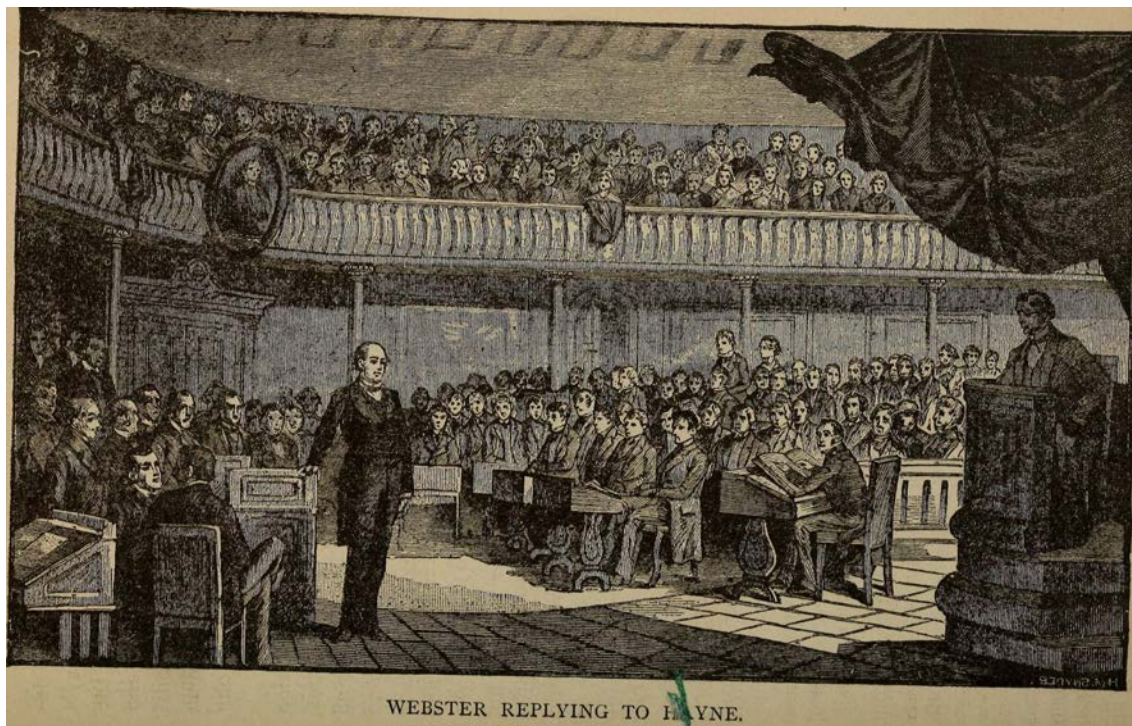


A Tale of Two Doctrines, Part II

by James Danielson, PhD | Published on July, 7, 2023



In the last issue of “Front and Center,” we introduced the two understandings of political order that comprise the general structure of American political history. The earlier political order, which may be called “Jeffersonian,” lasted from 1776 to 1861. The later political order, which may be called “Lincolnian,” was firmly in place in 1865 and is with us today. In fact, it is this understanding of American government that

we were taught as children in school, and it is this form of political order that is at present under pressure from many directions. The purpose of this essay and the one just before it is to describe Jeffersonian and Lincolnian political order and to indicate how the latter developed within the former and finally displaced it. In doing this, our primary focus will be on a series of exchanges among three senators in 1829 and 1830 that have come to be known as the Webster-Hayne debates.

In earlier writings of the Al Gray Civic Institute at Carolina Museum of the Marine, we have discussed the Treaty of Paris of 1783 in which the British crown acknowledged the independence of the former colonies of British America. Article I of the treaty opens with these words: "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free sovereign and independent States;..." Note that each state is recognized by name as a free sovereign and independent state. The states were bound together in a federal union for the purposes of mutual security and defense and to maintain the United States internally as a free-trade zone. So the name "United States" was not the

name of a unitary national state comprised of one people called Americans, but of a union of sovereign states united for limited and specified purposes. This union was populated by people called New Yorkers, Virginians, North Carolinians, and so on. At this point, a reader may reasonably wonder about the opening words of the preamble to the Constitution, "We the People of the United States,..." that are said to identify Americans as one national people. The confusion here is part of the tale of two doctrines under discussion.

