific content of agreed-upon provisions."[11] Communal unity is maintained in the face of particular disagreements by appeal to the Constitutional symbols.

Consequently, as Sanford Levinson points out, in any given controversy "one can simply avoid having to answer the political question . . . 'which side are you on?' by responding that one stands by the Constitution and that, in turn, the Constitution itself stands for the proper values."[12] In his recent book, Levinson compares the United States' political system with others by noting that in our system a political struggle "tends to take on 'constitutional' overtones, precisely because the Constitution is viewed as a way of structuring politics, . . ."[13] The alternative, Levinson notes, is that "adjudication of disputes is not possible, only power."[14]

To continue to provide such a grounding, the Constitution must serve an identity-building function; it must express both what the nation is and what we believe it ought to be. Predictably, under the influence of social change, disagreement about the application of fundamental values enshrined in the document will increase. But admitting a crack in the "cement of common beliefs" produces uncertainty about one's identity, and, in a larger sense, acknowledges the loss of a basis of belief and community. Just as an individual may feel uncomfortable about exploring his or her identity too carefully, so we are more comfortable with the Constitution at a distance, less concerned with understanding its terms and, instead, eager to affirm and reaffirm it, confident that it embodies a common core of basic values.

This dilemma encourages the transformation of controversies into Constitutional questions. Invoking the founding document as an authoritative sanction averts too searching a probe of basic values. Dispute about which party's values are embraced by the Constitution becomes a surrogate for extended controversy about the basic values themselves. Particularly when probing the values will lead to an impasse (such as on the morality of slavery), the surrogate argument makes it possible for public discussion to proceed without risking the community. The text's ambiguity is sufficient for people on all sides of a dispute to claim its authority. Recourse to the Constitution, then, makes it possible for rhetors to preserve the communal aspect of American society without fundamental challenge. Argument is still possible, but the focus is quite different.

Bound up with the issue of identity is an accompanying question of control: In any dispute, who will determine the preferred reading of the Constitutional text? The battle is for control of the *terms:* to make one's own definitions prevail and to win for oneself the right to define. The current debate between those urging that the Constitution should be interpreted strictly in accord with the framers' intentions and those urging that it be viewed in the light of modern needs illustrates the battle for possession of the key terms and symbols. A similar situation developed during the ratification controversy itself, when those favoring the new document successfully appropriated the term "federalist" which previously had identified *opponents* of a stronger central government.[15] By capturing the term and assuming the right to define it, advocates for the Constitution matched their own beliefs with the paramount values in a national hierarchy. The process is repeated with the Constitution

itself as the paramount value. Richard Weisburg attributes to the founders just such a theory of interpretive strategy that "whoever fights for and wins the authoritative status over constitutional meanings . . . deserves to win his or her way."[16]

Thus, not only does the ambiguity of the text require it, but the strategic interest of advocates encourages wrestling for possession of the Constitutional symbols. Since *symbols* rather than the details of the text are important, one need not examine those details too carefully. But a powerful rhetorical advantage will go to whichever party can capture the symbols. Wrestling for symbols, of course, reinforces the power of the symbols themselves: if each side seeks to control them, surely they are important. Disagreement thus paradoxically reinforces community by revealing the common ground or starting point from which a dispute proceeds. But because the stakes are so high, few advocates will be willing to yield either the interpretation of the terms or the right to define them. The danger is always present that positions will harden, with each side convinced that the other is trampling upon society's most basic values. The attempt to reinforce community may rip it apart instead. That is what happened in public discourse prior to the American Civil War.

The Case Studies

Three seemingly disparate issues—the treatment of subversives, the tariff, and slavery—became the focus of public debate which raised significant questions concerning where the ultimate authority for the Constitution resided and who had the power, in any given case, to discern its meaning. The cases build upon one another: controversy over the Alien and Sedition Acts raised questions about interposition and nullification which were central to the nullification crisis and instrumental in the secession crisis. Exploring the earlier disputes reveals how their transformation into Constitutional questions permitted them to be settled without being resolved. Eventually the fissures became too great for the common text to close. When that happened, the result was Civil War conducted by both sides in the name of the same Constitutional values.

