Community and Federalism in the American Political Tradition

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By

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Aside from the various minor issues, there are two major questions that are addressed in this dissertation: (1) Can socially cohesive community be attributed to the local and/or federal levels of the American system in the colonial and founding periods? (2) How has the political centralization of the twentieth century affected socially cohesive community and public policy for “sensitive” issues, which require such cohesion to become settled? The author attempts to answer these questions via articulating and defending the following thesis: Socially cohesive community (i.e., a mode of intrinsically valuable friendship community that can develop around shared thick-level values and that is often associated with political activity and local interaction) was a possibility for local-level communities during the colonial and founding periods of American history; whereas, when the colonies/States were grouped together as an aggregate union, they did not constitute a true nation or single community of individuals. Hence, such “union” lacked a common good (and, a fortiori, it lacked a thick-level common good necessary for social cohesion). Through the course of American history, the political system has been centralized or transformed from a federal system into a de facto unitary system, and this change has undermined the possibility of social cohesion at the local level. Since centralization trends have redistributed significant political power to the federal level,
which is inherently non-cohesive, and away from the local level (i.e., a combination of a
State and its localities), “sensitive” policy issues such as the abortion issue, which require
socially cohesive community for “a settled” resolution, have become increasingly
difficult to resolve. Moreover, significant centralization of the American system has
resulted in damaging social cohesion at the local level. This has somewhat, but not
irreparably, diminished the efficacy of transferring “sensitive” policy issues back to the
local level in order to realize “settled” resolutions. Although much of the United States
today seems to lack local-level communities with thick-level moral and
theological/philosophical agreement and social cohesion, there are some possibilities for
re-establishing this through both re-federalizing the United States and implementing
private initiatives to establish local communities among those with the same moral-
theology.
This dissertation is dedicated to
Dr. George Carey. He has been my teacher, mentor, and friend.
Without his patience and help, I never would have finished this work.

Many Thanks and God’s Blessings,
Peter Haworth
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Introduction

As suggested by the title, “Community and Federalism in the American Political Tradition”, a central problem addressed in this dissertation is the nature of community and its relation to federalism in the United States. Aside from the smaller issues also addressed, there are two major questions I seek to answer: (1) Can socially cohesive community be attributed to the local and/or federal levels of the American system during the colonial and founding periods? (2) How do the centralization trends of the twentieth century affect socially cohesive community and public policy on issues that require such cohesion? My dissertation will attempt to answer these questions via articulating and defending the following elaborated thesis: I argue that socially cohesive community (i.e., a mode of intrinsically valuable friendship community that can develop around shared thick-level values and that is often associated with political activity and local interaction) was a possibility for local-level communities during the colonial and founding periods of American history; whereas, when the colonies/States are viewed together as an aggregate union, they can not be considered to have been a true national community of individuals. Hence, such “union” lacked a common good (and, thus, it lacked a thick-level common good necessary for social cohesion). Through the course of American history, the political system has been centralized or transformed from a federal system to a de-facto unitary system, and this has undermined the possibility of social cohesion at the local-level. Since centralization trends redistributed significant political power to the federal level, which is
inherently non-cohesive, and away from the local level (i.e., a combination of a State and its localities), “sensitive” policy issues such as the abortion issue, which require socially cohesive community for “a settled” resolution, have become increasingly difficult to resolve. Moreover, significant centralization of the American system has resulted in damaging social cohesion at the local level, which has somewhat, but not irreparably, diminished the possibility of adequately resolving such “sensitive” public policy issues by transferring them back to the local-level. Much of the United States today seems to lack local-level communities with thick-level moral agreement and social cohesion. Nevertheless, there are some possibilities for re-establishing this through both re-federalizing the United States and implementing private initiatives to establish local communities among those with the same moral-theology.

Relation of Thesis to Historography:

The historical part of the above thesis runs counter to significant literature that attempts to conceptualize the United States as being founded with a normative identity. Bernard Baylin, Gordon Wood, J.G.A. Pocock, Michael Sandel, and others suggest that America had a republican identity at the founding.

In *The Ideological Origins of the American Revolution*, Bernard Baylin develops an early version of what has come to be the republican thesis. Although Baylin observes multiple “disparate strands of thought” (e.g., readings from “classical antiquity”, “Enlightenment rationalism”, “English common law”, and “New England Puritanism”) that were influential during the eighteenth century leading up to the Revolution, he argues
that “the radical social and political thought of the English Civil War and of the Commonwealth period” is what “brought” such diverse “strands of thought together.” It was such republican theory that “dominated the colonists miscellaneous learning and shaped it into a coherent whole…” This included seventeenth century writers such as John Milton, James Harrington, Henry Neville, Algernon Sidney. However, it also included eighteenth century “publicists and intellectual middleman” such as John Trenchard and Thomas Gordon who produced the Independent Whig and Cato’s Letters.

In The Creation of the American Republic 1776-1787, Gordon Wood argues that the republican transformation of America, which transpired during the Revolutionary period, was a whole-scale social revolution: the Americans self-developed an entirely new intellectual and cultural identity as a people. In addition to the English republican theories (e.g., Sidney and Harrington), there was widespread study of republican ideas from the Renaissance (e.g., Machiavelli) and classical antiquity (e.g., Greek city states and Roman Republic). There was an increased emphasis on sacrificing private interests for the public good, which was seen in reference to corporate (rather than individual) rights to self-rule and a lack of concern with mass tyranny due to the conception that all

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3 Ibid., 35
4 Ibid., 36
6 Ibid., 48-51.
the people were a unit and, hence, the basic measure of liberty. Moreover, there was increased focus on the need for virtue among citizens as a requisite for self-government.

Pocock also seems to conceptualize the eighteenth century colonies/States as a whole and, then, describes the political culture of this “civilization” as republican in character. This is seen in his famous book, *The Machiavellian Moment*:

In the first place, it has been established that a political culture took shape in the eighteenth-century colonies which possessed all the characteristics of neo-Harringtonian civic humanism. Anglophone civilization seems indeed to present the picture of a number of variants of this culture- English, Scottish, Anglo-Irish, New England, Pennsylvanian, and Virginian, to look no further- distributed around the Atlantic shores. The Whig canon and the neo-Harringtonians, Milton, Harrington and Sidney, Trenchard, Gordon and Bolingbroke, together with the Greek, Roman, and Renaissance masters of the tradition as fare as Montesquieu, formed the authoritative literature of this culture; and its values and concepts were those with which we have grown familiar- a civic and patriotic ideal in which the personality was founded in property, perfected by citizenship but perpetually threatened by corruption and operating through such means as patronage, faction, standing armies (opposed to the ideal of the militia), established churches (opposed to the Puritan and deist modes of American religion) and the promotion of a monied interest…

As will be discussed in Chapter Two, lumping the diverse colonial British people-groups and cultures together as if they constitute a single culture is problematic. Such overgeneralization often leads to other errors that ignore important particularity. For example, Pocock demonstrates an oversimplified view of diversity of Christian sects within the colonies/states when he suggests that the colonies viewed “established churches (opposed to the Puritan and deist modes of American religion)” as a “corruption”. In truth, the Puritan Congregationalism was the established church of Massachusetts and other New England colonies/States. Moreover, Anglicanism or the

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8 Ibid., 68.
Church of England flourished in Virginia, just as Puritanism did in New England. The Church of England was far more important and widespread relative to Deism, which was actually believed by various Virginia elites (e.g., Jefferson and maybe Washington) who maintained membership in the Church of England.¹⁰

Sandel argues that America’s public philosophy was largely based in republican theory during the time of the Revolution, the Founding, and well into the late nineteenth century.¹¹ Such republicanism emphasized the political goals of inculcating certain civic virtues in citizens, participation in self-government, and sacrificing one’s private interests for the sake of the common good. Prominent examples of this during the founding period include Jefferson’s argument against “developing large-scale domestic manufacturers on the grounds that the agrarian way of life makes for virtuous citizens, well suited for self-government…”¹² Similarly, George Mason lobbied against Virginia’s “Port Bill” of 1784, which aimed at centralizing commerce by limiting foreign trade to five ports throughout the state. He argued that such provisions would undermine the requisite civic virtue for republican government. Mason’s commentary is quoted in the following passage by Michael Sandel:

‘If virtue is the vital principle of a republic, and it cannot long exist, without frugality, probity and strictness of morals,’ Mason asked, ‘will the manners of populous commercial cities be favored to the principles of our free government? Or will not the

¹² Ibid., 124.
vice, the depravity of morals, the luxury, venality, and corruption, which invariably prevail in great commercial cities, be utterly subversive to them?"  

Mason’s argument, then, suggests that the economic benefits of centralized commerce are outweighed by the harmful costs to the republican self-government of Virginia (if not the greater United States) including the proliferation of vice and corruption that would arise in such “great commercial cities.” Sandel also references the concern of other important founders, like George Washington and John Adams, about maintaining virtue among citizens because this is necessary for a healthy republic.  

When reviewing this literature, one notices how such scholars seem to describe the colonies/states in aggregate. In various ways, Wood, Pocock, and Sandel seem to conceptualize the colonies/States as a whole and, then, view this “whole” as being republican in character. Although Wood recognizes that the Revolutionary period at the time of Declaration in 1776 did not establish a national government but, rather, thirteen independent sovereign States, he still views this to be launching (at least intellectually and culturally) of a new nation of people. This is seen throughout his commentary:  

Republicanism meant more for Americans than simply the elimination of a king and the institution of an elective system. It added a moral dimension, a utopian depth, to the political separation from England- a depth that involved the very character of their society. “We are now really another people,” exclaimed Paine in 1782. Socially, of course, they were not really another people, despite much economic unsettling and the

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emigration of thousands of Tories. But intellectually and culturally they were- and this is what Paine meant…\textsuperscript{16}

The Revolution was no simple colonial rebellion against English imperialism. It was meant to be a social revolution of the most profound sort.\textsuperscript{17}

The gist of these comments imply that America’s revolution entailed launching a deep and widespread national commitment to republicanism with its primary focus on the common good and communal integration via shared civic values.

In contrast, Louis Hartz, Joyce Appleby, and Isaac Kramnick suggest that the United State was founded as and/or quickly developed into a liberal regime. The liberal thesis developed by Hartz and others views America’s political culture as emphasizing autonomous individuality (or, according to Hartz’s phraseology, “atomistic social freedom”) and as being essentially Lockean even though many Americans are not self-conscious of this fact.\textsuperscript{18} There is, however, a significant problem with Hartz’s argument. Although Hartz seems to consciously follow Tocqueville’s reasoning about the important differences between the effects of the old European aristocratic age and the absence of these in America, he strangely avoids one of the primary independent variables (i.e., the Christian religion) affecting the American experience that is central to Tocqueville’s analysis. This may seriously taint the veracity of Hartz’s argument. For example, it might preclude him from accurately accounting for the lack of revolutionary and radical ideology in America (relative to Europe). Hartz views this absence to be caused by the lack of a “feudal tradition” and the presence of a “liberal idea” in America, but

\textsuperscript{17} Ibid., 91.
Tocqueville (in contrast) observes how restraint on radical ideology is actually the result of widespread adherence to Christianity in America and how this, in turn, bounds the imagination. At the very least, we would expect a Tocquevillean analysis like Hartz’s to explain its apparent contradiction with one of Tocqueville’s core principles of *Democracy In America: the importance of the Christian religion as a causal variable*.

Writing decades later and in response to republican critics of the liberal thesis, Joyce Appleby (in *Liberalism and Republicanism in the Historical Imagination*) argues that a language of liberalism developed in the late eighteenth century in order to make sense of the ever growing force of commerce in society:

> [B]y insisting that the only significant intellectual accommodation to change took place within a presiding paradigm, the revisionists [(e.g., J.G.A. Pocock and Lance Banning)] have made it difficult to recognize that alongside the Machiavellian conception of citizenship, order, and liberty there grew up another paradigm…Men did find the means of talking about commerce that over time produced a language totally unassimilable to the social grammar of civic humanism. Indeed, they were forced to do so in part because their political language had no means for discussing the early modern economy as it in fact operated.

According to Appleby, the earlier republican “Classical theory” or “civic humanism” failed to do this because it had conceptualized “the predominance of politics over all other aspects of social life.” Appleby maintains that the Jeffersonians transformed the old connotation of “republicanism” in the 1790’s (and during the early 1800’s) so that it

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22 Ibid., 334.
“embraced and celebrated the free individual. No longer seen as a threat, the emerging individualist had become the instrument of progress.”

A similar counter to the republican thesis is developed by Isaac Kramnick in his book, Republicanism and Bourgeois Radicalism. Against the republican advocates like Pocock and Wood, Kramnick argues the following:

The radicals of the later eighteenth century, both English and American, were much more likely to base their arguments on natural rights than on historical rights; they were preoccupied less with nostalgic country concerns than with very modern socioeconomic grievances. They shared a deeply felt sense that unreformed British constitution failed to serve the interests of the talented and hardworking middle class.

Kramnick further maintains that the importance of such “modern socioeconomic grievances” began to develop in the 1760’s. One cause of this was colonial discontent with being taxed without representation in Parliament. This pushed the colonists to move beyond the old republican “country ideology” and focus on “class-based categories…” (e.g., how “the talented and hardworking middle class” were not being served by the “unreformed British constitution”). The second cause was “the early years of the Industrial Revolution and the emergence of a new middle-class radicalism”. Although this second cause primarily affected politics in Britain, it helped inspire “a dramatic and decisive comeback” of “Lockean ideas” during “the 1760s and 1770s.”

Martin Diamond also develops a Straussian variant of the liberal regime theory when he suggests that Madison and the founders created a United States that would

23 Joyce Appleby, Liberalism and Republicanism in the Historical Imagination, 338.
25 Kramnick, Republican and Bourgeois Radicalism, 171.
26 Ibid., 172.
inculcate capitalist/commercial virtues. Diamond maintains that Madison had a vision for promoting and preserving a modern orthodoxy of civic virtues (i.e., an “American way” of capitalistic virtues fostered by freedom and the competition of different interests).\(^{27}\)

Although these scholars may be correct to identify liberal elements in the colonies/States during the late eighteenth century, it seems inappropriate for them to argue that the United States primarily had or immediately developed a liberal identity at its founding. Liberal elements like various individuals and groups valuing freedom of conscience, non-establishment of religion (e.g., Jefferson, Madison, and the Baptists), and a vibrant free market commercial system (e.g., Hamilton, Madison, and Marshall) existed at the time of the founding. However, as shown by Baylin, Wood, Pocock, and Sandel, republican elements also existed during this time. To some extent, Appleby and Kramnick concede as much, for both delay liberal development until late in the 18\(^{th}\) century. Kramnick dates its inception at sometime during the 1760s, but Appleby views it as developing in the 1790’s. Both, however, still have to contend with how republican elements were present in both decades. This challenge seems hardest for Kramnick due to his early dating of the liberal transformation. Although he argues for the 1760’s, there is significant evidence of vibrant republicanism during subsequent decades like the 1780’s. Appleby recognizes this fact and, hence, chooses a later date (sometime late in 1790’s and the first decade of the 1800’s) for “America’s” transformation. Even she, however,

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must struggle with counterfactual evidence such as key Jeffersonians (e.g., John Taylor of Caroline) who still advocated agrarian republicanism.

In assessing this debate between the respective advocates of the republican and liberal historical theses, Mark Noll comments that the issue is really “unwinnable”, for “the clash of interpretations has pushed understanding of the really existing historical situation toward greater flexibility, multivocality, and nuance.” 28 What the historians from each side had previously viewed as “discrete and competing principles” now appear “easier to see as overlapping, intermingled, and combing in ways not conforming to modern categories.” 29 Moreover, Noll cites how Gordon Wood, who still “defends the importance of discriminating between republican and liberal perspectives…” has come to recognize some the difficulty with this debate: “‘Classical republicanism in the eighteenth century was not a clearly discernible body of thought to which people self-consciously adhered. And what we call Lockean liberalism was even less manifest and less palpable.’” 30 Noll, then, employs Wood’s analysis to argue for the legitimacy of refraining from categorizing the founding identity as being either liberal or republican:

If, in Wood’s account, ‘None of the historical participants, including the Founders, ever had any sense that he had to choose between republican and liberalism, between Machiavelli and Locke,’” then neither should modern historians. “These boxlike categories of ‘republicanism’ and ‘liberalism’ are…necessarily dangerous distortions of past reality.” 31

Nevertheless, attempts to characterize the “American founding identity” continue.

In addition to the liberal vs. republican debate, others have suggested that the United

29 Ibid., 228.
30 Ibid., 228.
31 Ibid.
States really had a Christian normative identity at the time of the founding. In *The Myth of American Individualism*, Barry Shain argues that local-level America during the colonial and early founding years is better characterized as being Reformed Protestant in character. Also, James Hutson maintains (in *Religion and the Founding of the American Republic*) that the colonies/States during the revolutionary and founding period had a Christian character (albeit, the specific denominational identity would vary from colony to colony).

Such scholars cite significant evidence, and their works should be taken seriously. As readers will see, the current dissertation relies on both in Chapter Two.

Nevertheless, these scholars also tend to characterize the identity of the colonies and States as an aggregate whole, rather than looking at them as individual entities. Shain’s problem entails trying to characterize the local-level throughout the colonies as being Reformed Protestant:

It appears that, based on lived testimony as well, most 18th-century Americans cannot be accurately characterized as predominately individualistic or, for that matter, classically republican. The vast majority of Americans lived voluntarily in morally demanding agricultural communities shaped by reformed-Protestant social and moral norms.\(^{32}\)

Although Shain defines the “reformed tradition” of Protestantism very broadly (i.e., “a broad grouping of Calvinist-inspired denominations”\(^{33}\)), this obscures much of the particularity that distinguishes many of the Protestant denominations during the colonial and founding periods. Shain’s broad definition, for example, would include

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\(^{33}\) Ibid., xv(N).
Massachusetts Puritan Congregationalists, Presbyterians, and the Virginia Anglicans, but (as will be discussed in Chapter Two of this dissertation) there are notable thick-level differences between the theological-moral beliefs of these sects.

In contrast, although Hutson’s vast knowledge of American Christianity helps him avoid Shain’s overgeneralization, he still errs by trying to impose an identity on “America” as a “nation”. More will be said below about the units of analysis that are appropriate and inappropriate for speaking about the colonies and States. Here it is worthwhile noting the two-fold nature of Hutson’s error. First, he inappropriately suggests that the new States formed a nation, which was managed by Congress, at the time of the Revolution. In his fourth chapter entitled, “Religion and the Congress of the Confederation, 1774-1789”, Hutson’s first sentence is as follows: “The United States’ first national government was the Continental Confederation Congress, which functioned from 1774-1789.” The oversimplification is obvious. First, the Continental Congress lacked any legal authority before the Articles of Confederation were finally ratified in 1781. Between independence in 1776 and the Articles in 1781, Congress was merely a cooperative institution for coordinating affairs among the new States, and it lacked the formal delegated authority that would be established through the States (treaty) compacting under the Articles. Hutson, thus, errs by presenting “Congress” as a contiguous institution between 1774 to 1789, for this ignores how its legal nature and status fundamentally changes after 1781. Second, Hutson’s claim that Congress between 1774 and 1789 is a “national government” is also incorrect in another respect. Even after

34 Hutson, Religion and the Founding of the American Republic, 49.
the Articles were ratified in 1781, Congress was still just a legal body for deciding the terms (certain powers delegated to Congress—e.g., common defense and economic issues) of the Articles as a treaty linking multiple sovereign States into a confederate union. This confederate nature of Congress continued until the Constitution was ratified and established a new federal government in 1789. So, Congress could not have been a “national government” during the range of dates provided by Hutson. It was always just a confederate body similar to today’s United Nations, which relies on members to give it effective powers. The Confederate Congress relied on the States to provide it with tax revenues and compel their citizens to abide by its regulations; this Congress had little effective power over the States’ individual citizens. The status of the States in relation to the union will be further discussed in Chapters Three and Four of this dissertation; Chapter Four will consider how the Constitution merely established a federal government, not a national government.

Given the influence of men like Witherspoon and James Wilson on the revolutionary and founding period, it is not surprising to find some who argue that America derived a normative identity from Scottish Enlightenment thought. In his book *Inventing America: Jefferson’s Declaration of Independence*, Gary Wills, for example, argues that the ideas of Scottish Enlightenment thinkers like Thomas Reid and Francis Hutchenson were pivotal influences on Jefferson and his writing of the Declaration of Independence. Arthur Herman apparently summarizes Will’s argument in his own

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book, *How the Scots Invented the Modern World*, which is written more than two decades after Will’s *Inventing America*:

While Jefferson never attended any Scottish university, his alma mater at William and Mary College had been recently overhauled on the Scottish model. His closet teacher, William Small, had been a native-born Scot educated at the University of Aberdeen. The Most interesting phrases in his draft of the declaration, “we hold these truths to be self-evident” and “the pursuit of happiness,” owed their lineage to the Scottish school.³⁶

Specifically, according to Wills, the phrase including “self-evident” comes from Thomas Reid’s “common sense” theory, and the phrase “pursuit of happiness” is derived from Francis Hutchenson’s “moral sense” theory.³⁷

Although Wills’ book is extremely interesting, it falls short of being convincing. Wills discounts obvious evidence, which is provided by Jefferson himself, about the Declaration’s intellectual pedigree, especially when this evidence counters Wills’ own thesis. For example, Wills discounts Jefferson’s statement that Locke was one of the thinkers who influenced his writing of the Declaration. Jefferson’s recollection about the sources employed in Declaration is as follows:

Resolved it is the opinion of this Board that as to the general principles of liberty and the rights of man, in nature and in society, the doctrines of Locke, in his “Essay concerning the original extent and end of civil government,” and of Sidney in his “Discourses on government,” may be considered as those generally approved by our fellow citizens of this and the United States, and that on the distinctive principles of the government of our State, and of the United States, the best guides are to be found in 1. The Declaration of Independence, as the fundamental act of union of these States.³⁸

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³⁸Wills, *Inventing America*, 181-192 and 244-255.