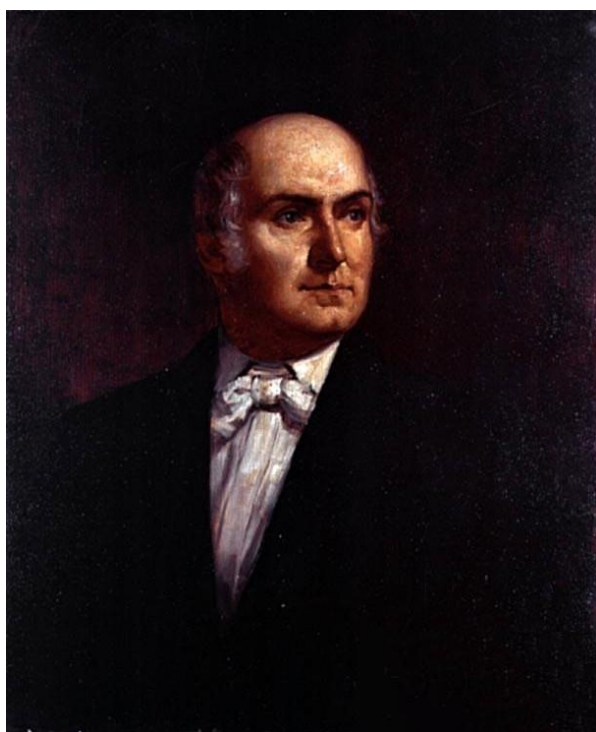
In 1812, President James Madison nominated Joseph Story of Massachusetts to be an associate justice of the Supreme Court. In 1833, Justice Story published a three-volume work titled *Commentaries on the Constitution of the United States*. What is remarkable about this study is that in it, Story interprets the Constitution as having established a unitary national state rather than the federation of sovereign states ratified by Americans in 1788/89. Story's commentaries appeared a few years after the Webster-Hayne debates and is part of what was a movement of growing intensity to change how Americans understood their governing order. To be sure, the understanding of government being advanced by Daniel Webster, Joseph Story, Chief Justice John Marshall and others had its adherents from the beginning of the country, but at this time, those whom we may call nationalists were

planning to establish their vision of a unitary national state, displacing the federation of sovereign states that the United States were at that time.

Story claims that the words in the preamble to the Constitution announcing that We the People of the United States are establishing a new Constitution is a proclamation issuing from a single people, a nation, Americans all, taken in the aggregate, from north to south, and not a proclamation from an “assemblage of nations.” Thus, Story will assert that the union is older than the states, that the People, in union, created the states, and therefore the states are but local governing districts within the union, rather like counties, with no sovereignty of their own. We believe with confidence, however, that Story’s tale is wrong on two closely related counts: there is no documentary evidence for it; and, all documentary evidence that exists establishes the opposite case, namely, that the United States were from their inception a federation of free sovereign and independent states.[i]

In 1840, Virginia jurist, secretary of the Navy, and secretary of state Abel Upshur published a reply to Justice Story’s commentaries with the cumbersome title *A Brief Inquiry into the Nature and Character of Our Federal Government: Being a Review of Judge Story’s Commentaries on the Constitution of the United States*. Upshur writes about the wording

of the preamble to the Constitution saying that in the preamble to the final version of the document approved by the delegates at Philadelphia, each state was named individually, just as in the Treaty of Paris and in the Articles of Confederation.