The Alien and Sedition Acts

Flushed with the excesses of anti-French prejudice triggered by the XYZ affair, Congress in 1798 passed the Alien and Sedition Acts, which sought to regulate presumably pro-French aliens and to resurrect the English common-law crime of sedition. In one respect, these acts had little direct effect: nobody was deported under the Alien Act and most applications of the Sedition Act were trivial. But symbolically the acts were most important. To Jeffersonians, they suggested that power was trampling upon liberty. Liberty, as an integral part of national identity, was seriously threatened. This conviction extended the issue from the fact of the laws to the underlying theory of sovereignty on which they rested. Instead of *maintaining* national identity, the Acts were seen as *negating* it through an inappropriate exercise of Congressional power. This view transformed the argument against the acts. They were not simply unwise policy, they were unconstitutional measures.

In the anonymously-authored Virginia and Kentucky Resolutions, Thomas Jefferson and James Madison initiated the transformation of the dispute. They argued that since the Constitution came from the states, the states should be the venue for the

redress of such inappropriate usurpations of power.[17] Jefferson and Madison fought to control the terms and to reconstitute the political (and thereby, we would argue, rhetorical) community by privileging the states as Constitutional arbiters. The Virginia Resolution asserted that "[Virginia] views the powers of the Federal Government as resulting from the compact to which the states are parties . . . and that, in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of evil, ..."[18] The states would come between the people and the Federal Government when the latter exceeded the authority explicitly granted to it. The first five sections of the Kentucky Resolution are also concerned with the sovereignty issue, establishing the tension between the states and the federal government and clarifying the role of each. This document went further, asserting the right of a state to nullify an unconstitutional act of the federal government (though it did not actually proceed to nullify the Alien and Sedition Acts).

In no sense did the authors of these resolutions view them as subversive or destructive of the Constitution. On the contrary, their purpose was to *reclaim* the Constitution. Their objects were rhetorical: first, to enlist allies among other states; and second, to put the federal government on notice to reconsider and reverse its course.[19] In effect, interposition was to deter violations of the Constitution, or, failing that, to nip them in the bud. "Correct" interpretation of the document became the means to control and power; "false" interpretation meant violation of the trust of the founders. Since identity is a fragile thing and yet basic to the survival of the union, appeal to the original intent of the venerated framers became the criterion for separating the correct view from the false.

Not until the sixth section does the Kentucky Resolution directly address the Alien and Sedition Acts. The expressed concern is that "no person shall be deprived of liberty without due process of law."[20] The real issue is that the *courts,* not the President, should have the power of judging any person who is under the protection of the law. The Resolution calls for adjudication as the only alternative to presidential violation of the sacred text through the use of coercion or force.

Interestingly, however, although the courts are the suggested alternative to the President, the Resolutions downplay this dimension, framing the dispute instead as one between the federal government and the states. This is accomplished by appointing the states (and, by implication, *their* courts) as intermediaries between the people and the federal government. This appointment is made most clearly in section six of the Kentucky Resolution. The executive/judicial dimension is thereby subsumed under the federal/state dimension, and the dispute becomes focused on the nature of the federal system. Once the shift in focus has been achieved, the prerogative of the states is defended, not as a revolutionary change but as an affirmation of the authority undergirding the Constitution itself. By addressing questions of sovereignty and interpretation rather than the specific matter at hand, the Resolutions effectively reconstitute a national hierarchy wherein the states become the arbiters of Constitutional ambiguity.

In fact, no other state supported Virginia and Kentucky. The Massachusetts Resolution proclaimed the Supreme Court to be the place to settle questions of constitutionality. It is hard to imagine how either position could have been extended

further, or a settlement achieved. Each rested on a different definition of the relationship between the central government and the states, and these opposing theories of the locus of sovereignty were largely incommensurable. Although the question was joined, it was never decided, because the Alien and Sedition Acts were allowed to expire quietly in 1801. Certainly the Jefferson Administration did not wish to renew them. As a result, the theory articulated in the Virginia and Kentucky Resolutions remained available as a premise for public argument and profoundly influenced the nullification crisis thirty years later.

