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**PARTY AS A 'POLITICAL SAFEGUARD OF FEDERALISM':  
MARTIN VAN BUREN AND THE CONSTITUTIONAL THEORY OF PARTY POLITICS**

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## **Party as a 'Political Safeguard of Federalism': Martin Van Buren and the Constitutional Theory of Party Politics**

Gerry Leonard

### **Abstract**

In the last decade or so, the Supreme Court has revitalized judicial enforcement of federalism. This development has spurred the partisans of Herbert Wechsler's "political safeguards of federalism" to begin a serious investigation of the ways in which extra-judicial politics can and does substitute for and complement the judicial role in enforcing federalism and the Constitution. Similarly, constitutional scholars have turned in increasing numbers to the question of how even judicially promulgated doctrines of constitutional law turn out to be more derivative of popular politics than vice versa. Necessarily, much of the investigation on both fronts has turned historical and has turned to the central institution of popular politics in this country - the political party.

This article is an effort to clarify the origins of the political party as a core institution of the American constitutional order - an institution unmentioned in the Constitution itself and, in fact, an institution to which the Founders were deeply hostile. The article focuses on the constitutional thought and political action of Martin Van Buren, the chief figure in the origins of American party politics in the early nineteenth century. Van Buren was the leader and virtual creator of the first, permanent mass political party, and he was its chief theorist as well. Brilliantly constructing a theory by which the antiparty American polity might accept the constitutional necessity of party organization, Van Buren drew on the vital political issues of his day to argue that only a truly democratic party - not the Supreme Court - could preserve and enforce the Constitution's most fundamental principles, including federalism and coordinate construction.

Like most successful revolutions, Van Buren's constitutional revolution turned out to have all sorts of unintended consequences, but Van Buren's work remains foundational to American governance. Substantially anticipating both the modern Supreme Court's Garcia doctrine and modern scholars' emphasis on constitutional law's dependence on constitutional politics, Van Buren's thought and action reveals how constitutional law has always been a matter of negotiation between judicial politics and party politics, never simply a matter of case law.

Party as a “Political Safeguard of Federalism”: Martin Van Buren and the Constitutional Theory of Party

Politics

Gerald Leonard\*

In the aftermath of the American presidential election of 2000, calls to amend the Constitution’s electoral scheme were rampant. Attacks on this relic of eighteenth-century elitism, however, faded with remarkable, if predictable, speed. Although the electoral college may sometimes prove an excellent whipping boy, it has remained immune to sustained attack, at least in part because it is today a largely inconsequential institution.<sup>1</sup> Despite its presence formally at the center of the Constitution’s electoral scheme and its supposed status as one of our “political safeguards of federalism,”<sup>2</sup> the electoral dominance of political parties has meant that the electoral college simply does not have an effect on presidential election strong enough to provoke sustained hostility. And this irrelevance is traceable to an “amendment” to eliminate the electoral college that was, in a sense, ratified as long ago as 1836. There was no formal amendment that year, of course, but I want to suggest that the election of Martin Van Buren in that year constituted a functional, if not formal, amendment to the Constitution and one that goes well beyond even the vitiating of the electoral college. Most of us have not been taught to think of Van Buren’s election as especially significant, let alone constitutionally transformative. But Van Buren’s

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<sup>1</sup> Not entirely inconsequential, of course. It did, for example, save the country from a nationwide, precinct-by-precinct recount in the fall of 2000.

<sup>2</sup> See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 552-558 (1954)

success in 1836 reflected a profound and permanent alteration of the American constitutional order, because he was elected not as the champion of some set of policy positions but—in defiance of the Madisonian constitutional design—as the candidate of a mass political party.<sup>3</sup> Even more importantly, he was elected as the champion of the idea of party itself as the new organizing principle of a states'-rights Constitution.

The drafters of the Constitution had designed the so-called “electoral college” partly to give states a role in electing the president but also to guarantee that the chief magistrate would be chosen in one of two ways: either by the near-common consent of the people; or else by an elite House of Representatives from a choice among five<sup>4</sup> men nominated by those electors. The mechanism was not designed even to reveal, much less vindicate, the will of a mere popular majority.<sup>5</sup> The drafters, however, had not reckoned with Martin Van Buren. Thanks to the invention of the mass party by Van Buren and his allies, the will of the voters—not that of the electors or the House—has been the consistent determinant of presidential elections across American history. Even after the election of 2000, it remains true that the only election in which the rules of the electoral college and House election seemed decisively to defeat the popular choice for president was that of John Quincy Adams in 1824-1825. And unlike the election of 2000, Adams’s election provoked an immediate, and ultimately successful, popular movement—Van Buren’s movement—that reformed the Constitution’s electoral system.

Within twelve years of Adams’s election, the possibility of another event so anti-democratic was eliminated by the integration of party into the constitutional system.<sup>6</sup> Under the intellectual and political leadership of Martin Van Buren, the new Democratic party emerged as the world’s first mass political party, announcing as one of its central purposes and justifications the effective amendment of the

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<sup>3</sup> A much more complete account of the emergence of the mass political party than is possible in this article will appear in Gerald Leonard, *A Constitution Against Parties: The Case of Jacksonian Illinois* (forthcoming from University of North Carolina Press, *Studies in Legal History*).

<sup>4</sup> The Twelfth Amendment reduced the number of candidates who could go into the House to three.

<sup>5</sup> Jack N. Rakove, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 90, 266 (1996).

Constitution to prevent elections by the House of Representatives. With the election of Van Buren in 1836 on a platform that elevated the principle of party above all else, that goal was permanently secured; election by the House has become a virtual impossibility, and the electoral college, while stirring intermittent debate as a diversion from the real pathologies of American democracy, has become largely irrelevant.

The election of 1836, then, signified the emergence of the political party as a central institution of American governance and exemplified the ways in which the American Constitution could be effectively amended by political action--not just through the formal provisions of Article V<sup>7</sup> and not just through the creativity of the Supreme Court. But the constitutional effects of party went far beyond this profound alteration of the electoral system. The party politician and mass party organization have, both inevitably and by Van Buren's specific constitutional design, also controlled much of the meaning of federalism. Designed as a device for democratization of presidential election, party was equally understood as a device by which the people could and would defend states' rights, the constitutional doctrine without which, according to Van Buren, democracy could not long survive. And Van Buren's Democratic party did just that for at least a generation, dominating American governance, marginalizing the Marshall Court's nationalism, and rescuing states' rights from what looked in the 1820s like an early death.

The Founders certainly did not expect such party control of the Constitution, but it is clear enough that many expected practical enforcement to come at least as much through the political process as through judicial review.<sup>8</sup> Today, the explication and enforcement of the constitutional principle of federalism is sometimes said by the Court to require judicial enforcement,<sup>9</sup> but other times it is said to be

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<sup>6</sup> Cf. Douglas W. Jaenicke, *The Jacksonian Integration of Parties into the Constitutional System*, 101 *POLITICAL SCIENCE QUARTERLY* (1986)

<sup>7</sup> Here, I am preceded in some ways by, among others, Bruce Ackerman, *WE THE PEOPLE: FOUNDATIONS* (1991) and Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457 (1994).

<sup>8</sup> See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *COLUMBIA LAW REVIEW* 215 (2000); Kramer, *We the Court*, --- *Harv. L. Rev.* --- (2001).

<sup>9</sup> See, e.g., *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

the province of politics.<sup>10</sup> Thus, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court insisted that the states had sufficient political resources to protect their rights and powers through the political process. The Court, therefore, would do best simply to accept the results of that process. The principle that the “federal balance” is an object of negotiation between the political branches and the judiciary, then, remains enshrined in Supreme Court case law. Moreover, there is a certain inevitable degree to which all constitutional law, including the law of federalism, has been and will be made by non-judicial officials, as a burgeoning area of scholarship continues to show.<sup>11</sup> The story of federalism’s meaning and enforcement, then, is necessarily the story of both judicial review and constitutional politics. And the story of constitutional politics, ever since Van Buren, is necessarily a story of party politics.

Notwithstanding the founders’ antipathy to political parties,<sup>12</sup> then, mass parties have, since the 1830s, had a central place in the constitutional system. They quickly became institutions of governance every bit as important as the institutions formally provided for in the Constitution,<sup>13</sup> and in that role they quickly claimed a central place in giving content to and enforcing the constitutional doctrine of federalism. In America’s “state of courts and parties,”<sup>14</sup> the party politics of federalism successfully claimed much of the role often conceded to judicial review or the judicial politics of federalism. If the

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<sup>10</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>11</sup> See, e.g., Keith Whittington, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); Kramer, *Putting the Politics Back*; Neal Devins, *How Constitutional Law Casebooks Perpetuate the Myth of Judicial Supremacy*, 3 GREEN BAG 2D (2000); Louis Fisher and Neal Devins, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* (1992); Killenbeck, *Pursuing the Great Experiment*; William E. Nelson, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988), esp. 27-34 regarding antebellum federalism; R. Kent Newmyer, *John Marshall and the Southern Constitutional Tradition*, in Kermit L. Hall and James W. Ely, eds., *AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH* (1989) 116; Harold M. Hyman and William M. Wiecek, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875* (1982) 115-146, 203; Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* (1998); Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 *LAW AND SOCIETY REVIEW* 57 (1975) 72-86; and Bruce G. Peabody, *Coordinate Construction, Constitutional Thickness, and Remembering the Lyre of Orpheus*, 2 *UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW* (2000), fn. 4, which cites further sources.

<sup>12</sup> Richard Hofstadter, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840* (1969).

<sup>13</sup> Hurst, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 56-62 (1950).

history of constitutional interpretation and enforcement is the history of the interaction between judicial politics and party politics, then it is imperative to know not just where judicial review came from but, equally, where “party review” came from. In this way, we can begin to understand the very real, if limited, “political safeguards of federalism” that were invented not in 1787 but in the Jacksonian period and that, in evolving form, remain with us today.<sup>15</sup>

Part I will briefly develop the history of antipartyism as a basic and universal tenet shared by all advocates of free government before the nineteenth century. That commitment pervasively informed the adoption of a limited, federal Constitution, designed to prevent party control of American governance. Part II will trace the fate of that constitutional promise through the politics of the early nation. By the 1820s, an implied-powers, antiparty constitutionalism appeared to have triumphed over strict construction and states’ rights. Moreover, the Supreme Court appeared to have established itself as the final and supreme interpreter of the Constitution. But a movement to overthrow these doctrines was afoot.

Against the background of 1820s nationalism, Part III will explain the constitutionally transformative theory and actions of Van Buren and the party he built between 1820 and 1840. It is now a commonplace that the Founders not only deemed party activity inimical to free government but deliberately tried to design parties permanently out of the American constitutional order.<sup>16</sup> Van Buren, however, invented a place for democratic party organization at the very foundation of the erstwhile antiparty Constitution, and he did so as a way of establishing and enforcing a doctrine of states’ rights through strict construction of the federal Constitution. When the Supreme Court’s *McCulloch*<sup>17</sup> decision seemed to claim final interpretive authority for the Court and seemed to grant nearly unlimited power to

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<sup>14</sup> Stephen Skowronek, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* 24-31 (1982).

<sup>15</sup> Cf. Kramer, *Putting the Politics Back*; Larry Kramer, *Understanding Federalism*, 47 *Vanderbilt L. Rev.* 1485 (1994); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543 (1954).

<sup>16</sup> Hofstadter, *IDEA OF A PARTY SYSTEM*, 49-73.

<sup>17</sup> *McCulloch v. Maryland*, 17 U.S. 316 (1819).

the federal government, Van Buren responded that only the people--never the unelected Supreme Court--could have the final word on the meaning of the Constitution, and this final power of review could be made real only through the device of party that Madison and his like so dreaded. Van Buren's Democratic party then effectively undid the nationalist judicial rulings of the 1820s and effectively amended some of the Constitution's own antiparty features--such as the electoral college and House election--that had served to block the movement for states' rights and democracy.

Public life at the dawn of "the party period"<sup>18</sup> was overtly and persistently constitutional. The Democratic party was invented and maintained on the basis of an explicitly constitutional theory. The purpose of the new party was not to press any particular substantive agenda but to preserve a states'-rights model of constitutional democracy. To do this, it would replace lawmaking by a Madisonian deliberative Congress with lawmaking by popular will through the party; replace president-making by electoral college and House with president-making by popular will through party nomination; and replace constitutional interpretation by the nationalist Supreme Court with constitutional interpretation by the people of the states through their party-disciplined representatives. Much of this theory is lost to us today, but its institutional legacy--the two-party system that now constitutes the main political safeguard of federalism--remains with us and will be better understood when its historical foundations are grasped.

#### I. CONSTITUTIONS AGAINST PARTIES

Competitive party politics has often been treated as if it were a natural and necessary feature of democracy,<sup>19</sup> and the founding father of party politics, Martin Van Buren, has often been treated as if he

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<sup>18</sup> Richard L. McCormick, *THE PARTY PERIOD AND PUBLIC POLICY: AMERICAN POLITICS FROM THE AGE OF JACKSON TO THE PROGRESSIVE ERA* (1986).

<sup>19</sup> See Hofstadter, *IDEA OF A PARTY SYSTEM*; Michael L. Wallace, "Ideologies of Party in the Ante-Bellum Republic," (Ph.D. dissertation, Columbia University, 1973) and *Changing Concepts of Party in the United States: New York, 1815-1828*, 74 *AMERICAN HISTORICAL REVIEW* 453 (1968). These examinations of the origins of mass party politics explain the ideology that Van Buren and the Albany Regency developed in the 1820s as an effort to make sense of the new democratic politics of interest groups, not as a tool for bringing the Constitution under the control of "the democracy."

were a precocious, mid-twentieth-century advocate of interest-group pluralism.<sup>20</sup> Yet Van Buren was, of course, a man of his own time, not ours, and in his early nineteenth century, both the idea and the reality of a party system remained in the future.<sup>21</sup> Van Buren thus saw his creation not in the terms favored by theorists of a “party system” but in terms inherited from eighteenth-century political theory.<sup>22</sup> The purpose of this part is to explain briefly the eighteenth-century constitutionalism of localism, hierarchy, and unity that gave antipartyism its continuing force in the early republic. That constitutionalism, rooted in pre-modern ideas about the relationships among monarchical, aristocratic, and democratic estates, informed both the design of the federal Constitution and the American culture of politics and governance in the first post-founding generations.

The unwritten constitution of early modern England celebrated the political self-containment of the undivided, partyless locality. Each locality was connected politically to others by little other than the common necessity of maintaining a central authority (such as Parliament) whose main function was to sanction and protect local autonomy. Within these communities the central constitutional value was unity through hierarchy. All politics and governance had as its fundamental purpose to sustain the structure of the local hierarchy of families, to make clear the sources of ultimate authority in the community, and thus to preempt any possible cause of division among the people as a whole.<sup>23</sup>

Experience had shown that division was not only expensive, dishonorable, and subversive but

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<sup>20</sup> See, e.g., Hofstadter, *IDEA OF A PARTY SYSTEM*, 252.

<sup>21</sup> The strength of antipartyism into the 1820s is outlined by Hofstadter, *IDEA OF A PARTY SYSTEM*, 188-208, 253. Its persistence even beyond the 1820s is suggested by a series of works by Ronald P. Formisano: *THE TRANSFORMATION OF POLITICAL CULTURE* (1983); *Deferential-Participant Politics: The Early Republic's Political Culture, 1789-1840*, *AMERICAN POLITICAL SCIENCE REVIEW* 68, no.2 (June, 1974); *Federalists and Republicans: Parties, Yes – System, No*, in Paul Kleppner et al., *THE EVOLUTION OF AMERICAN ELECTORAL SYSTEMS* (1981); *Political Character, Antipartyism and the Second Party System*, *AMERICAN QUARTERLY* 26, no.4 (Winter, 1969); *THE BIRTH OF MASS POLITICAL PARTIES* (1971).

<sup>22</sup> See Major Wilson, *Republicanism and the Idea of Party in the Jacksonian Period*, 8 *JOURNAL OF THE EARLY REPUBLIC* (1988); James W. Ceaser, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 131-132 (1979); Jean H. Baker, *AFFAIRS OF PARTY: THE POLITICAL CULTURE OF NORTHERN DEMOCRATS IN THE MID-NINETEENTH CENTURY* (1983), ch. 3.

<sup>23</sup>This is the argument of the first half of Mark A. Kishlansky, *PARLIAMENTARY SELECTION: SOCIAL AND*

pregnant with violence as well. Especially after England's seventeenth-century experience of persistent civil unrest, according to Richard Hofstadter, "Party was associated with painfully deep and unbridgeable differences in national politics, with religious bigotry and clerical animus, with treason and the threat of foreign invasion, with instability and dangers to liberty. Even in 1715, the Tories, the opposition party, could still be seen as quasi-treasonable."<sup>24</sup> Society simply lacked regular mechanisms for resolving large-scale clashes of interest. The polity assumed that the roots of any division were in individuals' private interests, which were further assumed to be inconsistent with the public interest of a naturally harmonious community. Personal clashes within the ruling class were expected to be worked out at the personal level, lest division be extended to the electorate as a whole and the ruling structure of the community itself be challenged. There was little or no challenge to the notion that a paternalist aristocracy should look after the manifest needs and interests of each peasant-populated locality. And there was little doubt that the symbiotic relationship between hierarchical authority and communal peace and unity was the heart of the unwritten constitution and the prerequisite for stable government.<sup>25</sup>

Into the eighteenth century, then, there hardly existed a discourse of party, unless routine, blanket condemnation counts as a discourse. But the eighteenth century would bring refinements on the ideas of party and antipartyism that would play crucial roles in the later, American invention of permanent, legitimate party organization. The key idea here is that society and polity were constituted by "estates." The monarchy, the aristocracy, and the democracy were distinct strata of both society and polity, and each might, in rare times of crisis, embody itself temporarily as a kind of "antiparty party"--a special sort of movement that might defend the constitution against the attacks of the more conventional sort of party, the self-interested cabal.