Having approved a finished Constitution, the delegates appointed a committee on style, headed by Gouverneur Morris of New York, to render the language of the text more elegant. When that version of the Constitution was returned to the whole body, the delegates went through it line-by-line to ensure that no

content inadvertently had been changed. When reading Article VII of the Constitution, the delegates noticed a difficulty they had previously missed. The first sentence of this short Article says: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so Ratifying the same." There were thirteen states in 1788, and so it would be embarrassing, at least, if four states rejected the Constitution but yet were named in the

preamble as though they had adopted it. So the delegates replaced the list of states with a familiar formula referring to the people of the United States. The argument here is that Story distorted the meaning of the preamble to the Constitution in order to advance a nationalist understanding of the government that is not actually in the Constitution. Importantly, we see in the argument of Joseph Story of Massachusetts and in the reply of Abel Upshur of Virginia the continuation of a debate on the nature of the political order established in our Constitution that breaks into view in the Senate in the Webster-Hayne debates of 1830.[ii]

The standard presentation of the Webster-Hayne debates includes the verdict that Sen. Daniel Webster was the overwhelming winner of the exchanges with Sen. Robert Hayne. In other words, the argument that the United States are a unitary national state with governing sovereignty held by the government in Washington, D.C. soundly defeated the argument that the United States are a federation of states with sovereignty held by the people of each state. However, reports on the debates at the time they took place suggest that their effect was further to polarize the two sides on the question of American political order one against the other. In short, the debates seem to have

been a tie in the sense that neither side convinced the other of the truth of its position.[iii]

The debates typically are presented as a one-on-one match between Webster and Hayne, but in fact, there was a third important participant in the contest who is usually ignored: Sen. Thomas Hart Benton of Missouri. The debates did not begin as a discussion of the nature of American political order, but with a resolution put before the Senate on December 29, 1829 by Sen. Samuel Foot of Connecticut to discuss the desirability of limiting the sales of land in the western territories and permanently to stop conducting land surveys. The next day, Sen. Thomas Hart Benton of Missouri rose before the Senate to denounce Sen. Foot's resolution as a brazen attempt by the East (North) to gain political advantage over the South and the West (today's Mid-West).[iv] Sen. Benton contended that the purpose for the proposed reduction in land sales was to keep people living in the East at home to be a labor force in the East's growing manufacturing enterprises, and to keep people of the South and West from migrating into the western territories, creating new states, and thereby expanding the power of these sections in the Congress.[v] At this point, the Senate took a brief recess. Upon re-convening, on January 18, 1830, Sen. Benton again went on the attack against Sen. Foot's resolution, but this

time, Benton added eastern protective tariffs to his rebuke of eastern senators for what he saw as their steady efforts to gain political and economic control of the country to the detriment of southern and western interests, and this because the tariffs were held by the South and West to be taxes on those sections in order to subsidize eastern manufacturing. The protective tariffs were held to be unconstitutional because Article I, section 8 of the Constitution, in delegating taxing power to Congress, gives it the following restriction: "...but all Duties, Imposts, and Excises shall be uniform throughout the United States." The burden of the tariffs fell mostly on southern states, while the eastern (northern) states were the primary beneficiaries of them. Thus, the argument went, the burden of protective tariffs was not uniform throughout the United States, and therefore the taxes were unconstitutional.

It was at this point, when Sen. Benton introduced protective tariffs into the dispute over land sales, that the turn was taken toward debating the nature of the federal government. The East was fast becoming a manufacturing economy while the South and West remained mostly agricultural. The growing power that manufacturing was bringing to leaders in the East encouraged their natural sense that they were by right suited to dominate the politics and economics of the

country, and Sen. Benton's arguments thus far in this episode were aimed at attacking this eastern motive. It was his contention, and soon it would be Hayne's contention, that the East's attempts to expand its power over the other sections were threatening the purpose of the union, that is, to provide for the common defense and to maintain internally a free trade zone. In all other matters, states were bound to respect the independence of sister states.[vi] However, eastern leaders could see that they might soon be in a position to have their way, and this included their desire, shared with the federalists of the generation who wrote and ratified the Constitution, to convert the United States from a federation of sovereign states into a unitary national state.