The Nullification Dispute

In 1828, South Carolina opposed the "Tariff of Abominations," partly for economic reasons (high tariffs risked international retaliation which would threaten cotton exports) and partly because of political considerations. The primary political fear was that the revenue the central government gained from the tariff might be used to subsidize the American Colonization Society, which promoted the return of freed slaves to Africa. That support would undermine the South's peculiar institution.[21] Interestingly, however, discussion of the tariff question quickly evolved into Constitutional terms. In the Webster-Hayne debate and in the ensuing years, Hayne and Calhoun argued for a state's right to nullify a federal law it thought unconstitutional. This proposal went beyond the Virginia and Kentucky Resolutions in two respects. It contemplated action by a single state, not just through all the states acting in concert. And it did not confine itself to warning the central government, but envisioned direct action to impede the enforcement of a federal law it thought unjust. Hayne equated the "South Carolina doctrine" with the Republican Doctrine of '98 and claimed that, ". . . it was promulgated by the fathers of the faith—that it was maintained by Virginia and Kentucky in the worst of times—. . . that it embraces the very principles, the triumph of which, at that time, saved the Constitution at its last gasp. . . ."[22] Thus, nullification, like interposition, was seen not as subversive to but as preservative of the Constitution. To answer this claim, Webster extended it to absurdity in the debate with Hayne by demonstrating that nullification must lead, invariably, to revolution, to the *destruction* of the Union.[23]

Matters came to a head when Andrew Jackson signed the Tariff of 1832, which reduced duties below the 1828 levels but maintained the protectionist principle. In a convention called for this purpose, South Carolina declared both the 1828 and 1832 tariffs null and void within the state. Jackson defied the nullifiers, issuing a proclamation that "the power to annul a law of the United States [is] incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, and destructive of the great object for which it was formed."[24] He asked Congress for power to close the ports of entry and to employ military force to hold goods on which tariffs were due. The bill embodying these powers was referred to as the Force Bill.

The transformation of the dispute from an economic and political controversy to a Constitutional question reveals, again, the real issues at stake. What Calhoun and the South Carolina ordinance of nullification were calling "unconstitutional" was, arguably, a constitutional power: "the right to lay and collect taxes, duties and imports, and excises."[25] The protest, however, assumed that the actions were unconstitutional because the *objects* for which power was exercised were themselves

without sanction in the founding document. Tariffs were being raised not to regulate trade but to finance actions which would benefit some sections at the expense of others. Such "social engineering" was not explicitly authorized by the Constitution.

In his proclamation, Jackson carefully noted that the South Carolinians were basing the constitutionality of a federal act on the *motives* of those who passed it. Jackson decried such a ruling standard as necessarily arbitrary and destructive. However, Calhoun's speeches in 1832 and 1833 went beyond the matter of motives and took issue with the very "system" from which such "oppression and disorder" had arisen (or, at least, *would* arise).[26]

The referent of the word "system" was initially left ambiguous—is it the system of taxes or the system arising out of the Constitution itself? But Calhoun's call for a re-convening of the Constitutional convention to "terminate the conflict and restore harmony and confidence to the country,"[27] clarified the "system" at issue. In his speech during the Force bill debate, Calhoun was even more explicit: "the moment that government is put into operation—as soon as it begins to collect taxes and to make appropriations—the different portions of the community must, of necessity, bear different and opposing relations in reference to the action of the government."[28] Thus, power to lay taxes and the dilemmas of a pure majority system are the points at issue for Calhoun and the South Carolinians. Yet, claiming that the act was unconstitutional allowed them to become *advocates* of the Constitution (wanting to preserve it) rather than *revisionists* (wanting to change the very issues and principles upon which it is based). They were not championing a radical doctrine; rather, Jackson had deviated from the sacred text.

By drawing on the rhetorical resources of interposition as the way to check the Federal government's power, Calhoun privileged the States in the hierarchical power structure. But he provided no check against the sovereignty of the States. In the Ordinance of Nullification, the possibility of the courts as third party adjudicator was eliminated by disallowing appeals to the Supreme Court and by limiting the options of the state courts in hearing the cases having to do with the ordinance. The State is no longer the *intermediary* between the people and the federal government. Rather, the State itself is to decide which powers shall be "reserved unto herself" [29] as well as the extent of those reserved powers. In that role, a state is a *competing force* establishing its own identity and power as distinct from and prior to that of the Union. Like the Virginia and Kentucky Resolutions, the nullification ordinance spoke to the question of where the power lay to interpret the Constitution, by assuming that sovereignty lay with the states, who had created the central government as their agent, not their master.