In England, the constitution to be defended was known as the "balanced constitution" or as "mixed government." Looked to as the guarantee of England's unrivalled freedom, the constitution was "mixed" or "balanced" in the sense that it incorporated the three distinct estates or constitutional orders

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POLITICAL CHOICE IN EARLY MODERN ENGLAND (1986).

<sup>24</sup> Hofstadter, IDEA OF A PARTY SYSTEM, 12.

into a single governing structure. The crown, the nobility, and the commoners were not just constitutional abstractions but easily defined, discrete elements of both society and polity. By institutionalizing the three constitutional orders in the monarch, the House of Lords, and the House of Commons, each limiting the others' ability to engross power, history had presented eighteenth-century England with a constitution that offered the hope of eternal liberty. This far, nearly all the English polity was in agreement.<sup>26</sup>

The development of English society and politics after the Glorious Revolution, however, prompted fundamental disagreement over the actual functioning of that constitution and its relationship to the greater society, especially in light of the eighteenth-century financial revolution.<sup>27</sup> Thus, on the Whig side, the Secretary of the Treasury, Sir Robert Walpole, set out to settle the essentials of the English constitution by using executive patronage—"influence"—to establish a permanent interdependence among the branches, by which the dominance of any one of them would be forever forestalled.<sup>28</sup> To the Tory opposition, of course, the Whig oligarchy was nothing more than the worst kind of faction, reducing the Commons, the people's bulwark against tyranny, to a mere tool of the executive.<sup>29</sup>

Led by Lord Bolingbroke, the Tories envisioned, instead, a kind of party balance among the three branches, each estate being prone to pursue its own constitutional dominance at the expense of the balanced constitution.<sup>30</sup> That is, although all professed to worship the balanced constitution, the

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<sup>25</sup> J. C. D. Clark, *ENGLISH SOCIETY, 1688-1832* (1985).

<sup>26</sup> See, for example, J. A. W. Gunn, *Influence, Parties and the Constitution: Changing Attitudes, 1783-1832*, *HISTORICAL JOURNAL* 17, no. 2 (June, 1974) and *FACTIONS NO MORE* (1972); B. W. Hill, *Executive Government and the Challenge of the Parties, 1689-1832: Two Concepts of Government and Two Historiographical Interpretations*, *HISTORICAL JOURNAL* 13, no. 3 (September, 1970); Harvey C. Mansfield, Jr., *STATESMANSHIP AND PARTY GOVERNMENT* (1965); O'Gorman, *VOTERS*; J. H. Plumb, *THE ORIGINS OF POLITICAL STABILITY, ENGLAND, 1675-1725* (1967); J. C. D. Clark, *A General Theory of Party, Opposition and Government, 1688-1832*, *HISTORICAL JOURNAL* 23, no. 2 (June, 1980) and *ENGLISH SOCIETY*.

<sup>27</sup> Isaac Kramnick, *BOLINGBROKE AND HIS CIRCLE: THE POLITICS OF NOSTALGIA IN THE AGE OF WALPOLE* (1968), chs. 2-3, 127-136.

<sup>28</sup> Kramnick, *BOLINGBROKE*, 111-127.

<sup>29</sup> Kramnick, *BOLINGBROKE*, chs. 2, 3.

<sup>30</sup> Bolingbroke saw the estates as the operative units of politics and thus put them roughly in the place that parties would occupy, but he does not seem to have referred to them explicitly as parties. His allies

executive would inevitably seek a constitutional order of effectively unchecked monarchy, the nobles a constitution of unchecked aristocracy, and the commoners one of unchecked democracy. The balanced constitution, then, was a balance of hostile constitutional parties.<sup>31</sup>

In the American colonies, constitutional assumptions and views of the ruling Whigs tended to follow those of Bolingbroke and his ilk. The colonists shared the British devotion to mixed government and to the universal antipartyism of the time, and they joined in the developing recognition that there was a difference between party-as-faction and party as antiparty defender of the constitution itself.<sup>32</sup> In fact, the imperial crisis of the 1760s-1770s was conceptualized as the resistance of a colonial party of the constitution against the latest usurpations of ministerial faction, with the colonists finally declaring independence only when George III himself seemed to side with the structure of official faction.<sup>33</sup> Revolution and the move from monarchy to republicanism were, then, a grand effort by a constitutional party to again eliminate party from the polity. As the Constitution would be a "Constitution against parties,"<sup>34</sup> so this revolution against monarchy was a revolution against party. This notion of parties as embodiments of constitutions would, under a fully democratic rather than mixed government, become a key to the constitutional thought of Americans all the way into the Jacksonian era.

Inherited from this colonial and English experience, the Founders' fear of and antipathy to parties is now well known to constitutional historians and scholars of all sorts.<sup>35</sup> The familiar story of the Constitution is that traditional antiparty commitments combined with the experience of party-ridden

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and admirers, however, occasionally did use that label for them while rejecting the legitimacy of party within an estate. See Gunn, *FACTIONS*, 12-15. Hofstadter traces this identification of "party" with a socio-political "estate" back through Machiavelli to Aristotle as well. Hofstadter, *IDEA OF A PARTY SYSTEM*, 51 n.11.

<sup>31</sup> Kramnick, *BOLINGBROKE*.

<sup>32</sup> Bailyn, *ORIGINS*, 14-23, 36-38; Hofstadter, *IDEA OF A PARTY SYSTEM*, 16-23.

<sup>33</sup> See Bushman, *KING AND PEOPLE*, 176-229; William D. Liddle, 'A Patriot King or None': Lord Bolingbroke and the American Renunciation of George III, *JOURNAL OF AMERICAN HISTORY* 65, no. 4 (March, 1979); Marston, *KING AND CONGRESS*.

<sup>34</sup> Hofstadter, *IDEA OF A PARTY SYSTEM*, 40.

<sup>35</sup> Among historians the idea is so well known as not to be worth citing particular writers. The same might be said of legal scholars, but a seminal article is Cass R. Sunstein, "Interest Groups in American Public Law," *Stanford Law Review* 38 (1985).

government in the states in the 1780s to inspire the Framers' "constitution against parties." In the newly independent states, the pre-Revolutionary imperial crisis of government by faction had inspired the making of antiparty state constitutions, while the federal Constitution of 1787 was in large part a reaction to the failure of those constitutions.<sup>36</sup> The new states hardly produced harmonious politics,<sup>37</sup> but their internal factionalism, far from prompting new justifications for party organization, became one of the main catalysts of the movement to write a new, antipartyist, federal Constitution.<sup>38</sup> In the words of Richard Hofstadter, "While most of the Fathers did assume that partisan oppositions would form from time to time, they did not expect that valuable permanent structures would arise from them . . . . The solution, then, lay in a nicely balanced constitutional system, a well-designed state which would hold in check a variety of evils, among which the divisive effects of parties ranked high. The Fathers hoped to create not a system of party government under a constitution but rather a constitutional government that would check and control parties. . . . Although Federalists and Anti-Federalists differed over many things, they do not seem to have differed over the proposition that an effective constitution is one that successfully counteracts the work of parties."<sup>39</sup>

To the Federalists of 1787, then, the 1780s had been a triumph of party-ridden democracy. Consequently, their Constitution attempted to create a gentleman's government within a near-democracy. Rooted necessarily in the democracy, it would be operated by a supra-partisan governing elite, not subject to the self-interested whims and caprices of the people. To this end, Madison and his colleagues famously established a system of representation designed to ensure that only men of reputation and character could be elevated to the federal Congress, never men of mere partisan

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<sup>36</sup> Gordon Wood, *CREATION*, ch. 11; Rakove, *ORIGINAL MEANINGS*, 30-31; Hofstadter, *IDEA OF A PARTY SYSTEM*, 40; Stephen E. Patterson, *POLITICAL PARTIES IN REVOLUTIONARY MASSACHUSETTS* (1973), 220-226; George Dargo, "Parties and the Transformation of the Constitutional Idea in Revolutionary Pennsylvania," in Patricia U. Bonomi, ed., *PARTY AND POLITICAL OPPOSITION IN REVOLUTIONARY AMERICA* (1980), 99-100.

<sup>37</sup>See, among many others, Jackson Turner Main, *POLITICAL PARTIES BEFORE THE CONSTITUTION* (1973).

<sup>38</sup> Rakove, *ORIGINAL MEANINGS*, 30.

<sup>39</sup> Hofstadter, *IDEA OF A PARTY SYSTEM*, 53.

connection or conviction.<sup>40</sup>

Madison conceptualized matters this way both in his private writings before the Convention<sup>41</sup> and in his public advocacy after the Convention, most famously in Federalist 10. This latter document now stands as one of the sacred texts of the founding among constitutional theorists,<sup>42</sup> largely because of its affirmation that legitimate constitutional government must lie in supra-partisan deliberation. Freed from party, national policy would partake of a substantive rationality that guaranteed minority rights against majority rule or, as Madison put it, “majority faction.”<sup>43</sup> Good government could never result from the mere clash of parties or from the coalition of private interests in a majority party.<sup>44</sup> The vices of the American constitution(s) after 1776 had lain fundamentally in majoritarian democracy’s tendency to oppress minority interests in pursuit of short term goals. This was party or faction at its worst, the short term self-interest of a majority eclipsing the just rights of a minority and thus the “permanent and aggregate interests of the community” as a whole.<sup>45</sup>

The cure for the disease of party was to be a system of representation that would ensure actual governance by the purest, wisest, most far-seeing and well motivated leaders, even as the democracy retained a basic role in government as voters and through the reserved powers of the states.<sup>46</sup> Thus popular election of the House would vindicate popular sovereignty, but the provision for large districts would ensure that only gentlemen with established reputations for public service would be elected.<sup>47</sup>

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<sup>40</sup> Rakove, ORIGINAL MEANINGS (1996) 214-227; Nedelsky, PRIVATE PROPERTY 49-52 (1990).

<sup>41</sup> Rakove, ORIGINAL MEANINGS, 46-56.

<sup>42</sup> See Larry D. Kramer, “Madison’s Audience,” HARVARD LAW REVIEW 112 (January, 1999): 611-679, 612-615. Kramer, however, sees this elevation of Federalist 10 as misguided, since, he argues, in fact the influence of that document was essentially nil in its own time. Assuming that Kramer is right about the still-born quality of Madison’s argument regarding the optimum size of an antiparty republic, however, Federalist 10 remains an appropriate emblem of a kind of moderately elitist, republican antipartyism that constituted a central strain of constitutional thought at the Founding. See generally, Hofstadter, Idea of a Party System, supra ---.

<sup>43</sup> *Federalist 10*, 132-133.

<sup>44</sup> See Sunstein, “Interest Groups,” 38-45.

<sup>45</sup> *Federalist 10*, 130.

<sup>46</sup> *Federalist 10*, 134; Nedelsky, PRIVATE PROPERTY, 46-66.

<sup>47</sup> Nedelsky, PRIVATE PROPERTY, 52-55.

Senators would remain few in number, chosen by the state legislatures and given long terms to insulate them from popular pressures and encourage collegial deliberation in the public interest.<sup>48</sup> If these basic devices failed in any particular case to elevate the “permanent and aggregate interests of the community” over the desires of a “majority faction,” then there remained backup devices like the executive veto and judicial review.<sup>49</sup> Establishing roles for the democracy and a kind of governing aristocracy, these devices did not render the Constitution a restoration of mixed government as such, but they did suggest that the Framers still had English constitutional categories in mind as they sought a restored polity of hierarchy and harmony.<sup>50</sup> The Constitution was an attempt to create a polity that incorporated both the democracy and an aristocracy of independent men (and even elements of monarchy) into a system that would transcend party.<sup>51</sup>

But even among the Framers there were important disagreements on how the Constitution should work. Sharing the belief that the democratic state governments had shown themselves incompetent to the tasks of republican government, Alexander Hamilton joined with Madison in campaigning for ratification of the Constitution as a means of delivering practical governance to an aristocracy. But Hamilton went further. Even the federal Constitution he found to be a “frail and worthless fabric” without firmer guarantees of aristocratic control. The government, he thought, had to do more than rely on elitist schemes of representation. It had to be administered so as to make an aristocracy dependent on it and so as to render the democracy deferential toward that aristocracy. He and Madison shared an abhorrence of parties and a longing for a peculiarly American brand of aristocratic leadership. Like Madison, he believed that, “We are attempting by this Constitution to

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<sup>48</sup> Nedelsky, *PRIVATE PROPERTY*, 55-57.

<sup>49</sup> Nedelsky, *PRIVATE PROPERTY*, 57-61. As Nedelsky notes, Madison had little faith in judicial review as a practical obstacle to congressional action, preferring instead a Council of Revision, but he certainly accepted it as better than nothing.

<sup>50</sup> Wood, *CREATION*, ch. 12.

<sup>51</sup> Wood, *CREATION*, 503-518, esp. 513; Hofstadter, “A Constitution Against Parties” (ch. 2), in *IDEA OF A PARTY SYSTEM*.

abolish factions, and to unite all parties for the general welfare.”<sup>52</sup> But where Madison hoped that parties and democracy could be controlled by the Constitution’s ingenious institutional design, Hamilton apparently believed they could be controlled only by executive manipulation of that design to serve a national aristocracy.<sup>53</sup> This division between men who were otherwise the allied geniuses of the antiparty American founding was of vital importance, because it was Hamilton’s effort to implement his own ideas of stable governance in the 1790s that inspired Madison’s opposition and the first, reluctant steps towards regularized party organization in the American system.

## II. PARTIES FOR AND AGAINST THE CONSTITUTION

The written Constitution has never, of course, been the sum of American constitutionalism. Instead, it has been the object of conflicting constructions and manipulations from even before its ratification. Intended, by Madison at least, to institutionalize the partyless rule of locally elected elites and to cure the disease of faction even within the states, the Constitution instead yielded fundamental conflict from the very start. The conflict centered on the interrelated – almost interchangeable – questions of loose versus strict construction, broad national power versus states’ rights, and aristocracy versus democracy; and it necessarily renewed the debate about when, if ever, party might have a legitimate role under a constitution against parties.

### A. The “Aristocrats” and “The Democracy”

For Hamilton, state sovereignty under the Articles of Confederation had meant nothing but rule by party.<sup>54</sup> On taking office as Secretary of the Treasury in 1789, therefore, Hamilton sought to develop Madison’s Constitution into a constitution of practical federal power at the expense of states’ rights. In particular, Hamilton planned to fund the federal debt held by the financial elite and to have the federal

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<sup>52</sup> Quoted in Hofstadter, *IDEA OF A PARTY SYSTEM*, 17.

<sup>53</sup> Gerald Stourzh, *ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT* (Stanford, 1970), 81-85; Wood, *CREATION*, 551.

government assume the similar state debts. He sought to create a national bank as a centerpiece of monied activities and of the economies of the states, and he aimed to promote domestic manufacturing through the use of protective tariffs and other devices. Federalist foreign policy, moreover, proved to be of a piece with domestic policy. The Jay Treaty and the federal adoption of neutrality in the war between France and England were at least in part efforts to preserve the trade with England that was so central to the commercial economy on which America's monied men and Hamilton's program depended. The so-called Quasi-War with France in 1798 tended to expand the federal establishment, and the passage of the Alien and Sedition Acts represented a highly controversial assumption of federal power. With this ascendancy of the federal government, in Hamilton's view, a national polity might transcend the factionalism of the state governments.<sup>55</sup>

Jefferson and his like, however, pictured Hamilton's doings as subversion of the enumerated-powers Constitution in the interests of a paper-money faction and the "consolidationism" (centralization of power) those interests required. If the Constitution was necessary to curb the epidemic of party in the states, its purpose was not to substitute the ascendancy of party in a "consolidated" central government. Yet that is what centralizing measures like the national bank and the Alien and Sedition Acts seemed to threaten. Insofar as the Republicans acted as a party in these early years, they self-consciously resumed the position of a constitutional party, justifying their movement only as a response to an anti-constitutional, even monarchical,<sup>56</sup> party in the government. The central features of the new Jeffersonian party, then, were its adherence to traditional antiparty values, its consequent justification of itself as a temporary party of constitutional defense, and its commitment to the core doctrine of democracy in the American constitutional context, states' rights. Any lesser purposes than these would have rendered the

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<sup>54</sup> Stourzh, HAMILTON, 112, ch. 3.

<sup>55</sup> Banning, JEFFERSONIAN, 129, 135-140, 213-214, 246, 251-264; chs. 8-9 generally; Stourzh, HAMILTON, ch. 3.

<sup>56</sup> See Hofstadter, IDEA OF A PARTY SYSTEM, 123-128; Louise Burnham Dunbar, "A Study of Monarchical Tendencies in the United States from 1776 to 1801" in UNIVERSITY OF ILLINOIS STUDIES IN THE SOCIAL SCIENCES 10, no. 1 (March, 1922); Banning, JEFFERSONIAN, 110-113, 119-120, 265-266.