The next day, January 19, 1830, Sen. Robert Hayne of South Carolina joined Sen. Benton in the rebuke of eastern motives. It is here that most accounts of the Webster-Hayne debates begin. Hayne did not speak long, saying simply that the tariff rate should be lowered, and sales of land in the western territories should be facilitated. The tariff harmed the South, since they were levied on the South's European trading partners (the East had comparatively little to export at that time), and the prices of land in the west harmed western states. Both of these policies, Hayne observed, were beneficial to eastern states and this advantage to the East at the expense of the other sections was well

beyond the purposes for which the union was established. Moreover, and here the issue comes near to a head, the great fund of money created by protective tariffs and land sales allowed the federal government to create domestic dependents owing to government largesse, and this process leads to the consolidation of power in Washington at the expense of state independence and individual liberty, and importantly, contrary to the form of government established in the Constitution.

When Webster joined the debate on January 20, he delivered a point-by-point response to Hayne without once mentioning Benton who had started the contest. Webster defended the policies that Benton and Hayne had criticized attempting the case that the federal money that alarmed Hayne was in fact a good thing that allowed the federal government to build roads and bridges, dig canals, and build schools. Transportation and education are good things, Webster insisted, that ought not to be attacked. More subtly, and more importantly, Webster contended that federally funded internal improvements, rising federal spending, and even national debt had the effect of binding states together and thus strengthening the union. Therefore, the arguments of Hayne, and of the South more broadly, against these things were in fact an attack on the union. "They

[southerners] significantly declare, that it is time to calculate the value of the Union." This is a not-so-concealed suggestion of southern disloyalty to a union understood as a unitary national state. Benton replied to Webster on the same day, rebuking him for failing to mention the West or Benton himself, focusing his attack on Hayne and the South, as an attempt to break the alliance between the West and the South in order to switch western allegiance to New England for the purpose of subjugating both the West and the South.[vii]

Hayne's reply to Webster took most of the following two days. Hayne rehearsed the history of the formation of the American union of states with the intent of arguing that not only is Webster mistaken to suggest that the South is disloyal to the union, but that Webster is asserting that the United States are something that no American should want, that is, a unitary national state with sovereignty over the states and the people thereof. Therefore, Hayne suggests, we may say that the South is the true friend of the union because those states want to "confine the Federal Government strictly within the limits prescribed by the constitution; who would preserve to the States and the People all powers not expressly delegated, who would make this a Federal and not a National Union, and who, administering the Gov't, in a spirit of justice, would make it a blessing and not a curse."

Of particular irritation to Hayne was Webster's claim that what he called the "Carolina doctrine"[viii] was in fact not a right of any state, but rather an act of defiance of legally constituted authority. Here we can see emerging the irreconcilable conceptions of government being debated in the Senate in 1830. For Hayne, a southerner, the states created the federal government and strictly circumscribed its powers. Thus any act by the federal government for which there is no delegated authority is an unlawful usurpation of power and not a law at all. For Webster, a northerner, the federal government is what Abraham Lincoln would call it in his first inaugural address: the National Authority. Because the federal government possesses national authority, that is, sovereignty, for a state to nullify a federal law would be an act of unlawful defiance and therefore rebellion.[ix]

Webster replied to Hayne on January 26-27, delivering an oration that was both celebrated as a definitive refutation of Hayne and a vindication of the claim that the United States are a unitary national state, and condemned as an exercise in eloquent mendacity, asserting a claim about American political order that is dispositively refuted in the text of the Constitution. His argument was later refined by others, including Joseph Story and Abraham Lincoln, to significant effect.

Central to Webster's argument are the assertions that the Constitution

is not a compact among sovereign states, as the Carolina doctrine insists, but a permanent government established by the people of the nation acting collectively, and that the authority to resolve constitutional disputes rests solely with the Supreme Court. This means that nullification, the center-piece of the Carolina doctrine, is unconstitutional since if the states had the authority to interpret the Constitution for themselves, the federal government would be at the mercy of the states, as it was under the Articles of Confederation. It is both interesting and surprising to find Webster asserting with confidence a reality that the "federalists" in 1787 were keen to conceal, namely, that the Philadelphia convention was convened in order to draft a constitution to replace the Articles of Confederation in order to free the federal government from the control of the states. Finally, throughout the debate, Webster was disciplined in keeping his focus on Hayne and the South, insisting that the states of the South were an increasingly disloyal section.