*Jefferson to President and Directors of the Literacy Fund, Minutes of the Board of Visitors at the University of Virginia, October 7, 1822, in Thomas Jefferson: Writings; Autobiography, A Summary*
All its [(i.e., the Declaration’s)] authority rests then on the harmonizing sentiments of the day, whether expressed in conversations, in letters, printed essays, or in the elementary books of public rights, as Aristotle, Cicero, Locke, Sidney, &c. 39

In reference to the latter of the two passages, Wills argues that Jefferson was “repudiating the charge that he had plagiarized Locke” and, then, makes the following comments:

Four things are interesting in this 1814 passage: 1) The only time Jefferson links Locke’s name with the Declaration, he is minimizing a connection first brought up by another. 2) He makes the customary paring of Locke with Sidney as types of the whig ancestry claimed for the Revolution. 3) He is deliberately citing works of general regard, rather than a set of specific influences on him. 4) The latter point is confirmed by the inclusion of Aristotle, not one of Jefferson’s favorite authors. 40

The problem with this critique is that it rests on the premise that Jefferson was simply not being honest about the intellectual influences he employed when writing the Declaration. This, however, makes no sense, especially if he is seeking to avoid the charge of plagiarizing Locke. Would not it have been more persuasive for Jefferson to simply make the case that Wills is trying to make (e.g., Jefferson: “Actually, Sir, I was influenced by the famed Scottish Enlightenment thinkers, Francis Hutchenson and Thomas Reid...”), rather than mention Locke at all (especially if he did not really use Locke)? Instead, in both the above Jefferson passages, readers see Jefferson make no reference to the Scottish Enlightenment thinkers that Wills attributes to him. How strange this is, if Wills is correct. Jefferson, however, does mention Locke. 41 Instead of just taking Jefferson’s

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40 Wills, Inventing America, 172.
41 In fairness to Wills and Herman, a case can probably be made that Jefferson’s above retrospective rhapsodizing about the Declaration and its intellectual pedigree is exaggerated and overdone.
word on the matter, Wills raises readers’ eyebrows by building his Scottish Enlightenment thesis on speculative circumstantial evidence (e.g., the facts that Jefferson’s pre-1770 writings were burned in a tragic fire, and that Jefferson had Scotch educated mathematics professor as a mentor while at William and Mary, etc.).

The above mentioned secondary texts are just examples, and others can also be identified. Some truth is found in many of these different views about the various religious and philosophical elements at play during the founding period. This realization, however, merely leads to an eclectic view of the America’s founding identity. Such a

As will be discussed in Chapter Three, Jefferson had to have known at the time that the draft of the Declaration that was finally approved by Congress clearly was not a “fundamental act of union of these States”, for the overall document and resolutions of the Congress made this manifest.

Second, it is doubtful that Jefferson had any significant time or textual resources available for consulting the great philosophers mentioned when he actually drafted the Declaration. Pauline Maier makes this point when showing the significant time constraints that were on Jefferson and his fellow committee members in Congress. See Pauline Maier, American Scripture: Making the Declaration of Independence (New York: Vintage Books, A Division of Random House, Inc., 1997), 99-105. Maier argues that Jefferson probably did not have time to visit the local library, and he just employed the texts in his possession or those he knew from memory. Ibid., 125. If this is true, then it is also doubtful that Jefferson had sufficient time to engage in analytical philosophical introspection. According to Maier, the two texts Jefferson did have and conceivably used were his draft to the Virginia Constitution and George Mason’s Virginia Declaration of Rights, which includes the phrase “pursuing and obtaining happiness…” Ibid., 125-128. It is Maier’s contention that Jefferson merely shortened, polished, and incorporated Mason’s language for aesthetic purposes: “What did Jefferson mean? The obvious answer is that he meant to say more economically and movingly what Mason stated with some awkwardness and at considerably greater length… In general, however, his rewriting of Mason produced a memorable statement of the same content. Less was more.” Ibid., 134.

Nevertheless, Maier leaves open the possibility that Jefferson could have been mindful of various philosophical works and concepts from his previous studies when writing the Declaration. If this is true, however, readers of the Declaration have no choice but to take seriously its author’s own claim that Locke (rather than the Reid and Hutchenson whom the author doesn’t mention in this context) influenced the writing of the Declaration.

With respect to the phrase “self-evident” in the Declaration, David Hackett Fischer shows that this was actually added as a revision of Jefferson’s original language, “sacred and undeniable”. See David Hackett Fischer, Liberty and Freedom: A Visual History of America’s Founding Ideas (Oxford, U.K.: Oxford University Press, 2005), 126. According to Fischer’s, this change was made due to objections made by the Quakers about “sacred and undeniable”. Fischer maintains that “self-evident” was more in keeping with Quaker ideas of “religious liberty”, “separation of church and state”, and the “Quaker idea of reason as a self-evident ‘light within.’” Ibid., 126. If this is true, then it further counters the thesis proposed by Wills and Herman.
multi-varied thesis, however, does not portray for a neat and coherent normative identity that is seemingly desired by many contemporary theorists.

Nevertheless, it is still helpful to make intelligible sense of the various and disparate intellectual influences of thought and faith. The author of the current dissertation wants to consider two factors that might help accomplish this. First, in accordance with Barry Shain, it seems helpful to distinguish between the views of various famous framers (e.g., Madison, Hamilton, Wilson, etc.) and those perspectives of a vast number of local-level communities. Shain argues that adherence to secular political theories like republicanism and modern rationalism was largely found among well known framers. According to Shain, many key Federalist defenders of the Constitution (e.g., Alexander Hamilton) were republican in their views about sacrificing short-term private interests for the public good; they believed that the long-term result of such private sacrifice would include achieving fame. Although Shain does not explicitly focus on the influence of Scottish Enlightenment thought, he seems to categorize some framers (e.g., James Wilson) who advocated such ideas as being modern rationalists.

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43 This author, however, disagrees with Shain’s claim that individualism was a new concept in the 1790’s. Shain argues that James Madison advocated a moderate form of individualism, which was very new by the last decade of the eighteenth century and still far from the modern (more radical) individualism of today. In particular, Shain notes Madison’s promotion of the government protecting “‘rights of property’” and “more generally those individual rights likely to be threatened by democratic majorities…” as key evidence (pp. 144-145). The current paper, however, concurs with both Walter McDougall and David Hackett Fischer that individualism was part of the thick-level values of the Scotch-Irish who settled much of the western frontier in the Southern colonies/States in the mid to late part of the eighteenth century. See Walter A. McDougall, Freedom Just Around the Corner: A New History, 1585-1828 (New York: Harper Collins, 2004), 154-155 and David Hackett Fischer, Liberty and Freedom, 75-85 and 125.

Finally, in contrast to such famous elites, local-level community was largely Christian and communalist in nature:

[M]ost 18th-century Americans cannot be accurately characterized as predominately individualistic or, for that matter, classically republican. The vast majority of Americans lived voluntarily in morally demanding agricultural communities shaped by reformed-Protestant social and moral norms.  

This passage from Shain’s analysis was already cited above. The current paper adopts part of Shain’s view, but it also qualifies it. First, in contrast to Shain, this paper observes the fact that there were multiple Christian thick-level moral and religious views in existence during the late eighteenth century. This will be further discussed in Chapter Two. So, it is inappropriate to categorize them all under the label, “reformed Protestant social and moral norms.” Instead, there were varying Christian thick-level identities (e.g., Anglican, Quaker, Puritan Congregationalist, and Scotch-Irish Presbyterians). Second, this dissertation will argue that the Scotch-Irish Presbyterian culture had both communalist and individualist tendencies in their respective habits of clannishness and love for independence. This also will be discussed in Chapter Two.

Further nuance becomes necessary when considering a second factor that helps develop an intelligible taxonomy of secular and religious thought during the colonial and founding periods. This entails distinguishing between the different thick-level beliefs that seemed to dominate in the different colonies/States. Chapter Two will further develop

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47 As will be discussed in Chapter Two, John Murrin corroborates this when identifying different “value systems” in the colonies/States during the late eighteenth century; two of these were “Anglican Moralists” and “Calvinist orthodoxy.” See John Murrin, “Religion and Politics in America from the First Settlements to the Civil War.”, in *Religion and American Politics: From the Colonial Period to the Present*, 2nd ed., edited by Mark A. and Luke E. Harlow (Oxford, U.K.: Oxford University Press, 2007), 30.
this. Here readers will see thick-level differentiation between Puritan Congregationalist Massachusetts, Quaker Pennsylvania, and Anglican Virginia. Such distinctions make it reasonable to categorize different colonial/State societies based on their different thick-level beliefs. So, instead of trying to link together the diverse religious and philosophical values of the late eighteenth century so as to discover the dominant American “national” paradigm, it seems more appropriate to find the thick-level agreement that was dominant within (and, thus, contributed to the identity of) each colony/State as its own people or society during the mid to late eighteenth century.

Such thinking is further supported and given an additional dimension by appropriate doubts concerning the whole project of searching and arguing for a normative identity for the United States as a “nation” during the time of its founding. Such a project unquestioningly presumes that the United States was a nation at or just after its founding, and this assumption is very questionable. Instead and as will be argued in Chapters Three and Four, the United States seems to have been founded as a federation (or confederation) among sovereign State-peoples.48 The Declaration of Independence was a joint statement to the world that the former thirteen British colonies were now “Free and Independent States.” The Articles of Confederation established a legal confederation among the sovereign State-peoples, but one that lacked a federal government with power over individual citizens. The Constitution maintained the confederation among the

48 In this dissertation, State-people refers to the people of a State. Later Chapters will suggest that each State-people maintains both its identity as an independent political society and its full sovereignty within the United States constitutional system. I am grateful to James Jackson Kilpatrick for his book, The Sovereign States: Notes of a Citizen of Virginia (Chicago: Henry Regnery Company, 1957), 18; reviewing Kilpatrick’s term “people-as-States” helped me understand the importance of “State-people” as a similar concept.
sovereign State-peoples, but it was also an agreement to establish a federal government that would share powers with each of their State governments. Such an agreement, however, did not undermine the sovereignty of each of the State-peoples. Just as each agreed to delegate or “entrust” a share of its power to the federal government (reserving the remainder for itself as a State-people and/or entrusting some of this reserved power to its State-government), each sovereign State-people was also free to reclaim the powers it had so entrusted. If all of this is true, then it seems a mistake to view the United States as being founded as a single nation and a single people. A more accurate description is that the United States are founded as multiple sovereign peoples (or societies) who had a federal political affiliation with one another via a mutual agreement that was detailed in the Constitution.

Thus, in contrast to many of the above scholars who seem to be searching for a “foundational myth” (to borrow from Barry Shain)\(^4^9\) for the American “nation”, the author of the current dissertation examines the founding of varying colonial/State societies (with different thick-level moral and religious beliefs) that each became sovereign after seceding from Great Britain and, then, entered into federal union with one another such that each still legally retained its independent sovereignty. Assuming Barry Shain is correct that key secular ideologies were predominant among the famed elites whereas the culture of the local-level was marked by religious communalism, Chapter Two will consider the differing religious-moral perspectives that dominated in some of the different colonies during the colonial and founding periods. Chapters Three and Four

will, then, consider how these differing colonies/States became different sovereign political societies who ultimately entered into a federal union.

Outline and Content of the Dissertation:

The structure of this dissertation is as follows. Chapter One is a theoretical examination of the above described conditions of socially cohesive community. In Chapters Two, Three, and Four, the major historical issues of the above thesis are explored. Chapters Five and Six develop a normative case for why such centralization is problematic. Finally, in Chapter Seven, the dissertation concludes by examining the thick-level diversity and heterogeneity of today’s United States and, then, argues why and how the U.S. should be re-federalized.

Chapter One, “A Theoretical Examination of Social Cohesion and the Conditions that Make It Possible”, considers the concept of socially cohesive community from an analytical perspective. The discussion analyzes what this concept means and implies. To accomplish this, the chapter employs insights from several scholars such as Aristotle, Alexis de Tocqueville, Hannah Arendt, John Finnis, J. Budziszewski, Patrick Devlin, and Robert P. George. The chapter’s central finding is that there are four significant characteristics of socially cohesive community: (1) it is an intrinsically valuable mode of community; (2) it is facilitated by and requires the sharing of thick-level agreement that is often moral-theological in nature; (3) it is very local in nature (i.e., involves face-to-face relationships); and (4) it is frequently generated by participation in (local) politics.
The second chapter, which is entitled “Community and Religion: reflections on the possibility of social cohesion within each of the American Colonies/States based on the religious-moral worldview that was dominant in each society”, examines the possibility of social cohesion based upon a shared thick-level worldview (i.e., moral-theological) within local-level American communities during the colonial and founding periods. In doing so, the chapter will consider the following topics. First, there is an analysis of how various colonial compacts, constitutions, and legal codes reveal the thick-level religious identity and agreement of the various colonies. Second, the chapter examines how the different colonies/States and/or regions had different thick-level, religious-moral characteristics due to the different types of sects that were dominant within each (e.g., Congregationalist Massachusetts, Anglican Virginia, Quaker Pennsylvania). Finally, the chapter considers how some of the sects, which were dominate in various colonies, did not tolerate the other sects. All of this suggests that there was not thick-level agreement among the peoples of the different colonies/States, and this points to the folly of considering them as one unified or aggregate “national” culture.

The third chapter, “‘Free and Independent States’: why the Declaration of Independence launched thirteen separate sovereign States and did not express a common thick-level national creed”, analyzes the political and normative nature of the Declaration of Independence. Specifically, I argue that this should be viewed as a formal announcement of the sovereign independence of the thirteen new states, rather than a creedal statement of normative ideas for governing the future American “Union.”
Although the new independent and sovereign States might have all adhered to various normative statements in the Declaration (e.g., “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”), such agreement would probably have been both thin-level in nature (i.e., capable of being further differentiated into varying and contradictory thick-level conceptions) and about the corporate-level rights possessed by each of the State-peoples. Moreover, each State-people probably had an independent, thick-level conception of these corporate rights.

In the fourth chapter, “Reflection on the States’ Constitutional Compact of 1787-1790: why the States remained sovereign after they created the Constitution and why the United States was not a nation with a thick-level common good”, I argue that the Constitution was founded as a compact among sovereign States, which maintained their full sovereignty after the Constitution was ratified and the new federal government was realized. This case is based upon significant evidence from (1) the text of the Constitution, (2) the relation between the Constitution, the Articles of Confederation, early foreign treaties, and the Declaration of Independence, (3) the many ratifying conventions in which the State-peoples became the law-givers who enacted and gave the original and legally-binding meaning to the Constitution; and (4) secondary commentary (e.g., John Taylor of Caroline Virginia, John C. Calhoun, W.E. Bradford, James Kirkpatrick, and Forrest McDonald) concerning the above items and relevant jurisprudential issues. In maintaining their independent sovereignty, the State-peoples maintained their identity as distinct political societies; they did not merge into a single
“American people” or national community of individuals. Hence, the “Union” was not a national community of citizens with a single common good; rather, it was only a union of separate State-peoples who were each distinct and basic sovereign units. All State-peoples had the federal government as a part of their various systems of governance, but the federal government had very limited functions and only those concerning issues related to foreign policy and some inter-State relations. The commonality of “Union”, then, was a common good among State-peoples. It was not a national common good shared among individual citizens; even more so, it was impossible to conceptualize individual citizens of different States as sharing a thick-level national common good (e.g., shared pursuit of a set of thick-level values).

The fifth chapter, “Centralization and Its Negative Implications: The Decline of Social Cohesion at the Local-Level Within the American System”, begins this dissertation’s examination of the normative concerns with the centralization of political power that has occurred in the United States during its two hundred year history. It begins with a brief consideration of how the United States were effectively, but not legally, transformed from a vibrant federalist system into a de-facto unitary system. This includes examining both the States’ reserved powers and how each State can entrust some such powers to inner-state localities (e.g., counties and townships). It also examines the major historical stages that contributed to centralization. Finally, the chapter considers two major normative problems associated with centralization: (1) the loss of a mode of community that was instrumentally necessary for successfully meeting many people’s
social and psychological needs; and (2) the loss of a mode of community that is intrinsically valuable to the human person and, hence, perfects his or her being.

Chapter Six, “Reflections On the Declining Ability to Resolve Sensitive Public Policy, On Subsidiarity, and On Natural Law Obligation To Respect Constitutional Law”, examines several important issues concerning the normative problems of centralization. First, it considers how centralization has made it increasingly difficult to resolve "sensitive" or controversial policy issues (e.g., abortion), whose stable resolution within a community requires the community to have thick-level moral agreement and social cohesion. This is true because centralization has taken policy power over sensitive issues away from the local level (i.e., a combination of a State and its localities) where social cohesion is possible and, in turn, transferring such power to the government of the non-socially cohesive federal level. Second, the chapter also examines how the subsidiarity principle provides a normative basis against the centralization of sensitive or controversial issues, given the long-term practical realities and character of federal and State governments. Finally, this chapter provides a natural law argument against violating the constitutional compact through Congress unconstitutionally usurping policy power over sensitive issues. Readers will see how this argument can be maintained even if one assumes (for the sake of argument) that such centralization could better uphold the subsidiarity principle with respect to advancing moral truth.

Chapter Seven is the conclusion of this dissertation, and it contains both an analysis and argumentation. An analysis is undertaken of the moral heterogeneity in the United States today and the widespread lack of local community with thick-level
agreement and social cohesion. Furthermore, this chapter considers the possibilities for re-establishing such local communities. Most importantly, the chapter considers the issue of how re-federalization (e.g., returning to States their former “reserve powers”—e.g., power to determine policy for sensitive domestic issues like abortion) could help re-establish local communities with thick-level agreement and the possibility of social cohesion. Here an argument is made that the net benefits that re-federalization would provide to States, the States’ localities, and the federal government puts a thumb-on-the-scale in favor of returning the states’ constitutionally recognized reserved powers. Based on this insight, a practical plan is presented for how such re-federalization might be implemented.
Chapter One, A theoretical examination of social cohesion.

There are four important characteristics of a socially cohesive community considered in this dissertation: (1) it is an intrinsically valuable mode of community; (2) it requires and is facilitated by the sharing of morals and virtues; (3) it is very local in nature (i.e., involves face-to-face relationships); and (4) it is frequently generated via the participation in local politics. In demonstrating these points, I will draw from an eclectic group of scholars such as Aristotle, Patrick Devlin, Robert George, John Finnis, J. Budziszewski, Hanna Arendt, and Thomas Jefferson.

Since the first two characteristics of socially cohesive community stem from its nature, one should begin by considering the essence of social cohesion. Aristotle addresses social cohesion as a mode of friendship, and he describes it as “concord” or “political friendship.” Aristotle’s high esteem for the good of friendship, in general, is evident in introductory chapter of Book VIII in *The Nicomachean Ethics*:

> After what we have said, a discussion of friendship would naturally follow, since it is a virtue or implies a virtue, and is besides most necessary with a view to living well. For without friends no one would choose to live, though he had all other goods…

The passage in general, and especially the reference to friendship as a virtue, implies that Aristotle views friendship to have the same level of goodness or value as virtue. In Book I, Chapter 7 of the same treatise, Aristotle suggests that virtue can be valued both instrumentally (i.e., for its usefulness as means to realizing happiness) and also intrinsically (i.e., for its own sake):  

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Now such a thing happiness, above all else, is held to be; for this we choose always for itself and never for the sake of something else, but honour, pleasure, reason, and every virtue we choose indeed for themselves (for if nothing resulted from them we should still choose each of them), but we choose them also for the sake of happiness, judging that through them we shall be happy.\footnote{Aristotle, \textit{The Nicomachean Ethics}, 12.}

From this, it seems to logically follow that Aristotle probably also views friendship to be valuable for its own sake.\footnote{Aristotle corroborates this insight in Book IX, Chapter 9, where he explains how friendship (like virtue) is valuable as a means for securing happiness: “If, then, being is in itself desirable for the supremely happy man (since it is by its nature good and pleasant), and that of his friend is very much the same, a friend will be one of the things that are desirable. Now that which is desirable for him he must have, or he will be deficient in this respect. The man who is to be happy will therefore need virtuous friends.” See Aristotle, \textit{The Nicomachean Ethics}, 241. Here Aristotle suggests that the virtuous man finds his own being inherently desirable because it is good and pleasant; thus, he will also find his friend’s being so desirable because his friend (as virtuous person) also is good and pleasant. Since having what is desirable is a necessary condition for realizing happiness, the virtuous man must have virtuous friends in order to secure his happiness. Thus, just as virtue is said to be instrumentally valuable as a means to happiness in Book I, Chapter 7, here Aristotle asserts that friendship is a necessary means to realizing the happiness of the virtuous person. This, again, suggests that Aristotle ranks friendship on the same value-level as virtue, which is both instrumentally and intrinsically valuable. As an aside, it is worth noting the significant possibility that Aristotle views virtue and friendship to also be constitutive facets of happiness, as well as instruments for its realization. For, it is logically possible to maintain that friendship and virtue are necessary conditions for realizing happiness because they are inherent facets of happiness. In fact, the wording in the passage above might even suggest as much: “but we choose them also for the sake of happiness, judging that through them we shall be happy…” Ibid., 12; in other words, we are happy “through” realizing such intrinsically valuable goods because these are actually constitutive elements of happiness.}

Aristotle further differentiates his concept of friendship. One important mode of friendship is “concord” or “political friendship.” Aristotle describes it in the following passages from (respectively) Book VIII and Book IX of \textit{The Nicomachean Ethics}:

\begin{quote}
Friendship seems too to hold states together, and lawgivers to care more for it than for justice; for concord seems to be something like friendship, and this they aim at most of all, and expel faction as their worst enemy; and when men are friends they have no need of justice, while when they are just they need friendship as well, and the truest form of justice is thought to be a friendly quality.\footnote{Ibid., 192-193.}
\end{quote}
Concord also seems to be a friendly relation… It is about things to be done, therefore, that people are said to be in accord, and, among all these, about matters of consequence and in which it is possible for both or all parties to get what they want…

The first passage clearly suggests that “concord” implies the absence of faction (i.e., the absence of a significant and damaging competition among conflicting interests within a political community). Furthermore, the passage’s description of the relationship between “friendship” and “justice” suggests that “concord” as a mode of “friendship” entails a special bond that motivates those who are in concord with one another to mutually pursue one another’s interests such that they are naturally just to each other. On the positive side (the second passage), concord entails “accord” on “matters of consequence” where the parties involved can all attain what they want (i.e., they all agree on or want the same thing).