Jeffersonian movement factional in its own eyes.<sup>57</sup>

Although Madison joined Jefferson in the new, antiparty Republican movement, it was not Madison's theory of the Constitution that informed the movement. Bearing little, if any, imprint from Federalist 10, Jefferson's theory of party and the Constitution was far more democratic than Madison's. To Jefferson, the problem of party in a democracy lay not so much in the natural differences of opinion or interest within the democracy as in the inevitable attempts by aristocrats or "monocrats" to subvert democratic constitutionalism.<sup>58</sup>

Jeffersonians did not believe that the United States contained estates in the strict sense. But they also did not believe the nation had yet secured itself against the re-creation of a social order in which a commercialized and modernized but still fixed aristocratic estate might come to dominate.<sup>59</sup> Republican ideologist John Taylor spoke for many in characterizing Hamilton's program as a calculated attempt to re-create in America the English socio-political order of rank and influence:

If the public debt has been accumulated by every possible contrivance, buoyed up by means of the sinking fund, made in a great measure perpetual, and formed into a powerful monied machine dependent on the fiscal administration, to [Hamilton's faction] it is due. If . . . a dangerous inequality of rank has been created, . . . thereby laying the foundation for the subversion of the government itself by undermining its true principles, to this combination it is due . . . [I]f a practicable means of influence whereby the members of the legislature may be debauched from the duty they owe their constituents has been found, if by implication and construction the obvious sense of the Constitution has been perverted and its powers enlarged so as to pave the way for the conversion of the government from a limited to an unlimited one, to this combination

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<sup>57</sup>Ketcham, *PRESIDENTS*, 100-113; Hofstadter, *IDEA OF A PARTY SYSTEM*, 123-128; Jeffrey L. Pasley, 'A Journeyman Either in Law or in Politics': John Beckley and the Social Origins of Political Campaigning, 16 *JOURNAL OF THE EARLY REPUBLIC* 531 (1996).

<sup>58</sup> Hofstadter, *IDEA OF A PARTY SYSTEM*, 122-128.

<sup>59</sup> Banning, *JEFFERSONIAN*, 194-200; Herbert Storing, *WHAT THE ANTI-FEDERALISTS WERE FOR* (1981), chs. 6,

they are due.<sup>60</sup>

Thus fear of aristocrats and “monocrats” impelled the Republican movement. But, of course, there was no such thing as a class of nobles or a royal line in the United States. In this setting, “aristocrat” connoted not a member of a distinct estate but an advocate of aristocratic constitutionalism. An “aristocrat” was anyone who sought to restore the hierarchical dependency that was the essence of English aristocratic society. Thus the most common of men might be condemned as aristocrats if they sought special privilege for a minority rather than the will of the majority. Such a minority might be Hamilton’s monied interest, or the slave-owning class, or, later, for example, the incorporated moral reform organizations associated with the Whig party.<sup>61</sup>

Similarly, Jefferson’s term “monocrat” obviously meant not a person who was or would be king but one who advocated monarchical government and its structures of dependency. And the term “democrat,” correspondingly, referred to any adherent of democratic constitutionalism, regardless of that person’s social position. “The democracy,” then, was the great mass of Americans devoted to the constitutional principle of majority rule, and Jefferson’s party was the party of majoritarianism. The perceived conflict between democracy and aristocracy was an adaptation of the language of the balanced constitution in which the conflict was no longer between actual estates but between the advocates of the competing constitutional theories traditionally associated with such estates.<sup>62</sup>

Rendered in the language of the day, then, the rapid development of conflict after the establishment of the government was a battle for control of the Constitution between Hamilton’s monied “aristocrats” and Jefferson’s “democracy,” neither side playing the role assigned it by Federalist 10.

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<sup>60</sup>Quoted in Banning, *JEFFERSONIAN*, 194-195.

<sup>61</sup>A version of this argument can be found in James L. Huston, *SECURING THE FRUITS OF LABOR: THE AMERICAN CONCEPT OF WEALTH DISTRIBUTION, 1765-1900* ch. 2 (1998). Aristocracy is there identified as the possession of governmentally protected special privileges that reflect and perpetuate an inequality of political power. See also John Ashworth, *SLAVERY, CAPITALISM, AND POLITICS IN THE ANTEBELLUM REPUBLIC* 23-24 (1995).

<sup>62</sup>On the use of aristocrat and democrat, see R. R. Palmer, *Notes on the Use of the Word 'Democracy,' 1789-1799*, 68 *POLITICAL SCIENCE QUARTERLY*, 205-206 (1953).

Never an advocate of permanent party organization,<sup>63</sup> Jefferson nevertheless understood the necessity of some measure of organization if the majoritarian Constitution was to be saved from Hamiltonian aristocracy. He thus acted as leader of the Republican opposition and guided his party to control of the national government in the “Revolution of 1800.” His presidency then opened a period of Republican dominance that would have the unintended effect of legitimating permanent party organization in the eyes of a rising generation of leaders. And the main point of constitutional interpretation at stake in the Revolution of 1800, as in the politics of Van Buren’s generation was the question of “consolidation” versus states’ rights.

#### B. “Consolidation” and States’ Rights, 1787-1825

Resting on the idea that the federal constitution was a constitution against parties, the politics of the “First Party System” was not only a struggle between two antiparty theories<sup>64</sup> of the Constitution—a Hamiltonian, monied elitism as against a Jeffersonian, farmer’s majoritarianism—but equally a clash between those who sought to “consolidate” power in the national government through a loose construction of the constitutional enumeration and those who sought to preserve a meaningful localism through strict construction. Between 1787 and the eve of partyist ascendancy, the struggle to define the Constitution as either elitist or democratic was equally a struggle to define that document as either a charter of broad national power or as a guarantee of state sovereignty.

The struggle began, of course, well before ratification. The Articles of Confederation had preserved to the states a nearly complete sovereignty,<sup>65</sup> and movements to amend or replace the Articles could never have lacked opposition from those jealous to defend that sovereignty. Although the

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<sup>63</sup> Hofstadter, *IDEA OF A PARTY SYSTEM*, 122-128; Onuf, *JEFFERSON’S EMPIRE* 85-88.

<sup>64</sup> On the essentially antiparty character of the so-called “First Party System,” see Ronald P. Formisano, *Federalists and Republicans: Parties, Yes – System, No*, in Paul Kleppner et al., *THE EVOLUTION OF AMERICAN ELECTORAL SYSTEMS* (1981).

<sup>65</sup> Wood, *CREATION*, 354-363.

Convention was weighted in favor of advocates of national power,<sup>66</sup> certain nationalizing efforts were doomed from the start. Even a proposal that Madison himself deemed central to the whole project of the Convention, a congressional veto power over all state legislation, was never able to gather substantial support.<sup>67</sup>

The pressure from those who dreaded consolidation really mounted, though, immediately after publication of the draft constitution. The Antifederalist opponents of ratification were a diverse group, ranging from virtual aristocrats accustomed to the political deference of their localities to the commonest of the common who embraced no exercise of public authority but what was endorsed by the local mob. What they shared, however, and bequeathed to the new politics under the new Constitution was a dread of centralized government and a commitment to the dispersion of most public authority among the states and localities.<sup>68</sup>

Moreover, even the supporters of the Constitution included quite a few committed states'-rights men. Thomas Jefferson was only the most prominent of these. In his letters to Madison from France, he declared his support for ratification, but he also criticized the document's many imperfections from a localist, agrarian perspective. Among his targets was, of course, the absence of a bill of rights, a criticism echoed by Antifederalists throughout the land.<sup>69</sup> But the demand for a bill of rights was not mainly an effort to have individual rights stated and given a judicially cognizable guarantee. Rather, it was specifically an effort to confine the power of the national government within narrow bounds. In Gordon Wood's words, "the Antifederalists in their demand for amendments and a bill of rights had actually been more concerned with weakening the power of the central government in its relation to the states in matters such as taxation than with protecting 'personal liberty alone' . . . ."<sup>70</sup>

As leader of the later Republican movement, Jefferson would be the leading exponent of a theory

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<sup>66</sup> McDonald, *STATES' RIGHTS AND UNION: IMPERIUM IN IMPERIO*, 1776-1876 15-16 (2000).

<sup>67</sup> Rakove, *ORIGINAL MEANINGS*, 51-53, 62, 81-82.

<sup>68</sup> Cornell, *THE OTHER FOUNDERS*, chs. 1-3.

<sup>69</sup> Wood, *CREATION*, 536-543; Cornell, *THE OTHER FOUNDERS*, 166.

<sup>70</sup> Wood, *CREATION* 543.

of the states'-rights Constitution that explained the integration of states' rights and individual liberties. In Jefferson's vision, no small, organic republic could long survive on its own but must instead come under the authority of a central government. That central government, however, need not be the sort of metropolitan center of a consolidated empire that dominated Europe—the sort he suspected Hamilton of pursuing in the national government. Starting in America, the integration of multiple republics into an empire could take the form of an “empire for liberty,” an empire of localist equality rather than consolidation.<sup>71</sup>

The metaphor was a pyramid, in which there existed a perfect political equality at each level, whether the individual or the county or the state, and a strictly limited delegation from those equal units to the governmental unit one step above. The purpose of that delegation, moreover, was to maintain peace and political equality among the delegating units, not to give away power over each unit's internal affairs. Formally equal individuals could not be trusted to respect each other's equality over the long term, and the republics that they formed could not, in their turn, be trusted to respect the equality of neighboring republics. Thus the necessity of a union of republics under a central government, the task of which was limited to preserving peace and equality among the otherwise independent republics as well as between the union and the rest of the world: “[I]n government, as well as in every other business in life, it is by division and subdivision of duties alone, that all matters, great and small, can be managed to perfection. And the whole is cemented by giving to every citizen, personally, a part in the administration of the public affairs.”<sup>72</sup> Every citizen must possess a personal role in governance or else the equality at the base of the pyramid would be a sham. And the actual exercise of governing power must be kept to the lowest practical level lest government become an engine of special privilege. Thus the central government, in particular, must be strictly limited in its powers lest it disrupt rather than protect the equality of its constituent parts, the states. In this scheme, bills of rights within the states were necessary to restrict the state governments clearly to their proper tasks, but a bill was equally necessary at the

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<sup>71</sup> Peter S. Onuf, *JEFFERSON'S EMPIRE* (2000)

<sup>72</sup> Quoted in Onuf, *JEFFERSON'S EMPIRE*, 120.

national level, not so much as a direct protection of individual rights as an explicit restriction of the national government to its place in the pyramid, that of preserving peace and commerce among its constituent republics without displacing any more than necessary the republican states' preeminent role in governing the people as such.<sup>73</sup>

In contrast, Federalists often argued that a bill of rights was unnecessary. The Constitution, they said, represented a moderate augmentation of national power in a federal system, not a consolidation of sovereignty in a distant, central government. James Wilson, for example, first gave broad publicity to the argument that the grants of power to the federal government need not be feared, because those grants were specific and limited. The new government would have no power to do anything that was not specified in the enumerated powers, and none of those powers authorized the government to violate any of the rights usually collected in such a bill. State governments rightly had bills of rights because they had otherwise unrestricted power; the federal government did not. The continuing integrity of the states was, therefore, guaranteed by the Constitution itself.<sup>74</sup>

The Antifederalists, however, simply did not believe that the Constitution as drafted was immune to a consolidating construction, and so they insisted on a bill of rights to closely confine those powers.<sup>75</sup> We, of course, now know the Bill of Rights as a catalogue of individual rights against state and national government, and certainly the Bill had something of that character from the start. But, especially when the various amendments are viewed in connection with the 10<sup>th</sup> Amendment and the Antifederalist localism that forced their adoption, the Bill reads less as a series of protections for individual rights than as a holistic textual guarantee that the Constitution was indeed a limited grant of power and a guarantee of states' rights when properly – later states'-righters would say “strictly” – construed.<sup>76</sup>

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<sup>73</sup> Onuf, *JEFFERSON'S EMPIRE*, 8-10, 64-79, 120-121.

<sup>74</sup> Rakove, *ORIGINAL MEANINGS*, 142-144; Cornell, *THE OTHER FOUNDERS*, 58; Wood, *CREATION*, 537-542.

<sup>75</sup> Wood, *CREATION*, 538-543.

<sup>76</sup> Akhil Reed Amar, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

As the Bill of Rights went to the states for ratification, however, the post-constitutional politics of consolidation versus states' rights was already underway. As indicated above, the nascent coalition of old Antifederalists and newer anti-Federalists under the lead of Jefferson reacted sharply to Hamilton's attempts to shape American governance in a neo-Walpolean mold. Funding, assumption, and the new national bank appeared as efforts specifically to erase state authority and consolidate power in the national government. The rise of the original Republican party – not a mass party but a label under which an anti-Hamiltonian opposition began to coalesce – was a states'-rights reaction to this program.<sup>77</sup>

Similarly, the Supreme Court's *Chisholm*<sup>78</sup> decision, which held that a state could be sued in federal court by a citizen of another state, was roundly condemned for treating the states as mere subordinate "corporations" within a central, "consolidated Government."<sup>79</sup> The case provoked a quick response in the form of the Eleventh Amendment, which confined "the judicial power of the United States" short of any such disparagement of the sovereignty of the states.<sup>80</sup>

The climax of the debate in the 1790s was the controversy over the Alien and Sedition Acts. The Federalist assertion of national power to punish seditious libel prompted resistance from Madison, Jefferson, and other Republicans in the form of the Virginia and Kentucky Resolutions. Those articulations of the "principles of '98" focused less on the Act's abridgment of the right of free speech – since the states themselves generally had more restrictive laws of seditious libel – than on its expansion of federal power beyond the constitutional enumeration. It stood, therefore, as climactic evidence of

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<sup>77</sup> Cornell, *THE OTHER FOUNDERS*, 172-175, 187-194; McDonald, *STATES' RIGHTS AND UNION*, 28-33.

<sup>78</sup> *Chisholm v. Georgia*, 2 U.S. 419 (1793).

<sup>79</sup> McDonald, *STATES' RIGHTS AND UNION*, 35.

<sup>80</sup> McDonald, *STATES' RIGHTS AND UNION*, 34-36. On *Chisholm* and the Eleventh Amendment generally, see Clyde E. Jacobs, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972); William R. Casto, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* ch. 7 (1995); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 *STAN. L. REV.* 1033 (1983).

Federalist consolidationism.<sup>81</sup> Similarly, it stood as evidence of the way in which states' rights and individual liberties were of a piece.<sup>82</sup>

While the resistance of 1798 made little immediate headway, tainted as it was by hints of secessionism, the Federalists were turned out of office in 1800 as Jefferson was elected to vindicate states' rights.<sup>83</sup> Notwithstanding some broad assertions of national power by Jefferson himself once in office, most notably the acquisition of Louisiana<sup>84</sup> and other matters of foreign relations, the Republican ascendancy and the rapid withering of the Federalists appeared to evidence a broad national commitment to limit the powers of the federal government and vindicate states' rights.<sup>85</sup>

As the power of the Federalists shrank, consolidationism was widely seen as retreating to its bastion in the federal judiciary under the leadership of John Marshall. The Republicans responded with a series of attacks on the federal courts, including the repeal of the Federalist Judiciary Act of 1801, the impeachment of Justice Samuel Chase, and the rumored threat to impeach Chief Justice Marshall himself. These attacks were blunted, however, when Chase was acquitted in the Senate and when Marshall himself led his Court in a politic direction, doing little to irk the Jeffersonians after the *Marbury* case of 1803 until after the close of the War of 1812.<sup>86</sup>

Federalist weakness in electoral politics and quiescence in judicial politics, however, soon opened the door for the rise of nationalist tendencies in the Republican camp. The Republicans had operated a grossly under-prepared military in the War of 1812, yet they won the war at home decisively. The result was a new era of national ambition and the emergence of a new brand of Republican.

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<sup>81</sup> McDonald, *STATES' RIGHTS AND UNION*, 40-43; Cornell, *THE OTHER FOUNDERS*, 240-242, 230-245.

<sup>82</sup> Onuf, *JEFFERSON'S EMPIRE*, 93-98.

<sup>83</sup> McDonald, *STATES' RIGHTS AND UNION*, 44-46.

<sup>84</sup> McDonald, *STATES' RIGHTS AND UNION*, 58-59.

<sup>85</sup> See Andrew C. Lenner, *THE FEDERAL PRINCIPLE IN AMERICAN POLITICS, 1790-1833* chs. 2-3 (2001).

Lenner argues that the Jeffersonians insisted on strict construction of the constitutional enumeration but that they were happy to acknowledge broad federal power within areas clearly committed to the federal government, such as international relations.

<sup>86</sup> Ellis, *JEFFERSONIAN CRISIS*, chs. 3-7; Robert G. McCloskey, *THE AMERICAN SUPREME COURT* ch.2 (1960). Note that the Court's arguably nationalist decision in *Fletcher v. Peck* was actually a politically safe

Immediately after the War, men like Henry Clay and John Calhoun (the latter soon to lead the most radical states'-rights men in the country) turned to the national government, not the states, as the agency by which the people might realize unimagined glory and prosperity. In the flush years of national awakening, freed from the British and Federalist threats alike, newly nationalist Republicans pressed a neo-Hamiltonian program of protective tariffs, federally funded internal improvements (transportation infrastructure), and a new national bank. While federal funding of internal improvements pressed constitutional boundaries too far even for many of the new nationalists, the tariffs and the national bank were signed into law by James Madison himself, the Republican leader who had once joined Jefferson in pronouncing any such bank an unconstitutional expansion of national power.<sup>87</sup> Slowly, even federal funding for internal improvements began to seem within the constitutional grant to some erstwhile "old republicans" like the new president, James Monroe.<sup>88</sup> With the election of one-time Federalist John Quincy Adams, moreover, loose-constructionism seemed to have risen ascendant from the ashes of the Federalists.<sup>89</sup>

These developments only encouraged a largely nationalist – although largely Republican – Supreme Court to come out of hiding and vindicate the national government's use of the "implied powers" of the Constitution. Thus, in *McCulloch v. Maryland*,<sup>90</sup> the Court weighed in on the national bank, the focal point of the debate between the consolidators and the states'-rights men since the very first Congress. The Court held that the chartering of such a bank was a constitutional exercise of power because it was manifestly useful to the achievement of enumerated ends even if the power to charter a bank was not itself enumerated.<sup>91</sup> Such loose construction of federal power, of course, meant a

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decision, since it was clear that a large part of the Republican party would endorse the substantive outcome of the case. See C. Peter Magrath, *YAZOO* (1966).

<sup>87</sup> McDonald, *STATES' RIGHTS AND UNION*, 71-76. On Madison, see Banning, *JEFFERSONIAN*, 279-280 and n.19.