Since South Carolina would not submit the dispute to adjudication, Jackson had no way to respond to the nullification ordinance other than "only power": coercion and force, although he probably would not have used the courts in any case. As Webster had noted in the debate with Hayne: "Direct collision, therefore, between force and force, is the unavoidable result of that remedy for the revision of unconstitutional laws which the gentleman contends for."[30]

In effect, Jackson used the notion of interpretive violation *against* the ordinance by arguing that it violated the letter and spirit of the Constitution. By showing that its intent was "partisan" and that it challenged the very identity of the union, Jackson

shifted the locus of control back to a hierarchy that privileged the Federal Government and, in particular, the President.

A confrontation over where the ultimate locus of sovereignty resided seemed inevitable. But the deadlock was broken, albeit in an ambiguous way. Henry Clay proposed a compromise tariff which gradually scaled the duties down to a level the Carolinians found acceptable. In return, South Carolina rescinded its nullification of the offensive tariff acts. But that was not the end of the matter. Since the acts had been repealed and the Force Bill was a moot point, South Carolina quickly nullified the Force Bill. Although nullifying a dead-letter law was in some sense an idle exercise, it was symbolically important. The action enabled the Carolinians, while compromising on the tariff, to *avoid* compromise on the underlying Constitutional issue. By nullifying the Force Bill, they could demonstrate that they had the power to overturn acts of Congress; sovereignty had not been ceded in the course of ratifying the Constitution fifty years before. Precisely because the Force Bill was moot, no one would challenge their action, and they could insist that they had emerged victorious.

At this point, two clearly different legacies had emerged about where sovereignty lay: one represented by judicial review, Webster's arguments, and Jackson's proclamation; the other, by the Virginia and Kentucky Resolutions, Calhoun, and Hayne. Neither could be shown demonstrably right; both could be grounded in the same Constitutional text. Meanwhile, issues ranging from foreign spies to agricultural tariffs had been turned into Constitutional conflicts. From this background, we can understand the last great ante-bellum rift, which hinged on the question: In whose hands had the Constitution placed the power of decision regarding slavery in the territories?

The Secession Controversy

The reason this question seemed so vital is interesting to note. As Arthur Bestor observed, it was paradoxical: "Slavery was being attacked in places where it did not, in present actuality, exist. The slaves, close to four million of them, were in the states, yet responsible leaders of the antislavery party pledged themselves not to interfere with them there. In the territories, where the prohibition of slavery was being so intransigently demanded and so belligerently resisted, there had never been more than a handful of slaves during the long period of crisis."[31] Yet the territories were the only place where the *Constitutional* issue was unsettled. And, even if the status of slavery in the *current* territories could be settled, future expansion to other territories was possible. Thus, this question became a surrogate for larger issues of time and national destiny.

Three basic answers were offered to the question of where the power of decision lay. The most straightforward was that it lay with Congress, since Article IV, Section 3 of the Constitution states, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; . . ." This was the answer of the new Republican party, which wanted Congress to use its power in order to prohibit slavery in the territories.

A second answer, offered by Stephen A. Douglas, was that the power lay with the settlers themselves. He reasoned that, since the territories were not to be held as colonies, they were states in an embryonic form. In that case, settlers should have the same rights of self-determination as if they were citizens of states. As he would ask

rhetorically, Why does a resident of Iowa, who everyone knows is competent to regulate his affairs, lose that competence when he crosses over into Nebraska territory?[32] For Douglas, the word "territory" in the Constitution referred only to a geographic domain, not to a political unit.

The third position was that of the South. From this purview, power of decision lay with the states, in line with the reasoning of the Virginia and Kentucky Resolutions. The federal government was only the agent of sovereign states; it must guarantee to all citizens who go to the territories the protections afforded them in their states. As a practical matter, the federal government must actively intervene to protect slavery in the territories. This position was a clear reversal from the previous years when Southerners favored "strict construction" and limited federal powers. Apparently, political philosophy underwent a radical metamorphosis as shifts in self-interest required.