In an attempt to further explicate Aristotle’s definition of “concord,” J. Budziszewski writes the following:

Civic concord means much more than the absence of faction. It means that the citizens are neighbors instead of strangers, supporting each other in a close-woven fabric of crisscrossing bonds. It means that they delight in small sacrifices for the common good and are not so obsessed with keeping score. It means that voluntarily and without direction they teach the young, provide for the old and look out for each other.

According to this interpretation, “concord” resembles the description of intrinsically valuable community (i.e., one that is valued for its own sake) that Robert George (in his book, Making Men Moral) attributes to Patrick Devlin in the famous Hart-Devlin debate:

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54 Aristotle, The Nicomachean Ethics, 231.
55 Please see footnote #56 (on the next page) for an account of the relationship between “concord” and “justice.”
It is community considered as something intrinsically valuable—a state of affairs which is marked by a distinctive self-understanding among members who in fact identify their own interests and well-being with that of others with whom they live and to whom they are thus integrally related…\(^{57}\)

When considering the both passages above, we see a striking parallel: both suggest an interpersonal relationship of people who are closely integrated with one another.

Budziszewski suggests this when describing Aristotle’s “concord” to entail a relationship among citizens as “neighbors” connected to one another via a “close-woven fabric of crisscrossing bonds.” Devlin (according to George’s interpretation) seems to be making the same point when describing a relationship among people who are “integrally related.”

For Devlin, the “integration” or (to use Budziszewski’s metaphorical language) “close-woven fabric of crisscrossing bonds” among people is realized through such people “identify[ing] their own interests and well-being” with one another. In order for a person to integrate with another person, he or she must be able to “identify” or incorporate (i.e., take on) the other’s “interests and well-being” as his or her own “interests and well-being.”\(^{58}\)

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\(^{58}\) Furthermore, in assuming that Devlin’s “social cohesions” (according to George’s interpretation) and Aristotle’s “concord” (according to Budziszewski’s interpretation) are sufficiently similar, we can discover a basis for further understanding why “concord” as a mode of friendship is inherently compatible with and promotes justice. As was already stated above, “concord” as a mode of “friendship” entails a special bond that motivates those who are in concord to also mutually pursue one another’s interests such that they are naturally just to each other. Why do people in “concord” (as friendship) mutually pursue one another’s interests in this way? George’s interpretation of Devlin suggests the answer. The special bond of “concord” or “political friendship,” which motivates people to automatically treat one another justly as each pursues his or her own interests, seems to entail each person’s identification with one another’s interests and well-being. As a person integrates with another via identifying that other’s “interest and well-being,” the person will naturally pursue the other’s interests because these have now also become the person’s own interests. Through such integration, then, a person’s own interests and well-being inherently entail pursuing a moral requirement “of practical reasonableness” that “excludes arbitrary self-preference in the pursuit of good.” See John Finnis, *Natural Law and Natural Rights* (Oxford, UK: Clarendon Press,
Based on this identification of Aristotle’s and Devlin’s conceptions of (respectively) “political friendship” and “social cohesion,” we can extrapolate additional insights from these concepts. Specifically, we come to see how such community is both intrinsically valuable and requires participants to share the same values (i.e., have a thick-level of agreement).

As suggested above, people become members of socially cohesive community through integrating with one another in the sense of identifying (i.e., incorporating) with one another’s well-being and interests such that other members’ well-being and interests becomes constitutive of one’s own. As seen in the above passage, Robert George makes this point during the process of interpreting Patrick Devlin’s position on socially cohesive community (or “social cohesion”). For convenience, George’s relevant passage is cited again below:

It is community considered as something intrinsically valuable- a state of affairs which is marked by a distinctive self-understanding among members who in fact identify their own interests and well-being with that of others with whom they live and to whom they are thus integrally related.\(^{59}\)

Here George describes socially cohesive community (i.e., one in which members “identify” or incorporate other members’ “interests and well-being” as their own

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1980), 164 and 106-108. For additional discussion on Finnis’ articulation of how practical reasonableness excludes having “arbitrary self-preference in the pursuit of good,” please see notes below.

As John Finnis suggests the keeping of this moral requirement is “closely related” to the “requirements of justice,” which are the “concrete implications of the basic requirement of practical reasonableness that one is to favor and foster the common good of one’s communities.” (Finnis 164) When people in a community live in “concord” with one another, they integrate and, hence, don’t arbitrarily have “self-preference in the pursuit of good” in their dealings with one another. Since this reasonable concern for the interest and well-being of others is projected toward the members of the community as a whole, it will take the form of a reasonable concern for advancing the community’s “common good,” which all members have an interest in promoting. Thus, people in a community having “concord” for one another will ultimately entail people living in accordance with the “requirements of justice.”

\(^{59}\) George, Making Men Moral, 69.
“interests and well-being”) as being intrinsically valuable. George’s interpretation of
Devlin, then, suggests that socially cohesive community is “intrinsically valuable” (i.e.,
valuable for its own sake).

Such intrinsically valuable community can be deemed desirable independently of
its usefulness for pursuing another end and/or giving pleasure to its participants. In
Natural Law and Natural Rights, John Finnis identifies the intrinsic value of the various
manifestations of friendship community (e.g., socially cohesive community) as its
common good. Finnis claims generally that the “common good” of a community is its
members’ “shared conception of the point of continuing co-operation.” Moreover, he
specifically identifies the common good of friendship community as “mutual self-
constitution, self-fulfillment, self-realization” of the friends such that “what [friend] A
wants for himself he wants (at least in part) under the description ‘that-which-[friend] B-
wants-for-himself’, and vice versa.” In other words, the common good of friendship
community is participating in the cohesion or integration among members of such
community (i.e., mutual self-fulfillment following from and entailed in mutual
identification of one another’s well-being and interests) that can be deemed as valuable
by each of the members for its own sake (i.e., independently of its usefulness or the
degree it induces pleasure).

Another important facet of the integration process in socially cohesive community
is that such community requires the sharing of certain morals or virtues. As George

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60 Finnis, Natural Law and Natural Rights, 153.
61 Ibid., 141.
suggests in his interpretation of Devlin, the process of people integrating with one another (via identifying with each other’s well-being and interests) also entails them identifying with one another’s morality:

The identification of one’s own interests and well-being with that of others to whom one is thus integrally related is essential to community (as it is to marriage) considered not merely as instrumentally valuable (whether for the sake of peace, order, prosperity, prestige, or any other extrinsic goal) but as intrinsically worthwhile. But such an identification, Devlin supposed, depends upon the integration of members of a society around shared moral principles. Where the conditions of such integration are destroyed, social cohesion, considered as an end-in-itself, and thus as in itself a reason for coordinated activity, is lost.62

In addition to emphasizing the intrinsic value of community (i.e., socially cohesive community), the passage asserts that the identification process of such community requires (i.e., “depends on”) “the integration of members of a society around shared moral principles.” Morals determine whether or not people’s conception of their well-being and interests are in conflict because morals direct us in how we should conceptualize and pursue our well-being.63 We can see this in controversial areas of our pluralistic society. When two people have contravening morals, their conception of how to pursue their interests and well-being often conflict. In the abortion controversy, for example, people who view the abortion to be a categorical moral wrong that should be legally prohibited and otherwise discouraged will seek to realize their interests and well-being in a manner that assists with (or, at a minimum, does not hinder) obstructing or discouraging the practice; sometimes such people choose to undergo significant sacrifices

63 For more on the relationship between moral norms and human goods, please review footnote #62.
to their well-being (e.g., risking their physical and/or psychological health, forgoing opportunities to advance a firmly held life-plan, etc., via completing unwanted pregnancies). Whereas, those who view abortion to be moral (if not a liberating alternative for women) will seek to realize their well-being and interests in a manner that helps (or, at a minimum, does not hinder efforts) to secure the practice. In such cases, two people with opposing morals will have opposing conceptions of their well-being and interests; hence, they will be unable to fully integrate in the sense of identifying with one another’s well-being and interests.  

There are three supplements to the above reflection. First, the shared principles, which are required for the integration process of socially cohesive community, must be specific moral norms, not generalized moral norms that have abstract meanings with vague application to practical concerns. It is easy, for example, to find widespread agreement about the Golden Rule (i.e., act toward others as you would want them to act toward you) as a moral principle. Such a general principle, however, may not be a relevant point of demarcation between people whose morality is similar enough for

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64 This seems partially corroborated by C.S. Lewis’ analysis of friendship in The Four Loves. Here Lewis argues that friendship is actually quite blind to differences in socio-economic status, family, and other factual background issues; instead, it seems entirely dependent upon agreement on beliefs or “truth.” As Lewis writes, “Friendship, unlike Eros, is uninquisitive. You become a man’s Friend without knowing or caring whether he is married or single or how he earns his living. What have all these ‘unconcerning things, matters of fact’ to do with the real question, Do you see the same truth? In a circle of true Friends each man is simply what he is: stands for nothing but himself.” C.S. Lewis, The Four Loves (New York: Harcourt Brace & Company, 1988), 70.

Although Lewis might be correct (in principle) about the “uninquisitive” nature of friendship with respect to externals, the development of friendship (in practice) might actually correlate with the very externals to which friendship is also blind. Although it is possible for friendship to develop among people with the same moral beliefs and who have very different external backgrounds, this might be a rare occurrence if people’s beliefs tend to correlate with the external facts of their background (e.g., the type of family that they come from).
integration and those whose morality is just too incommensurable for such friendship. Instead, the point of demarcation is probably a more specific application of the Golden Rule like a specific rule enjoining person A to undergo significant sacrifice X for the sake of person B because that is how person A would want to be treated if similarly situated to person B. 65

65 The first step in seeing this entails understanding that a person’s moral principles are integral facets of his or her conception of what constitutes his or her well-being. This is elucidated in the following line of reflection. Moral principles can either be second or third level practical reasons for action. First level reasons are provided by basic human goods themselves. The intrinsic value of such goods provides fundamental reasons for acting to realize them. Since, however, there are countless ways of realizing the seven basic human goods, choices must be made about what goods and particular ways of realizing them. How does one make this choice? Since the basic human goods provide the highest-level (first-level) reasons for action and human practical reasonableness cannot appeal to a higher standard for adjudicating their relative value (i.e., one that could guide choices about what to pursue and what to forgo), it is necessary to look to lower levels (i.e., second and third levels) of practical reasons for guidance. Such lower level reasons are moral principles. Second-level principles are often very general in form. They specify the type of choosing that practical reason requires in order for one to “choose and otherwise will those and only those possibilities whose willing is compatible with a will toward integral human fulfillment.” See John Finnis, Joseph Boyle, Jr. and Germain Grisez, Nuclear Deterrence: Morality and Realism (Oxford: Clarendon Press, 1987), 283, quoted in George, Making Men Moral, 16.

Finnis elucidates several of these general requirements of reasonableness, which is itself a basic human good, in Natural Law and Natural Rights. Three such examples are the following: (1) In choosing, human persons ought to see, plan, and pursue our life as “A COHERENT PLAN OF LIFE” with respect to the level of general commitments, and the harmonizing of them…” (i.e., given the limited time and opportunity of temporal life, people should choose actions that are in accordance with a full, but limited and compatible, set of commitments to basic human goods and their particular instantiations) (See Finnis, Natural Law and Natural Rights, 103-105); (2) In choosing, human persons should be guided by “NO ARBITRARY PREFERENCES AMONGST PERSONS” (i.e., This has commonly been referred to as the “Golden Rule”; “Do to (or for) others what you would have them do to (or for) you.” Put yourself in your neighbour’s shoes. Do not condemn others for what you are willing to do to yourself. Do not (without special reason) prevent others getting for themselves what you are trying to get for yourself.”) (See Ibid., 106-109); and (3) In choosing, one should always have “RESPECT FOR EVERY BASIC VALUE IN EVERY ACT” (i.e., “one should not choose to do any act which of itself does nothing but damage or impede a realization or participation of any one or more of the basic forms of human good.”). Ibid., 118-125.

The general nature of such second-level principles often is a source of ambiguity when applying such principles to the every-day realm of moral nuances and quandaries. Thus, such second-level principles are further specified via the formulations of specific moral norms that direct certain actions for certain moral circumstances. Robert George describes such third-level practical reasons as “the most specific moral norms which forbid particular immoral acts (e.g., rape, theft, and various forms of unfair dealing, to take some uncontroversial examples).” See George, Making Men Moral, 17. For the purposes of elucidation, we will start with an easy one. A specific moral norm that prohibits “theft,” for example, is a specification of the “Golden Rule” that directs one never to choose in a manner that entails being guided by

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Second, the quality of one’s moral analysis and (in turn) one’s specific moral conclusions will be contingent upon the degree of his or her openness to relevant empirical data, metaphysical (in the philosophical sense) insights, and often spiritual/religious truths. According to the New Natural Law theory of Grisez, Finnis, and George (among others) a human person’s employment of their practical reasoning capacity to make non-inferential acts of understanding, which grasp the intrinsic value and basic reasons for action of basic human goods, is often dependent upon one’s prior experience and theoretical/speculative knowledge (including empirical knowledge and understanding). Here such prior experience and theoretical/speculative knowledge “arbitrary preferences among persons.” With respect to theft, the arbitrary preferences is for one’s own person in the sense of choosing to fulfill one’s desires for attaining someone else’s property at the expense of depriving that person of such rightful property without consent and/or just recompense; this is obviously a mode of NOT treating another in a manner that you would want to be treated.

66 Here it is helpful to consider the following discussions on this matter by George and Finnis. George elaborates on the “self-evident” and “non-inferential” knowing of basic human goods- i.e., “life (in the broad sense that includes health and vitality); knowledge; play; aesthetic experience; sociability (i.e., friendship broadly conceived); practical reasonableness; and religion”- in the following passage of Making Men Moral: “As basic reasons for action, the value of intrinsic goods cannot (and need not) be inferred from more fundamental reasons for action. Nor, as Germain Grisez rightly insists, can basic reasons for action be deduced from purely theoretical premises (i.e., premises that do not include reasons for action). As first principles of practical thinking, basic reasons for action are, as Aquinas held, self-evident (per se nota) and indemonstrable (indemonstrabilia). The human goods that provide basic reasons for action are fundamental aspects of human well-being and fulfillment, and, as such, belong to human beings as parts of their nature; basic reasons are not, however, derived (in any sense that the logician would recognize) from methodologically antecedent knowledge of human nature, such as is drawn from anthropology or other theoretical disciplines. Rather, they are grasped in non-inferential acts of understanding by the mind working inductively on the data of inclination and experience....” See George, Making Men Moral, 12-13. Finnis elaborates on the connection between such “self-evident” basic goods and theoretical knowledge and experience in his book, Aquinas (note: in this book, Finnis interprets St. Thomas Aquinas to be very similar to and affirm much of the New Natural Law theory that Finnis and Grisez have developed): “Self-evident (per se notum) (‘known through itself’), means no more than: not known by virtue of knowing some ‘middle term’- i.e., not deduced by syllogistic reasoning from some prior, more evident proposition. A proposition thus knowable per se is only known, however, when its terms (and what they refer to) are understood, and this understanding cannot be had without experience. In discussing the first principles of practical reason, Aquinas indicates that we will understand and accept them only if we have the experience and other relevant knowledge needed to understand their terms; for he points out that there are some
merely prepare (analogously speaking, like a primer) one to employ their practical reasoning to grasp the basic goods; the practical insights about basic goods are not deduced or logically inferred from experience and theoretical/speculative knowledge. Nevertheless, such experience and theoretical/speculative is often necessary and naturally inherent to the process of employing practical reason to non-inferentially grasp the basic goods.

Finnis seeks to demonstrate this point with respect to the basic good (i.e., the intrinsic value) of knowledge. For those with requisite experience of learning, Finnis’ dialectic proves intelligible enough. Their experience has already caused them to either deliberately or implicitly ascertain the intrinsic value of knowledge. This is probably not the case for those without the requisite experience of learning.

When, however, we move to other basic goods, the field of requisite experience and knowledge may be less accessible (due to a person’s lack of openness to relevant metaphysical and religious knowledge). The basic good of life is an important example.

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practical principles (not perhaps absolutely first principles) which, though per se nota, are known only to people who are wise.” See John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford, U.K.: Oxford University Press, 1998), 88.

67 In the following passage of Finnis’ *Aquinas*, we see Finnis discussion of the relationship between basic goods as “first principles” of practical reason and prior experience: “The first principles are not, properly speaking, innate; babies do not know them at all, and young people come to know them more or less gradually. One cannot, for example, understand that knowledge is a human good unless one has had both the experience of wondering whether...or why...and of finding an answer to one’s question, and has noticed that answers to questions tend to hang together as ‘knowledge’, and that other people share this ability and opportunity. Anyone who has this sort of ordinary experience can readily go beyond it by ordinary intellectual acts of the kind we simply call ‘understanding’ {intellectus}- the kind of simple insight which in every field of human knowledge is needed to provide the premisses for all reasoning and every conclusion. These acts of insight yield new concepts, and propositions about universals that can be instantiated in inexhaustibly many particulars: so knowledge (and not merely the answer to this question that grips me now) is a good for any being like me; and human life (not just my survival in this present danger) is a good; and so forth.” See Finnis, *Aquinas*, 88-89.
People seem to require sufficient reflection on the unique nature of man in order to ascertain that the life of a human being, like themselves, has intrinsic value (i.e., valued for its own sake, without appeal to or inference from a higher reason). Here various qualities of the human personhood seem important. Man has certain cognitive, emotional, and spiritual capacities and components that distinguish him from the other animals and organic life and make him similar to God and the Angels. Moreover, human personhood also includes a bodily quality/component; the spiritual qualities/components are uniquely fused to the bodily components and qualities. Through recognizing such insights, one becomes able to ascertain that such a human life (with these unique human capacities and components—bodily, spiritual, cognitive, and emotional) is intrinsically valuable. This basic evaluative judgment is not deduced from the theoretical/speculative knowledge (e.g., empirical, metaphysical, and religious truths) about man’s nature; however, reflection on such truths helps to prime one’s practical reason to make this non-inferential act of understanding. Inaccessibility to this and other similar practical insight (e.g., the intrinsic value of human life as entailing personhood that includes both body and spirit in union) arises from the fact that many people in contemporary western cultural refuse to accept the metaphysical and religious truths/assumptions, which constitute such requisite theoretical/speculative knowledge. Most naturalists and atheistic/agnostic secular humanists, for example, probably would not accept the premise that human beings have

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68 The human organism’s being entails the inseparable union of body (physical) and soul (spiritual). As discussed by John F. Crosby in his article, “Human Person”: “We human persons are not purely spiritual, like Divine Persons and even the angelic persons; we are incarnate persons, and ours is an embodied personhood.” See John F. Crosby, “Human Person”, in Our Sunday Visitor’s Encyclopedia Of Catholic Doctrine, ed. Russell Shaw (Huntington, Indiana: Our Sunday Visitor Publishing Division, 1997), 309.
an immaterial spiritual capacity and component within their nature. Furthermore, even among Christian theists, there are serious differences about the immaterial spiritual capacity and component of human nature. Catholics and Orthodox are willing to accept the thesis that humans have an immortal soul sometime between conception and birth; whereas, many Protestants view this to be mere extra-Biblical theological speculation that cannot be counted on and made relevant to evaluating the life of post-conception and pre-birth modes of human life (e.g., embryos and fetuses). Such moral-theological disagreements will be further discussed in Chapter Seven. Since embryos and fetuses clearly lack the emotional and cognitive components and capacities of human personhood, their possession of bodily and spiritual components and capacities becomes vital for evaluating their intrinsic value. The lack of openness that many Protestants have to the “Tradition” component of Catholic and Orthodox theology (e.g., belief in “ensoulment”) make it difficult for them to ascertain the intrinsic and equal value of embryos and fetuses; albeit, conservative Protestants’ socialization in and identification with traditional Christianity often render them stalwart defenders of such new human life, even though their view of theological authority severely hinders their moral theology. This is an important example of how the inaccessibility and non-openness to various metaphysical and religious truths can hinder one from properly ascertaining the full scope of the basic human goods (e.g., the basic good of life).

Our third supplemental consideration concerns the relation between having a shared morality and the common good of socially cohesive community. Since shared specific moral principles and commensurable conceptions of well-being and interests are
important to the integration process of socially cohesive community, the common good of such community will be thick-level in nature. As previously discussed, the common good of such community (or basis for the members to co-ordinate with one another) is the members’ intrinsically valuable integration with one another. Such integration entails people identifying with one another’s well-being and interests in the sense of making each other’s well-being and interests constitutive of their own. We have also seen that this identification process requires integrating parties to share the same specific morals because their conceptions of morality will determine whether or not their pursuit of well-being and their interests are commensurable enough to be integrated. Thus, intrinsically valuable integration (i.e., the common good of socially cohesive community) requires integrating members to share specific moral norms. Moreover, as seen and implied in the above second supplemental point, sharing specific practical and moral insights often involves prior ontological agreement among the parties in the sense that they often share many beliefs about eternal and temporal reality (e.g., theology) that enable and make capable the non-inferential practical judgments about basic human goods, which are the first-level insights of practical reason and necessary for making second-level (moral) and third/specific-level (moral) judgments. ⁶⁹ In general, we say that the common good of

⁶⁹ I realize that Robert George and probably other New Natural Law theorists disagree with this view. For them, New Natural Law moral theory provides us with a publicly reasonable justification (i.e., an argument for a normative conclusion that merely relies on common human reason and does not rely on various controversial ontological or religious commitments for its validation) for many important moral norms about the evils of abortion, homosexual relations, etc. See Robert George, “Public Reason and Political Conflict: Abortion and Homosexuality,” in In Defense Of Natural Law, by Robert P. George (Oxford, U.K.: Oxford University Press, 1999), 201-205. Nevertheless, I disagree that their moral theory can be free of and/or refrain from employing such controversial ontological and/or religious assumptions, and I argue that Robert George’s anti-abortion position (for example) ultimately seems to need Catholic
socially cohesive community is thick-level (in nature) because the integrating parties share specific morals, commensurable conceptions of well-being and interests, and (ultimately) views about eternal and temporal reality. In this dissertation, we will also refer to this as thick-level (moral and metaphysical/religious) beliefs or agreement.