<sup>88</sup> McDonald, *STATES' RIGHTS AND UNION*, 91.

<sup>89</sup> McDonald, *STATES' RIGHTS AND UNION*, 92-93.

<sup>90</sup> 17 U.S. 316 (1819).

<sup>91</sup> 17 U.S. 316 (1819); McDonald, *STATES' RIGHTS AND UNION*, 81.

diminution in state power or sovereignty<sup>92</sup>--specifically here a diminution in Maryland's power to tax banks operating in its midst--and so *McCulloch* was a close companion case to *Martin v. Hunter's Lessee*. In *Martin*, the Court had held that state court judgments were subject to correction by the national Supreme Court whenever the judgment rested on an interpretation of federal law.<sup>93</sup> In the early republic, this holding had none of the air of inevitability it has since acquired. Rather, adhering to the Jeffersonian notion that the Constitution merely confederated a collection of independent republics, many (including Jefferson himself)<sup>94</sup> insisted that the confederal Constitution recognized multiple, distinct judicial powers in the American system; the "judicial power of the United States" and the judicial powers of each of the several states existed independently and coordinately, without power to revise each other's judgments.<sup>95</sup> The supremacy of federal *law*, strictly limited to the categories of the constitutional enumeration, did not at all imply for these men the supremacy of federal *institutions* on questions--even federal questions--that state institutions legitimately had before them.<sup>96</sup> Otherwise, public power would again be consolidated in one unchecked "federal head" rather than coordinated among multiple, mutually checking institutions.

By the mid-1820s, then, the War of 1812 had stigmatized the old Federalists so thoroughly as to leave nearly all of American politics to self-declared Republicans. Yet loose construction and consolidation were on the verge of an ascendancy that could never have been achieved by avowed Federalists. At this point, it cannot be too strongly emphasized that the traditional rejection of party spirit, party behavior, and party organization remained central to American political and constitutional culture. Informing the entire structure of the federal Constitution, the conviction that republican government could not survive persistent party strife survived the party clashes of the first post-

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<sup>92</sup> Cornell, *THE OTHER FOUNDERS*, 278-288.

<sup>93</sup> 14 U.S. 304 (1816).

<sup>94</sup> R. Kent Newmyer, *John Marshall, McCulloch v. Maryland, and the Southern States' Rights Tradition*, 33 *John Marshall L. Rev.* 875, 903 (2000).

<sup>95</sup> F. Thornton Miller, *JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1783-1828* ch. 5 (1994).

<sup>96</sup> See, e.g., Miller, *JURIES AND JUDGES*, ch. 5.

constitutional generation almost completely intact. As indicated above, Jefferson tailored his partisan activity for a future in which the ascendancy of the democracy over Federalist consolidationism would eliminate the need for and bases of party activity.<sup>97</sup> Such was the general view of the Jeffersonian Republicans,<sup>98</sup> and so with the apparent elimination of the Federalists as a political force, the partyless democracy promised by the Constitution seemed finally aborning—even as many of its leaders began to turn it in a direction never before advocated by any but Federalists. Amid this nationalist Republican ascendancy, however, there remained Republicans who thought that a strict regard for states’ rights and the constitutional enumeration was the permanent precondition of democracy and who were developing a new understanding of party organization’s relationship to the Constitution.

### III. MARTIN VAN BUREN, PARTY ORGANIZATION AND THE CONSTITUTION

To the younger generation of Republicans, Jeffersonian constitutionalism was the political bible.<sup>99</sup> They knew that Federalism meant aristocracy and that, as the embodiment of the landed democracy, the Republican party was itself the foundation of the Constitution. Far from being just one of many possible parties under the Constitution, the Republican party was the only legitimate party and its natural state was an “exclusive and towering supremacy”<sup>100</sup> over the monied factions.

In 1815, this natural position seemed largely realized and the constitutional order finally settled. To most Republicans, therefore, the need for party was over, and the president was expected to unite the nation, not lead a party.<sup>101</sup> But to some of the younger Republicans the threat of consolidation and aristocracy remained. For them, organized, single-party ascendancy was a constitutional arrangement to be perpetuated under all circumstances, not to be tossed away just at the moment of its triumph. And it was this commitment to single-party ascendancy, oddly enough, that ultimately gave birth to the “two

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<sup>97</sup> See Hofstadter, *IDEA OF A PARTY SYSTEM*, 150-169.

<sup>98</sup> See Formisano, *Federalists*, and *TRANSFORMATION*, ch.3.

<sup>99</sup> For Van Buren’s boundless worship of Jefferson, see Van Buren, *INQUIRY*, 424; *Autobiography*, 188. And for other Jeffersonians, see Hofstadter, *IDEA OF A PARTY SYSTEM*, 241-242.

<sup>100</sup> Van Buren, *Autobiography*, 303.

party system” as the chief institution for enforcement and elaboration of constitutional federalism.

The leader of the partyist Republicans was Martin Van Buren. Van Buren thought himself a thoroughly conservative defender of Jeffersonian constitutional theory, but he moved beyond and even against Jefferson in two ways. First, where Jefferson had thought of the constitutional structure as accommodating elements of monarchy and aristocracy<sup>102</sup> while still resting on the majoritarian principle—shades of mixed government again—Van Buren’s Constitution was radically democratic. And the principle of democracy meant to Van Buren, as it did to Jefferson, not just decision-making by 50% plus one, but the maximum dispersal of power consistent with order, since every unnecessary concentration of power impaired personal independence, political equality, and the “unbiased” quality of popular decision-making. In short, a Constitution of the democracy alone was necessarily a states’-rights Constitution.

Second, Van Buren believed that preservation of the democratic character of the Constitution required a permanently and highly organized party of the democracy, by which every aspect of government would be made directly responsible to the majority of the people. The Constitution was a magnificent design in which the people’s sovereignty had been guaranteed through a governing structure of delicate balances, both among the coordinate branches of the national government and between the coordinate national and state governments. Experience had shown, however, that that governing structure, which contained no sovereign except the people themselves, was incomplete; it required a final institution to provide the people with direct capacity to settle disputes among the Constitution’s coordinate institutions. This final institution was the democratic political party.

The Van Burenites would spend the rest of their political lives not trying to create a modern party system or “party government” in the modern sense<sup>103</sup> but defending the constitutional order of democratic single-partyism and preventing consolidation of ultimate power in any of the Constitution’s

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<sup>101</sup>See Ketcham, *PRESIDENTS ABOVE PARTY*.

<sup>102</sup>On this aspect of Jefferson’s thought, see Harvey C. Mansfield, Jr, *Thomas Jefferson*, in Morton J. Frisch and Richard G. Stevens, eds., *AMERICAN POLITICAL THOUGHT: THE PHILOSOPHIC DIMENSION OF AMERICAN STATESMANSHIP* 44-49 (1971).

“coordinate” institutions – most especially the national Supreme Court. This part, therefore, examines Van Buren’s intellectual and political leadership of a Democratic party that sought to implement single-party ascendancy and coordinate constitutionalism against an opposition that pursued federal – and sometimes judicial – supremacy by attacking the very legitimacy of party action.

#### A. Van Burenism I: The Constitutional Character of Party Politics to 1828

Van Buren is widely given credit for inventing the modern politics of party competition within a democratic consensus.<sup>104</sup> But that politics is not what Van Buren desired or expected. Far from advocating party organization *within* the democracy, Van Buren sought only party organization *of* the democracy. In a remarkable document written in 1840,<sup>105</sup> the undisputed king of party organization outlined his party’s public approach to the campaign. Although the election of 1840 is generally thought to mark the full flowering of the pluralist mass party system at work,<sup>106</sup> Van Buren’s writings confirm that he endorsed party only insofar as it *opposed* the pluralist theory that underlies the modern idea of a party system.

The intensity of Van Buren’s anxiety to define the role of party correctly in this campaign is best understood through the international perspective then so salient. Van Buren had an acute awareness that, in the estate-conscious Old World, government by the democracy was an object of contempt. Specifically, the international enemies of democracy pointed to America’s persistent party divisions as

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<sup>103</sup>James W. Ceaser, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 131-132 (1979).

<sup>104</sup>Hofstadter, *IDEA OF A PARTY SYSTEM*, ch. 6; Cole, *VAN BUREN*; Ketcham, *PRESIDENTS*, ch. 8; John Niven, *MARTIN VAN BUREN: THE ROMANTIC AGE OF AMERICAN POLITICS* (1983); Robert V. Remini, *MARTIN VAN BUREN AND THE MAKING OF THE DEMOCRATIC PARTY* (1959); Michael L. Wallace, “Ideologies of Party in the Ante-Bellum Republic,” (doctoral dissertation, Columbia University, 1973) and *Changing Concepts of Party in the United States: New York, 1815-1828*, 74 *AMERICAN HISTORICAL REVIEW* 453 (1968). Modifications of the standard view appear in Major L. Wilson, *Republicanism and the Idea of Party in the Jacksonian Period*, 8 *JOURNAL OF THE EARLY REPUBLIC* (1988); Ceaser, *PRESIDENTIAL SELECTION*, ch. 3; Jean H. Baker, *AFFAIRS OF PARTY: THE POLITICAL CULTURE OF NORTHERN DEMOCRATS IN THE MID-NINETEENTH CENTURY* (1983), ch. 3.

<sup>105</sup>Martin Van Buren, “Thoughts on the Approaching Election in N. York,” in *Papers of Martin Van Buren*.

<sup>106</sup>See, e.g., William R. Brock, *PARTIES AND POLITICAL CONSCIENCE: AMERICAN DILEMMAS, 1840-1850* 4-5 (1979).

conclusive evidence of the futility – not the health – of democracy. Van Buren took it upon himself, therefore, to refute that position by explaining the true character of American party competition. But, far from developing a modern understanding of a “party system,” he drew on nineteenth-century concerns about relations among democratic, aristocratic, and monarchical constitutional orders to explain the structure of politics in 1840.

Van Buren’s analysis of the campaign of 1840 makes sense only if one understands his unspoken, pre-modern premise: party competition was not among democrats but between democrats and aristocrats (or “monocrats”). On that premise, if the outcome of the election actually remained uncertain, then the people’s very commitment to the sovereignty of the democracy was in doubt. Here is Van Buren’s frank (if syntactically challenging) acknowledgement of the plausibility of this charge:

That the choice of the people of the U. States between two parties so undeniably divided in [?] principles + objects, which are, with almost the single exception of the form of the Government[,] identical with those for which the Revolution itself was waged, should ever be doubtful has been a source of surprise + regret to many intelligent and well disposed observers of the workings of our system in all parts of the world, + a fruitful theme of derision to the enemies of free Government. They glory in the supposition as affording triumphant evidence of their favourite theory, that the mass of the people are every where too fickle in their opinions, too little informed in public affairs + too unstable in their views for the enjoyment of self Government.<sup>107</sup>

Van Buren argued here that everyone abroad recognized the American party division as a conflict between self-government and aristocracy, the opposing principles of the American Revolution. The only change since the Revolution was that the opposition no longer contended for the actual “form” of the British government, constitutional monarchy. Otherwise the contest continued as it always had. The fact that, to foreign eyes, this contest’s outcome “should ever be doubtful,” then, was sufficient reason for the world to question the people’s capacity for self-government – the people’s ability both to conduct their

government and to sustain their commitment to the Constitution that gave them such responsibility.

Having acknowledged this indictment of democracy and party politics, Van Buren did not dispute the constitutional theory at work, as he would certainly have done if he had been some modern theorist of two-party-ism. Instead, he actually seemed to agree that uncertainty in the outcome of a looming presidential contest might cast doubt on the people's capacity for democratic rule. But he refused to accept that any uncertainty actually existed in these races. Rather than argue that close, two-party competition reflected the healthy diversity and freedom of a democratic society, he argued that the competition between the democracy and the aristocrats was never really that close. Although a minority of the democracy might occasionally be misled by crypto-aristocratic deceptions, in fact, the nation had sustained the democratic party by large majorities in every national election since the organization of parties in 1798.<sup>108</sup>

The elections of Jefferson, Madison, and Monroe, as the clear choices of the Republican party, amounted to declarations of the popular commitment to democracy. Even in 1824, when the election in the House yielded the crypto-Federalist John Quincy Adams, the people's own voice on the question of democracy versus aristocracy had been clear. In fact, this election was the single most important episode in the history of American constitutionalism after the Revolution of 1800, as Van Buren could explain from his own experience.

Van Buren had gone to Washington in the Era of Good Feelings, intending to expose the continuing power of consolidationism and restore the unity of a Republican party that was disintegrating under the antiparty Monroe. By 1822 there were at least four nominally Republican presidential candidates in the field, each building a faction within the party, each disregarding the danger of the seemingly moribund Federalists or, worse, actively seeking Federalist support. President Monroe did nothing to unify the party but rather seemed content to let it dissolve.<sup>109</sup> The only hope for keeping the

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<sup>107</sup> Van Buren, "Thoughts," 33.

<sup>108</sup> Van Buren, "Thoughts," 34-39.

<sup>109</sup> Hofstadter, *IDEA OF A PARTY SYSTEM*, 188-200, 226-231; Remini, *VAN BUREN*, chs. 2-3; Ketcham, *PRESIDENTS ABOVE PARTY*, 124-130.

party undiluted by Federalism and true to its democratic principles was to restore its unity behind a single, authentically Republican, party candidate. And the only established mechanism for this purpose was the congressional nominating caucus. This body had nominated Republican candidates ever since the Revolution of 1800, and in each election its candidate had triumphed by an overwhelming majority.<sup>110</sup>

In the absence of an avowed Federalist candidate to contend with, however, only William Crawford was willing to submit his name to the caucus. He was duly nominated by the minority of congressmen who attended, while the remaining candidates, Adams, Henry Clay, and Andrew Jackson, all ran against the legitimacy of caucus dictation. Jackson came away from the election with a national plurality but without a majority of the electoral vote. The election therefore went into the House. Crawford had run weakly, but Van Buren's "radical" Republicans stood by Crawford throughout the House election in defense of the principle of party regularity.<sup>111</sup>

The principle of party had not resonated for the antiparty electorate in 1824, however, and Adams outmaneuvered Jackson to gain the presidency, despite having trailed in the popular vote. In Van Buren's view, therefore, in the one case where an aristocratic, or consolidationist, president was elected, the choice had not been made by the people but in defiance of their clear preference for one of several democrats; the democracy had succumbed to a failure of organization, not a failure of principle.<sup>112</sup> There was no reason, then, to doubt that the people would continue to vote their well understood constitutional convictions and that only a failure of organization could render those votes futile.<sup>113</sup> As long as elections were free and organized by constitutional parties, the democracy would forever be equipped to spy and defeat all attempts to re-create a society of anti-democratic dependency.

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<sup>110</sup> Noble E. Cunningham, Jr., *The Jeffersonian Republican Party*, in 1 Arthur M. Schlesinger, Jr., *HISTORY OF U.S. POLITICAL PARTIES* 252, 263-267 (1973).

<sup>111</sup>Remini, *VAN BUREN*, chs. 4-7.

<sup>112</sup>According to Van Buren, all three of the other candidates that year, Jackson, William Crawford, and Henry Clay, who later turned out to be a constitutional aristocrat, were then generally acknowledged to be old republicans. Jackson won a national plurality in the election, and together the three "democratic" candidates polled a large majority for, as Van Buren saw it, democracy.

And every election, including that of 1840, would yield an overwhelming Democratic majority.

Adams's election confirmed for Van Buren the indispensability of party organization to popular sovereignty and thus the necessity of an immediate, partyist reform movement to guarantee popular control of presidential elections. But the Jackson movement for 1828 was not initially a partyist movement. It actually contained many firm opponents of party, since Jackson himself had been an old-fashioned antipartyist.<sup>114</sup> For this reason, Van Buren was wary of supporting Jackson. Lacking a plausibly democratic alternative, however, Van Buren turned to Jackson and did all in his power to convert the campaign from a personal candidacy to a party operation. In a now famous letter to Thomas Ritchie, Van Buren insisted that he sought not just to unify the anti-Adams vote behind Jackson but also to achieve "what is of still greater importance, the *substantial reorganization of the old Republican Party*," a goal which he acknowledged was contrary to the antiparty prejudices of the mass of the electorate.<sup>115</sup>

Had the anti-caucus, anti-party Jackson been elected in 1824 in place of Adams, such a popular and uncontroversial result would have been disastrous for Van Buren and for the future of the very principle of party organization. Likewise, had Jackson's victimization in 1825 carried him to election in 1828 without the aid of party, the result might have foreclosed successful mass party organization for a generation. Such an election would have suggested to the people that their will--their constitutionally guaranteed sovereignty--could be made effective without the mechanism of party. In the event, however, Jackson himself slowly embraced the partyist argument--that the democracy as a body could protect its sovereignty only through the mechanism of party organization.<sup>116</sup> Van Buren thus succeeded in placing the election of 1828 on an organized party basis in much of the Union and, over time, in turning Jackson into the nation's most important symbol of partyism.<sup>117</sup>

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<sup>113</sup>Van Buren, "Thoughts," 34-39.

<sup>114</sup> Hofstadter, *IDEA OF A PARTY SYSTEM*, 195; James S. Chase, *EMERGENCE OF THE PRESIDENTIAL NOMINATING CONVENTION, 1789-1832* 110-111 (1973).

<sup>115</sup>Remini, *VAN BUREN*, 130-133, quotation on 130.

<sup>116</sup> On Jackson's gradual conversion to partyism, see Richard B. Latner, *THE PRESIDENCY OF ANDREW JACKSON: WHITE HOUSE POLITICS, 1829-1837* 126-129 (1979).

<sup>117</sup>On the election of 1828, see, especially, Remini, *VAN BUREN* and *THE ELECTION OF ANDREW JACKSON*.