This reversal suggests that the Constitutional arguments were far less valuable for their substance than for their symbolic appeal. They were the links which joined the authority implicit in the founding document to the specific matter at hand. Ideology was a means, not an end. The argument resembles that of Calhoun and the South Carolinians who saw the Union as a means of security and protection for rights which the State "reserved unto herself." While the Federal government should not be the locus of sovereignty, it *should* offer the basis of power (security and protection) which would allow the states to assume that position. The "contract" between states became, as a result, a kind of protection treaty—the power of the whole (the Union) used to protect the individual sovereignty of each.

The *Dred Scott* decision appeared to legitimize the Southern viewpoint. In response, the Republican Party, fearful of losing its biggest political issue, railed against the *Dred Scott* decision which they suggested was part of a conspiratorial plan to spread slavery nationwide. Lincoln, for example, used the metaphor of building a frame house to insinuate that Chief Justice Roger B. Taney, Senator Douglas, and Presidents Pierce and Buchanan were acting in concert, "all understood one another from the beginning, and all worked upon a common *plan* or *draft* drawn up before the first lick was struck."[33] Lincoln and other Republicans made similar allegations of conspiracy throughout the 1858 campaign.

Douglas attempted to defend the *Dred Scott* decision by appealing to the authority of the Supreme Court as arbiter of Constitutional disputes, suggesting that Lincoln's recourse was to "appeal" the decision to the judgment of the mob. "It looks," Douglas said in the Galesburg debate, "as if there was an effort being made to destroy public confidence in the highest judicial tribunal on earth." The incumbent went on to prophesy that if Lincoln succeeded, "He will have changed the government from one of laws into that of a mob, in which the strong arm of violence will be substituted for the decisions of the courts of justice."[34]

Lincoln's approach was to regard the Supreme Court as a *political* body. It had exercised its authority for the moment in the *Dred Scott* ruling, but ultimately sovereignty rested with the people. He proposed a political remedy: the people would elect a Republican President; he would appoint Republican Justices as vacancies developed on the Supreme Court, and when the new Justices constituted a majority on the Court, they would overturn the *Dred Scott* decision. In this fashion he

reconciled deference to the Court's ruling with his belief that the Court did not have the final say in interpreting the Constitution.

Meanwhile, however, many in the South had come to regard the *Dred Scott* decision as being of supreme importance—not because they planned to take slaves to Kansas or Nebraska, but because they believed that the decision symbolized their status within the Union. It indicated that their property in slaves should receive the same protection as land or personal property of Northerners. To overturn the decision would be to strike a blow not only at their personal status but also at their beliefs about Constitutional prerogative. From this point of view, the election of a Republican President in 1860 was itself evidence of a Constitutional crisis and precipitated states seceding from the Union in order to impress on the national government the need to restore "the Union as it was, the Constitution as it is."[35]

Constitutional Conflicts and Public Discourse

If the earlier conflicts were inconclusive, one might well regard the settlement of the Civil War as decisive. In one sense, it was. By force of arms, the North removed any doubt about the perpetuity of the Union. Yet neither then nor for a long period did the South acknowledge that the underlying Constitutional issues had been settled. Instead, advocates maintained that the South had bowed only to superior military force. Indeed, these issues reappeared in our own time in the Southern resistance to mandatory school desegregation during the 1950s and early 1960s. All the familiar elements were there: the compact theory of the Constitution, denial that the states ceded any sovereignty in 1787, a plea for strict construction, and an appeal to the original intent of the founders. In 1956, Virginia adopted a resolution of interposition, specifically grounding its authority in the Virginia Resolution of 1798. Georgia and Mississippi adopted nullification ordinances,[36] and Alabama Governor George Wallace's famous "stand in the schoolhouse door" partook of the drama of both.

But there is a difference. Widespread acceptance of judicial review has, in effect, removed the question of where sovereignty ultimately lies, by assigning to the Supreme Court the role of Constitutional adjudication. However seriously the arguments of "massive resistance" were taken by Southerners expounding them, nobody viewed them as justifying the breakup of the Union or Civil War. If the Union is perpetual, as the Civil War established, then that fact establishes limits on one's ability to resist Court orders.[37] And outside the South, the calls for interposition and nullification were largely regarded as patently absurd, the last gasp of losing politicians reaching back to the lost causes of a century before. If they had any purpose, it was theatrical—to enact a performance of resistance, for the benefit of local voters. Often the moves *were* theatrical: Wallace, after all, left the "schoolhouse door" and proclaimed victory, but the black matriculants did enroll at the University of Alabama.