With this in mind, we can now turn to the third and fourth characteristics of socially cohesive community: its local nature and its generation via participation in local politics. Aristotle elucidates his notion of cohesion (i.e., “political friendship”) as being local in nature (i.e., our third characteristic of socially cohesive community). He implies this in a very subtle, matter-of-fact way in Book IX of The Nicomachean Ethics:

“Concord also seems to be a friendly relation. For this reason it is not identity of opinion; for that might occur even with people who do not know each other…”

It is the last sentence of this passage, which is of interest to us. Here Aristotle rules out the possibility that “identity of opinion” can be synonymous with “concord” because it would be possible to have this among “people who do not know each other”; thus, he implies that the condition of “knowing” (i.e., personal acquaintance) is a requisite for having concord. In other words, people must be acquainted with those whom they are in concord with. Such a condition can be practically filled in a local community setting like a small town or neighborhood of a larger city. We shall consider this issue further in a moment.

We also see how the locality condition follows from the nature of integration or friendship community discussed above. The locality characteristic follows from the theological views about why human life is valuable and the ontology of human personhood. For more on this, see Appendix D of this dissertation.

70 Aristotle, The Nicomachean Ethics, 231.
above discussed conditions. One must truly know the individual he or she integrates with in socially cohesive community, for integration entails incorporating the well-being and interests in the sense of making them constitutive of one’s own. This condition cannot be met without direct relationship among the integrating members of the community. One must spend (at least some) time with his or her fellow integrating members getting to know the constitution of their morals, well-being, and interests. Only after this occurs is one ready to choose to integrate with the members of the socially cohesive community.  

The fourth and final facet of social cohesion in our theoretical examination is its connection to politics. Aristotle indicates this in his description of concord as “political friendship” in Book IX of The Nicomachean Ethics: “Concord seems, then, to be political friendship, as indeed it is commonly said to be; for it is concerned with things that are to our interest and have an influence on our life.” In Book I of The Nicomachean Ethics, Aristotle regards politics to be “the most authoritative art”:

[P]olitics appears to be of this nature; for it is this that ordains which of the sciences should be studied in a state, and which each class of citizens should learn and up to what point they should learn them; and we see even the most highly esteemed of capacities to fall under this, e.g. strategy, economics, rhetoric; now, since politics uses the rest of the sciences, and since, again, it legislates as to what we are to do and what we are to abstain from, the end of this science must include those of the others, so that this end must be the good for man.

Since Aristotle views politics to include the end of other important sciences like “strategy, economics, rhetoric” and to entail the “good for man,” it seems reasonable to

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71 Here I must add that the locality condition is a limitation of natural human friendship, and it seems possible for people to be integrated with one another via supernatural friendship. This is what is implied in traditional Christian teachings about the communion of all believers in Christ and via the Holy Spirit. See John 15-17 (New International Version).
72 Aristotle, Nicomachean Ethics, 232.
73 Ibid., 2.
assume that he views the realm of politics to overlap with the realm of concord (i.e., “concerned with things to our interest and have influence on our life”). This, then, explains why he would refer to “concord” as “political friendship.”

A vision of Aristotle’s notion of political friendship is developed by Hanna Arendt in her book *The Human Condition*. Here Arendt interprets Aristotle as viewing politics to be an intrinsically valuable activity and to entail action and speech. She claims that Aristotle views politics to be “actuality.”

Aristotle, in his political philosophy, is still well aware of what is at stake in politics, namely, no less than the ergon tou anthropou (the “work of man” qua man), and he defined this “work” as “to live well” (eu zen), he clearly meant that “work” here is no work product but exists only in sheer actuality.\(^{74}\)

According to Arendt, Aristotle views “actuality” to be action valued for its own sake. This is seen in her interpretation of Aristotle’s views on how speech and action as actuality:

It is this insistence on the living deed and spoken word as the greatest achievements of which human beings are capable that was conceptualized in Aristotle’s notion of energeia (“actuality”), with which he designated all activities that do not pursue an end (are ateleis) and leave no work behind (no par’ autas erga), but exhaust their full meaning in performance itself.\(^{75}\)

The above points can be formulated to show how Aristotle, according to Arendt, views politics to entail speech and action: (1) Politics is actuality; (2) Actuality is speech and action; (3) So, if something is actuality, then it is also speech and action; (4) Thus, since politics is actuality, politics is also speech and action.

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\(^{75}\) Ibid., 206.
In apparent agreement with Aristotle’s thought, Arendt also views speech and action to be uniquely political activities. She categorizes this as “action,” which is one of the four categories within the “vita active” (i.e., Arendt’s umbrella category for fundamental human activities). Action is “the only activity that goes on directly between men without the intermediary of things or matter…” This “corresponds to the human condition of plurality, to the fact that men, not Man live on the earth and inhabit the world.” Based on this, Arendt believes that “action” is closely related to politics. In all “political life,” we find “specifically the condition….” of “plurality” (i.e., the multiplicity of human beings, rather than the single notion of “man” as an individual) to be in place. Moreover, action (i.e., speech and action) “corresponds to” the “human condition of plurality.” So, action (i.e., speech and action) is closely related to politics.

Arendt’s notion of action as a fundamental human activity can be further elucidated in the following manner. For Arendt, action (i.e., the activities of speaking and acting) both connects one human being to other human beings and discloses the uniqueness of individual human beings to one another. In speaking and acting in the presence of others, a person reveals (to these others) the uniqueness of “who” he or she is (i.e., his or her unique set of “qualities, gifts, talents, and short-comings…,” etc.). Arendt suggests that this is essential for developing a person’s humanity: “A life without speech and without action….is literally dead to the world; it has ceased to be a human life.

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76 Arendt, The Human Condition, 7.
77 Ibid.
78 Ibid.
79 Ibid., 7 and 175-176.
80 Ibid., 7 and 175-176.
81 Ibid., 175-181.
because it is no longer lived among men.”

Through participating in speech and action, a human being realizes and maintains his or her humanity because having a “human life” requires that it be “lived among men…” (i.e., other humans). Speech and action connect one to other human beings; partaking in these activities allows one to live his or her life “among men.” What is entailed in these activities connecting one to others? Speech and action connect a human person to others via disclosing the uniqueness of who he or she is to these others; one becomes connected to others via making himself or herself known to them. Thus, according to Arendt, the process of disclosing who one is as a unique human being to others (via engaging in speech and action in the company of these others) is a necessary condition for realizing and maintaining the person’s humanity.

Arendt’s conception of politics is based on this understanding of the fundamental human activity of action (i.e., action and speech) and how it discloses and affects the “web of human relationships.” According to Arendt, the political realm is constituted through the process of people acting and speaking together:

[T]he political realm rises directly out of acting together, the “sharing of words and deeds.” Thus action not only has the most intimate relationship to the public part of the world common to us all, but is the one activity which constitutes it.

Furthermore, she seems to believe that this political realm has both instrumentally and intrinsically valuable purposes. The instrumental purpose of politics consists of people acting and speaking together as a group to resolve common concerns about the physical world that they share; hence, they often act and speak together to formulate and achieve

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83 Ibid., 183.
84 Ibid., 189.
collective goals about how meet the common challenges of their world. The intrinsic purposes of politics are realized through the process of people engaging in such collective action. Through acting and speaking together as a group to meet common problems, individuals are provided with an opportunity to disclose their uniqueness to their fellows; thus, such activity allows individuals to realize or constitute their individual humanity. In addition, the process of acting and speaking constitutes the participants into a unified group or a people. Arendt seems to view both of these constituting ends (i.e., people constituting themselves as individuals and also as a group) to be intrinsically valuable; hence, since acting and speaking together to resolve common problems works to realize these ends, both ends are intrinsically valuable purposes of politics.\(^{85}\)

Putting aside some of Arendt’s more controversial and foundational views and implications that seem evident from her theory,\(^{86}\) the above reflection is helpful to our present analysis. The last function (i.e., participants become constituted as a unified group or a people) of politics as speech and action among human beings is the most

\(^{85}\)Much of the schema in this paragraph was developed by Mark Warren in “Nietzsche and the Political,” *New Nietzsche Studies* II, no 1&2 (Fall 1997), 41-43.

\(^{86}\)At least one part of the above mentioned facets of Arendt’s theory is controversial and seems to reveal an almost postmodern conception of reality. The notion that a human being must disclose (via speech and action) who he or she is to others in order to constitute his or her humanity (i.e., become truly human) suggests that one’s humanity is a subjectively constituted entity. What seems implied is that one’s unique and valuable humanness does not objectively exist independently of the subjective recognition and perspective of others. This seems to be in clear contrast with a realist view that can be derived through employing the concepts of natural law theory. According to this, a human being’s uniqueness and value is found in the fact that the he or she can participate in and, hence, consist of intrinsically valuable human goods, which are real facets of his or her fulfilled human person. Although facets of this will depend on community and, hence, other people, the human person’s ability to realize his or her well-being is not entirely and continually dependent upon the subjective perspective of others. According to this realist schema, even a man stranded on a desert island could participate in and constitute his well-being via life, knowledge, play, aesthetic experience, practical reasonableness, and religion. I doubt that Arendt’s subjection conception of humanness would allow for such a possibility.
relevant to our present analysis of political friendship. When people come together as a political body to resolve common problems (i.e., collectively deliberating about “what”, as Aristotle says in reference to politics, they “are to do” and “abstain from…”),

they act and speak together. Through this process, they disclose who they are to one another. When we consider these insights in context of our prior observations about the integration process in socially cohesive community, the importance of such political participation becomes apparent. When people of a locality (marked by a thick-level of agreement) disclose who they are to one another through the speech and action of politics, they recognize how they share the same morals, underlying worldview, and a commensurable conception of well-being and interests. Such mutual recognition, in turn, can facilitate people choosing to integrate with one another around their thick-level agreement; people with thick-level agreement have the opportunity to identify with one another’s well-being and interests. When the parties mutually choose to realize this opportunity (i.e., identify with and pursue the good of one another for the sake of one another), they enter into a socially cohesive community. Thus, through the process of acting and speaking together in politics, people with thick-agreement are presented with an opportunity to enter into social cohesion with their fellow participants.


It is interesting that C.S. Lewis (in *The Four Loves*) also discusses the link between common activity and the formation of friendship: “Friendship arises out of mere Companionship when two or more of the companions discover that they have in common some insight or interest or even taste which the others do not share and which, till that moment, each believed to be his own unique treasure (or burden). The typical expression of opening Friendship would be something like, ‘What? You too? I thought I was the only one.’ We can imagine that among those early hunters and warriors single individuals- one in a century? one in a thousand years?- saw what others did not; saw the deer as beautiful as well as edible, that hunting was fun as well as necessary, dreamed that his gods might be not only powerful but holy. But as long as each of these percipient persons dies without finding a kindred soul, nothing (I suspect) will come
It is quite possible that this social cohesion is more diluted than the richest mode of friendship possible. Social cohesion, which Aristotle has referred to as concord or political friendship, probably entails something very similar to neighborliness. Here it is helpful to return to the Budziszewski interpretation of Aristotle’s notion of “concord” or “political friendship”:

Civic concord means much more than the absence of faction. It means that the citizens are neighbors instead of strangers, supporting each other in a close-woven fabric of crisscrossing bonds. It means that they delight in small sacrifices for the common good and are not so obsessed with keeping score. It means that voluntarily and without direction they teach the young, provide for the old and look out for each other. 89

The description of citizens as neighbors in a “close-woven fabric of crisscrossing bonds” suggests the integration of socially cohesive community. Nevertheless, one can question the depth of such socially cohesive integration when it is facilitated and primarily maintained through people’s interaction with one another in the activities of local politics. Although this can be qualitatively viewed as social cohesion, its strength as friendship might be diluted by participants lacking opportunity to spend significant time with one another (over a long period of time) doing the things that friends do (e.g., coordinating their activities for the sake of caring for one another). One will have some close friends, but there will not be time to develop rich friendships with all of one’s

89 Budziszewski, Written On the Heart, 43.
worthy fellows. In fact, one can only do this with a precious few during our short sojourn in this world.\textsuperscript{90}

In his famous work, Democracy In America, Alexis de Tocqueville also developed important reflections on democratic political association that are relevant to our examination of political friendship. These considerations can be used to elucidate the exclusive nature of deeper friendship is described well by John Finnis. He does this through exegesis on Aristotle’s refutation of Plato’s communism: “So Aristotle had to begin the Politics with some reminders. Friendship is nothing if it is not willing the good of one’s friend, committing oneself to helping him in his self-constituting participation in any or all of the basic aspects of human flourishing. In the first place, then, there will be no friendship if there is no commitment, and to commit oneself is, in this finite life, to turn aside from an inexhaustible multitude of alternative commitments that one might have made. In the second place one can give nothing to a friend unless one has something of one’s own to give… In the third place, much that I have to give can only be given to a few and can only be fully given to a few who are specified by a relationship to me that is intrinsically permanent (e.g., genetic) or deliberately made quasi-permanent… To cut the whole matter short, we must bluntly say that Plato’s proposal, made in the name of friendship, is tantamount to a dualistic dilution, ‘watering-down’, of friendship- a radical emancipation of a basic aspect of human well-being.” See Finnis, Natural Law and Natural Rights, 144-145.

Also, C.S. Lewis, in The Four Loves, discusses the exclusive nature of friendship, and how it is contrary to notions that values the “collective above the individual”: “Again, that outlook which values the collective above the individual necessarily disparages Friendship; it is a relation between men at their highest level of individuality. It withdraws men from collective ‘togetherness’ as surely as solitude itself could do; and more dangerously, for it withdraws them by two’s and three’s. Some forms of democratic sentiment are naturally hostile to it because it is selective and an affair of the few. To say ‘These are my friends’ implies ‘Those are not.’” See Lewis, The Four Loves, 60.

Although the above C.S. Lewis passage might appear to rule-out a thinner and more communal mode of friendship like what is implied in our notion of “social cohesion” or “concord,” some of his other passages clearly demonstrate that his analysis is open to such possibilities as well: “Hence true Friendship is the least jealous of loves. Two friends delight to be joined by a third, and three by a fourth, if only the newcomer is qualified to become a real friend. They can say, as the blessed souls say in Dante, ‘Here comes one who will augment our loves.’ For this love ‘to divide is not to take away.’ Of course the scarcity of kindred souls- not to mention practical considerations about the size of rooms and audibility of voices- set limits to the enlargement of the circle; but within those limits we posses each friend not less but more as the number of those with whom we share him increases.” See Lewis, The Four Loves, 61-62.

This last passage is actually in reference to rich friendship among people who have the time and long-standing experience to really know one another. If a communal mode of friendship is open to people within rich and deep friendships, then a communal mode of friendship seems possible for those within more thin, but genuine, social cohesion or concord modes of friendship. In the same way that deep friends lose a unique aspect of their communion when they lose contact with a common friend, those in social cohesion around similar thick-level beliefs will also lose a small, but unique, expression of their cohesion in the absence of a fellow participant; for the absent participant uniquely expresses the commonly shared belief via individual speech or action. Moreover, the lesser standards of knowing fellow communicants within concord friendship, allows for a larger number of participants; social cohesion can occur, for example, among the speaking and acting (i.e., political) participants in small local communities (e.g., a township).
local character of political friendship and its important contribution to civil society. Tocqueville’s advocacy of democratic politics is largely focused on local-level democratic institutions in which people have significant opportunity to participate (e.g., the democratic politics of New England townships). Such local politics combats people’s tendency to withdraw from associations with others; they “bring men constantly into contact, despite the instincts which separate them, and force them to help one another.” Through participating in local politics, people gain invaluable experience of associating with one another, and this causes greater civil association. Tocqueville writes: “In all countries where political associations are forbidden, civil associations are rare.” Thus, although Tocqueville recognizes that civil association is possible without significant political association (due, for example, to “common business concerns”), he believes that quantity and quality of civil association will be much higher when political association is allowed to flourish.

Tocqueville cites several reasons for why political association helps to beget more civil association (and not vice-versa). Unlike “civil life” where “each man can, at stretch, imagine that he is in a position to look after himself…,” experience in politics instills a mentality of dependency on one’s associates. Moreover, political (not civil) association induces many people to interact for the sake of accomplishing “great ends”, and (through

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92 Tocqueville, Democracy in America, 520-524.
93 Tocqueville, Democracy In America, 520-524.
94 Ibid., 521.
this process) they learn “the value of helping one another even in lesser affairs.”

Since the smaller ends and objectives of “civil life” (e.g., attaining wealth) allows individuals the luxury of imagining and striving for his or her self-sufficiency, “civil life” can encourage and reinforce the human tendency to withdraw from association with others. In contrast, the larger ends and inherent associational habits of political life compel people to rely on others. Furthermore, taking part in civil association often entails significant risk, especially for the entrepreneurs who must invest their money in the undertaking they initiate, but there usually is no such risk (i.e., of losing financial capital) entailed in political association. Hence, people are more inclined to enter into political association; this can socialize them in how to associate successfully and with confidence, and this, in turn, fosters more willingness to incur the risks entailed in civil associations. Finally, Tocqueville argues that limiting or not allowing political association often casts a chilling effect over civil associations:

So one may think of political association as great free schools to which all citizens come to be taught the general theory of association. But even if [(only for the sake of argument)] political association did not directly contribute to the progress of civil association, to destroy the former would harm the latter. When citizens can only combine for certain purposes, they regard association as a strange and unusual procedure and hardly consider the possibility thereof… It is therefore a delusion to suppose that spirit of association, if suppressed in one place, will nevertheless display the same vigor in all other directions, and that if only men are allowed to prosecute certain undertakings in common, that is enough to ensure that they will eagerly do so. When citizens have the faculty and habit of associating for everything, they will freely associate for little purposes as well as great. But if they are only allowed to associate for trivial purposes, they will have neither the will nor the power to do so. To leave them entire liberty to combine in matters of trade will be in vain; they will hardly feel the slightest interest in using the rights granted; and having exhausted your strength in keeping them from

95 Tocqueville, Democracy In America, 521.
96 Ibid., 521-522.
forbidden associations, you will be surprised to find that you cannot persuade them to form those that are allowed.\textsuperscript{97}

For Tocqueville, political association is a requirement for vibrant civil association, and the latter should be desired because civil association blossoms into an immense network of social activity that fulfills a countless number of tasks and “lesser undertakings” throughout society.\textsuperscript{98}

Although he does not specify local level political association when citing the above reasons,\textsuperscript{99} he must imply that he is only refereeing to local political association because he argues for \textit{inefficacy} of aggregate level political association as a practical mechanism for most citizens a few pages earlier.\textsuperscript{100}

The general business of a country keeps only the leading citizens occupied. It is only occasionally that they come together in the same places, and since they often lose sight of one another, no lasting bonds form between them. But when the people who live there have to look after the particular affairs of a district, the same people are always meeting, and they are forced, in a manner, to know and adapt themselves to one another.\textsuperscript{101}

According to Tocqueville, these salubrious effects of political association begetting greater civil association couldn’t be accomplished through national-level democratic politics because it does not offer people enough opportunities for association and interaction with their fellows that are sufficient for socializing them well.\textsuperscript{102} The only central level alternative to the process of local political activity engendering habits of

\textsuperscript{97} Tocqueville, \textit{Democracy In America}, 522-523.
\textsuperscript{98} Ibid., 515.
\textsuperscript{99} Ibid., 520-524.
\textsuperscript{100} Ibid., 511.
\textsuperscript{101} Ibid., 511.
\textsuperscript{102} Ibid., 511.
civil associations, which accomplish countless tasks, is an expanding central government and an inverse loss of citizen-associations.\textsuperscript{103}

The above account of the political association causing the habits of association that beget civil association presumes a different conception of human psychology than what is typical of more free-market economic analysis. The free-market economist might argue that civil association can arise independently of political association because individuals are rational agents who seek to maximize their economic self-interest. Hence, in pursuing their own interests, they will choose to interact with others in a number of ways that realize the common good (e.g., numerous economic exchanges that have the aggregate effect of increasing the efficiency and quality of desired goods and services). Tocqueville would probably view this explanation as overly simplistic. According to his conception of human psychology, man oscillates between two poles: withdrawal and hyper-activity. Without sufficient institutions to help moderate such oscillation, many will ultimately withdraw from their fellows even when their rational self-interest would be maximized by interaction. Tocqueville believes that local democratic politics is one of the key institutions for moderating the human self’s oscillation. Moreover, as discussed above, its functioning realizes habits of association that ultimately cause people to interact rationally in civil association (e.g., merchant-vendor associations, etc.).\textsuperscript{104}

There are two important considerations about Tocqueville’s analysis. First, although it does not entail all of the above qualitative considerations about the intrinsic

\textsuperscript{103} Tocqueville, \textit{Democracy In America}, 515.

\textsuperscript{104} Dr. Joshua Mitchell revealed this point in both class lectures and his book \textit{The Fragility of Freedom: Tocqueville On Religion, Democracy, And The American Future} (Chicago: The University of Chicago Press, 1995), 5-11.
nature of political friendship as social cohesion, his notion of local democratic political association can clearly be identified with our concept of political friendship. This is seen when comparing Tocqueville’s commentary to Arendt’s conception of speech and action as politics. Both are focusing on the process of individuals coming together to engage in speech and action with one another in order to resolve a collective concern. Furthermore, both view this process to occur at a very local level (i.e., a municipal gathering) in which there is more opportunity for face-to-face interaction. Thus, both seem to be discussing Arendt’s conception of politics as speaking and acting together. Arendt, however, just delves deeper into the intrinsic facets of what this phenomenon entails. She suggests (as discussed above) that such speaking and acting together on a local level is intrinsically valuable in constituting individual participants into a unified group; whereas, Tocqueville merely considers the instrumental effects of local political participation.

A second noteworthy fact about Tocqueville’s analysis is that it demonstrates the importance of local democratic political association for society in general. If one concurs that local political association is causal and necessary for vibrant civil association, then a loss of the conditions for effective local political association damages the quantity and quality of civil association. Here it is relevant to discuss Michael Sandel’s *Democracy’s Discontent*. Specifically, there is a real problem with Sandel’s solution for reestablishing republicanism in America. Instead of advocating a return to vibrant federalism in which local-level governments have real power to settle serious public policy questions, his apparent fear of the benighted implications that could result from federalism causes him to rely on civil associations (e.g., trade unions, etc.) as sites for citizens to interact with
one another and engage in democratic participation. As seen in our above discussion, Tocqueville makes it clear that this will not produce the desired results; reliance on civil association, without local democratic political association, will result in very weak and disappointing civil association. Without allowing for significant local political participation, there will not be vibrant civil association.