The party-organized election of 1828, therefore, has often been portrayed as the decisive triumph of the modern, pluralist politics of the “two party system.” Van Buren’s partyism, however, as the above paragraphs show, was not modern. Van Buren rejected modern pluralist notions of party competition: that two parties in regular competition might manage sub-constitutional conflict among interest groups and subcultures; and that the permanent dominance of a single party must be a sign of oppression and institutional failure rather than a vindication of democratic self-government. The supposed prophet of the party system was imbued with antipartyism’s condemnation of parties as enemies to the general interest and understood his party as an antiparty party of last resort. His writings make clear that he aspired only to perpetuate what he saw as the grandest of Jefferson’s achievements: the constitutionally required dominance of the landed, states’-rights democracy over the anti-constitutional, consolidationist party of the monied aristocracy.

## B. Van Burenism II: The Democracy, Party, and States’ Rights

As important as it is to understand Van Buren’s vision of a party of the whole democracy, that is only part of the picture. Democracy, majoritarianism, and equality were little more than slogans to him if disconnected from the fundamental localism—in practice, states’ rights—that rendered democracy real. In his *Inquiry into the Origin and Course of Political Parties in the United States*,<sup>118</sup> Van Buren offered his understanding of the historical origins of modern democracy, and from that history Van Buren extracted the principle that only maximum dispersal of power preserved the vitality of democracy, because every concentration of power increased the danger of inequality and dependency. In the context of the Constitution, such dispersal of power was protected by the doctrine of states’ rights.

### 1. *The States’-Rights Constitution*

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<sup>118</sup> Van Buren wrote his *INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES* (New York, 1967; orig. 1867) and his autobiography, *The Autobiography of Martin Van Buren*, *ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1918* (Washington, 1920), in his retirement in the 1850s.

To Van Buren, a commitment to local, closely accountable government as a corollary of majoritarianism and political equality was a natural product of American soil.<sup>119</sup> The small farmers who populated the colonies were the “democratic party” for Van Buren, and they were committed above all to equality: to equality among individuals; to minimal government, since unnecessary government could only mean redistribution of society’s benefits from the people at large to special interests; and to constitutional equality among confederated colonies. He pointed to the seventeenth-century confederation of New England colonies, which was agreed to only when the principle of equality of control among large and small colonies was adopted.<sup>120</sup> Similarly, when the Albany Plan of Union was submitted to the colonies in 1755, the proposed cessions of power were defeated as too dangerous to liberty. According to Van Buren, even though the plan was remarkably democratic for that period, “the attachments of the colonists to their local governments, and, above all, their distrust and dread of central government . . . were sufficient to deprive the plan of their favor.”<sup>121</sup> It was unsurprising, therefore, that most of the patriots of the Revolution, as well, sought to “restrict grants of authority to their public functionaries to the lowest point consistent with good government, and to subject what they did grant to the most stringent responsibilities.” Similarly, they “cherish[ed] the same preference for their local organizations, and . . . entertain[ed] the same distrust of an overshadowing central government, for which the great body of the people had long been distinguished.”<sup>122</sup>

If the crisis of the Revolution finally induced the colonies to form a central government, their dread of the inegalitarian tendencies of centralized government manifested itself in the wholly inadequate, “so-called Government” established by the Articles of Confederation.<sup>123</sup> And those fears were validated when there quickly arose a party, led by Hamilton, bent on the replacement of the

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<sup>119</sup>Martin Van Buren, *INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES* 11-12 (1967; orig. 1867).

<sup>120</sup> Van Buren, *INQUIRY*, 24.

<sup>121</sup> Van Buren, *INQUIRY*, 24-25.

<sup>122</sup> Van Buren, *INQUIRY*, 27-28.

<sup>123</sup> Van Buren, *INQUIRY*, 33.

Articles not just with a revised model of confederation but with “a virtual consolidation of the two systems—Federal and State.”<sup>124</sup> Such a party could not emerge, however, without stimulating the “political feelings which lay nearest to the hearts of the great body of the people,” their “veneration and affection for their local governments as safeguards of their liberties” and their associated “distrust . . . of what they called an overshadowing general government.”<sup>125</sup> Thus party conflict between “Federalists” and “Anti-Federalists,” according to Van Buren, arose “out of propositions to take from the State governments the rights of regulating commerce and of levying and collecting impost duties, and for the call of a Convention to revise the Articles of Confederation.” To Van Buren, these particular Federalist measures were healthy in themselves, since the Articles of Confederation truly were inadequate. Many true democrats, therefore, supported them. But many other democrats objected to them on the grounds that “the views of the Federalists were rather political than financial,—that they were at least as solicitous to gratify their well-understood passion for power, through the adoption of these propositions, as they were to maintain public credit.”<sup>126</sup> The party division, in the minds of these opposition democrats, was a constitutional battle between localist democracy and centralized aristocracy, fought out on questions of the government’s role in the economy.

The unorganized democracy remained on both sides of the contest after the 1787 Convention. Smelling consolidation in every breeze, the Anti-Federalists misread the Constitution as an elitist ruse when it was, in fact, as subsequent decades showed, a fully democratic document—when strictly construed: “By the exercise of those powers only which were plainly given by the Constitution . . . and . . . in regard to which there has been no dispute, and which were at the times of its adoption well understood by those who made and those who adopted it, our country has prospered and grown to its present greatness.”<sup>127</sup>

Finally, almost fortuitously, the democratic Constitution was narrowly ratified, a result perhaps

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<sup>124</sup> Van Buren, INQUIRY, 34.

<sup>125</sup> Van Buren, INQUIRY, 36.

<sup>126</sup> VAN BUREN, INQUIRY, 38-39.

spearheaded by Federalists but given its final character by Anti-Federalist insistence on democratic principles, including a bill of rights.<sup>128</sup> When the Constitution was ratified with support from both parties, according to Van Buren, and when Madison secured the democratic, states'-rights character of the Constitution with the Bill of Rights, the Anti-Federalists were converted from skeptics and enemies of the new Constitution to "its warmest friends" and the best defenders of its true meaning.<sup>129</sup>

## 2. *The Consolidationists and Loose Construction*

If all had then abided by the states'-rights Constitution, parties would forever have been mere passing factions. But, Van Buren argued, the polity in fact contained an anti-democratic minority, determined to construe the Constitution against its manifest meaning and to produce a consolidated government in place of the true Constitution:

Without any open question affecting permanently every interest . . . as is the case with such as relate to and embrace the sources of power and the foundations of the government, if the Constitution had been upheld in good faith on both sides partisan contests must of necessity have been limited to local or temporary and evanescent measures and to popular excitements and opposing organizations as shifting and short-lived as the subjects which gave rise to them. But Hamilton took especial care that such halcyon days should not even dawn on the country.<sup>130</sup>

Hamilton sought, first, to create a "MONEY POWER," attached by self-interest to the support of the central government.<sup>131</sup> This financial elite, drawing on the power of the government, would undermine the landed democracy in America, "an immense majority of [the] people,"<sup>132</sup> just as it had

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<sup>127</sup>VAN BUREN, INQUIRY, 50-56; quotation, 56.

<sup>128</sup>VAN BUREN, INQUIRY, 261-2.

<sup>129</sup> Van Buren, INQUIRY, 201.

<sup>130</sup>VAN BUREN, INQUIRY, 271.

<sup>131</sup>VAN BUREN, INQUIRY, 161.

<sup>132</sup>VAN BUREN, INQUIRY, 180.

sapped the power of the landed aristocracy of eighteenth-century England.<sup>133</sup> Complementarily, Hamilton sought to enact a series of measures, patently and intendedly unconstitutional, by which the principle of loose construction of the Constitution would become established. Funding, assumption, a national bank, and aid to manufacturing would sustain Hamilton's monied aristocracy, but, even more importantly, they would establish the central government's general power to do whatever it conceived to be in the national interest, regardless of constitutional restrictions.<sup>134</sup>

If he had succeeded in these [measures] and secured his advances, he would have been fully warranted in regarding the enumeration of the powers of Congress contained in the Constitution as a sham, and the brief clause he proposed to the Convention, giving to the national legislature power to pass all laws which it should judge necessary to the common defense and general welfare of the Union, as inserted in its place.<sup>135</sup>

The indispensable principle of states' rights, distinctly incorporated into the supreme law of the land, was thus to be rendered nugatory by this aristocracy of loose construction and consolidation.

Hamilton himself was soon beaten, but his approach to the Constitution was never fully routed. Rather, the anti-constitutional party of the monied proved itself a fixed feature of American public life.<sup>136</sup> From 1789 to the 1850s, argued Van Buren, this consolidationist party promoted any number of pernicious measures. But always the point of the measures was less the particular policy at issue than the constitutionalism of centralized aristocracy through loose construction:

The principle of construction contended for by Hamilton, and for a season to some extent made successful, was not designed for the promotion of a particular measure, for which the powers of Congress under the Constitution were to be unduly extended, on account of its assumed indispensable importance to the public safety, but intended as a sweeping rule by which those powers, instead of being confined to the

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<sup>133</sup>VAN BUREN, INQUIRY, 160-166.

<sup>134</sup>VAN BUREN, INQUIRY, 121-160.

<sup>135</sup> Van Buren, INQUIRY, 141-142.

constitutional enumeration, were to authorize the passage of all laws which Congress might deem conducive to the general welfare and which were not expressly prohibited; a power similar to that contained in the plan he proposed in the Convention.<sup>137</sup>

As he had contended throughout his political life, so at the close he believed that the Federalists, the National Republicans, the Whigs, and at least a large part of the sectional Republicans of the 1850s were identical in the only way that mattered. While denying their descent from Hamilton, they perpetuated Hamilton's project: "the same preference for artificial constructions of the Constitution . . . ; the same inclination to strengthen the money power and increase its political influence . . . ; the same disposition to restrict the powers of the State governments, and to enlarge those of the Federal head; the same distrust of the capacity of the people . . . and the same desire also for governmental interference in the private pursuits of men and for influencing them by special advantages to favored individuals and classes."<sup>138</sup>

### *3. Strict Construction and the Emergence of Party*

How, then, had this project been forestalled and the states'-rights Constitution preserved? In Hamilton's day, the subversion had seemed all but achieved when, to the surprise of the Federalists, the people seized on the device of party. Starting in 1797, according to Van Buren, the monarchism of Hamilton and Adams<sup>139</sup> solidified a spontaneous union between the old Anti-Federalists and the newer Republicans in the Republican party.<sup>140</sup> Yet, spontaneous though it was, tight organization became, for Van Buren, the movement's most indispensable aspect: ". . . [S]ustained by a great preponderance of the landed interest in every part of the country, the old Republican party attained a degree of vigor and efficiency superior to that of any partisan organization which had before or has since appeared on the

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<sup>136</sup> Van Buren, *INQUIRY*, 166.

<sup>137</sup> VAN BUREN, *INQUIRY*, 212; see also 223-226.

<sup>138</sup> VAN BUREN, *INQUIRY*, quotation, 223; 413-422.

<sup>139</sup> See, for example, VAN BUREN, *INQUIRY*, 247-258.

<sup>140</sup> VAN BUREN, *INQUIRY*, 246-247.

political stage.”<sup>141</sup> Here, Van Buren exaggerated the reality of the 1790s--he was, after all, a politician and political theorist much more than a historian--but clearly revealed his own devotion to organization and his purpose to vindicate it as an institution of the fathers.

The new party pointed particularly to the Sedition Act as a Federalist mockery of the Bill of Rights—the amendments by which the democratic character of the Constitution and the limited nature of federal power had been ensured. Thus the contest turned to a large degree on a particular measure but only because that measure went to the heart of the Constitution.<sup>142</sup> Since that time, contests had always depended on passing substantive issues, but only rarely, if ever, had the issues been treated as more important than the abiding constitutional principles that separated the permanent, natural parties: “Questions of public policy, disconnected from considerations of constitutional power, have arisen, been discussed, decided or abandoned and forgotten, whilst the political parties of the country have remained as they were.”<sup>143</sup>

The Revolution of 1800, then, was the first restoration of the Constitution by party organization. To Van Buren, that election was the origin of a permanent revolution, rewon in every quadrennial test of the American people’s constitutionalism. And the permanent necessity of a kind of revolutionary popular politics implied as well the permanent necessity of 1800’s agency of revolution: the organized political party, united by the interlocked principles of majority rule and states’ rights as mechanized by adherence to the regular nominations of convention or caucus.

The importance of this last, mechanical aspect of party should not be underestimated.<sup>144</sup> If the Revolution of 1800 legitimated and even demanded party as an indispensable aspect of democratic constitutionalism and governance, it did not demand just any old party that could get rid of Adams and the Hamiltonians. It required one that could be counted on to embody the democracy as a whole. Just as the legitimacy of judicial review has depended on arguments that the judiciary’s structural features, like

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<sup>141</sup>VAN BUREN, INQUIRY, 259.

<sup>142</sup>VAN BUREN, INQUIRY, 263-7.

<sup>143</sup>VAN BUREN, INQUIRY, 268.

life tenure, give it certain characteristics, like impartiality, that are indispensable to that function,<sup>145</sup> so the legitimacy of party organization depended on its having structural features, like convention nomination, that, for Van Buren, gave it an essentially democratic character.

For a party to reliably bear a democratic character under the American Constitution, it had to have two kinds of characteristics: First, as argued above, it had to commit itself to a master principle. Much as a judge must commit to rule by law rather than by will, a democratic party had to commit first, foremost, and always to the principle of states' rights via strict construction. Second, the internal operations of a democratic party must themselves be democratic—not just because a party espousing democracy should live up to its own principles internally but because the party's job was not simply to *espouse* democracy but to *be* the democracy in action, in governance. The Democratic party was virtually to be the government or, as Max Mintz once put it, "the prime organ of government."<sup>146</sup> If American government was to be democratic, then, the party that *was* the ultimate authority within the government must itself have a structure that preserved the real authority of the majority of the people.

That internal structure centered on the "convention system" and its associated ethic of strict party loyalty. The base of the system was the local convention that gave every last voter the opportunity to have his voice heard and his vote counted. These conventions nominated local officers, adopted resolutions, and elected delegates to county or state conventions. The subsequent delegate conventions would in turn nominate county and state officers, and every four years they would also elect delegates to the national convention. These delegates would, in their own turn, nominate the democracy's candidates for national office, always obeying strictly the instructions from the conventions that had selected them.<sup>147</sup> This pyramidal structure gave every democrat his just voice—no more, no less—in the larger

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<sup>144</sup> This aspect is developed at much greater length in Leonard, *A Constitution Against Parties*, supra ---.

<sup>145</sup> See, e.g., *Federalist* 78.

<sup>146</sup> Max M. Mintz, *The Political Ideas of Martin Van Buren*, 30 *NEW YORK HISTORY* 422, 443 (1949).

<sup>147</sup> Hofstadter, *IDEA OF A PARTY SYSTEM*, 243-245 (recognizing the authority of "party conclaves" over party leaders and the centrality of strict party loyalty); Wallace, *Changing Concepts*, at 468 n.50; Ratcliffe, *PARTY SPIRIT IN A FRONTIER REPUBLIC* 125-127, 132-135, 196, 213-214, 242-243 (1998); Formisano,

deliberations of the democracy. It thereby ensured that the genuine collective will of the nation's united democracy might be expressed and given effect in the government, notwithstanding the resources and artificial influences of special interests, the nation's constitutional aristocrats.

The convention system could only work, however, as long as a strict ethic of party loyalty was in place.<sup>148</sup> One could only be a democrat, according to Van Buren, by placing the principle of majority rule above any other principle, especially above any particular substantive policy one might favor.<sup>149</sup> Only majority rule manifested equality, so only firm adherence to the nominations and policy positions actually adopted by majoritarian conventions could mark one as a genuine democrat. To place any special, substantive interest above this principle was the very definition of aristocracy. (And this test of one's democracy, by the way, was the main prop of the "spoils system," since only genuine democrats could be thought eligible for positions of trust under a democratic Constitution.<sup>150</sup>)

In short, strict construction, states' rights, and the pyramidal, majoritarian convention system—paralleling Jefferson's pyramidal, devolved model of republican government--were all aspects of a constitutional equality or democracy that could not possibly be preserved by any other mechanism but the single party defined by those values and structures. Any bolting from the party that embodied those things, therefore, no matter how vital the policy inspiring the bolt, necessarily marked one as no democrat and thus alien to the order established by the American Constitution.<sup>151</sup> These radically democratic features of the Democratic party were, to Van Buren, the true features of an institution that would perform the ultimate act of sovereignty in the American system—final interpretation of the

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TRANSFORMATION OF POLITICAL CULTURE, 245-246, 258-260; Altschuler and Blumin, *RUDE REPUBLIC* 20 (2000); Joel H. Silbey, *THE AMERICAN POLITICAL NATION, 1838-1893* 59-69 (1991).

<sup>148</sup> Hofstadter, *IDEA OF A PARTY SYSTEM*, 244-245; Silbey, *THE AMERICAN POLITICAL NATION*, 65-69.

<sup>149</sup> Wallace, 458-463 and *passim*.

<sup>150</sup> See, e.g., Van Buren, *Autobiography*, 123-124.

<sup>151</sup> It is entertaining to observe here that Van Buren himself, of course, bolted the Democratic presidential nominee in 1848, running for president himself on the Free Soil ticket. Without trying to evaluate the integrity of Van Buren's conduct that year, it should be understood that his rationale was that Democratic party procedures had been so perverted as to justify his candidacy not as a real run for the presidency but as a measure for disciplining his party and insisting on adherence to genuinely democratic procedure. See, e.g., Mintz, 443-444.

Constitution.

