

FOREWORD

Abel Upshur's *A Brief Enquiry into the True Nature and Character of Our Federal Government* is one of the finest and most systematic defenses of the Virginian states' rights school of constitutional interpretation ever written—and yet hardly anyone today has even heard of it, much less read it. American law students are amply exposed to the writing and arguments of nationalists like John Marshall and Joseph Story, but know nothing of the Jeffersonian alternative expounded in the work of John Taylor, St. George Tucker, Spencer Roane, or, indeed, Abel Upshur.

Upshur (1790-1844), a Virginian statesman and legal thinker, was educated at Yale and Princeton, and later undertook legal study in his native Virginia. He served brief terms as Secretary of State and Secretary of the Navy in the early 1840s until his premature death in an explosion aboard the *USS Princeton*. His *Brief Enquiry*, though, was surely his most significant and lasting contribution to American history.

Upshur's book is a point-by-point refutation of Justice Story's immortal *Commentaries on the Constitution of the United States* (1833). Story, in turn, was among the most prominent nationalist theorists of the Constitution, holding that the American Union had been created not by discrete sovereign states but by a single, aggregated American people. That may sound like a distinction without a difference to those new to the subject, but it amounts to perhaps the most important controversy in early American history—and perhaps in all of American history.

The compact theory, which Upshur sought to uphold against the nationalist version put forth by Story, held that the United States had been formed when the peoples of each of the thirteen states, each acting in its sovereign capacity, ratified the Constitution in the months and years following its drafting in 1787. (The very fact that the states voted separately to ratify the Constitution, and that the Constitution was not ratified by a single, consolidated vote of all individuals in the thirteen states, is an important piece of evidence to compact theorists that the states, rather than some single American people, created the federal Union.) They delegated to that government a small number of enumer-

ated powers, reserving the remainder to themselves. Thomas Jefferson further proposed that the states could refuse to enforce any federal law that exceeded the powers that they had delegated to the central government. According to the compact theory, therefore, the United States consists of distinct sovereign peoples, organized into distinct states, as opposed to a single, aggregated people.

This is a dispute of no mean significance, since acceptance of the compact theory opens up all kinds of radical possibilities in defense of liberty, including both nullification (the right of a state to refuse to enforce a federal law it considers unconstitutional) and even secession. For compact theorists, such actions amount to the legitimate exercise of sovereignty by sovereign bodies in defense of their liberties against a federal government that was supposed to be the agent, not the master, of the states. The nationalist view, by contrast, would condemn both nullification and secession, as well as lesser expressions of state sovereignty, as illegal and possibly treasonous.

The nationalist view, on the other hand, denies that the states established the federal government or that the United States is a league or compact among states. The ratification of the Constitution by state holds no significance for the nature of the Union, according to this view. Ratification was an act of the whole people, who alone are sovereign even if they happen to have expressed that sovereignty through the intermediary of state conventions. State resistance to federal power, according to this reading of the American tradition, can be conceived of only as insubordination. The states are essentially helpless to defend themselves against the federal government, and must instead depend for the maintenance of their liberties on such notoriously unreliable mechanisms as national elections—as if elections alone could prevent unjust or wicked federal legislation—or the Supreme Court.

Upshur's book considers the logical and historical difficulties involved in the nationalist view. For instance, when exactly did the thirteen states constitute come to comprise "one people"—a central plank of the nationalist theory—and cease to be thirteen separate peoples? If they were "one people" because they had all been subject to the same sovereign during their history as British colonies, that would make them "one people" with Jamaica and Canada as well. Moreover, their common experiences as British subjects cannot render them one people, particularly when we recall, with Upshur:

The people of one colony owed no allegiance to the government of any other colony, and were not bound by its laws. The colonies had no common legislature, no common treasury, no common military power, no common judicatory. The people of one colony were not liable to pay taxes to any other colony, nor to bear arms in its defence; they had no right to vote in its elections; no influence nor control in its municipal government, no interest in its municipal institutions. There was no prescribed form by which the colonies could act together, for any purpose whatever.

And, Upshur wonders, if the thirteen states really constituted “one people,” what would have been the status of states that chose not to ratify the Constitution? Could the others have coerced them into the Union by force? As it turned out, Rhode Island did not ratify until 1790—two years after the document had gone into effect over the other states. During that time it never occurred to anyone that the U.S. government, by virtue of all the states having become “one people,” had any political power over that recalcitrant state.

Another serious problem for the nationalist theory to overcome is that the Articles of Confederation proclaimed in 1781 that the “[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” There it is, as clear as anyone could ask for: *each state retains its sovereignty, freedom, and independence*. The states would have had to be sovereign in the first place in order for them to *retain* their sovereignty in 1781. Thus their status as separate and distinct sovereign states is officially acknowledged in the 1780s, meaning that any collapsing of the distinct peoples of the states into “one people” could not have occurred prior to that date.

But no action so collapsing them occurred after that date, either. Nor could it, for sovereignty is neither partible nor alienable. The great international lawyer Emmerich de Vattel observed in *The Law of Nations* (1758) that “several sovereign and independent States may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect State. They will together constitute a federal republic: their joint deliberations will not impair the sovereignty of each member, though they may, in

certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements.”

Nationalists may be able to scrape together some kind of reply to these objections, though the persuasiveness of such a reply seems dubious. But Upshur’s book is *filled* with intractable problems for the nationalist position. With states’ rights having gone out of fashion, complacent nationalists have felt little need to bother replying to them, but they are serious and almost certainly insuperable objections all the same.

No plank of the nationalist theory is left standing in the wake of Upshur’s relentless arguments from reason and history. But that version of the American constitutional tradition, however nonsensical and poorly supported by the evidence, was perceived as having been vindicated on the battlefield in 1865, and works like this one thus found themselves consigned to the dustbin of history. They were replaced by and large by the nationalist treatises they had successfully defeated in argument but that were found to suit the new, one-and-indivisible Union rather better.

Abel Upshur’s *Brief Enquiry* could have been a classic, but the historical winds blew in the wrong direction. Its recovery by Vance Publications rectifies a long-standing injustice, and brings this magnificent and powerful defense of a decentralized political order to a modern audience for the very first time.

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