Since Sandel’s prescription fails on Tocquevillian grounds because it does not advocate the vibrant federalism entailing significant transfer of power away from the federal level and back to the local-levels like townships (praised by Tocqueville) and the wards (suggested by Jefferson), and since the above reflection has been a bit discursive, it seems appropriate to conclude the analysis of this chapter with an examination of how local-level politics can demonstrate the four characteristics of social cohesion. This will be accomplished through considering how our previous application of Arendt’s speech-and-action theory can be applied to examining Jefferson’s proposed ward system, which Arendt herself views favorably.

Jefferson’s proposed (but never adopted) ward system would have added an additional local level of government. Jefferson formerly proposed this plan for the State of Virginia: “A plan was formerly proposed to the legislature of this State for laying off every county into hundreds or wards of five and six miles square...” As Jefferson

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105 Sandel, Democracy’s Discontent, 348.
describes to John Adams, this new local-layer would be an approximation of “your
townships” (i.e., the famous New England townships that Tocqueville will later praise for
their model of local democracy and political association). The new Virginia “wards”
would have “a free school for reading, writing and common arithmetic…” Moreover,
Jefferson’s proposal “had a further object to impart these wards those portions of self-
government for which they are best qualified, by confiding to them the care of their poor,
their roads, police, elections, the nominations of jurors, administration of justice in small
cases, elementary exercises of militia, in short, to have made them little republics…”
His later commentary on the plan to Joseph C. Cabell suggests that he also regarded his
ward system as beneficial for America’s federal system as a whole:

[T]he way to have good and safe government, is not to trust it all to one, but to divide it
among the many, distributing to every one exactly the functions he is competent to. Let
the national government be entrusted with the defense of the nation, and its foreign and
federal relations; the State governments with the civil rights, laws, police, and
administration of what concerns the State generally; the counties with the local concerns
of the counties, and each ward direct the interests within itself. It is by dividing and
subdividing these republics from the great national one down through all its
subordinations, until it ends in the administration of every man’s farm by himself; by
placing under every one what his own eye may superintend, that all will be done for the
best.

In addition to states, counties, and municipalities, counties would be split into wards, and
these would provide added opportunities for the residing citizens to interact and
deliberate about their common affairs and, in turn, develop public policy:

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108 Jefferson to Adams, Monticello, October 12, 1813, Thomas Jefferson: Writings, ed. Peterson, 1308; and Tocqueville, Democracy In America, 62-66.
109 Jefferson to Adams, Monticello, October 12, 1813, ed. Peterson, 1308.
110 Ibid., 1308.
Where every man is a sharer in the direction of his ward-republic, or of some of the higher ones, and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day; when there shall not be a man in the State who will not be a member of some one of its councils, great or small, he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte.\textsuperscript{112}

As this latter passage suggests, Jefferson believed that such a system would provide ample opportunities for “every man” to participate in (at least) one level of government, and this would (in turn) motivate all to guard their stake in political power from being usurped by the kind of despotism as experienced in Rome under the Caesars and in France under Napoleon.

When examining the ward system according to our four criteria, the local and political conditions seem sufficiently apparent in the plan so as not to require further elaboration; instead, it is helpful to directly consider the plan’s intrinsic-value and common-virtue characteristics. As previously discussed, we can employ Arendt’s insights on the disclosing nature and group-constituting results of speech and action (as politics) to see how local-level politics can reveal the sharing of common values and, hence, facilitate social cohesion (i.e., one facet of people’s well-being or happiness). With this application (of Arendt) in mind, it is possible to see how such processes and characteristics could occur during the participatory-democratic operation of Jefferson’s ward system. Through speaking and acting together to resolve common problems, the people of a ward would disclose who they are to one another and, hence, can come to realize that they share the same thick-level moral beliefs. Through such mutual

\textsuperscript{112} Jefferson to Cabell, Monticello, February 2, 1816, ed. Peterson, 1380.
recognition, the people of a ward would be able to choose to identify with one another’s well-being. Thus, through the process of action and speech in the local politics of the ward, people would have an opportunity to develop social cohesion or political friendship with their fellow participants; albeit, this will probably take the form of a more mild-mode of friendship like neighborliness.

Based on the above reflection, I conclude by merely re-emphasizing how socially cohesive community entails the following four characteristics: (1) it is an intrinsically valuable mode of community; (2) it requires and is facilitated by the sharing of morals and virtues; (3) it is very local in nature (i.e., involves face-to-face relationships); and (4) it is frequently generated via the participation in local politics. In the remaining chapters of this dissertation, I will consider the historical relationship between social cohesion (as consisting of these four characteristics) and the American political tradition.
Chapter Two, Community and Religion: reflections on the possibility of social cohesion within each of the American Colonies/States based on the religious-moral worldview that was dominant in each society.

Given the discussion of social cohesion in the first chapter, identifying the possibility of social cohesion at the local-level in early America may not be surprising. What is more interesting, however, is the degree that two of the other above mentioned characteristics (i.e., participants sharing thick-level moral agreement and social cohesion being associated with politics) are also verified by the early American experience. This can be seen when reviewing the colonies/States during the colonial and founding periods. In doing so, one sees how these three conditions (locality, sharing thick-level moral agreement, and association with politics) suggest the possibility of members of early American, local-level communities entering into intrinsically valuable (the fourth characteristic of) social cohesion.

Thick-level agreement and the role of politics within local-level communities during the seventeenth and eighteenth centuries:

A thorough review of seventeenth and eighteenth century life in local-level American communities (towns, cities, and larger colonies/states) suggests that there was often significant agreement within localities about what the human good life entails. This included a detailed understanding of the theological reality and the norms that followed from this. Many of the New England constitutions, for example, elucidated commitment to God and Christian living as goals for the colonial community and its government. In the earliest such document, The Mayflower Compact (1620), states the following:

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In the Name of God, Amen. We whose Names are underwritten, the Loyal Subjects of our
dread Sovereign Lord King, James, by the grace of God of Great Britain, France and
Ireland, King, Defender of the Faith etc. Having undertaken for the glory of God, and
advancement of the Christian Faith, and the Honour of our King and Countrey, a
Voyage to plant to the first Colony in Northern parts of Virginia; Do by these Presents,
solemnly and mutually, in the presence of God and one another, Covenant and Combine
our selves together into a Civil Body Politick, for our better ordering and preservation,
and furtherance of the ends aforesaid: and by virtue hereof do enact, constitute, and
frame, such just and equal Laws, Ordinances, Acts, Constitutions and Officers, from time
to time, as shall be thought most meet and convenient for the general good of the Colony;
unto which we promise all due submission and obedience…. 

For the purposes of this paper, it is most helpful to note how this passage
demonstrates its signers (i.e., the earliest Puritan colony in New England) as having
“political friendship.” First, the document shows a clear consensus in identification of the
good life and its concomitant values; these early Puritans consciously form a “Civil Body
Politick” that is committed to “furtherance of the ends aforesaid,” which includes “the
glory of God, and advancement of the Christian Faith.” Thus, these early Puritans have
explicated a commitment to the good life of the Christian faith and all the norms for
behavior entailed in this. Moreover, they can be presumed to have a thick conception of
their common good (i.e., a commitment to their sect’s specific and differentiated
conception of the Christian faith and all the concomitant ends and norms that follow from
this). Such agreement about the ultimate ends of human life served as strong locus for
intrinsically valuable integration among the citizens of this colony. Second, the document
demonstrates how the body of participants have already and will continue to politically
associate with one another (i.e., speak and act together) to resolve their collective

113 Mayflower Compact, November 11, 1620, in The American Republic: Primary Sources, ed.
Bruce Frohnen, (Indianapolis: Liberty Fund, 2002), 11.
challenges (i.e., “by virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions and Officers, from time to time, as shall be thought most meet and convenient for the general good of the Colony”). Third, the document demonstrates how this community is very local in nature; there are just forty-one signers, and each of these men represent one of the families that (together) entirely constitute this new colony.

Even more than the *Mayflower Compact*, other colonial political documents demonstrate their respective citizens’ commitment to a sectarian understanding of the Christian faith (i.e., all the specific ends and prescribed modes of behavior that follow a differentiated sectarian conception of Christianity). The *Fundamental Orders of Connecticut* (1639) legally established the following confederate agreement:

> Confederation together, to mayntayne and presearve the liberty and purity of the gospell of our Lord Jesus wch we now prfesse, as also the disciplyne of the Churches, wch according to the truth of the said gospell is now practiced amongst us…¹¹⁴

This was a confederation of the local settlements (“Townes”) in the area, and (as discussed in the document) it upheld each local unit’s authority to enforce the norms of behavior that followed from the tenets of each one’s own sectarian faith. Thus, this Connecticut document implies and expects that each local community or “Towne” within the colony will have a specific sectarian conception of the Christian faith; moreover, the document suggests that maintaining such thick-level agreement within the community is a justifiable basis for using the community’s political (i.e., legal) authority.

Even more specific legal enforcement of Christian morals is elucidated in *The Massachusetts Body of Liberties* (1641). Clause “94” of this document serves as penal code against acts deemed immoral by the Christian faith:

1. If any man after legall conviction shall have or worship any other god, but the lord god, he shall be put to death DUT.13.6.10, DUT.17.2.6, EX.22.20… 2. If any man or woeman be a witch, (that is hath or consulteth with a familiar spirit,) They shall be put to death. EX.22.18, LEV.20.27, DUT.18.10… 3. If any person shall Blaspheme the name of God, the father, Sonne, and Holie ghost, with direct expresse, presumptuous or high handed blasphemie, or shall curse god in the like manner, he shall be put to death. LEV.24.15.16… 4. If any person committt any willful murther, which is manslaughter, committed upon premeditated malice, hatred, or Crueltie, not in mans necessarie and just defence, nor mere causaltie against his will, he shall be put to death. EX.21.21, NUMB.35.13.14, 30.31… 5. If any person slayeth an other suddainely in his anger or Crueltie of passion, he shall be put death. NUMB.25.20.21, LEV.24.17… 6. If any person shall slay an other through guile, either by poisoning or other such divelish practice, he shall be put to death. EX.21.14… 7. If any man or woman shall lye any beaste brute creature by Carnall Copulation, They shall surely be put to death. And the beast shall be slaine and buried and not eaten. LEV.19.23… 8. If any man lyeth with mankinde as he lyeth with a woeman, both of them have committed abhominacion, they both shall surely be put to death. LEV.19.22… 9. If any person committeh Adultery with a married or espoused wife, the Adulterer and Adulteresse shall surely be put to death. EX.20.14… 10. If any man stealeth a man or mankinde, he shall surely be put to death. EX. 21.16… If any man rise up by false witness, wittingly and of purpose to take away any man’s life, he shall be put to death. DUT.19.16, 18.19… 12. If any man shall conspire and attempt any invation, insurrection, or publique rebellion against our commonwealthe, or shall indeavor to surprise any Towne or Townes, fort or forts therein, or shall treacherously and perfediouslie attempt the alternation and subversion of our fame of politie or Government fundamentallie, he shall be put to death…

Most of the above laws prohibit violations of a respective Christian moral norm, and they justify both the prohibition and capital punishment on the Biblical grounds. Here we begin to see evidence of the sectarian nature of Massachusetts’ laws. As elaborated in Appendix A, Massachusetts’ Reformed Puritan approach to governing communal affairs

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seems somewhat similar to the governing in early Calvinist-Reformed communities (e.g., Geneva) within Europe. Both imposed legal directives (and penalties for violations), which they derived from Old Testament Scripture, and both did not tolerate the different theological views professed by various competing Christian sects. Furthermore, the various Massachusetts towns and small communities, which adhered to this legal document, must have sufficiently had a similar thick-level theological and moral worldview (i.e., possessed a thick conception of the common good), which the above document and other Massachusetts laws seem to partially reflect.

Such agreement about the religion and morality must have served as a strong locus for intrinsically valuable integration among the citizens in the local units (“Townes”) of these colonies. Nevertheless, one might ask how the Connecticut and Massachusetts colonial documents demonstrate social cohesion since each (as an aggregation of multiple local units) is not a local unit in-itself. To answer this objection, one must view these colonial documents as showing common adherence within each local “Towne” to specific moral/theological worldview. In other words, the people in each of the local “Townes,” which together compose the colony, shared the same understanding of Christian values. Although this agreement might be sufficiently widespread so as to involve most of the local “Townes” within an entire colony as was the case in Massachusetts, the basic and most relevant unit for such agreement was the agreement realized among citizens in a single local-level unit- e.g., a “Towne.” Thus, we see common adherence to the same set of moral values at a local, face-to-face, level.
The final thing to emphasize is the political activity in such colonial towns. Alexis de Tocqueville’s account of this is perhaps the most famous memorial to the local politics of the New England town. As discussed above, such town politics had a very democratic nature; they possessed much of what Arendt calls the unique political activity, “speaking and acting.”

In moving our examination beyond New England, it is important to also consider the other colonies. Barry Shain discusses this in his important book, *The Myth of American Individualism*:

For most colonial Americans, serving God and leading a fulfilled human life depended on membership in a locally controlled community. In turn, each community was to be guided by appropriate substantive ethics (usually a particular understanding of Protestant Christianity) that, in effect, defined it as a community.

As suggested by the passage, Shain is speaking of colonial American experience as a whole. Consensus about moral norms was viewed as a necessary condition for maintaining a tight social bond among residents in a local community, and deviance from this consensus was viewed as destructive to such social cohesion.

Shain probes this thesis through considering Pennsylvania as the “the most progressive state” and, hence, the most likely to tolerate deviance from local moral orthodoxy. However, other than its legal right to freedom of religious conscience, Pennsylvania (like the other states) enacted “‘laws for the encouragement of virtue, and prevention of vice and immorality.’”

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118 Ibid., 58-59.
This account of Pennsylvania can be further elaborated through briefly reviewing relevant parts of the “Act for Freedom of Conscience” (December 7, 1682), which is one of the founding documents of the Pennsylvania colony. Here there is evidence that tolerance was only extended to different modes of theism:

Be it enacted, by the authority aforesaid, that no person now or at any time hereafter living in this province, who shall confess and acknowledge one almighty God to be the creator, upholder, and ruler of the world, and who professes him or herself obliged in conscience to live peaceably and quietly under the civil government, shall in any case be molested or prejudiced for his or her conscientious persuasion or practice. Nor shall he or she at any time be compelled to frequent or maintain any religious worship, place, or ministry whatever contrary to his or her mind, but shall freely and fully enjoy his, or her, Christian liberty in that respect, without any interruption or reflection.\(^{119}\)

The above inference of intolerance toward atheism is explicitly confirmed in the following passage that also requires some religious practice:

But to the end that looseness, irreligion, and atheism may not creep in under pretense of conscience in this province, be it further enacted, by the authority aforesaid, that, according to the example of the primitive Christians and for the ease of the creation, every first day of the week, called the Lord’s day, people shall abstain from their usual and common toil and labor that, whether masters, parents, children, or servants, they may the better dispose themselves to read the scriptures of truth at home or frequent such meetings of religious worship abroad as may best suit their respective persuasions.\(^{120}\)

It should also be noted that even more tolerance and civil liberties are granted to those who profess a mode of Christian theism:

Chap. II. And be it further enacted by, etc., that all officers and persons commissioned and employed in the service of the government in this province and all members and deputies elected to serve in the Assembly thereof and all that have a right to elect such deputies shall be such as profess and declare they believe in Jesus Christ to be the son of


\(^{120}\) *Act for Freedom of Conscience*, ed. Donald Lutz, 432.
God, the savior of the world, and that are not convicted of ill-frame or unsober and dishonest conversation and that are of twenty-one years of age at least.\textsuperscript{121}

Finally, there are many other instances of religious-moral requirements:

Chap. III. And be it further enacted, etc., that whosoever shall swear in their common conversation by the name of God or Christ or Jesus, being legally convicted thereof, shall pay, for every such offense, five shillings or suffer five days imprisonment in the house of correction at hard labor to the behoof of the public and be fed with bread and water only during that time.\textsuperscript{122}

Chap. V. And be it further enacted, etc., for the better prevention of corrupt communication, that whosoever shall speak loosely and profanely of almighty God, Christ Jesus, the Holy Spirit, or the scriptures of truth, and is legally convicted thereof, shall pay, for every such offense, five shillings or suffer five days imprisonment in the house of correction at hard labor to the behoof of the public and be fed with bread and water only during that time,…\textsuperscript{123}

Chap. VI. And be it further enacted, etc., that whosoever shall, in their conversation, at any time curse himself or any other and is legally convicted thereof shall pay for every such offense five shillings or suffer five days imprisonment an aforesaid.\textsuperscript{124}

The above passages demonstrate a clear connection between Quaker religious devotion and moral behavior requirements, which they deemed to be acceptable objects of the law. Preserving theism and Christian devotion was sufficiently important to the colony. This was so much so that it legally required belief in God, observing the Sabbath, and refraining from the following vices: “swear[ing] in their common conversation by the name of God or Christ or Jesus”, “speak[ing] loosely and profanely of almighty God, Christ Jesus, the Holy Spirit, or the scriptures of truth”, and “curs[ing] himself or any other.”

\textsuperscript{121} Act for Freedom of Conscience, ed. Donald Lutz, 432. 
\textsuperscript{122} Ibid., 432-433. 
\textsuperscript{123} Ibid., 433. 
\textsuperscript{124} Ibid.
When considering these, one can observe the inherent connection between religious worldview and normative principles. Their religious tolerance for all theists (i.e., those who professed belief in God) may have partially spawned from their belief that all men possessed an inner light and, hence, had the capacity to commune with and receive salvation from God. James Hutson briefly describes Quaker theology in colonial America as follows:

Theologically, they expanded the Puritan concept of a church of individuals regenerated by the Holy Spirit to the idea of the indwelling of the Spirit or the “Light of Christ” in every person. Salvation was available to anyone who would open himself or herself—Quakers scandalized their contemporaries by stressing the equality of the sexes—to the power of God within, “The whole tendency of their preaching,” wrote the famous Quaker apostate, George Keith (1638-1716) in 1702, “was that the Light within every Man was sufficient to his salvation without anything else.”

As this suggests, Quakerism was radically individualistic. This also can be seen in the Quaker’s rejection of many of the touchstones of traditional Christian worship and authority:

[T]hey believed that the Inner Light made most organized religion irrelevant. The sacraments were considered to be unnecessary, as was a trained ministry. The Bible was not binding, for it was only “a declaration of the foundation, not the foundation itself.”

When viewed in light of this individualistic and seemingly non-authority oriented mode of Protestant Christianity, there seems little need of the state’s coercive power to encourage orthodox doctrine. All human persons possessed “the Light” and, hence, could be saved without “organized religion.” So, they did not need the “sacraments”, trained teaching “ministry”, or even strict adherence to Biblical authority. Given the

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125 Hutson, Religion and the Founding of the American Republic, 8-9.
126 Ibid., 9.
open-ended nature of Quakerism, the Quakers naturally felt comfortable with allowing all theists great religious liberty. Nevertheless, although they want to provide sufficient freedom for successful communion with God, the Quaker community refused to tolerate atheistic abandonment of God and corrupt behavior that could turn people toward such atheism.

When extrapolating about the similarity between Pennsylvania and other colonies/States (i.e., Pennsylvania, like the other states, enacted “‘laws for the encouragement of virtue, and prevention of vice and immorality.’”), Shain writes the following:

Only when so guided and within a restricted enclave of unified believers was a good human life, a life of moral limits guided by tradition and custom, possible. This vision demanded that little protection be awarded the potential source of discord— the non-conforming individual. In such communities, “narrow but consensual norms might be necessary for any clear sense of communal purpose and unity.”

Shain’s reflection here and above, along with the above supplemental consideration of Pennsylvania, suggests that social cohesion around shared moral and religious values within local communities in colonial and early United States history was a common characteristic of the colonies/states.

Donald Lutz in his article, “Liberty and Equality from a Communitarian Perspective”, seems to agree with Barry Shain on this point. In studying “American documents written between 1620 and 1800,” Lutz concludes that there was a strong communitarian perspective with early America. According to Lutz, Americans during the

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colonial and founding periods “made it a habit of writing foundation documents for their communities…”:

Some, like the Mayflower Compact, are reasonably well-known, but most, like the Cambridge Agreement of 1632, the Dorchester Agreement of 1633, and the Salem Agreement of 1634, to name just a few out of dozens, are generally not known.\footnote{128}

In describing these founding documents, Lutz observes how they “define the common values, interests, and rights of the community.”\footnote{129} Two of the relevant facets of local-level community in early America that Lutz observes are the following: (1) they presume that “humans develop and maintain the highest levels of moral and material existence possible on Earth while living in communities…”; (2) “A community is defined by a commonly held set of values, interests, and rights homogenously distributed through a limited population…” (i.e., a true community is one that is local in nature and entails members sharing the same “set of values”).\footnote{130} Thus, Lutz finds that local-level communities in early America were constituted, in part, by their members’ shared adherence to the same moral values. This implies that such local-level communities had a thick-level condition (i.e., a shared specific conception of morality) for social cohesion.

Furthermore, Lutz also notes how early American local-level communities, which were partially constituted by their members sharing the same values, preserve the community’s shared morality through their local politics. Lutz implies this when describing two more characteristics of such local-level communities: (1) “The members

\footnote{129} Ibid., 226.
\footnote{130} Ibid., 225.
of the community have a common interest in protecting and preserving these values, interests, and rights…” that shared in common by members of the community…”; and (2) “Governmental process should continually be based upon, and beholding to, the deliberate sense of the community”. Together these seem to imply that protecting the community’s shared morality is a legitimate objective for the political realm to pursue. Since the “governmental processes” and the policies that result from them “should continually be based upon, and beholding to, the deliberate sense of the community…,” the fact that the community has a “common interest in protecting” its shared morality suggests that protecting this morality is a legitimate objective for the government to pursue.