Even into the 1820s, however, Van Buren's advocacy of permanent organization and strict party loyalty were at odds with all tradition. Van Buren understood the appeal of the antiparty impulse. He too regarded as factious any organization that defined itself by a substantive platform--today's major parties, for example. But his own party was a constitutional party, akin to those once justified by Bolingbroke, Jefferson, and others.<sup>152</sup> In contrast to those earlier, temporary constitutional uprisings, however, Van Buren's party was to be a mass party, organized down to the last democrat in the land, anticipating no single millennial victory but permanent triumph through permanent constitutional struggle.<sup>153</sup>

Van Buren himself was a kind of mass antipartyist then, pining for the "halcyon days," the "real 'era of good feeling'" that the nation might have enjoyed absent the Federalist attack on the Constitution itself.<sup>154</sup> Still, the natural and often effective response to Van Burenite organization was to call on the antiparty principle, as Van Buren well knew: "It is a striking fact in our political history that the sagacious leaders of the Federal party, as well under that name as under others by which it has at different times been known, have always been desirous to bring every usage or plan designed to secure party unity into disrepute with the people, and in proportion to their success in that has been their success in elections." In contrast, the Republican party, "whenever it ha[d] been wise enough to employ the caucus or convention system" in good faith, had always been successful.<sup>155</sup>

Van Buren and his allies responded, not always with great success, that their accusers were the real manipulators of party. While democratic partyism was of a principled, constitutional sort, Federalist

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<sup>152</sup> Stourzh, HAMILTON, 111, Hofstadter, IDEA OF A PARTY SYSTEM, 22.

<sup>153</sup> See Wilson, *Republicanism and the Idea of Party*.

<sup>154</sup> VAN BUREN, INQUIRY, 271.

<sup>155</sup> VAN BUREN, INQUIRY, 5. Van Buren acknowledged that there had been one exception to this pattern, presumably his own defeat in 1840, but insisted that that isolated instance was "susceptible of easy explanation." He did not go on to offer the easy explanation in full, but he had in mind the terrible depression the country faced during his administration, produced by the banks but plausibly blamed on him. The people then went on to vindicate him and his party by their "sober second thought" in the 1844 election of James K. Polk. See VAN BUREN, INQUIRY, 228-229, 231.

antipartyism, they claimed, was not principled. It could not reflect a genuine belief in the constitutional illegitimacy of party, since the Federalists were themselves, in fact, a *sub rosa* party, permanently and easily unified by the artificial, commercial nature of their interests:

. . . [A] political party founded on such principles and looking to such sources for its support does not often stand in need of caucuses and conventions to preserve harmony in its ranks. Constructed principally of a network of special interests,--almost all of them looking to Government for encouragement of some sort,--the feelings and opinions of its members spontaneously point in the same direction, and when those interests are thought in danger, or new inducements are held out for their advancement, notice of the apprehended assault or promised encouragement is circulated through their ranks with a facility always supplied by the sharpened wit of cupidity . . . . Sensible of these facts, the policy of their leaders has been from the beginning to discountenance and explode all usages or plans designed to secure party unity, so essential to their opponents and substantially unnecessary to themselves.<sup>156</sup>

The permanent contest between the states'-rights and consolidationist interpretations of the written Constitution, therefore, resolved itself into a contest over the unwritten constitution's disposition of the question of party. At each election, the Democrats would renew their call for all-encompassing organization on democratic principles and for constitutional party conflict as the best kind of antipartyism in the circumstance of consolidationist conspiracy. At each election, according to Van Buren, the consolidationists would renew their call to put down party even as they acted in united, organized pursuit of the substantive interests of an elite. If the naturally democratic public embraced Van Buren's partyist constitutionalism—that is, simply the forcing of all elections on to open party grounds—then constitutional governance and states' rights were assured. If Federalist antipartyist constitutionalism predominated—that is, the running of elections among candidates not openly tied to parties—then the victory of Federalist anti-constitutional governance was equally certain.

#### 4. *The Decline of Party as the Decline of Strict Construction*

The empirical proof that constitutional governance depended directly on the question of party could be found most easily in the closing years of the Monroe Administration. During sixteen years of firm party rule under Jefferson and Madison, at least as Van Buren saw it,<sup>157</sup> popular adherence to party organization had translated automatically into mandates for constitutional democracy at the polls and into strictly construed, constitutional governance in the capital. Under the Monroe and Adams administrations, however, neglect of party had meant neglect of the Constitution. For Van Buren, the Republican party of the early 1820s had been “long in the ascendant, and apparently . . . omnipotent,” until a multiplicity of presidential aspirants divided the party into factions. Had Monroe then exerted appropriate leadership and demanded acquiescence in the nomination of the party caucus, the party’s rightful “omnipotence” might have been preserved. But “Mr. Monroe and a majority of his cabinet were unfortunately influenced by different views, and pursued a course well designed to weaken the influence of the caucus system, and to cause its abandonment.”<sup>158</sup> By the middle of Monroe’s second term, moreover, the President had reversed his former, stout adherence to the exclusion of Federalists from appointive office.<sup>159</sup> Heretically, this caucus-nominated president was “doing openly all that a man . . . could be expected to do to promote the amalgamation of parties and the overthrow of that exclusive and towering supremacy which the republican party had for many years maintained in our national councils.”<sup>160</sup>

The inevitable result of such a revival of antipartyism was the revival of consolidating anti-constitutionalism, even among dyed-in-the-wool Republicans. Thus, Monroe’s sudden abandonment of his commitment to Republican organizationalism coincided with his sudden avowal of the federal

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<sup>156</sup>VAN BUREN, *INQUIRY*, 226.

<sup>157</sup>VAN BUREN, *INQUIRY*, 3.

<sup>158</sup>VAN BUREN, *INQUIRY*, 3-5.

<sup>159</sup>Van Buren, *Autobiography*, 234.

<sup>160</sup>Van Buren, *Autobiography*, 303.

government's power to fund internal improvements projects, a sharp break from his quarter-century commitment to strict construction: "A diminished zeal for the support of [the party's] pure and self-denying principles was the natural consequence of a diminished, might I not say an extinguished solicitude for its continued ascendancy. It was almost inevitable that efforts to destroy the republican organization should lead to the gradual abandonment of the principles it sustained."<sup>161</sup>

Monroe's antiparty apostasy, however, was mere prelude to the election of the nominally Republican John Quincy Adams, "the latitudinarianism of whose constitutional views extended beyond those of any of his cotemporaries."<sup>162</sup> Although unelectable if he had not publicly declared his adherence to Republican principles and barely elected even so, "he was no sooner seated in the Presidential chair than he disavowed those principles in their most important features — those of constitutional construction."<sup>163</sup> In particular, he launched his administration by calling for a federal program of internal improvements and other splendid projects without regard either for the constitutional enumeration or for the will of the democracy.<sup>164</sup> Adams, in short, was a constitutional Federalist in all but name and could only have been elected in the absence of party organization. He was an arch-"amalgamationist" (a believer in the need to "amalgamate" Federalists into the legitimate polity of Republicans), a consolidationist in constitutional principle, and a favorite of the avowedly Federalist segment of the electorate. His bargained election alone was enough to restore many Republicans' commitment to organization, and his subsequent administration restored many more to their original faith.<sup>165</sup>

The most important among these prodigal sons was Andrew Jackson himself. Jackson's famous

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<sup>161</sup>Van Buren, *Autobiography*, 303.

<sup>162</sup>Van Buren, *Autobiography*, 303.

<sup>163</sup> Van Buren, *INQUIRY*, 229.

<sup>164</sup>Van Buren, *Autobiography*, 193-5, 199; see also Van Buren, *INQUIRY*, 229, 269.

<sup>165</sup>Van Buren, *Autobiography*, 196.

amalgamationist letter to Monroe in 1816<sup>166</sup> and his opposition to the congressional caucus had made him suspect to “old republicans.” His failure to take a hard line on the constitutionality of federal funding of internal improvements deepened suspicions.<sup>167</sup> By 1824, he too seemed prime evidence that antipartyism and consolidationism were two sides of the same coin. But Jackson’s mistreatment in the House election of 1825 boosted his already impressive popularity and made him the only alternative to Adams’s Federalism. Van Buren thus hoped “that by adding the General’s personal popularity to the strength of the old Republican party which still acted together . . . we might . . . be able to compete successfully with the power and patronage of the Administration . . . ; that we had abundant evidence that the general was at an earlier period well grounded in the principles of our party, and that we must trust to good fortune and to the effects of favorable associations for the removal of the rust they had contracted . . . ”<sup>168</sup>

Jackson was the most important of the many antipartyist republicans who had to learn the lesson of the 1790s all over again – the lesson that genuinely democratic party organization and the states’-rights Constitution were two names for the same thing. In the years after Adams’s election, Van Buren would teach Jackson that lesson well, but, in the meantime, the great theorist of party had to take account of the Supreme Court as well.

### C. Van Burenism III: The Constitutional Theory of Coordinacy – “The Democracy” versus the Supreme Court

The White House was not the only place that Van Buren and his partyists detected “latitudinarian” constitutional construction in the 1820s. Loose-constructionism was as well the dogma of the United States Supreme Court. But, in the case of the Court, that doctrine led not just to federal

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<sup>166</sup> When Monroe won the presidency nearly by acclamation in 1816, Jackson wrote the new president, urging him to disregard political affiliations when making appointments so as to put down the “monster” that was party, a position that Van Buren, of course could not endorse. See, e.g., Van Buren, *Autobiography*, 233-238.

<sup>167</sup> Robert V. Remini, *THE ELECTION OF ANDREW JACKSON* 55 (1963).

supremacy but to judicial supremacy, a doctrine that Van Buren and others opposed with the constitutional theory of “coordinacy,” which they took to be a merely logical extension of the basic constitutional principle of popular sovereignty.<sup>169</sup>

For Van Buren, the triumph of 1800 had been blunted by the Federalists’ adroit deployment of a loose-constructionist judiciary to control both the state governments and the political branches of the national government:<sup>170</sup> “No sooner had the efforts of the leaders of the Federal party to break down the power and influence of the State governments been arrested through the triumph of the Democratic party in the great contest of 1800, which was to a great extent carried on in [the states’] defense, than an attempt was set on foot to rescue a portion of the political power lost by the former, by raising the judicial power . . . above the executive and legislative departments of the Federal Government.”<sup>171</sup> This move for federal judicial supremacy was now bearing fruit amid the post-war willingness of erstwhile Republicans to relax party ties and sanction broad federal power.

In the courts, this Federalist offensive had two prongs. While *McCulloch v. Maryland*<sup>172</sup> vindicated the national government’s virtually unlimited legislative power, *Martin v. Hunter’s Lessee*<sup>173</sup> equipped the federal judiciary to supervise state laws that might challenge such consolidation. Surveying the history of the Federalist judiciary, Van Buren came to doubt the compatibility of an

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<sup>168</sup>Van Buren, *Autobiography*, 198.

<sup>169</sup>On the constitutional theory of “coordinacy,” including some of its early history, see, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Georgetown L. J.* 217 (1994). Less directly on point here, but quite incisive in its characterization of the constitutional responsibilities of the different branches, is James B. Thayer’s great essay, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harvard L. Rev.* 129 (1893). Revising Thayer in important respects is Kramer, Foreword, *supra* ---. Kramer convincingly argues that the judicial role in constitutional review was originally intended and expected to be quite small in light of the active role the people as a whole had taken and were expected to take in constitutional enforcement. Van Buren would, of course, have agreed.

<sup>170</sup>Van Buren, *INQUIRY*, 277-278.

<sup>171</sup>Van Buren, *INQUIRY*, 383.

<sup>172</sup>17 U.S. 316 (1819).

<sup>173</sup>14 U.S. 304 (1816).

appointed judiciary with democracy,<sup>174</sup> and he elaborated his view that only the sovereign people of the states – embodied in a single democratic party, of course – could finally judge the scope of federal power granted by the constitutional enumeration. The federal and state judiciaries might come to differing conclusions on the reach and content of federal law, as might the coordinate branches of the federal government itself, but none of those institutions, least of all the unelected and irresponsible federal judiciary, could claim final authority on any such question. Acting through the constitutional mechanism of the ballot box, only the sovereign people – the one constitutional body superior to and not coordinate with any other constitutional body – could claim that power.

In Van Buren’s view, the originally intended place of the Supreme Court and, in fact, of the entire federal judicial power had been “one of little consideration,” the Supreme Court having little more power than that of reviewing the judgments of the few federal courts.<sup>175</sup> He did not believe that the Supreme Court had authority to review the decisions of the state courts as well, even on questions of federal law. And he pointed out the failure of the Constitution explicitly to enumerate such a power in Article III.<sup>176</sup> Properly understood, then, the federal and state systems were independent, and *Martin’s* holding that the Court could review the judgments of state courts, even on federal law, was little different from a claim that the Court could review the judgments of foreign courts:

To confer upon that tribunal, the anomalous authority of issuing writs of error to the highest courts of other States confessedly sovereign, and which in all such matters might well be regarded as foreign States,--courts which were not established by the Federal Government, and between which and it there existed no judicial relations,--commanding those courts to send it for reexamination, reversal, or affirmance, the record of judgments and decrees which had neither been made under Federal authority nor by judges in any sense amenable to it for the discharge of their official duties, was an idea never broached

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<sup>174</sup> Van Buren, *Autobiography*, 184-185.

<sup>175</sup> Van Buren, *INQUIRY*, 293.

<sup>176</sup> Van Buren, *INQUIRY*, 295.

in the Federal Convention, or in the slightest degree alluded to in the Constitution it adopted.<sup>177</sup>

As in the case of party organization, the question was one of maintaining formal lines of responsibility, from subordinate institutions of governance through constitutional structure to the supreme people. The state courts were responsible to the state polities in whatever way the state constitutions made them so. They were in no way responsible to federal institutional authority even if they were bound by federal law. “Instead of one consolidated government ours was a confederacy of sovereign States” which had itself created a federal authority with no more purchase on the states than the states themselves had given the national government.<sup>178</sup>

When the Federalist Judiciary Act of 1789 nevertheless granted the Supreme Court jurisdiction to review state court judgments, it empowered the judiciary, in effect, to veto state laws. And the Supreme Court did not hesitate to vindicate that jurisdictional grant when challenged in *Martin*.

Complementarily, in cases like *Sturges v. Crowninshield*,<sup>179</sup> the Supreme Court read the federal Contracts Clause broadly and invalidated state laws eagerly. For Van Buren, then, the Court had combined its unconstitutional assumption of power to review state court judgments with an aggressive construction of the substantive provisions of the Constitution to give “the Supreme Court the supervision and control of the most valuable and hitherto the most cherished portion of the legislation and jurisprudence of the State governments.”<sup>180</sup> An even more direct, congressional supervision had been defeated in the Convention of 1787,<sup>181</sup> but Van Buren thought that the Federalist Congress of 1789 and the Federalist judiciary ever since had secured that power in a mode at least as effective as if it had actually been

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<sup>177</sup> Van Buren, INQUIRY, 301.

<sup>178</sup> Van Buren, INQUIRY, 297.

<sup>179</sup> 17 U.S. 122 (1819). Van Buren’s reference to this case is only implicit but, I think, clear enough.

<sup>180</sup> Van Buren, INQUIRY, 294. It should be noted that *Sturges* came up through the federal courts, but that does not undermine Van Buren’s point that the states’ powers to use their own courts to resist federal supervision of state law was formally eliminated by *Martin*’s subjection of the state courts to federal appellate authority. Van Buren could as easily have used *McCulloch*, of course, which did come to the Supreme Court from state court and which resulted in the invalidation of state law.

granted by the Constitution.<sup>182</sup> The Marshall Court's virtual consolidation of American judicial power in the Supreme Court was of a piece with the revived effort in the national political branches to drain legislative power from the states and deliver it to the federal government.

But the Federalist judiciary had even more in mind than such direct usurpations of states' rights. It sought as well to replace a genuine separation of powers—a central aspect of Van Buren's constitutional theory of coordinacy—with the doctrine of judicial supremacy over the political branches. The Court could not, of course, do too much in the way of legislating of its own accord. Although, by the rule of *Martin*, it could deprive the states of a certain amount of legislative power, and, by the rule of *McCulloch*, it could grant such power to the national Congress, it could not compel Congress or the President to implement a Hamiltonian program. Still, by establishing itself as the final arbiter of constitutional meaning, it could hope to blunt any challenges to federal power and policy by depriving any such challenges of their constitutional dimension.

In this connection, Van Buren first condemned *Marbury v. Madison* for its attempt to tell a coordinate branch the scope of its authority in a case in which Marshall admitted his court had no jurisdiction.<sup>183</sup> Van Buren then argued at length that the *McCulloch* decision—approving the national bank on a constitutional theory of implied powers and arrogating to the judiciary the authority to say finally what the law is—was in no way binding on the other federal branches.<sup>184</sup> President Jackson, therefore, would rightly veto the bill rechartering the bank when it came before him in 1832 and would rightly do so on explicitly constitutional grounds. Van Buren concluded that, “Each of the [federal

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<sup>181</sup> Rakove, ORIGINAL MEANINGS, 51-53, 81-82. Van Buren ignored Madison's leading role in that episode, preferring to pin it to Hamilton. See Van Buren, INQUIRY, 294.

<sup>182</sup> Van Buren, INQUIRY, 294. Van Buren acknowledged that in 1789 Congress could constitutionally have consolidated the state and federal judicial powers on questions of federal law only—and only as long as the states had consented. That is, while the Constitution explicitly contemplated the possibility of inferior federal courts, it did not rule out the alternative that the role of inferior federal judiciary might be played by the state courts. In that case, the formal, institutional merger of the state systems and the constitutionally required Supreme Court would have rendered the latter the appropriate appellate body on questions within the constitutional categories of federal judicial power. Van Buren, INQUIRY, 296.

<sup>183</sup> Van Buren, INQUIRY, 281-292.