Perhaps the underlying Constitutional issues can never be settled. Noting that "it is difficult to adapt time-honored assumptions to changing realities," Michael Kammen concludes, "few constitutional issues ever get fully resolved. Most of them are forever being reopened in some mutant form."[38] The change from a public to a technical forum is one influence on the evolution and mutation of the issues. Yet the very fact that controversies mutate tells us that some points are settled even as new

questions present themselves. Thirty years after the Southern "massive resistance," the reappearance of interposition and nullification seems unlikely.

In pre-Civil War America, the Constitution's ambiguities were tested and worked out, sometimes sharpened and sometimes blurred, in public discourse. But imposing a Constitutional overlay on a controversy changes the nature of the issue. Arthur Bestor has observed that Constitutional issues develop when disputes "begin to cut deep." When identity is uncertain questions of policy give way to questions of power; of wisdom, to legality.[39] Constitutionalizing a dispute imposes a unique pattern on it and reduces the public space available for deliberation and compromise. Referring to the early 19th century, Daniel Walker Howe judged that "the tendency to debate the constitutionality of issues rather than their expediency did little to temper the discussion; if anything, it exacerbated differences."[40] The explanation is simple. Questions of procedure, propriety, and place pre-empt the substantive issues. These procedural issues may serve effectively as surrogates for the deadlocked substantive questions, but they also may lead to an unresolvable impasse. Once issues have been made matters of Constitutional principle and incommensurable principles are in conflict, there is little to say. A hardening of the arteries of public discussion occurs and the reluctance to compromise (on which effective political discourse depends) grows. As Paul Brest points out: ". . . the felt need to justify decisions by invoking the authority of the Constitution may indeed constrain decisions. The question is whether it constrains them in ways conducive to the ends of constitutionalism."[41] Paradoxically, when the same public forum is the site of both Constitutional veneration and Constitutional interpretation—as in pre-Civil War America—the answer is likely to be no.

James Boyd White, attempting to shift our ideas about the kind of discourse appropriate to Constitutional issues, addresses this paradox. He views the Constitution as achieving or creating new possibilities for communal life. For him, the key question is, "what opportunities for speech and thought does it create?" Yet he is equally conscious of the limited *a priori* claim which the Constitution is able to make about that community's identity. As he asserts: "The only respect in which the Constitution makes the claim that its people are 'one' is in the establishment of the Constitution itself."[42] Borrowing from Marshall, White argues that the Constitution does not establish a separate sphere of life or language apart from the people, but is rather an integral part of the culture of which it is made and which it, in turn, reconstitutes. Thus, the Constitution must not be regarded merely as a legal instrument, resting on some abstract authority, "but as a true constitution of language, of community, and of culture."[43] Its function as condensation symbol is real and important.

Certainly, a middle ground between regarding the Constitution's meaning as self-evident and as utterly relativistic is desirable. This middle ground might function along the lines of Burke's discussion of dialectical as opposed to positive terms. "In the Constitution," he writes, "generalized rights and duties exist together in perfect peace and amity but in the realm of the practical, the merger or balance among the clauses is transformed into a conflict among the clauses. To satisfy the promises in one clause, the promises of another must be foregone."[44] Because the Constitution does not order or assign priorities to the promises or the clauses, the Court or the Congress or the public must decide and, in so doing, begin a new act, constitute a new

community. These decisions, moreover, cannot be made in the abstract, but only in the context of specific issues and cases. What should be avoided, as far as possible, is discourse which, as Brest noted, constrains the possibility of decision.