Moreover, as Lutz makes clear, the governmental process involved here is inherently democratic in character. After suggesting that “[g]overnmental processes should continually be based upon, and beholding to, the deliberate sense of the community…,” Lutz makes it clear that “[t]he deliberate sense of the community is based upon the continuous and direct consent of the majority.” Moreover, the “majority is the voice of the people…” Lutz’s description here seems to imply a participatory local politics. This, in turn, suggests that people would have opportunities to speak and act with one another and, hence, discover their thick-level agreement. Through this process, entering into social cohesion would become possible.

132 Ibid., 225 and 231-232.
133 Ibid., 225.
134 Ibid.
The thick-level moral and religious worldviews in the different colonies:

One can further elaborate on the observations of Lutz and Shain through noting how different thick-level moral and religious views seemed to dominate the various colonies/states and regions during the seventeenth and eighteenth centuries. The following includes brief sketches of three major colonies/states and/or regions that developed different thick-level, moral-religious cultural identities.

Also, the Scotch-Irish moral-religious culture will be examined. Their late arrival (starting in the eighteenth century) in already established colonial cultures and migration to the western frontier may have precluded the Scotch-Irish from sufficiently defining the cultures of the three colonies considered. Nevertheless, they did contribute, and one can see tangible evidence of Pennsylvania and Virginia cultures evolving during the middle to late eighteenth century due to the Scotch-Irish influence.

Puritan Massachusetts and Other Parts of New England:

Puritan Congregationalism dominated Massachusetts and other parts of New England, and facets of its legal and social influence persisted during the late eighteenth century.

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135 In *The Democratization of American Christianity*, Nathan Hatch discusses how both Christian (e.g., Methodists) and Non-Christian (e.g., Mormons) religious movements began and developed significant momentum in America during the nineteenth century. However, he also suggests that there were significant sectarian differences among these groups. See Nathan O. Hatch, *The Democratization of American Christianity* (New Haven, Connecticut: Yale University Press, 1989), 62-66. Presumably, such thick-level differences would serve as impediments to people from these different sects entering into social cohesion with one another. Thus, although there were now religious movements that probably facilitated more sharing of religious beliefs among people from different regions or states, the various local level-communities in a particular state could be divided by their different beliefs due to their adherence to different sects (e.g., Methodists and Mormons).
century and even into the early nineteenth century. In the early New England colonial documents examined above, readers could see facets of this thick-level moral-religious worldview. This picture of New England culture can be supplemented by Walter McDougall’s analysis in Freedom Just Around The Corner: A New American History 1585-1828. A summary of McDougall’s description of the Puritan New England’s conception of liberty is also provided in his sequel book, Throes of Democracy The American Civil War Era, 1829-1877:

How did New Englanders define liberty? Knowing there is no freedom in moral anarchy wherein all men are slaves to sin, but also no freedom to be found beneath bishops or kings, Puritans preached “ordered liberty” rooted in the rule of law, private virtue, the family, and communal self-government of towns and churches. They hated hierarchy and privilege, place public service above private wants, and believed men free in all things except willful sin. Such was the liberty loved by John Hancock, and Sam and John Adams.

Here McDougall suggests that New Englander’s had a differentiated, thick-level understanding of the political value, “liberty”, which usually means different things to different people. The Puritan differentiated conception of “‘ordered liberty’” stemmed from their thick-level religious and moral Puritan worldview; their reformed congregational religion suggested that “there is no freedom in moral anarchy wherein all men are slaves to sin, but also no freedom found beneath bishops or kings…”.

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Also, as intimated by their early documents above, many of the New England Puritan communities were believers in political establishment of religion, and their view of the political community’s common good seemed defined by their Reformed Christianity. In fact, they might have come close to equating the participants in the common good of the polity as being a presumptive group of the elect (i.e., the true Christians who have been predestined by God). Further analysis of this can be found in Appendix A.

*Quaker Pennsylvania:*

Various sects (e.g., Mennonites, Lutherans, and Presbyterians) could be found in Pennsylvania, but Quakerism had a dominate impact on the colony’s political culture. The above paragraphs contain an analysis of Pennsylvania’s early documents. These show how the early Quaker’s had (limited) religious tolerance (and utter intolerance of atheism and immorality). This picture of the Quakers can, in turn, be supplemented through considering their particular conception of the liberty. Walter McDougall provides a summary of his analysis of the Quakers in his *Throes of Democracy:*

The Quaker political culture dominating in the Delaware Valley abominating the Puritans for their belligerence and intolerance, and the Cavaliers for their hierarchy and slavery. The Society of Friends dispensed with all clergy, churches, ceremony, symbols, and dogmatic theology in the belief that all men and women possess a divine “inner light.” They admonished each other to live in simplicity and equality, albeit their shrewd merchants elevated countinghouse values over those of the meetinghouse. William Penn’s religious toleration, for instance, doubled as a shrewd promotional gimmick to attract settlers, and his far-flung advertising agents helped make Pennsylvania a stunning commercial success. But the Quakers, of course, were pacifists with a “live and let live” idea of liberty. A simple enough proposition, but its corollaries were in fact complex, including resistance to taxes for waging war and any taxes imposed by a
nonrepresentative body. Hence, Pennsylvanians such as John Dickinson would shout for liberty as loudly as other colonists, but drive the others batty by refusing to fight.\textsuperscript{139}

Aside from McDougall’s rhetorical employment of hyperbole and cynicism, this is a pithy account of how Quaker thick-level religious and moral worldviews were connected to their thick-level conception of liberty. As a culture with a relatively progressive understanding of religious toleration, the Quaker’s were natural advocates of “a ‘live and let live’ idea of liberty” or liberty as toleration; however, as non-revolutionary pacifists the Quakers were less willing (than the Southern Anglicans and New England Puritans societies) to terminate efforts to peacefully reconcile with political foes such as the Indians in the French and Indian War and the British during the Revolution.\textsuperscript{140}

In addition to their differentiated view of liberty as toleration, the Quakers imparted many long-term characteristics on the colony that stemmed from the Quaker moral-religious worldview. In addition to McDougall’s above brief description, the Quaker legacy can be seen in Isaac Sharpless’ book, \textit{A Quaker Experiment In Government}. First, the Quaker political system was extremely democratic. Sharpless describes the “settlers” original vision as follows:

1. Perfect democracy. This hardly needs qualification. For while the governor was non-elective and to some extent thwarted the will of the people, this was probably not the

\textsuperscript{139} McDougall, \textit{Throes of Democracy: The American Civil War, 1829-1877}, xxi.

\textsuperscript{140} Although the Pennsylvania government ultimately opted for warfare in both cases, the Quakers consistently exerted a mollifying effect on these outcomes. Pennsylvania was delayed in taxing for military provisions for the French and Indian War, and the Quaker majority in the Assembly ultimately resigned rather than go along with such measures. Also, Pennsylvania was the long-time hold out in agreeing with the other colonies to jointly secede from Great Britain; many of its representatives continued to push the Continental Congress to peacefully petition the Crown. Finally, after about a year of actual fighting, enough members of the Pennsylvania delegation in the Continental Congress were in agreement that declaring independence was necessary, but one of Pennsylvania’s key leaders, John Dickson, still refused to vote for and sign the Declaration of Independence.
original intention, but rather an unexpected development of proprietary rights as construed by unsympathetic heirs of William Penn.\textsuperscript{141}

In fact, history suggests that this was largely the case. First, the legislature, which was called the Assembly, had some direct-democratic character: “The Assembly of the first year was to consist of all freemen of the province, afterwards of two hundred members.”\textsuperscript{142} Ultimately, however, the maximum number was narrowed to “thirty-six”, which “remained throughout the Colonial period.” Although Penn envisioned the Assembly to be tempered by a smaller body called the Council, this ultimately gave way (in 1693) to the people’s desire for full “legislative rights for the Assembly.”\textsuperscript{143} In 1701, the Council “became an advisory board for the Governor, appointed by the Propreitor.”\textsuperscript{144}

There is a second historical corroboration of Sharpless’ commentary above. The governor did not try to thwart the democratic will of the people (as expressed by the Assembly) when Penn was Proprietor, and the governor and the Assembly proceeded on good terms until relations deteriorated in 1739. Penn (until his health forced him into involuntary retirement) seemed willing to defer to the will of the legislature on most issues; he acquiesced to being without veto-power until it was restored in 1696, and then used his power as Proprietor very sparingly.\textsuperscript{145} Even beyond Penn’s time, however, there was a “thirty years’ peace” in the colony in which there “were no more contentions


\textsuperscript{142} Sharpless, \textit{A Quaker Experiment In Government V1}, Kessinger Publishing, 62.

\textsuperscript{143} Ibid.

\textsuperscript{144} Ibid.

\textsuperscript{145} Ibid., 61-62, 67, and 105-106.
between Governor and Assembly” and the “Quaker government went quietly on, performing its functions with vigor and system.”\textsuperscript{146}

Unfortunately, an international war between Britain and Spain in 1739 changed the dynamics of the colonial politics, for war “meant privateering, and privateering destroyed commerce, and this touched Pennsylvania immediately. War meant taxes, and taxes produced discontent, differences with Governors about the rights of the Assembly, cessation of friendly feeling, and a re-creation of parties.”\textsuperscript{147} In the new period of conflict between the governor and the Assembly, the Assembly was able to win through controlling the governor’s salary and employing other budgetary bargaining tools. Moreover, the people’s struggle for democratic control ultimately manifested itself in a small rebellion against the governor. Although the participants were small in number and the traditional Quakers who sought to struggle for liberty only through peaceful methods did not approve, this incident demonstrates how the Quaker value on democratic authority had become deeply embedded in Pennsylvania’s political culture.

The democratic character of colonial Pennsylvania seems to have been the product of both (1) the Quaker’s moral-religious worldview, which valued the equal dignity of all human persons (as possessors of the “Inner Light”) and sought to grant generous civil and political liberties to those who were not atheists, and (2) the Quaker’s long tenure ruling the colony (1682-1756). Even after 1756, the politics of Pennsylvania didn’t radically change, for the Quaker’s continued to nominally control the legislature:

\textsuperscript{146} Sharpless, \textit{A Quaker Experiment In Government VI}, Kessinger Publishing, 99.
\textsuperscript{147} Ibid., 101.
The withdrawal of the Quaker members of the Assembly did not change its political
tendencies. In all things, save a greater willingness to vote money for defence, it showed
the same hostility to proprietary encroachments as before. The new members, while not
Friends, were of the same political party as their predecessors (indeed, there did not seem
to be any proprietary party of consequence in the Assembly), and were elected by the
same constituencies. They doubtless had the support of the Quaker voters, and the same
machinery (whatever it was) which had hitherto been effective. It was still in popular
language the Quaker Assembly, and so remained till 1776, when there was a sudden and
radical change. It represented the “Quaker party” (of which probably a majority were
non-Quakers) and carried out its decrees. 148

If this is correct, then it is reasonable to view the Quakers as having a defining
impact on the political culture of colonial Pennsylvania. 149 Not only did they impart a
love of liberty as toleration, they also gave Pennsylvania a fierce love of democratic
politics. Moreover, the Quaker’s helped Pennsylvania balance its values of liberty and
rule-by-the-people with a desire to seek peaceful and non-revolutionary solutions to
conflicts, even sometimes holding out for peace after war seemed inevitable.

148 Sharpless, A Quaker Experiment In Government V1, Kessinger Publishing, 265-266.
149 Colonial Pennsylvania, however, was extremely diverse. Many religious sects and ethnic
identities settled there. This was initiated from the outset by the colony’s founder, William Penn. As James
Hutson describes, Penn “began promoting Pennsylvania with a public relations campaign that flooded the
European Continent with books and pamphlets in Dutch, German, and French.” See Hutson, Religion and
the Founding of the American Republic, 12. He “assured the audience that Pennsylvania offered ‘Liberty to
all Peoples to worship God, according to their Faith and Persuasion.’” Penn also “touted his province as a
place to make a good living.” Ibid., 12. Such promotion yielded results: “Europe’s oppressed Christians
immediately responded to Penn’s invitation, the first to come being a group of Mennonites (possibly
including some Quakers) who arrived in Pennsylvania from Krefeld, Germany in 1683. The experience was
typical of the German and Swiss sectarians who began flowing into Pennsylvania; they had been repeatedly
banished from their homes and warned the last time, ‘if they come againe, they should be whipt and burnt
ontheire backs.’ Swiss Mennonites, brutalized in Bern by being jailed and forced to work eighteen hours a
day on bread and water, followed a few years later, and additional German groups- Dunkers,
Schwenfelders, Moravians- arrived apace, with the result that, by the early eighteenth century,
Pennsylvania came to resemble ‘an asylum for banished sects.’” Ibid., 12. These largely German-speaking
immigrants poured into Pennsylvania during the eighteenth century, and (according to McDougall) “[b]y
1750 Pennsylvania became the first colony in which a majority of the white population was no longer of
English stock.” See McDougall, Freedom Just Around The Corner, 138. Initially, this upset the Quaker
elite, but they soon grew to accept (if not welcome) the German-speaking immigrants because they were
industrious, benefited the economy, shared the Quaker’s pacifist values, and “voted for the Quaker
party…” Ibid., 138. This last contribution allowed the Quaker “oligarchy to maintain its majority in the
assembly long after Quakers were outnumbered by Presbyterians and others in Pennsylvania.” Ibid., 138.
Anglican Virginia:

Historical evidence also shows how Anglicanism was a powerful influence in Virginia. Early Virginian foundational documents demonstrate the establishment of Anglicanism, which was quite distinct from New England Puritanism. In the “Laws and Orders Concluded by the Virginia General Assembly” (“March 5, 1624”), the following passages provide evidence of this:

2. That whosoever shall absent himselfe from divine service any Sunday without an allowable excuse shall forfeite a pound of tobacco, and he that absenteth himselfe a month shall forefeith 50lb. of tobacco.¹⁵⁰

3. That there be an uniformity in our church as neere as may be to the canons in England; both in substance and circumstance, and that all persons yield readie obedience to them under paine of censure.¹⁵¹

4. That the 22nd of March be yeerly solemnized as holliiday, and all other holliadies (except when they fall together) betwixt the feast of the annunciation of the blessed virgin and St. Michael the archangell, then only the first to be observed by reason of our necessities.¹⁵²

Additional evidence of strict Anglican observance requirements are found the following sequence of successive passages in the “Laws Enacted by the First General Assembly of Virginia” (“August 2 – 4, 1619”):

All ministers shall duly read divine service and exercise their ministerial functions according to the ecclesiastical laws and orders of the Church of England and every Sunday in the afternoon shall catechize such as are not yet ripe to come to the

¹⁵¹ Ibid., 67.
¹⁵² Ibid.
communion. And whosoever of them be found negligent or faulty in this kind shall be subject to the censure of the Governor and Council of Estate.\textsuperscript{153}

The ministers and church wardens shall seek to prevent all ungodly disorders; the committers whereof if, upon good admonitions and mild reproof, they will not forbear the said scandalous offences, as suspicious of whoredoms, dishonest company keeping with women, and such like, they are to be presented and punished accordingly.\textsuperscript{154}

If any person, after two warnings, does not amend his or her life in point of evident suspicion of incontinency or of the commission of any other enormous sins, that then he or she be presented by the church wardens and suspended for a time from the church by the minister. In which interm, if the same person do not amend and humbly submit him or herself to the church, he is then fully to be excommunicated and soon after a writ or warrant to be sent from the Governor for the apprehending of his person and seizing all his goods.\textsuperscript{155}

The above establishment mandates and religious-moral observance requirements are distinctly Anglican (and not New England Puritan). Not only do they mandate conformity with the “laws”, “orders”, and “canons” of the “Church of England”, they also provide for observing “the feast of the annunciation of the blessed virgin and St. Michael the archangell…”, which the Puritans (who eliminated celebration of several traditional Christian holidays) probably would have viewed as heresy. Furthermore, the documents suggest that religious and moral values are connected. Illegal immorality is referred to as sin: “incontinency or of the commission of any other enormous sins”. These include “scandalous offences, as suspicious of whoredoms, dishonest company keeping with women, and such like.” Moreover, it is the “ministers” who are responsible for policing this: “The ministers and church wardens shall seek to prevent all ungodly disorders.”

Also, “ministers” temporarily suspended repeat sinners from the church; if such sinners

\textsuperscript{153} \textit{Laws and Orders Concluded by the Virginia Assembly}, March 5, 1624, ed. Donald Lutz, 61.
\textsuperscript{154} Ibid., 61-62.
\textsuperscript{155} Ibid., 62.
still don’t repent, ministers “excommunicate” and, then, turn them over to the governor for civil punishment.

Although such evidence is from early seventeenth century Virginia, the colony’s Anglican character is also manifest during the eighteenth century. In fact, the Anglican Church exerted significant influence in Virginia into the very late eighteenth century. As late as 1776, the “Anglicans- later Episcopalians- formed perhaps half of the body of orthodox believers, where almost all gentleman and ladies were Anglican, although not nearly all Anglicans were aristocrats….“156 Moreover, the Anglican Church was not legally separated from the state of Virginia until 1786.157

157 Ibid., 320-322. Some might doubt whether there is truly a significant moral-theological difference between the Congregational Puritan worldview and the Anglicanism, especially during the eighteenth century. The fact that the two denominations have some links to Calvinist theology may suggest that the differences between the two are not at the level of thick-level ideas. However, this assumption would be mistaken. In fact, there is strong evidence that American Anglican theology in the eighteenth century became increasingly different from the Calvinist orthodoxy (i.e., different from the Puritan Calvinism of old, as well as the new Calvinist orthodoxy that spread during the First Great Awakening) that had been dominate in New England. This new mode of Anglicanism developed in England after the Restoration in 1660. It, then, flowered into a powerful theological movement by 1685. It was commonly referred to as Latitudinarianism, especially by its early critics. See John Spurr, “‘Latitudinarianism’ and the Restoration Church” The Historical Journal 31 (March 1988), 61-64 and 82.

Its influence in America has been largely linked to American readership of John Tillotson’s sermons during the late seventeenth and eighteenth centuries. See Norman Fiering, “The First American Enlightenment: Tillotson, Leverett, and Philosophical Anglicanism” The New England Quarterly 54 (September 1981), 307-344. Fiering argues that Tillotson’s ideas and sermons were particularly popular in the Anglican South. Ibid., 308-309. Moreover, they also gained some traction in New England via the influence of John Leverett and his leadership in Massachusetts (e.g., his presidency at Harvard College). Ibid., 321-330. Efforts by George Whitefield and Jonathan Edwards in the 1740’s to battle Tillotson’s influence probably weakened their effect on New England. However, “Philosophical Anglicanism” (Ibid., 330) was still strong in the South with its wide Anglican base, even though Evangelical missionaries from the Baptist and Presbyterian denominations did begin to penetrate the Southern colonies after 1740. Ibid., 308-309; and John Murrin, “Religion and Politics in America from the First Settlements to the Civil War,” ed., Noll and Harlow, 26-29.

Tillotson’s teaching, which was often advocated by Leverett, shows the content of this moral-theological worldview. Nature and reason reflected the law of God. Nature (especially human nature) is revelation of God. See Fiering, “The First American Enlightenment”, 336. Religion benefits from rational innovation. Ibid., 337. Christian principles should not contradict practical reason. Ibid., 341-342. Moreover,
Another variant of thick-level difference between Virginia and other colonies stemmed from Virginia’s English aristocratic and Cavalier culture. In *Freedom*, Walter McDougall describes how this culture had its own conception of liberty. McDougall concisely summarizes his analysis in *Freedom* in his sequel book, *Throes of Democracy*:

What really placed a stamp on the Chesapeake was the influx of distressed Cavaliers, or King’s Men, who lost their lands fighting Cromwell and accepted an offer by Governor Berkeley of Virginia granting land in America. They stemmed mostly from England’s southwest and spoke in a languid rhythm (Guv’nah Baaahkley). Planters in Virginia cared little for religious disputes, but made a religion of horsemanship, hospitality, and hierarchy. Their pride was expressed by William Byrd II, who likened himself to a biblical patriarch endowed with herds, flocks, manservants, maidservants, and independence from all authority save that of Providence. Thus was born the American South, and a notion of liberty contrasting sharply with that of New England. Planters took human inequality for granted; hence to be free meant not to be dominated by others—such domination is slavery—and thus to exert authority over others, be it wife, children, or servants. Such “hegemonic liberty” was the direct descendent of the aristocratic ethic that inspired the Magna Carta, English Parliament, and Bill of Rights of 1690. To a highborn Virginian the salient question was not who should govern, but whether the natural

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the most important part of the Christian faith entails practicing upright moral conduct; true theological falsity is a living in a morally bad manner. Ibid., 321. The touchstone of the Christian life is proper moral conduct. Ibid., 337. God’s goodness and justice undermines the doctrine of predestination. Ibid., 342.

John Murrin refers to the continuation of this mode of Anglicanism in the American colonies during the mid to late eighteenth century as “Anglican moralism”, and he describes it in contrast to eighteenth century America’s “Calvinist orthodoxy”, which was preached in the First Great Awakening (e.g., Jonathan Edwards): “Anglican moralists, by contrast, rejected the necessity of a conversion experience and emphasized the need to lead an ethical life in this world. This tradition left few systematic expressions in eighteenth-century America, but it undoubtedly made a deep impact on gentleman and planters and other elite groups.” Murrin, “Religion and Politics in America from the First Settlements to the Civil War”, ed. Noll and Harlow, 31.