<sup>184</sup> Van Buren, INQUIRY, 311-316, 328-352.

branches] is the agent of the people, doing their business according to the powers conferred; and where there is a disagreement as to the extent of these powers, the people themselves, through the ballot-boxes, must settle it.' [para]This is the true view of the Constitution. It is that which was taken by those who framed and adopted it, and by the founders of the Democratic party."<sup>185</sup>

Delicate though the resulting relations among governmental institutions might be<sup>186</sup> and unfortunate as repeated appeals to the people for arbitration might be, there could be no gainsaying the ultimate authority of the people—and not the Court—as long as the principle of popular sovereignty was the acknowledged basis and object of the Constitution. And Van Buren did not hesitate to characterize every presidential election in which the people had changed the party in power, beginning with the Revolution of 1800 and carrying through to the 1850s, as an example of this supreme popular power of constitutional review.<sup>187</sup> Truly, Van Buren concluded, the remarkable doctrine that the coordinate Court and not the sovereign people must be the last resort for ascertaining the meaning of the Constitution could only have come from “the same inexhaustible fountain from whence have proceeded the most tenacious of our party divisions—an inextinguishable distrust, on the part of numerous and powerful classes, of the capacities and dispositions of the great body of their fellow-citizens.”<sup>188</sup>

#### D. States' Rights and Party Under Jackson and Van Buren: Constitutional Development Outside Article V

##### 1. *The Attack on McCulloch v. Maryland*

By the mid-1820s Van Buren was working tirelessly to draw the battle lines.<sup>189</sup> The measures of the younger Adams and the consolidationist Supreme Court, proved the necessity of constitutional party

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<sup>185</sup> Van Buren, INQUIRY, 330 (quoting Hugh Lawson White). Cf. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457 (1994).

<sup>186</sup> See, e.g., Van Buren, INQUIRY, 346-348.

<sup>187</sup> Van Buren, INQUIRY, 348-349. On characterizations of the presidential elections as episodes of constitutional review, see also Van Buren's "Thoughts on the approaching election in N. York."

<sup>188</sup> Van Buren, INQUIRY, 352. For a more general account of the emergence of the doctrine of judicial supremacy against a constitutional tradition of active popular supremacy in constitutional interpretation, see Kramer, Foreword, *supra* ---.

<sup>189</sup> Remini, VAN BUREN, ch. 10.

organization. Such an organization was inseparable from the preservation of the coordinate constitutionalism of states' rights, strict construction, separation of powers, and a government responsible to the democracy rather than to a monied elite. Through the campaign of 1828 and two Jackson Administrations, Van Burenites hammered the partyist argument home. And if Jackson's election was not entirely the doing of a party organization, as Van Buren had wished above all else for it to be,<sup>190</sup> Van Buren's own election in 1836 was exactly that, as was every Democratic success to follow.

Andrew Jackson, newly elected president in 1828, was not the ideologue of party that Van Buren was. Still, his own notions of democracy came quickly to merge with Van Buren's, and he made the partyist leader his Secretary of State and chief adviser.<sup>191</sup> Together, Jackson and Van Buren promptly set about restoring an old-fashioned states'-rights constitutionalism to federal governance by way of the three most salient substantive issues of the day: the national bank; internal improvements; and the tariff. But it was left to Van Buren, as Jackson's successor, to attach the states'-rights revival firmly to the constitutional theory of coordinacy and party organization.

While Jackson and Van Buren both accepted the possibility that "national" projects of internal improvement might sometimes be within the scope of federal power, they agreed that "local" projects could not constitutionally be built or funded by the national government.<sup>192</sup> On these grounds, Jackson vetoed the congressional appropriation for the Maysville Road project in Kentucky in 1830 and thereby signalled his determination to roll back the implied-powers constitutionalism of the 1820s.

Shortly after the shock of the Maysville veto, Jackson's opponents in Congress planned and passed an early renewal of the Second Bank of the United States, the charter of which was due to expire in 1836.<sup>193</sup> The Bank had, of course, provided the occasion in 1819 for the Marshall Court's double offensive against Van Burenite constitutionalism,<sup>194</sup> an offensive that Jackson would doubly roll back with his 1832 veto of the recharter bill. By resting on explicitly constitutional grounds,<sup>195</sup> Jackson's veto challenged both major aspects of *McCulloch*: it implicitly denied the theory of implied powers; and it

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<sup>190</sup> Remini, VAN BUREN, ch. 10.

rejected the Court's claim to have the final word on constitutional interpretation.<sup>196</sup>

On the question of interpretive authority, *McCulloch* had been quite bold: "[T]he conflicting powers of the government of the Union and of its members, as marked in [the] constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. . . . [That question] must be decided peacefully, . . . and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty."<sup>197</sup> Jackson's response, however, was just as bold: "It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."<sup>198</sup>

As to the merits of the question, while Jackson did not use the terms "implied powers" or "strict construction," he vigorously argued that the recharter of any Bank with powers greater than those strictly "necessary and proper" to the functions of a "fiscal agent" of the government was unconstitutional. Repeatedly emphasizing the rights and reserved powers of the states (among other matters), he identified state power to tax the banking business as fundamental and directly attacked *McCulloch's* constitutionalization of Congress's intrusion on that power.<sup>199</sup> Jackson did not merely

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<sup>191</sup> Niven, *MARTIN VAN BUREN*, 228.

<sup>192</sup> Niven, *MARTIN VAN BUREN*, 261.

<sup>193</sup> Michael F. Holt, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY* 15-16 (1999).

<sup>194</sup> *McCulloch v. Maryland*, 17 U.S. 316, 400-401 (Supreme Court as having special charge of the Constitution), 406-421 (implied powers) (1819). See also, G. Edward White, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, 546-547, 544-550 (1988)

<sup>195</sup> Holt, *RISE AND FALL*, 16.

<sup>196</sup> Hyman and Wiecek, *EQUAL JUSTICE UNDER LAW* 59-60 (1982).

<sup>197</sup> *McCulloch v. Maryland*, 17 U.S. 316, 400-401 (1819).

<sup>198</sup> 2 James D. Richardson, ed., *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897* 582 (1896).

<sup>199</sup> Richardson, *MESSAGES OF THE PRESIDENTS*, 586-589.

embrace an area of policy discretion left to the President and to Congress by the Court but made a point of declaring the constitutional illegitimacy of *McCulloch*. In so doing, he also vindicated the President's power to vitiate, if not formally overrule, that decision.

Consolidationists like Daniel Webster would loudly condemn him as a usurper for his defiance of the Supreme Court on a constitutional question, but Jackson took his case to the people in the veto message and in the fall presidential election and came away with a resounding vindication.<sup>200</sup> The Bank was dead and with it, in large degree, went implied-powers constitutionalism until the Civil War.

## 2. *The Democracy "Amends" the Constitution, 1836*

None of these victories for states' rights and strict construction, however, was overtly a victory for party organization. None explicitly vindicated Van Buren's theory that a party of the democracy was an indispensable adjunct to the states'-rights Constitution and its formally mandated institutions of governance. At this point, the lesson of the Jackson presidency for many Jacksonians need not have had much to do with party and, in fact, did not.<sup>201</sup> Jackson simply appeared to be the same heroic figure he had been during his military career, the incorruptible tribune of the people standing against the aristocracy of special interests.<sup>202</sup> The difficulty with a constitutional theory that relied on the spontaneous emergence of such tribunes, however, was obvious to Van Buren. Jackson's mishandling of the final major issue of the time, the tariff, sealed the point and reinforced the necessity of tying the principle of states' rights and every institution of government to party organization.

With states' rights ascendant under Jackson, John C. Calhoun and the South Carolina nullifiers announced their refusal to be bound by a protective tariff that they deemed oppressive to the South, radically unequal in its operation, and without constitutional authorization. Further, they announced a

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<sup>200</sup> For Webster's attack and Jackson's victory, see, e.g., Robert V. Remini, *DANIEL WEBSTER: THE MAN AND HIS TIME* 366-372 (1997).

<sup>201</sup> See, e.g., Jean E. Friedman, *REVOLT OF THE CONSERVATIVE DEMOCRATS* (1979) for an account of the steady drain of antiparty Jacksonians from the party after this date.

<sup>202</sup> Thomas Brown, *From Old Hickory to Sly Fox: The Routinization of Charisma in the Early Democratic Party*, 11 *JOURNAL OF THE EARLY REPUBLIC* 339 (1991)

constitutional theory by which each state might nullify federal law on constitutional grounds and ultimately secede from the Union. In this crisis, when even states'-rights men generally refused to go to South Carolinian extremes, Jackson did stand again as the nation's tribune.<sup>203</sup> In the course of his stand for the Constitution, however, he articulated a theory that seemed to go to the opposite extreme, inspiring admiration and political overtures even from the likes of the ultra-consolidationist and judicial supremacist Daniel Webster.<sup>204</sup> His proclamation against nullification seemed to erase the states as the constituent parts of the Union and replace them with a single, consolidated American people, an idea often used to justify the implied-powers constitutionalism and expansive national authority against which Van Buren had designed the Democratic party.<sup>205</sup> The crisis soon passed, as Congress worked out a compromise on the tariff, but Jackson's states'-rights supporters had to walk the fine line of supporting Jackson without quite endorsing the constitutional heresy that had slipped into his proclamation.

Van Buren himself, who had been away from Jackson's side at the crucial time when the message was drafted, wrote the response of the New York legislature.<sup>206</sup> That address placed the principles of strict construction and states' rights front and center<sup>207</sup> while rejecting the secessionist theory of the nullifiers.<sup>208</sup> It rejected as well the overly nationalistic character of some of the ideas in Jackson's message, but it affirmed the Democratic legislators' faith in Jackson's abiding constitutional fidelity as evidenced by the general course of his presidency.<sup>209</sup>

In this episode, Van Buren could not have helped thinking of Monroe's apostasy with respect to the internal improvements question. That episode had shown that only firm party control could sustain the principles of states' rights and strict construction, since imperfect individuals must eventually stray

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<sup>203</sup> William W. Freehling, *THE ROAD TO DISUNION* 277-286 (1990).

<sup>204</sup> See, e.g., Holt, *RISE AND FALL*, 20-23.

<sup>205</sup> Richard E. Ellis, *THE UNION AT RISK* ch. 4.

<sup>206</sup> Van Buren, *Autobiography*, 549-553.

<sup>207</sup> Van Buren, "Resolves of the Legislature of New York," in *STATE PAPERS ON NULLIFICATION* 136 (1970; orig. 1834).

<sup>208</sup> Van Buren, "Resolves" 138-146.

<sup>209</sup> Van Buren, "Resolves" 149-151.

from their principles. Even more than Monroe, Jackson was a great democrat but only an imperfect vehicle of democracy. Thus Van Buren had only warily accepted Jackson in 1828 as the focus for reorganization of the democratic party, worrying that the great man's democratic principles had proven susceptible to rust.<sup>210</sup> Great as he was, his every act, like that of every other democrat, must serve only the organization of the democratic party, not a cult of Jackson nor even of democracy itself except through its indispensable institution, the majoritarian party of the masses. The democrats, after all, could not trust that an Andrew Jackson would appear at every moment of crisis; nor, as the nullification episode proved, could they trust that even Andrew Jackson himself would see clearly and stand firmly against the wily consolidators--except by the aid of party.

These truths were much in evidence when Van Buren himself was chosen to succeed Jackson as the Democratic candidate for the presidency in 1836. Van Buren had little of Jackson's personal popularity, but he had Jackson's favor<sup>211</sup> and he had his own constitutional theory of states' rights, democracy, and party organization. Indispensable as Jackson's revival of states' rights had been, Van Buren could not entrench his constitutional theory as the basis of American governance if he did not win the election, and, not being Jackson, he could not win the election without open and efficient party organization. The campaign of 1836 thus became, in effect, a campaign finally and permanently to modify the Constitution to ensure the sovereignty of party.

As modified by the Twelfth Amendment, the Constitution provided that three names should go to the House for final election unless one person received a majority of the electoral vote. This provision was the immediate target of the Van Buren campaign of 1836. The longer term objectives of the 1836 campaign and of the partyist movement were the antipartyism and consolidationism that the Constitution's electoral scheme encouraged.

Van Buren was nominated by the Democratic national convention of 1835, which some months

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<sup>210</sup> Van Buren, *Autobiography*, 198. See also Robert V. Remini, *MARTIN VAN BUREN AND THE MAKING OF THE DEMOCRATIC PARTY* ch. 10 (1959).

<sup>211</sup> Cole, *VAN BUREN* 261-262.

later published an address.<sup>212</sup> The burden of the address was not to lay out a platform of policies but to justify party organization itself and, in particular, the national convention, as constitutional reforms. The startling premise from which the argument proceeded was that among the greatest threats to “public liberty and our happy system, next to revolution and disunion, is an election of President by the House of Representatives.”<sup>213</sup> In a House election, authorized by the Constitution though it was, the fundamental constitutional principle of rule by popular majority would be replaced – as it had been in 1825 – by minority selection of the president. Presuming that the anti-democratic usurpation of 1825 was the controlling political memory of the nation in 1835, the address argued that election by a distant, elitist House in a nation wedded to the ethic of localist democracy, provided too many means by which “ambition and Party might successfully triumph over the People’s will.”<sup>214</sup>

Also startling, at least on the surface, was this use of “Party” as the antithesis of “the People’s will” in an address whose central purpose was to show that party was in fact the indispensable tool of the popular will. The authors still had at least one foot stuck in traditional antipartyism, in which party was by definition the tool of a minority, even as they invented a new kind of party to transcend older categories. This new kind of party would encompass all adherents of majority rule. Its very purpose was to destroy party in its traditional sense of elite factionalism, not to create a modern, sub-constitutional party working within a pluralist constitutional consensus.

Given this understanding of American politics, the Democrats concluded that, even if their national convention had not been perfectly representative of the people – even if the pyramidal convention system never fully vindicated the theory – its defects must be minor when measured against the dangers of the only alternative, “the calamities of an election by the House of Representatives, the

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<sup>212</sup> “Address to the Democratic Republicans of the United States,” *Chicago Democrat*, September 9, 1835 and September 16, 1835; reprinted from the *Washington Globe* of August 6, 1835. This is the same address that is often known as “Statement of the Democratic Republicans of the United States,” available in abridged form in Arthur M. Schlesinger, Jr., ed., *HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS* (1971), vol. 1, 616-638.

<sup>213</sup>Schlesinger, *HISTORY*, 618-619.

<sup>214</sup>Schlesinger, *HISTORY*, 617.

Pandora Box of” the Constitution. Of course, the constitutional provisions for indirect election had, in fact, been designed as harmonious contributors to the Madisonian project of filtration of the popular will through a structure of elite, partyless representation.<sup>215</sup> But that did not stop the radically egalitarian partyists from insisting on their own very different version of the Constitution, a version in which House election was an anomaly in an otherwise democratic Constitution. In the absence of a single democratic party organization, the reformers observed, no popular will could ever coalesce, and elections would routinely go into the House. There, intrigue would reign, as the candidates and representatives, freed from any clear expression of majority will, would produce corrupt deals among minority interests. Such a result was predicted by partyists before 1824 and seemed confirmed by the “bargained” election of the “aristocratic” Adams in 1825. Implicitly referring to a series of failed constitutional amendments in recent years, then, the address declared that the fundamental purpose and justification of party was finally to effect an informal amendment of the Constitution’s electoral mechanisms in order to preserve more generally the true Constitution of states’ rights and democracy:

[U]ntil some amendment of the Constitution shall be adopted to cut off the possibility of an election by the House of Representatives, and cause the will of the People to be respected in the choice of their Chief Magistrate, it should be the duty of the Republican party, either through National Conventions, or some other efficient mode, to concentrate their power, and produce harmony and union among their friends . . . .[Should such an amendment succeed], then will our argument in favor of nominating candidates for . . . President and Vice President, through the medium of a National Convention, be

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<sup>215</sup> I do not mean to imply that the adoption of these provisions was unproblematic, only that their virtues were thought to include the usual virtues of federal representation, centrally the delivery of crucial decisions into the hands of representatives of national vision. Although some, including Madison, preferred election by the people rather than permitting the president to become dependent on the Congress, the prevailing principle at the convention remained government by elitist “filtration,” not direct democracy. See Rakove, *ORIGINAL MEANINGS*, 89-90, 214-227, 259-260, 264-268; Nedelsky, *PRIVATE PROPERTY* 58.

obviated, because then the sovereign right to choose these offices will be secured to the People themselves in that contingency.<sup>216</sup>

In the absence of an effective amendment, formal or informal, presidential elections would become the vehicle by which outnumbered “latitudinarians” might gain control of the federal government and advance the work of consolidation.

Confirmation that a “principled” party had to be a constitutional party recurred in the Convention’s rebuke to those who reflexively condemned all parties alike. In Great Britain, party had defended the balance of the constitution against “the great and overweening power of the monarchical and aristocratical branches of the government,” while in this country, the two great parties would, respectively, “secure the Constitution on a firm basis” or “overturn that Constitution.”<sup>217</sup>

The address perorated, “We sincerely believe, that upon the preservation of the old Democratic Republican party the prosperity and happiness of our country greatly depend.”<sup>218</sup> It did not say that the state of the nation depended on Democratic “victory” but only on the “preservation” of the party; victory was taken for granted if only the party of the democracy were preserved. No danger could come from an anti-democratic party as long as it was clearly identified as such by its willingness to challenge the party of the embodied democracy. Danger lurked only in the antiparty sentiment that high-minded democrats sometimes overindulged and that anti-democrats regularly exploited in campaigns.

The Democratic party thus contemplated an amendment to the Constitution sufficiently fundamental and abiding to be worthy of the name, whether accomplished by way of Article V or directly through popular action. Still analyzing politics in the estate-structured terms of Old World constitutionalism—in terms of “monarchical and aristocratical branches” resistable only by a party of the democracy—these democrats sought more than Jackson’s revival of states’ rights. They sought to entrench an institution, not a personality or even a doctrine, that could guarantee the permanence of the

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<sup>216</sup>The beginning of this quotation is in Schlesinger, *HISTORY*, 620-621. The balance is omitted in that version.