To clarify this potential "middle ground," we should consider again the question of why some constitutional claims end in war and others do not. When one perspective becomes prioritized to the extent that it is cemented into the public mind, it acts, to use Burke's phrase, as a trained incapacity. It does not allow for the application of a more appropriate perspective given the situation. Such "ultimate" prioritizing is an attempt to eliminate or, at least, deal with ambiguity. Yet, the result is two sides who paint each other into a corner until one side feels the wall against its back and turns to force. Technicalizing the process of argument via Supreme Court review and prescribed amendment procedures is another way to impose a degree of certainty on otherwise ambiguous terms. Deference to technical discourse and the authority of the court has been a stabilizing force in 20th century American civic culture. This outcome, however, also has its costs. While war may be avoided, alternate perspectives are not preserved. The substance of the Constitutional disputes loses its meaningfulness and the problematic nature of the text recedes from consciousness. We celebrate the symbolism and pageantry of the Constitution without understanding very well what the document is about and the process of argument is hindered as a result.

If, as others have suggested, the potential for rhetoric is related to a culture's ability to generate alternative interpretations of events, actions, beliefs, or character, then, without solidifying the shape of public discourse and leading to war, the Constitution still needs to be a primary force behind innovation and change in political discourse. Recognizing that the Constitutional symbols always admit of alternate readings sensitizes us to the choices we make when we appropriate the symbols. The document may be analogous to a sacred text but in its application to particulars it always renders received wisdom contingent. This realization, in turn, helps us to mature as a community because we can explore and challenge the communal identity without fear of dissolution of the whole. At the basis of that identity is a community *rhetorically* constituted and *this* common grounding does allow for debate, argument, and decision.

NOTES

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[1]Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Knopf, 1986).

[2]Condensation symbols are those which designate no clear referent but "condense" into a symbol a host of different meanings and connotations which might diverge if more specific referents were attempted. On the distinction between referential and condensation symbols, see Edward Sapir, "Symbolism," *Encyclopedia of the Social Sciences*, ed. Edwin R.A. Seligman (New York: Macmillan, 1934), p. 492.

[3]On the theory of essentially contested concepts, see W.B. Gallie, *Philosophy and the Historical Understanding* (London: Chatto and Windus, 1964), chapter 8. A useful overview is John Kekes, "Essentially Contested Concepts: A Reconsideration," *Philosophy and Rhetoric*, 10 (Spring, 1977), 71-89.

[4]The best treatment of the circumstances and theory of this case is Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978).

[5]Kenneth Burke, *A Grammar of Motives* (1945; rpt. Berkeley and Los Angeles: Univ. of California Press, 1969), pp. 360–61.

[6]*The Federalist*, No. 49.

[7]James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1984), p. 244.

[8]See Herbert J. Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1981) and James Jasinski, "The Anti-federal Vision of America in the Constitutional Debate of 1787–1788," paper presented at the Speech Communication Association convention, Chicago, 1986. See also his "Rhetorical Practice and Its Visions of the Public in the Ratification Debate of 1787–1788," Diss. Northwestern 1986.

[9]*The Federalist*, No. 49.

[10]White, p. 262.

[11]Erwin Chemerinsky, *Interpreting the Constitution* (New York: Praeger, 1987), pp. 36, 38–39.

[12]Sanford Levinson, "Law as Literature," *Texas Law Review*, 60 (March, 1982), 400.

[13]Sanford Levinson, *Constitutional Faith* (Princeton: Princeton Univ. Press, 1988), p. 27.

[14]Levinson, "Law as Literature," p. 400.

[15]Storing, p. 74.

[16]Richard Weisburg, "Text Into Theory: A Literary Approach to the Constitution," *Georgia Law Review*, 20 (1986), 993.

[17]One might ask why Jefferson and Madison did not simply urge taking the matter to the Supreme Court. Aside from the fact that the Court was composed of Federalist appointees, the key reason is that the principle of judicial review had not yet been authoritatively established. Indeed, it was one of the key points at issue in this dispute.

[18]The Virginia Resolutions of December 24, 1798 are reprinted in Volume I of Henry Steele Commager, ed., *Documents of American History* (New York: F.S. Crofts & Co., 1938), p. 182.

[19]This statement about the goal of the acts is inferred from the discussion in John C. Miller, *The Federalist Era, 1789–1801* (New York: Harper and Row, 1960), pp. 239–241.

[20]The Kentucky Resolutions of November 16, 1798, are also reprinted in Volume I of Commager's *Documents of American History*, p. 178.