Although there were obvious examples of some Virginia gentleman like Thomas Jefferson who (like Tillotson) had a high view of the role of reason in revealing God’s will and law, it also seems reasonable to presume that not all Anglican moralists regressed into heterodoxy. Orthodox Protestant Christianity had inertia in Anglo-American culture during the seventeenth and eighteenth centuries. Even if all Anglican moralists “rejected the necessity of a conversion experience and emphasized the need to lead an ethical life in this world”, some probably still held to the orthodox Protestant Christian view of the Bible being the source of God’s revelation, and biblical Christianity is not necessarily in conflict with Anglican moralism’s rejection of evangelical conversion nor its high emphasis on “lead[ing] an ethical life in this world.”

aristocrats governed with honor, justice, and wisdom. George Mason, George Washington, Thomas Jefferson, and James Madison cherished such values.\footnote{McDougall, *Throes of Democracy: The American Civil War, 1829-1877*, xx-xxi. McDougall’s summary here is overly flippant concerning the issue of religion and the early Virginians. As seen by the early colonial documents, religion was established and seemingly important as late as the 1620’s. The Cavaliers came decades later (1640-50’s); however, historical evidence suggests that the Virginians were still religious even after the Cavaliers. This can be seen in the continued influence of Anglican Latitudinarianism during the late seventeenth century and, then, throughout the eighteenth century. See Fiering, “The First American Enlightenment”, 307-344. In his expanded analysis within *Freedom Just Around the Corner*, McDougall also admits that many of the early English aristocratic settlers were “Anglican” and practiced their religion, but he adds that they did not intrude into the religiosity of their neighbors: “In the plantation South, perhaps more than anywhere in England itself, Queen Elizabeth I’s Anglican latitudinarianism prevailed. Virginians might attend church on a Sunday, consult their prayer books regularly (William Byrd II, between bouts of fornication, prayed morning and night), and cherish their family Bible. But they did not pry into what, or how fervently, their neighbors believed.” See McDougall, *Freedom Just Around the Corner*, 150.}

Key to this depiction of Virginia’s aristocratic planting culture is its distinct view of “‘hegemonic liberty’” as the freedom “not to be[ing] dominated by others- such domination is slavery- and thus to exert[ing] authority over others, be it wife, children, or servants.”\footnote{Although McDougall portrays the Virginians’ conception of “hegemonic liberty” as stemming from its British aristocratic culture, it seems plausible that this value is also connected with the Anglican worldview, which is more traditional and pre-modern in nature. Like Catholicism, Anglican ecclesiology emphasizes (much more than other Protestants) the visible Church that is historically and sacramentially connected to Christ and His Apostles. This connection is preserved through the generations in the persons of the bishops, priests, and deacons who are sacramentally ordained in their clerical offices. Such clergy, in turn, have a special role in ministering and administering the sacraments to the lay members of the Church body (i.e., helping to better connect them to Christ). The English political constitution is also an inherent part of the Anglican Church, for the King is recognized to be its visible head. The King is not a republican and democratic phenomenon; he receives his office through hereditary right and, hence, is ordained and provided by God. Thus, both political and ecclesial hierarchies are important in the Anglican worldview. Just as ecclesial hierarchy is composed of descending levels of King, Archbishop, bishop, and priest, so the political hierarchy is composed of descending levels of King, Aristocrats (e.g., Lords), and Commons. It seems quite possible that the concept of hierarchy inherent within in the “hegemonic” understanding of liberty is a product of this traditional English ecclesial-political vision.} In *Freedom*, McDougall adds to this when arguing that the Virginian “planter” accepted the “natural aristocracy of prominent gentleman”; rather, than focusing on “‘who should govern’”, planters concerned themselves with whether the
natural aristocracy “governed with honor, justice, and wisdom.” According to this mindset, only natural aristocracy was truly compatible with “liberty”, for true “liberty” could not survive in the alternative of egalitarianism “because people are not naturally equal and can only be made to appear equal through coercion (in which case everyone is a manner of slave), or pretense (in which case society pretends to be all chiefs and no Indians).” As McDougall suggests, this unique Virginian view of liberty persisted into the founding period and was admired by many of the state’s late eighteenth century leaders.

The Scotch-Irish Influence:

Finally, it is necessary to briefly consider the “Scotch-Irish” culture in colonial America. Scotch-Irish is a name used to refer to “Scots, whether from Ulster or southern Scotland, extreme northern English, and a few southern Protestant Irish.” These British peoples emigrated to the North American colonies/states from throughout the eighteenth century. Since the Scotch-Irish came later than the Puritans, Quakers, and Anglican-Aristocrats who had settled much of the prominent portions of their colonies (e.g., much of eastern New England, the Middle Colonies, Virginia, and swaths of coastal areas in other southern colonies), they tended to settle in the less populated western frontier of various colonies/States. A large portion of the Scotch-Irish migration entailed landing in Philadelphia, traveling west over the “Great Philadelphia Wagon Road”, and settling in

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161 McDougall, *Freedom Just Around the Corner*, 151.
162 Ibid.
163 Ibid., 152.
either the colonial frontier of Pennsylvania or “[f]anning out in the Appalachians” of Virginia and the Carolinas.\footnote{164} This western area included what would become Kentucky and Tennessee.

The social, religious, and political cultures of this people were clannish, colorful, and fierce. According to McDougall, the main commonalities among the different Scotch-Irish people groups were that “almost all spoke English rather than Gaelic and all were fleeing chaotic and bloody borderlands” of Ireland, Scotland, and northern England.\footnote{165} This common experience, in turn, seemed to result in some common cultural characteristics:

The human beings who had to live on either side of these borders, for all their deep-seated hatreds, nevertheless shared identical fears, hardships, and duties, chief among them being always on guard, fiercely protective of family, loyal toward friends, and ruthless toward enemies. They were proud and clannish, distrustful of outsiders, hungry as sheep for security, yet ferocious as wolves for their next meal. No wonder the settled communities on the Atlantic seaboard were appalled when these newcomers poured onto the docks in their thousands, then relieved when they moved to the frontier where they could endanger no one but Indians.\footnote{166}

The Scotch-Irish also tended to share a particular Protestant religious worldview. Most were Presbyterians. In describing how Ulster Scots “represented that traditional Presbyterian Scot culture”, Arthur Herman says the following:

They were Irish by geography only. In their settlements in the northern counties of Ireland, they had struggled to preserve the twin characteristics of their Scottish forebears. The first was a fierce Calvinist faith. The other was a similarly fierce individualism,

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\footnote{164} McDougall, \textit{Freedom Just Around the Corner}, 152-153. \footnote{165} Ibid., 152. \footnote{166} Ibid.
which saw every man as the basic equal of every other, and defied authority of every kind.\footnote{Arthur Herman, \textit{How The Scots Invented the Modern World: The True Story of How Western Europe’s Poorest Nation Created Our World & Everything in It} (New York: Three Rivers Press, 2001), 232.}

This combination of Christian faith and individualism may, in turn, help explain the success of the “Great Awakening” style preaching among the Scotch-Irish in the Appalachia. McDougall describes how such evangelism was well received:

Since few civil authorities policed the Appalachian foothills, the main source of social discipline was personal conscience quickened by itinerate preachers. Thus, while the “Great Awakening” touched all the colonies, the revivals may have had the profoundest impact on the frontier. So numerous and idiosyncratic were the evangelical preachers who worked the frontier that no generalizations are possible except to observe that they were highly emotional, given to field-preaching in the manner of Whitefield, hostile to organized churches, and focused on the born-again, life changing experience. Those were features bound to appeal to a rural Celtic population already romantic, suspicious of authority, and jealous of independence. “Repent, ye sinner, and be saved”- especially when cried at dusk in a torchlit meadow littered with jugs- was simple message that blamed the frontiersman alone for his sordid condition and put his future entirely in his own hands. The preacher was the medium, but the message was that man and God are alone with each other, free to make their own peace.\footnote{McDougall, \textit{Freedom Just Around The Corner}, 154.}

An emotional (Spirit-filled) appeal to the individual that encouraged him or her to examine one’s own conscience and, then, make his or her “own peace” with God. From a Calvinistic perspective, a person’s positive and life-changing response to such experiences was a sign that he or she was among God’s elect.

Given this individualistic mode of Calvinism, it is not surprising that the Scotch-Irish had a libertarian-independence conception of freedom. McDougall describes part of this as follows:

As primitive as this Scots/Ulster/north English culture may seem today, its politics expressed a familiar conception of liberty. Having known nothing but oppression and
suffering for centuries at the hands of all manner of governments and churches, these were people infused with a pure libertarian spirit for whom freedom meant individual choice. These were people who hated taxes because they reckoned all who imposed or collected them to be glorified thieves. These were people who hated boundaries because they reckoned all who drew or enforced them to be glorified jailers. These were people who, as a German traveler observed in 1768, “shun everything which appears to demand of them law and order, and anything that preaches constraint. They hate the name of a justice, and yet they were not transgressors. Their object is merely wild.” On the American frontier they could achieve that object as they never could back on the Irish and Scottish marches. Should obnoxious officials impinge on them, why, a whole continent lay beyond the Appalachian ridge in which one could fine “elbow room.” That was the freedom precious to Francis Marion (born 1732), Daniel Boone (born 1734), Daniel Morgan (born 1736), and Patrick Henry (born 1736).\(^{169}\)

Although this is helpful, it seems reasonable to qualify McDougall’s description of Scotch-Irish’s “pure libertarian spirit for whom freedom meant individual choice.” Their notion of freedom could also have been more complicated. It may have encompassed a larger desire for independence for one’s person and for one’s group (e.g., family and clan). As discussed above, the Scotch-Irish were fiercely loyal to their family and clan, so it would probably be a mistake to view them as holding an atomistic individualist conception of liberty, which is frequently associated with libertarianism of today.

As suggested above, their late arrival (starting in the eighteenth century) and migration to the western frontier precluded the Scotch-Irish from sufficiently defining the 18\(^{th}\) century cultural identity of the three colonies considered above. Nevertheless, they did contribute, and one can see tangible evidence of Pennsylvania and Virginia evolving to varying degrees in the middle to late eighteenth century due to the Scotch-Irish influence. In Pennsylvania, Presbyterians like George Bryan and Charles Thomson served as leaders within the dominate Quaker Party; however, the Presbyterian Party

(sometimes called the Whig Party) didn’t dominate the Pennsylvania government until the 1770’s. The Presbyterians were more aggressive, and “by 1770 [they] had assembled all the elements which supported American independence in 1776”

The Scots also provided Pennsylvania and the colonies in general with notable political leaders and philosophical contributions during the founding period of the late eighteenth century. James Wilson, for example, was an immigrant from Scotland who represented Pennsylvania at the Continental Congress and the Constitutional Convention. Also, during the late eighteenth century, important framers such as James Madison were educated at Princeton in Scottish Enlightenment philosophy (e.g., David Hume and Francis Hutchinson) by Scottish immigrant, John Witherspoon.

As seen in both examples, the influence of Scottish Enlightenment thought in the colonies came in the late eighteenth century originally through Scotch educated elite colonists and immigrants. It was very influential among the elites at the Constitutional Convention. Forrest McDonald shows this in Novus Ordo Seclorum when discussing how

171 Ibid., 4.
172 Considering the Scottish Wilson in contrast to southern Scotch-Irish Patrick Henry is very interesting. Wilson was a well and foreign educated Scot who had acquired command of the great works of the Scottish Enlightenment. In particular, he showed great affinity for the works of Thomas Reid’s common sense philosophy. Wilson was also an advocate of nationalism. He advocated developing a “national government” during the Constitutional Convention. See Charles Warren, The Making of the Constitution (New York: Barnes & Noble, Inc., 1967), 150. In contrast, Patrick Henry was a self-educated Virginian who advocated the above notion of liberty as independence, which he seemed to view as implying the independence State-peoples from connections with external powers (e.g., the British Crown and the Constitution’s federal government).
173 Herman, How The Scots Invented the Modern World, 244-245.
various delegates were strongly influenced by David Hume’s moral and political thought.\textsuperscript{174}

In Virginia, the Scotch-Irish contribution also came later in the eighteenth century. First, they provided some pivotal leaders to the State. The most notable example is Patrick Henry who virtually controlled the Virginia legislature in the late eighteenth century. Second, the Presbyterians helped to upset Virginia’s establishment of the Anglican religion in 1786 when they entered into a coalition with the Baptists, James Madison, and Thomas Jefferson to pass Jefferson’s “Bill for Establishing Religious Freedom.”\textsuperscript{175}

Third, there is evidence that the Scotch-Irish notion of libertarian-independence or liberty as independence was mixed with the Anglican-Cavalier concept of “hegemonic liberty.” Thomas Jefferson, for example, seemed to hold such a hybrid view. In being raised in the Cavalier culture, Jefferson seemed to have life long affinity with the freedom entailed in having authority over others and not being under the authority of others. This was evidenced by his famed Montecello Plantation in which Jefferson housed and employed slaves. Such a life provided Jefferson with aristocratic leisure to pursue his various studies, arts, and political interests. However, Jefferson also seemed to appreciate the notion of liberty as independence for communities and individuals. David Hackett Fischer argues for this as follows:

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In 1776, Jefferson himself held an ideal widely shared in the southern colonies and back-country, that liberty meant independence for nations and individuals. In his first draft of the Declaration he wrote that “all men are created equal and independent [sic].”\(^{176}\)

In mentioning “back-country”, Fischer is referring to the Scotch-Irish settlers of the Appalachian frontier. A reasonable inference about the above data is that Jefferson and other Virginians had affinities for a hybrid conception combining the two connotations of liberty: liberty as independence for individuals and communities in conjunction with having authority over others as a means of realizing one’s independence.

Finally, it should be noted that Scotch-Irish Presbyterians played an immense role in Pennsylvania’s and Virginia’s fighting contribution to the Revolutionary War. As noted above, “by 1770 [the Presbyterian Party] had assembled all the elements which supported American independence in 1776”.\(^{177}\) One “Ulster Scot” Patriot in Philadelphia remarked, “‘a Presbyterian loyalist was a thing unheard of.’”\(^{178}\) Furthermore, Arthur Herman describes how the Scotch-Irish supplied some of the best troops of the Continental Army:

The Scotch-Irish from places such as Mecklenburg and Orange counties in North Carolina, Augusta and Rockbridge counties in Virginia, and Bucks and Chester counties in Pennsylvania supplied the cause of independence with more than just patriotic fervor. Debate now rages among historians about how skilled the average American colonist really was with firearms and whether most even owned or had fired a musket. One thing seems certain, however: the typical frontier Scotch-Irish settler had grown up with firearms, including the use of the rifled musket, which, the British general Howe had to admit, they had “perfected with little knowledge of ballistics.” They would supply the backbone of George Washington’s Continental Army. One estimate (probably exaggerated) had it that half the army at Valley Forge were Ulster Scots. Certainly they

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\(^{178}\) Herman, *How The Scots Invented the Modern World*, 250.
brought military experience, leadership, and a fighting spirit to a revolution that badly needed all three.\textsuperscript{179}

Given the Scotch-Irish Presbyterian’s strong thick-level view of freedom as individual and group independence from external authorities, their strong participation in a fight to become independent from their current (and former) English masters is not surprising.

Although the Scotch-Irish contributed to the colonies in the mid to late eighteenth century, their most significant influence in the United States would come in the nineteenth century. With their immense numbers and distinct culture, they molded much of the American South into the independent loving, State’s rights culture (e.g., the leadership of John C. Calhoun) that ultimately led to a noble struggle against the federal government that climaxed in the “War Between the States.”\textsuperscript{180}

\textbf{Conflict Between the Sects:}

Some of these competing sects sought to forcefully impose their beliefs on the colony/State where they had significant influence. There were a plethora of Christian sects during the seventeenth and eighteenth centuries that did not tolerate each other. Such conflict sometimes included imposing legal punishments on those who deviated from the dominant sect. As John Richard Alden suggests in \textit{The South in the Revolution: 1763-1789}, the Anglican Church exerted significant influence in Virginia into the very late eighteenth century (e.g., 1780’s), and it was not legally separated from the state until

\begin{footnotesize}
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\item \textsuperscript{179} Herman, \textit{How The Scots Invented the Modern World}, 251.\textsuperscript{179}
\item \textsuperscript{180} Ibid., 235-237 and Walter McDougall, \textit{Freedom Just Around The Corner}, 153-154.\textsuperscript{180}
\end{enumerate}
\end{footnotesize}
1786 In *The Democratization of American Christianity*, Nathan Hatch suggests that the persecution of non-Anglicans was common during this period in Virginia: “As late as the 1770’s, Baptist preachers in Virginia were still being thrown in jail…” Competition and persecution among protestant sects was not limited to the South, some New England states enacted laws during the seventeenth century that banned and punished alternative Christian sects. As the text and adjacent footnotes in the Volume One of Tocqueville’s *Democracy In America* suggest, Connecticut and Massachusetts sought to legally prevent the spread of what they viewed as errant theology:

In other places the lawgivers, completely forgetting the great principles of religious liberty which they themselves claimed in Europe, enforced attendance at divine service by threats of fines and went so far as to impose severe penalties, and often the death penalty, on Christians who chose to worship God with a ritual other than their own. This was not peculiar to Connecticut. See, *inter alia*, the Massachusetts law of September 13, 1644, which condemned the Anabaptists to banishment (*Historical Collection of State Papers*, Vol. I, p. 538). See also the law passed on October 14, 1656, against the Quakers: “Whereas there is a pernicious sect, commonly called Quakers, lately arisen…” (*The Charters and General Laws of the Colony and Province of Massachusetts Bay*, Boston, 1814, p. 123] There follow provisions imposing very heavy fines on the captains of ships bringing Quakers to the country. Quakers who succeed in coming in are to be whipped and shut up in prison to work there. Those who defend their opinions will first be fined, then imprisoned, and finally driven out of the province. (*Historical Collection of State Papers*, Vol. I, p. 630).

Under the penal law of Massachusetts a Catholic priest who sets foot in the state after he has been driven out therefrom is subject to the death penalty.

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181 Alden, *The South and Revolution*, 320-322. Here Adlen reveals that (even as late as 1776) within Virginia the “Anglicans- later Episcopalians- formed perhaps half of the body of orthodox believers, where almost all gentleman and ladies were Anglican, although no nearly all Anglicans were aristocrats....”. Ibid., 320.


183 Tocqueville, *Democracy In America*, 42-43.

184 Ibid., 42-43.

185 Ibid., 43.
Moreover, it is likely that the long-standing traditional Puritan view of national covenant (i.e., that the Puritan peoples of New England had national covenants with God) still exerted significant influence among New England Congregationalists even up to the late 1780’s. Thus, adherents of this traditional view would have a natural justification for declaring Puritan superiority over alternative Christian sects within the social and

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186 Mark Noll argues that Jonathan Edwards’ rejection (in 1749-1750) of the strong-sense of the traditional notion that the Puritan peoples of New England had national covenants with God (in a manner similar to the covenant between God and the ancient Hebrews) was catalytic for its decline. See Mark Noll, *America’s God: From Jonathan Edwards to Abraham Lincoln*, Oxford, U.K.: Oxford University Press, 2002, 44-50. However, it seems likely that the vestige of this long-standing view of national covenant still exerted influential weight among the Reformed Congregationalists in New England during the 1780’s. How could such a long-standing idea ceased to be influential within just over three decades of Edwards’ critique? As Noll himself reports, Jonathan Edwards was extremely unpopular when he started to imply it via arguing against the baptism of children of the “professedly unregenerate,” which had been a key mode of allowing New Englanders to be part of the national covenant with God even without experiencing regenerating religious conversion. Ibid., 46. Edwards’ own scholarly cousin, Solomon Williams, arose as a “champion” for Edwards’ opponents on such issues. Ibid., 46. Williams attacked Edwards both on the notion of the sacraments being limited to the regenerate and the threat of his idea to the ability of New England to defend itself against various erroneous Christian sects (e.g., the “Arminian, Independent, and Antinomian Errors”) Ibid., 46-47. Finally, Edwards was ultimately fired from his pastoral position at his Northampton, Massachusetts in 1750 when he “abandoned his grandfather Stoddard’s practice of open communion and instead began to insist that candidates for church membership (and the privilege of communion) offer a convincing statement of faith.” Ibid., 45. Given the strength and tenacity of the idea of national covenant during Edwards’ time (as evidenced by the outcry against Edwards’ critique), it probably remained influential among important segments of the New England Congregationalists thirty-seven years later. In fact, Noll concedes this when suggestion that the “the Old Calvinist traditionalists” and the “Rationalistic Congregationalists” continued to defend some mode of the idea of national covenant after Edwards had passed from the seen. Ibid., 48. Two “Old Calvinist” examples were Nathanael Taylor and Ezra Stiles who maintained the traditional notion of the New England Puritan people having a national covenant with God; albeit, Stiles also applied this national-covenant language (e.g., using the ancient Hebrews as a metaphor) to America’s Revolutionary leadership in 1783. Ibid., 133-134 and 136-137. Second, “New Light non-Separates like Edwards maintained formal allegiance to an integrated system of covenants…” (e.g., the notion that the New England Puritan people had a national or social covenant with God), but they denied “that membership in the social covenant conferred ecclesiastical privileges under the covenant of grace…” (i.e., membership in the national covenant didn’t mean one was a member of the covenant of grace, and only members of the covenant of grace had privileges to the sacrament of Baptism and Communion) Ibid., 48. Thus, Edwards and his followers accepted a qualified notion of the New England Puritan people’s national covenant with God. Based on these considerations, it is quite conceivable that the sheer presence of the New England Puritan traditional notion of national covenant, which implied that a Puritan people’s colonial/State common good (e.g., the common good of Massachusetts) was tantamount to the common good of a nation in covenant with God, was still a cultural-force for Madison and other framers to wisely be mindful of during the framing of the United States Constitution in 1787.
political society of New England. Finally, and very importantly, there is evidence to suggest that the dominating influence of Puritanism within the New England states of Massachusetts and Connecticut was effective into the early nineteenth century.\textsuperscript{187} This, then, suggests that other Christian sects did not have equal influence and privileges within these key sections of New England.\textsuperscript{188} The above examples provide anecdotal, but sufficient, evidence that competition, persecution, and/or enduring another’s hegemonic influence could be (and was often) characteristic of the relationships among the Christians sects within seventeenth and eighteenth century America.

Even in cases where there was some overlap in the moral beliefs among these competing sects (especially when the early American ethos is contrasted with the moral

\textsuperscript{187} In the midst of discussing the issue of aristocracy, Jefferson mentions the continued connection between “church and state” within early nineteenth century New England in his letter to John Adams (on October 28, 1813): “In coupling Connecticut with you [(i.e., Massachusetts)], I mean it politically only, not morally. For having made the Bible the Common law of their land they seem to have modelled their morality on the story of Jacob and Laban. But altho’ this hereditary succession to office with you may in some degree be founded in real family merit, yet in a much higher degree it has proceeded from your strict alliance of church and state….”. See Jefferson to Adams, October 28, 1813, Thomas Jefferson: Writings, ed. Peterson, 1307. Moreover, he seems to be mentioning this in the context of a long tradition of church-state alliance in New England; thus, he must be referring to a continuation of the Puritan Church’s connection with the states of Massachusetts and Connecticut.