<sup>217</sup>Schlesinger, *HISTORY*, 621-622.

true Constitution.

In the 1836 election itself, Van Buren and the Democratic party faced a disorganized opposition that ran multiple regional candidates. I say “disorganized” because that is the judgment of most historians who have studied the campaign,<sup>219</sup> but for the Democrats the opposition actually appeared all too organized. Consistent with the consolidationists’ preference for centralized control, it seemed cleverly designed to use multiple candidacies to prevent coalescence of a majority, fragment the electoral vote, and throw the election into the House. In the campaign, the Democrats endlessly emphasized the conformity of these circumstances to the predictions made by their theory of party and the Constitution, and it worked; Van Buren triumphed with a solid majority.<sup>220</sup> With the election thus going almost eerily to plan, but for Van Buren’s falling short of the “immense majority” that he thought the birthright of the party, the Democracy’s amendment of the Constitution was complete. From 1836 forward, the highly organized mass party has been an essential feature of American politics and the foundation of American governance.

Moreover, beginning with the Democratic party’s states’-rights domination of the national government up to the Civil War, the mass party has been perhaps the central institution for enforcement of states’ rights. Thus, having vindicated democratic party organization, Van Buren used his inaugural address predictably to emphasize that doctrine. Observing that the current peace and prosperity would “avail us nothing if we fail sacredly to uphold those political institutions” that alone could guarantee the permanence of such blessings,<sup>221</sup> he celebrated states’ rights, the great gift of the founding generation: “A natural fear that the broad scope of general legislation might bear upon and unwisely control particular interests was counteracted by limits strictly drawn around the action of the Federal authority,

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<sup>218</sup>Schlesinger, HISTORY, 634.

<sup>219</sup> See Richard P. McCormick, *Was There a ‘Whig Strategy’ in 1836?*, 4 JOURNAL OF THE EARLY REPUBLIC 47 (1984); Holt, RISE AND FALL, 38-45.

<sup>220</sup> Holt, RISE AND FALL, 46. Holt calls Van Buren’s 51% majority narrow, but, even apart from the fact that his electoral college majority was much wider, this popular vote was achieved against a collection of regional candidates, each of whom had great regional advantages over him.

and to the people and the States was left unimpaired their sovereign power over the innumerable subjects embraced in the internal government of a just republic, excepting such only as necessarily appertain to the concerns of the whole confederacy or its intercourse as a united community with the other nations of the world.”<sup>222</sup> Devoted always to a “perfect equality of political rights,” Van Buren declared that the strict construction that alone could preserve states’ rights would be his guide in his every official act, lest the national government perversely become an engine of the political inequality – aristocracy – it existed to forestall.<sup>223</sup>

A funny thing happened, however, on the way to democratic party ascendancy: the party of the democracy lost the election of 1840, perhaps because of the widespread economic hardship that had begun during his presidency, perhaps because much of the electorate continued to cling to a traditional sort of antipartyism, most likely a combination of those reasons. Still, even in ignominious defeat, Van Buren had succeeded magnificently in his project of placing presidential elections permanently on a party basis, so magnificently that he found his party out-organized by the ostensibly antiparty Whigs of 1840.

His failure to win reelection, therefore, reflected not the old problem of getting the election properly organized – that battle he had permanently won – but the problem of convincing the electorate that the two parties really did represent the states’-rights democracy, on the one hand, and a consolidationist aristocracy, on the other. Van Buren rationalized the result as one of those moments of rashness and disorder in which the aristocracy, aided by a general economic distress, succeeds temporarily in manipulating large parts of the democracy.<sup>224</sup> In his final annual message, a month after his loss in 1840, Van Buren warned the incoming administration that it should not take the aberrant election as a sign that the people had suddenly altered their long-held convictions. They would not

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<sup>221</sup> Martin Van Buren, “Inaugural Address,” in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES OF AMERICA FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989*, 71 (1989).

<sup>222</sup> Van Buren, “Inaugural Address,” 71.

<sup>223</sup> Van Buren, “Inaugural Address,” 76.

easily forsake their fundamental beliefs that the national government was one of limited (not implied) powers and, particularly, that restoration of a national bank would constitute war on the democratic, states'-rights character of the Constitution.<sup>225</sup> Even though the Supreme Court was by this time populated largely by Jacksonian appointees, Van Buren did not turn to that institution. He never suggested that the Constitution might be preserved by the Court's power to invalidate a new Whig national bank (although he elsewhere embraced a limited power of judicial review). He only lectured the Whigs on the abiding principles of American constitutional politics.

In fact, the Whigs did try to restore a national bank as one of their first orders of business in 1841,<sup>226</sup> but a strange confluence of events thwarted them<sup>227</sup> and ultimately returned the Constitution, as Van Buren would have it, into the hands of the people. The democracy then regained its bearings and, exercising its right of constitutional review, gave the 1840 election a "sober second thought." On seeing the true Whig character, according to Van Buren, the people promptly rejected the Whigs' theory of implied powers and restored the true Constitution in the presidential election of 1844,<sup>228</sup> electing the no-name candidate of the Democratic party simply because he was indeed the regular nominee of the democracy.<sup>229</sup> With Democratic dominance restored, the national bank, the protective tariff, and federal funding for internal improvements—the leading measures of consolidationism—were decisively ruled unconstitutional by the sovereign democracy, not to be revived until the Civil War inaugurated a wholly new phase of constitutional transformation.

#### IV. CONCLUSION

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<sup>224</sup> Martin Van Buren, "Fourth Annual Message," in Fred L. Israel, ed., *THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966*, (1966); Van Buren, *INQUIRY*, 349.

<sup>225</sup> Van Buren, "Fourth Annual Message," 549-556, esp. 552-554.

<sup>226</sup> Brock, 82.

<sup>227</sup> Brock, 91-98. The chief, unexpected event was the death of the new president, William Henry Harrison, after only a month in office. He was succeeded by the "old republican" vice president, John Tyler, who vetoed the two bank bills of the Whig congressional majority.

<sup>228</sup> Van Buren, *Autobiography*, 8, 226-227, 393-394; Van Buren, *INQUIRY*, 349.

<sup>229</sup> Holt, 173-174, 195.

Before the 1830s, antipathy to party organization remained dominant in America's quickly democratizing constitutional culture. Inherited from the founding generation, this commitment survived the constitutional warfare between Federalists and Republicans so strongly that, even by 1820, very few Americans could yet imagine a permanent politics of mass parties. Only in reaction to the "amalgamation" of the older parties of "magnates and notables" after the War and the consequent resurgence of "consolidationism" in America's constitutional politics--both judicial and electoral--did Van Buren and his coadjutors begin the partyist campaign. And only under pressure from that campaign did American constitutional culture come to accommodate parties.

Drawing on the inherited, Old World notion that polities were composed of "estates"--"the democracy," "the aristocracy," and "the monarchy"--Van Buren hoped to restore the ascendancy of the democracy as the only legitimate constituent of the American polity. In addition, he understood the Constitution to establish a fully confederated form of government--one in which each state retained a genuine Jeffersonian independence--as indispensable to democracy. He thus set out to restore the states'-rights, strict-constructionist, democratic Constitution (those three adjectives being largely interchangeable to Van Buren). His device for doing so was the political party of the democracy, itself ostensibly inherited from the Jeffersonian Revolution of 1800 but in significant part invented by Van Buren himself. Because the party embodied the entire democracy--at least in principle and, in fact, more nearly than any other available institution--the party was to speak for, if not actually become, the only sovereign body in the constitutional scheme. Each of the Constitution's formal institutions was just one of several "coordinate," sub-sovereign institutions, supreme in nothing, but charged only with doing some aspect of the sovereign people's work. The Supreme Court, especially, had no higher role with respect to the Constitution than did the other federal branches and the states themselves. Even the Federalists of 1787 had insisted that sovereignty lay nowhere in the government but only in the people themselves.<sup>230</sup> Only the people, who could not speak but through a party of the democracy, possessed

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<sup>230</sup> See, e.g., Edmund S. Morgan, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 280-283 (1988).

that genuine constitutional supremacy to which the irresponsible Court sometimes made pretense.

This vision of a genuinely popular institution, resting on a social order of landed equality, reflected a nineteenth-century recognition of the constitutional nature of politics, a recognition largely lost to modern America. Understanding their politics not as working *within* a constitutional order so much as *working out* a constitutional order, Van Buren and his multitude of co-democrats could plausibly understand their institution as the embodied democracy, constitutionally superior to the judiciary as much as to every other branch of government. In their name, then, judicial precedent might be overturned outside the courts, and the Constitution might be amended outside Article V. Thus was *McCulloch v. Maryland* functionally overruled by the electorate's vindication of Jackson's bank veto, and the electoral mechanism established by the Constitution itself amended by party organization, as surely and effectively as any case is ever overruled or any portion of the Constitution amended.

Even in the 1850s, Van Buren continued to understand the history of American presidential elections as reflecting the permanent dominance of the single party of the democracy, the only final agent of the Constitution and states' rights, as against the antiparty, corporate aristocracy and its most reliable ally, the federal judiciary. The Whig victories of 1840 and 1848 he explained away as products of passing crises, the Democratic victories of other years as reflecting the settled constitutional principles, the "sober second thought," of the people.<sup>231</sup>

But the fact is that the partyist reforms—successful as they were in effectively ruling Hamiltonian policies unconstitutional—did not in the end produce a party of "exclusive and towering supremacy." Instead, the effort to do so provoked a sustained politics of competitive parties that only gradually evolved into an accepted, permanent way of conducting a democracy. From a modern perspective, the party competition of Van Buren's last years looks like the beginnings of our regularized two-party competition. It has been a very long time since any party has held itself out as the embodiment of the democracy, even if each party insists that its own collection of interests and social groups best pursues the public good. As of the 1850s, however, this sort of regularized competition between parties of

substantive commitment was only beginning to emerge from the Van Burenite politics that imagined a “democracy” pitted against an “aristocracy.” In Van Buren’s view, the desperate crisis over slavery in the territories was moving otherwise genuine democrats to fall in with the merely factional movements of the southern-rights Democrats and the free labor Republicans--neither party now resting on the democracy as a whole but only on the partisans of its substantive policy preferences.<sup>232</sup> This change was fundamental for Van Buren, because the rise of two-partyism or, as he would have seen it, the rise of a politics of faction rather than constitutional principle, left the Constitution without its legitimate interpreter – the embodied people. It therefore ceded control of the Constitution to the worst possible institution – the federal judiciary, unelected, life-tenured, and irresponsible. And such an anti-popular politics tended inevitably to consolidation.

For Van Buren, the predictable and damning result of this development was *Dred Scott*.<sup>233</sup> It’s not that Van Buren was terribly progressive on racial matters. He actually endorsed, although with reservations, Taney’s holding that African-Americans could not be citizens within the meaning of Article III.<sup>234</sup> Rather, Van Buren complained that this Jacksonian Court<sup>235</sup> had reached out beyond that holding to “settle” a question not before the Court. In the true Federalist fashion that even the most democratically pedigreed judges ultimately found irresistible,<sup>236</sup> Taney seized his chance to exercise a judicial supremacy over the nation’s constitutional politics. Not satisfied with merely disposing of cases, he and his Democratic majority asserted the Court’s authority over the constitutionality of the Missouri

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<sup>231</sup>Van Buren, *INQUIRY*, 348-349; Van Buren, “Thoughts on the approaching election in N. York.”

<sup>232</sup> For Van Buren’s view that the slavery controversy was distorting the proper constitutional structure of American politics, see, e.g., Van Buren, *INQUIRY*, 223, 369-376; Mintz, 443-444; Douglas Jaenicke, “American Ideas of Political Party as Theories of Politics: Competing Theories of Liberty and Community,” (Ph. D., Cornell University, 1981); Niven, 604-607.

<sup>233</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>234</sup>Van Buren, *INQUIRY*, 356-358.

<sup>235</sup> Van Buren, *INQUIRY*, 353.

<sup>236</sup> Van Buren, *Autobiography*, 184-185, 219; Van Buren, *INQUIRY*, 363-366. Of course, Taney himself had begun public life as a Federalist, and Van Buren did not overlook that fact as part of the explanation for Taney’s actions. Van Buren, *INQUIRY*, 362-363.

Compromise even though that question was now unnecessary to disposition of the case.<sup>237</sup> For Van Buren, this question, like all constitutional questions, belonged preeminently in politics where the sovereign majority might most readily dispose of it, and the Court's holding on that question was a usurpation by a merely coordinate institution in the service of the substantive interests of the South. Among the party's grand achievements had been the scotching of the notion, trumpeted in the days of the Alien and Sedition Acts and *McCulloch v. Maryland*, that "it belongs to the judicial power to decide upon [the] constitutionality" of laws while only "their expediency" lay with Congress.<sup>238</sup> But *Scott* had revived that doctrine. Delivered by a Democratic Court and held out as the last word by a Democratic president, the case represented the dreaded triumph of Federalist consolidationism within the Democratic party itself.<sup>239</sup>

Moreover, in the Van Burenite world view, *Scott's* ultimately successful implanting of "substantive due process" into the federal judicial system was the natural, anti-democratic complement to the rise of merely factional parties. Today, *Dred Scott* is universally condemned, but it is also remembered as the first federal example of the doctrine of substantive due process,<sup>240</sup> a doctrine warmly embraced by many who otherwise revile the case. So modern Americans often see *Scott* as an aberrational start to an otherwise salutary doctrinal line.<sup>241</sup> Had Van Buren lived to see the rise of the Due Process Clause as the Supreme Court's warrant for supervising state legislation, however, he would have seen those Court offenses as the legitimate heirs of *Scott's* own consolidationism. And he would have seen such federal judicial ascendancy over state legislative power as the natural complement to a national politics now dominated by a persistent two-party competition--maybe he would have called it the "two-faction system"--in which his Democrats even became for a while the minority party before the

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<sup>237</sup> Van Buren, INQUIRY, 358-366.

<sup>238</sup> Van Buren, INQUIRY, 374. See also Keith E. Whittington, "The Road Not Taken: *Dred Scott*, Judicial Authority, and Political Questions," 63 JOURNAL OF POLITICS 365 (2001), for an argument that Justice Curtis, in dissent, had a view of constitutional decision-making much like the one I attribute to Van Buren. Whittington, too, sees *Dred Scott* as a kind of revival of *McCulloch*.

<sup>239</sup> Van Buren, INQUIRY, 366-376.

<sup>240</sup> Currie, 271.

consolidationist Republicans. The ironies would have been exceedingly painful: Using the constitutional theory of coordinacy, he had built a magnificent new institution, the sovereign party of the democracy. Yet the party politics yielded by that creation only brought a fundamentally different institution that embodied a contrary constitutional theory--the "two party system" of mere interest-group management, linked to judicial supremacy in constitutional interpretation.

And yet we still live with Van Buren's legacy. For better or worse, Van Buren's generation salvaged and bequeathed to us a strong states'-rights tradition as well as a tradition of popular party politics. While the Supreme Court has solidified its cultural place as supreme constitutional interpreter, the Court has rarely ruled in ways decidedly contrary to popular opinion; for all its imperialist tendencies, the Court is often subordinated to party politics even on constitutional questions and stands as just one of many political actors in the drama of constitutional politics.<sup>242</sup> Van Buren's constitutional

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<sup>241</sup> See, e.g., William W. Wiecek, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT* 124-125 (1998).

<sup>242</sup> For chastened, pragmatic revisions of the supposed supremacy of the Court, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *JOURNAL OF PUBLIC LAW* 279 (1957); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 *VA. L. REV.* 1 (1996); Barry Friedman, *Dialogue and Judicial Review*, 91 *MICH. L. REV.* 577 (1993).

For studies of the ways in which the Constitution gets interpreted and constructed in electoral and legislative politics, see, e.g., Whittington, *CONSTITUTIONAL CONSTRUCTION*. Whittington argues that much of the development of "constitutional meaning" in America has gone unobserved because it happens outside the courts in the course of apparently normal policy debates. Such debate can truly be constitutional insofar as it successfully establishes "authoritative norms of political behavior" (p. 8) and thus "constrain[s] future political debate" (p. 6). Among the many constitutional issues that are often dealt with by "political" rather than judicial actors are the "structures of political participation" (p. 9), which certainly include the place of political parties in American governance. Whittington concludes that the "meaning of the Constitution is . . . a very real prize of political struggle," as Van Buren and all of the politicians of his generation would certainly have affirmed.

Of course Bruce Ackerman too has famously argued that the Constitution's meaning has been developed in most fundamental ways in the course of party politics. See Ackerman, *WE THE PEOPLE: FOUNDATIONS* (1991). But Ackerman, unlike Whittington, largely (not entirely, see p. 196 of *FOUNDATIONS*) confines this constitutional politics to rare constitutional moments. See Keith Whittington, *CONSTITUTIONAL CONSTRUCTION* 217 and fn. 8.

With respect to federalism in particular, see (in addition to Whittington) Larry Kramer's argument that, historically, American courts have almost never enforced constitutional federalism (states' rights) as a legal principle but have left its vindication to the political process. Effective defense of that constitutional principle was, of course, exactly the function that the partyists expected democratic party organization to serve, in the face of "aristocratic" efforts to consolidate power in the federal government. See Larry Kramer, *But When Exactly Was Judicially-Enforced Federalism 'Born' in the First Place?* 22 *HARVARD JOURNAL OF LAW AND PUBLIC POLICY* 123 (1998) and Kramer, *Putting the Politics Back*.

theory and much of his practice is largely lost to us today, yet the fact remains, as Van Buren hoped and ensured it would be, that constitutional politics is in large degree party politics; that the states and local governments remain as meaningful points of organization from which to contest federal hegemony and rally dissent; and that the Supreme Court really is, for better or worse, just one of the “coordinate” institutions of the Constitution, not the supreme, consolidated sovereign.

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More generally on the importance of party politics to constitutional development, see the sources cited in n.--- above.