[21]For background on the nullification crisis, see William W. Freehling, *Prelude to Civil War: The Nullification Crisis in South Carolina, 1816–1836* (New York: Harper and Row, 1965).

[22]Robert Young Hayne, "On Foote's Resolution," *Modern Eloquence*, ed. Thomas B. Reed (Philadelphia: John D. Morris, 1903), v. 13, p. 1176.

[23]Daniel Webster, "Reply to Hayne," *Modern Eloquence*, ed. Reed, v. 15, p. 2062.

[24]Jackson's "Proclamation to the People of South Carolina, December 10, 1832," is reprinted in Volume I of Commager's *Documents of American History*, p. 264.

[25]Calhoun's "Address to the People of the United States," may be found in *Living Documents in American History*, ed. John A. Scott (New York: Washington Square Press, 1963), p. 420.

[26]See John C. Calhoun, "The Compact Theory of the Constitution," *American Forum: Speeches on Historic Issues, 1788–1900*, ed. Ernest J. Wrage and Barnet Baskerville (New York: Harper and Row, 1962), pp. 120–132.

[27]Calhoun, "Address to the People of the United States," p. 426.

[28]Calhoun, "The Compact Theory," p. 122.

[29]Calhoun, "Address to the People of the United States," p. 424.

[30]Webster, "Reply to Hayne," p. 2078.

[31]Arthur Bestor, "The American Civil War as a Constitutional Crisis," *American Historical Review*, 69 (January, 1964), 338.

[32]Douglas asked this question during his 1860 campaign speeches in Iowa. In Dubuque, for example, he said, "[The Republicans] admit that so long as you live in a state, under a state organization, you are capable of self-government, but the moment you cross a state line and go to a territory, you are totally unfit for it." Perhaps alluding to Lincoln's Mexican War "spot" resolutions, he added, "I would like to have them explain at what time it is—and at what particular place the man who is capable of self-government in a state loses all the sense he ever had and becomes incapable of taking care of himself when he goes into a territory." Quoted in Rita McKenny Carey, *The First Campaigner: Stephen A. Douglas* (New York: Vantage, 1964), p. 89. He had used a similar line of argument in his Ohio speaking tour in the fall of 1859. In Columbus he asked, "If you are capable of deciding the Slavery question for yourselves in Ohio, and have brains enough not only to decide it here but to decide it for the people of Kansas and New Mexico, would you be any less gratified to do so when you moved to these Territories, and became citizens of them?" *New York Times*, September 8, 1859, p. 1.

[33]This line was used in Lincoln's "House Divided" speech and repeated during the first debate with Douglas. For the text, see Paul M. Angle, ed., *Created Equal? The Lincoln-Douglas Debates of 1858* (Chicago: University of Chicago Press, 1958), p. 6.

[34]Douglas made this statement in the Galesburg debate with Lincoln. Angle, ed., *Created Equal?*, p. 319.

[35]This was a popular slogan among those favoring compromise in 1860–61 and then among Northern "Peace Democrats" who wanted to negotiate an end to the Civil War.

[36]On the three ordinances, see Herbert O. Reid, "The Supreme Court Decision and Interposition," *Journal of Negro Education*, 25 (Summer, 1956), 109–117, esp. pp. 112, 114–15.

[37]For example, in the integration controversies of the early 1950s and 1960s, the use of Federal troops in Southern cities was justified primarily to assert the sanctity of court decisions and orders. The justification for Federal force was procedural, not substantive. See President Eisenhower's proclamation upon sending troops to Little Rock, "Obstruction of Justice in the State of Arkansas," in the *Federal Register, 1957* Proclamation 3204, p. 7628 and "Radio and Television Address to the American People on the Situation in Little Rock," found in *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1957* (Washington D.C.: National Archives and Records Service) pp. 689–694.

[38]Kammen, p. 382.

[39]Bestor, p. 328.

[40]Daniel Walker Howe, *The Political Culture of the American Whigs* (Chicago: University of Chicago Press, 1979), pp. 23–24.

[41]Paul Brest, "The Misconceived Quest for the Original Understanding," *Boston University Law Review,* 60 (1980), 235.

[42]White, p. 241.

[43]White, p. 260.

[44]Burke, p. 349.