Public opinion around the country at the time of the debates was divided, and the division was becoming sharper. The sectional differences between North and South were hardening to the point at which one could argue that they were two different countries having incompatible theories of government. In such a situation, what would

be the proper course of action? What are the options? Should a divided people continue politically to struggle with one another until one side prevails, or should they separate into different political unions? A third option is to acknowledge the differences and seek a compromise position that accommodates, as far as possible within the existing order, the interests of the parties involved. Seeking such an option would require people possessed of what Aristotle called political friendship in which people care about the well-being of others in the interests of the whole community, and it would require political leaders who seek peace and concord, rather than discord for political advantage. How this can be accomplished requires at the same time, if not as prelude, a careful discussion of the question of how large a republic can become and still remain internally able to resolve differences amicably.

[i] In *Federalist* no. 39, for example, James Madison argues against the concern of so-called anti-federalists that the proposed constitution will establish a unified national state of the sort Americans fought a war to

escape, arguing in part as follows. "...this assent and ratification is to be given by the people, not as individuals composing one entire nation; but as composing the distinct and independent states to which they respectively belong. It is to be the assent and ratification of the several states derived from the supreme authority in each state, the authority of the people themselves. The act therefore establishing the constitution, will not be a *national* but a *federal* act." (Emphasis in the original.)

[ii] A text of the Webster-Hayne debates may be found at the link below.

<https://teachingamericanhistory.org/document/the-webster-hayne-debates/>

[iii] An interesting and informative treatment of this view of the debates may be found

here: <https://www.abbevilleinstitute.org/who-won-the-webster-hayne-debate-of-1830/>

[iv] In the antebellum period, what Americans called the “East” is what Americans today call the “North.” So, in their terms, the sectional differences that eventually led to war were largely between the East and the South.

[v] Benton’s analysis here was well known. The states of the north (east) were oriented toward the sea, making most of their national income in shipping, insurance, and related activities. They were also the first and most enthusiastic of American states to industrialize. The southern and western states had agricultural economies, and so these states had political and economic interests in common, and unlike those of the northern states. New states created out of the western, inland, territories, would also be agricultural and so they would align in Congress with the South and the West of that time to the detriment of northern political influence.

[vi] We have discussed in brief the analysis of British migration to North America in David Hackett Fisher’s *Albion’s Seed: Four British Folkways in America*. One of Fisher’s findings is that the Puritan’s who settled at Massachusetts Bay saw themselves as God’s chosen people, and thus it

fell to them to be both the example to other settlers in North America for how to live, but also to govern in order to ensure that others lived as they should. Over time, New England Puritans lost their Puritan Christian faith, but they did not lose their desire to control the country as a whole.

[vii] Southern leaders objected to federally funded “internal improvements” because the Constitution did not delegate power to the federal government to do this. However, western states had vital needs for roads and bridges and, at that time, little money to provide them. Northern states thought they could win the allegiance of western states by arguing in favor of federally funded improvements in those states. This is why southern opponents of federally funded improvements like John C. Calhoun of South Carolina finally gave up opposition to them.

[viii] South Carolina had written into its ratification statement when it adopted the Constitution that it reserved the right to nullify any enactment of the Congress for which there was no authority delegated to it in the Constitution. So the right to nullify a federal law is what Webster termed the Carolina doctrine.

[ix] The text of Lincoln's first inaugural address may be found at the link below. One might pay attention to the president's statement in the fourth paragraph after the greeting "Fellow-Citizens of the United States."

<https://www.battlefields.org/learn/primary-sources/lincolns-first-inaugural-address>