\textsuperscript{188} One voice of protest concerning the Congregationalist hegemony over other Christian sects was that of “the leader of New England’s Baptists, Isaac Backus (1724-1806).” See Noll, Mark A, “Christianity and Culture In America,” in Christianity: A Social and Cultural History, by Kee, et al. (New York: Macmillan Publishing Company, 1991), 644. In the midst of the Revolution, “Backus asked Massachusetts and Connecticut why they maintained establishments of religion that forced Baptists and other non-Congregationalists to support forms of Christianity that these others conscientiously opposed. If the colonists were fighting Britain for liberty, Backus asked, why do the colonies themselves not grant religious liberty to their own residents?” Ibid., 644. Mark Noll provides another description of Backus criticism of the political leaders and legislature in Massachusetts for legally restricting the Baptists: “In 1770 Backus enlisted Whig rhetoric against a Massachusetts legislature that was continuing to enforce legal restrictions against the Baptists. Particularly obvious to him was the incongruity that ‘many who are filling the nations with the cry of LIBERTY and against oppressors are at the same time themselves violating the dearest of all rights, LIBERTY OF CONSCIENCE.’ Three years later Backus published a more comprehensive argument for freedom of conscience, a case he presented in person at Philadelphia several months later to the slightly incredulous Samuel Adams and John Adams.” See Noll, America’s God, 82. Such protesting statements demonstrate that the Puritan dominance over the other Christian sects in New England was still very much in effect late into the eighteenth century.
pluralism of today), significant sectarian differences tended to obstruct persons from
different sects (e.g., a Baptist and a Puritan Congregationalist) from identifying with one
another’s well-being and, hence, from realizing social cohesion. So, there were often
thick-level differences and disagreements between the peoples from the different
colonies/States. Furthermore, the above evidence also suggests that the shared thick-level
conceptions at the local level were often protected and/or reinforced by the political
authority at the local-level.

**Conclusion:**

The commentary from this chapter suggests the existence of powerful thick-level
moral and religious agreement, which is necessary for realizing social cohesion, at the
local-level during the colonial and founding periods. The work of Barry Shain, Donald
Lutz, and supplements in this paper elucidate how shared moral-religious values within
local-level community were generally associated with and protected by the politics of
such community. Moreover, the additional survey of pivotal colonial documents and
some of the religious characteristics of seventeenth and eighteenth century America also
supports this conclusion. This examination emphasizes the significant thick-level
agreement (which was largely grounded in and inherent to a particular sectarian religious
worldview) that existed at the local-level and that was often a distinguishing
characteristic of a colony/State and/or region.
Chapter 3, 'Free and Independent States': why the Declaration of Independence launched thirteen separate sovereign States and did not express a common thick-level national creed.

Here it will be argued that the Declaration of Independence is not proof of thick-level national agreement within America. This case must be made so as not to be confused by some of Jefferson’s high-toned language when describing the document. A few examples of this are as follows:

Resolved it is the opinion of this Board that as to the general principles of liberty and the rights of man, in nature and in society, the doctrines of Locke, in his “Essay concerning the original extent and end of civil government,” and of Sidney in his “Discourses on government,” may be considered as those generally approved by our fellow citizens of this and the United States, and that on the distinctive principles of the government of our State, and of the United States, the best guides are to be found in 1. The Declaration of Independence, as the fundamental act of union of these States.\(^{189}\)

All its [(i.e., the Declaration’s)] authority rests then on the harmonizing sentiments of the day, whether expressed in conversations, in letters, printed essays, or in the elementary books of public rights, as Aristotle, Cicero, Locke, Sindey, &c.\(^{190}\)

Here we see suggestion from Jefferson, himself, that the Declaration expresses many notions (e.g., conceptions of right, good, natural law, etc.) found in philosophical treatises. This raises the question about whether the Declaration is a pivotal statement of American morality on human rights, natural law, etc.\(^{191}\)

\(^{189}\) Jefferson to President and Directors of the Literacy Fund, October 7, 1822, ed. Peterson, 479.

\(^{190}\) Jefferson to Lee, Monticello, May 8, 1825, ed. Peterson, 1501.

\(^{191}\) An affirmative answer to this question has been developed in the contemporary period. A notable example of this is the famous “west coast” Straussian, Harry Jaffa, in his work *Equality and Liberty*, which George Nash (in *The Conservative Intellectual Movement In America*) which explicates and quotes from as follows: “To Jaffa, a political scientist at Claremont and ardent admirer of Lincoln, the formative document, the fount of principle, for the American tradition was the ‘all men are created equal’ clause of the Declaration of Independence. Jaffa was not advocating worldly leveling; he was insisting only that political equality was our defining principle: ‘It was *because* men are by nature equal; *because*, that is, no man is by nature the ruler of another, that government derives its just powers from consent- that is, from the opinion of the governed.’ In order to obtain such consent, majority rule as a practical matter is required,
Such a question can be answered in the negative. Readers of both the Declaration and its relevant secondary literature can develop a potent critical response to the view that the Declaration proves the existence of thick-level national morality. The following considerations will elucidate this critical response.

**On Interpreting the Declaration:**

In starting, one should notice the Declaration’s dual-nature: (1) most of the entire document (except for the concluding paragraph) is an argument for why the thirteen colonies are justified in seceding from Great Britain and realizing sovereign independence;\(^\text{192}\) (2) the concluding paragraph is a statement that actually and formally declares both separation from “the State of Great Britain” and the realization of the “United Colonies” as “Free and Independent States.”\(^\text{193}\) When further examining this demarcation of the Declaration, one notices that each part has different characteristics.

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\(^\text{193}\) Ibid., 6-7.
Jefferson’s writing in the first part (i.e., the argument for independence) entails many of the rhetorical techniques that are characteristic of political propaganda writing (e.g., incomplete presentation of all the relevant facts; instances of false representation; etc.).

In *The Declaration of Independence: A Study in the History of Political Ideas*, Carl Becker cites many examples of this (albeit, he does not refer to it as propaganda). First, Jefferson’s use of the phrase, “the people,” within the clause, “‘that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it…’”, creates the false impression “that the people of the colonies were thoroughly united in wishing to ‘institute new government’ in place of the government of the king.”¹⁹⁴ Whereas, in reality, “a large part of the people in the colonies, not being convinced that the British government had as yet become destructive of their liberties, or for some other reason, were either indifferently or strongly opposed to separation.”¹⁹⁵ Second, Becker’s analysis also suggests that Jefferson’s omission of references to “Parliament” and “the ‘rights of British subjects’”, which were both crucial topics in the Revolution’s causal story, reveals how Jefferson’s (or the Declaration’s collective drafters) justification-argument prioritizes persuasion ahead of a balanced presentation of relevant facts.¹⁹⁶ Third, Becker’s discussion of the “catalogue of acts, attributed to the

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¹⁹⁵ Ibid., 8-9.
¹⁹⁶ Becker suggests this in the following passages: (1) “The Declaration thus becomes interesting for what it omits as well as for what it includes. For example, it does not, in its final form, contain the word, ‘Parliament’ - a most significant omission, considering that the controversy of the preceding decade was occasioned, not by acts of the king, who plays the leading part in the Declaration, but by the acts of Parliament.” (see Becker, *The Declaration of Independence*, 18); (2) “Another significant omission is the term ‘rights of British subjects.’ Throughout the controversy the colonists had commonly protested against parliamentary taxation precisely on the ground that they possessed the rights of British subjects. They said
king of Great Britain…”, which the Declaration cites as causes for separation, suggests that Jefferson’s attempt at persuasion entailed an incomplete presentation of relevant historical facts.\(^{197}\)

By contrast, the Declaration’s last and concluding paragraph seems to be a clear statement of the relevant facts of secession and independence. It clearly says who is declaring independence and what new sovereign States now exist as a result of such secession. This statement was largely a repeat of the Resolution of Independence (adopted by Continental Congress on July 2, 1776, which was two days before the Declaration of Independence was voted on), which as Carl Becker clearly says “was the official declaration of independence.”\(^{198}\) Since the Declaration’s concluding statement of

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that the British Parliament could not constitutionally tax British subjects without their consent, and that British subjects in the colonies were not, and in the nature of the case could not well be, represented in the British Parliament.” (Ibid., 20); and (3) “The framers of the Declaration refrained from mentioning Parliament and the ‘rights of British subjects’ for the same reason that they charged all their grievances against the king alone. Being now committed to independence, the position of the colonies could not be simply or convincingly presented from the point of view of the rights of British subjects. To have said: ‘We hold this truth to be self-evident, that it is a right of British subjects not to be taxed except by their own consent,’ would have made no great appeal to mankind, since mankind in general could not be supposed to be vitally interested in the rights of British subjects, or much disposed to regard them as axioms of political speculation…” Ibid., 21.

\(^{197}\) This is seen in the following passage from Becker’s *The Declaration of Independence*: “We do in fact find, in the Declaration, a list or catalogue of acts, attributed to the king of Great Britain, and alleged to have been done by him with the deliberate purpose of establishing over the colonies ‘an absolute tyranny.’ These ‘causes’ which the Declaration sets forth are not quite the same as those which a careful student of history, seeking the antecedents of the Revolution, would set forth. The reason is that the framers of the Declaration were not writing history, but making it. They were seeking to convince the world that they were justified in doing what they had done, but rather a presentation of his acts in general terms, and in the form of an indictment intended to clear the colonists of all responsibility and to throw all the blame on the king.” See Becker, *The Declaration of Independence*, 3 and 6-7.

\(^{198}\) Both the Resolution of Independence (approved on July 2, 1776) and the Declaration of Independence (approved on July 4, 1776) have very similar language. In fact, Becker claims that the Declaration “incorporates in its final paragraph the resolution of July 2; and so the Declaration may be said to be a declaration of independence, inasmuch as in it Congress once more declared what it had already declared two days before.” See Becker, *The Declaration of Independence*, 5. For comparison, passages
actual declaration of independence is congruent with the Continental Congress’ earlier and official declaration of independence, one would presume that the Declaration’s concluding statement accurately represents the understanding and intention of the Continental Congress. In its two acts of declaring independence (i.e., the Resolution and the Declaration’s concluding statement), the Congress chooses the same words to communicate its announcement of separation from Great Britain and the establishment of sovereign independence. Since both documents clearly assert the “United Colonies” to be “of right ought to be, free and independent States…,” we can assume that this is an accurate representation of how the Congress understood the nature of the independent political sovereignty that it was now asserting.

Furthermore, as Professors Carey and Kendall have discussed in Basic Symbols, this “text speaks of ‘Free and Independent States’ and so as far as we can tell they are endowed with all those powers we normally attribute to sovereign states.”199 As their wording here suggests, Kendall and Carey view the Declaration’s reference to “‘Free and Independent States’” as meaning that each of the thirteen colonies is now “endowed with

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all the powers” of a “sovereign state”. So, each of the thirteen colonies is becoming a separate and independent sovereign State. Since the relevant wording here from the Declaration of Independence (“Free and Independent States”) is also included in the Resolution of Independence, Kendall and Carey’s analysis presumably applies to the Resolution as well.

As Professors Kendall and Carey also show, the colonial/State governments’ response to the Declaration suggests that they viewed themselves to now be separate sovereign States. Specifically, they cite how “eleven of the thirteen colonies either at the urgings of the Continental Congress or shortly after the Declaration did establish

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200 In Basic Symbols, Kendall and Carey also argue that the formal title given to what we now call the Declaration of Independence also suggests the notion of thirteen separate and sovereign states: “The Declaration begins with these words: ‘The unanimous Declaration of the thirteen united States of America.’ The words are in themselves important because we see at once that, contrary to what we may have been taught in our institutions of higher learning, there is no pretense as of this moment that we are, legally speaking or otherwise, one people or nation. Why, indeed, would this phraseology be used if the participants felt the colonies should be regarded as one? The thirteen states are ‘united’ for the purpose of declaring their independence, and so far as we can see no other purpose is even so much as mentioned in the remainder of the document. The word ‘unanimous’ in this connection is also revealing. It clearly suggests that the Declaration could have been something other than unanimous; but, beyond any question, the document takes on added force simply because of this unanimity.” Kendall and Carey, Basic Symbols, 75, 77, and 90.

Kendall and Carey’s insights can be further supplemented by reflecting on the information that Becker includes in his book, The Declaration of Independence. As Becker reports, the Continental Congress voted to add this title to the document on July 19, 1776 (fifteen days after the Declaration was adopted by Congress) See Becker, The Declaration of Independence, 4. The previous title read as follows: A Declaration by the Representatives of the United States of America, in General Congress assembled (Becker 4). The July 19th title that Congress finally authorized clearly changes this wording to “the thirteen united States of America” and, hence, explicitly removes any hint of a single and united nation. This is obviously very significant and telling of the Continental Congress’ ultimate view on the nature of their declaration. It was an announcement to the world that the thirteen colonies were mutually declaring their separation from Great Britain (or, as Kendall and Carey suggest, “the thirteen states are ‘united’ for the purpose of declaring their independence”); hence, they were becoming thirteen sovereign “States” (i.e., each one’s sovereignty was separate and independent of the others). Here Congress was restating its proper understanding of the independent sovereignty of each of the States. In the Resolution of Independence and the concluding statement of the Declaration of Independence, the Continental Congress had twice suggested that thirteen “Free and Independent States” were being created (i.e., thirteen separate States were being developed, and each had its own sovereign status). Now, fifteen days after approving the Declaration on July 4th, the Congress retrospectively deems it necessary to further emphasize its understanding of the of thirteen separate and sovereign “States” (not in legal union with one another)
independent governments (that is, independent of Great Britain).”

The Georgia Assembly even explicitly recognizes the Continental Congress’ reasons for recommending each State to adopt its own independent government: “where no government, sufficient to the exigencies of their affairs, hath been hitherto established, to adopt such government as may, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and America in general.”

These insights about the concluding paragraph of the Declaration suggests that it should be viewed as an accurate statement of the Continental Congress’ view (and, hence, the more authoritative view) of the relevant facts for the colonies’ secession and independence. The thirteen American colonies were mutually declaring their independence from Great Britain, but this (in turn) entailed each colony becoming a separate and sovereign state.

Keeping the above considerations in mind, it is important to consider the phrase, “one people,” in the first sentence of the Declaration: “WHEN IN THE COURSE OF HUMAN EVENTS, it becomes necessary for one people to dissolve the political bands which have connected them with another…” (Italics added). If “one people” implies that the thirteen American colonies are forming a new, single, unified, and sovereign country, then how can this first sentence be compatible with the concluding paragraph of the Declaration implying that thirteen American colonies were mutually declaring their

201 Kendall and Carey, Basic Symbols, 91.
202 Ibid., 90.
203 Declaration of Independence, July 4, 1776, ed. Friedrich and McCloskey, 3-7.
independence from Great Britain and, hence, that each colony was becoming a separate and sovereign State?

The answer to this question appears to be that “one people” was not implying that the thirteen colonies were forming a single and united sovereign nation state; rather, the phrase may have been added to the Declaration as part of the general attempt to elucidate the document’s justifying argument in terms of British Empire theory. This shall be elaborated in the next few paragraphs.

As Carl Becker demonstrates, the persuasiveness of Jefferson’s argument relies on the “theory of the British empire.”204 Although the colonists’ main grievances leading up to the Revolution and Declaration had to do with the British Parliament and its deprivation of “the rights of British subjects”, such important facts are scantly referenced in the Declaration’s list of grievances that were intended to justify the Revolution to the rest of the world.205 Instead, the Declaration’s explicit grievances are all directed at the king of the British Empire.206 Becker explains the purpose for framing the Declaration in this manner. The authors intended to convey the colonies as “a free people” who had always been loosely and contingently connected with Great Britain.207 As members of the British Empire, this free American “people” had been under the proper authority of the king as head of the Empire, and not the British Parliament.208 Thus, as members of the British Empire, the free American people were (properly

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204 Becker, The Declaration of Independence, 22.
205 Ibid., 18-19 and 21.
206 Ibid., 14.
207 Ibid., 22.
208 Ibid., 22.
speaking) a distinct and united people separate from the British people and its Parliament. As such a free people, the American colonies possessed certain natural rights that properly belonged to every free people. The argument in the Declaration is that the king had egregiously violated such natural rights. Such violation entailed a transgression against the compact between the colonies and the king that was sufficient for justifying the colonists’ secession from the Empire.

As Becker also suggests, however, this invocation of British Empire theory was less than an accurate statement of the true relationship between the colonies and Great Britain. Instead of accuracy, it served the rhetorical purpose of persuading readers about the soundness of the colonists’ justification for revolting against their parent country. The employment of British Empire theory enabled Jefferson to abscond how the colonists possessed “positive and legal obligations that were admittedly binding upon British subjects” and complicated (if not nullified) colonial British subjects’ employment of natural rights. The Empire theory allowed Jefferson to imply that the “connection” between the American colonists’ as a “free people” and Great Britain had “never, strictly speaking, been a connection binding in the positive law, but only a connection voluntarily entered into by a free people.”

Aside from the interesting legal questions raised by Becker’s analysis concerning the legitimacy (or illegitimacy) of the American colonies’ secession from Great Britain, it

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210 Ibid., 21-22.
211 Ibid., 9-16 and 21-22.
212 Ibid., 18-23.
213 Ibid., 21.
214 Ibid., 22.
is important to notice the Declaration’s phrase, “one people”, can be viewed both (1) as part of an argument based on British Empire theory and (2) as not contradicting the thesis that the thirteen colonies were becoming thirteen separate, independent, and sovereign States. Benjamin Franklin, who Becker elucidates as having significant input on Jefferson’s drafting of the Declaration, develops a unique view of the unity and connection both (1) among the colonies and (2) between the colonies and Britain. Evidence suggests that Franklin probably understood the Declaration to be explicating that the colonies were becoming thirteen separate and sovereign States, having previously been thirteen separate states under the “the King” as a common sovereign. Becker demonstrates the early date that Franklin came to view the relationship between the colonies and Britain in terms of the British Empire theory; he cites Franklin’s 1768 reflections on the political relationship between the colonies and Parliament:

I am not yet master of the ideas these… writers have of the relation between Britain and her colonies. I know not what the Boston people mean by the “subordination” they acknowledge in their Assembly to Parliament, while they deny its powers to make laws for them, nor what bounds the Farmer sets to the power he acknowledges in parliament to “regulate the trade of the colonies,” it being difficult to draw lines between duties for regulation and those for revenue; and, if the Parliament is to be the judge, it seems to me that establishing such a principle of distinction will amount to little. The more I have thought and read on the subject, the more I find myself confirmed to the in opinion, that no middle ground can be well maintained, I mean not clearly with intelligible arguments. Something might be made either of the extremes: the Parliament has a power to make all laws for us, or that it has a power to make no laws for us; and I think the arguments for the latter more numerous and weighty, than those of the former. Supposing that doctrine established, the colonies would then be so many separate states, only subject to the same king, as England and Scotland were before the union.  

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Here Franklin is responding to the two preceding theories by John Dickinson and Samuel Adams about whether and to what extent the British Parliament had authority to legally regulate the American colonies. Finding such arguments lacking, Franklin concludes that “no middle ground can be well maintained...Something might be made either of the extremes: either the Parliament has the power to make all laws for us, or that it has a power to make no laws for us...” After stating this either/or dichotomy, Franklin chooses the latter option, and concludes by radically revising the basis of the colonies’ political ties to Britain and one another: “Supposing the doctrine established, the colonies would then be so many separate states, only subject to the same king, as England and Scotland were before the union.” Thus, according to Franklin, the colonies are actually “many separate states” whose only tie to Great Britain and one another is their common subjection “to the same king, as England and Scotland were before the union.”

Franklin further develops such ideas in subsequent writing. This is seen in the following passage of his writing from 1770:

That the colonies originally were constituted distinct States, and intended to be continued such, is clear to me from a thorough consideration of their original Charters, and the whole conduct of the Crown and nation towards them until the Restoration. Since that period, the Parliament here has usurped an authority of making laws for them, which before it had not. We have for some time submitted to that usurpation, partly through ignorance and inattention, and partly from our weakness and inability to contend: I hope,

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216 Franklin’s phrase, “Boston people mean by ‘subordination’,” is a reference to Samuel Adams’ “theory (best stated in a letter to Dennys De Berdt, January 12, 1768) designed to show that the colonies were ‘subordinate’ but not ‘subject’ to the British Parliament.” See Becker, *The Declaration of Independence*, 98. Moreover, Franklin’s writing, “what bounds the Farmer sets to the power he acknowledges in parliament to “regulate the trade of the colonies,” is a reference to John Dickinson’s *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies*. This essay argued for making a “distinction between duties laid for regulation of trade and duties laid for bringing in a revenue...”; the former was permissible, but the latter was “unconstitutional” since the colonies had not give “their consent...”. Ibid., 93-94.
when our rights are better understood here [in Great Britain] we shall, by prudent and proper conduct, be able to obtain from the equity of this nation a restoration of them. And in the meantime, I could wish, that such expression as the supreme authority of Parliament: the subordinancy of our Assemblies to the Parliament, and the like… were no more seen in our publick pieces. They are too strong for compliment, and tend to confirm a claim of subjects in one part of the king’s dominions to be sovereign over their fellow subjects in another part of his dominions, when in truth they have no such right, and their claim is founded only in usurpation, the several states having equal rights and liberties, and being only connected, as England and Scotland were before the union, by having one common sovereign, the King.  

Here, again, Franklin describes the colonies relationship to one another and Britain as entailing connection based on “having one common sovereign, the King…”, but it is also a relationship of “several states having equal rights and liberties.” The colonies “originally were constituted distinct States, and intended to be continued such…” Since “the Restoration”, however, the “Parliament here has usurped an authority of making laws” for the colonies, and the colonies have “for some time submitted to that usurpation…” due to “ignorance”, “inattentiveness”, and “weakness.”

Based on such comments, it seems reasonable to infer that Franklin views both (1) the unity among the colonies “as several states” and (2) the connection between the colonies “as several states” and Britain as merely entailing all such states as “having one common sovereign, the King…” This limited view of unity, in turn, provides a basis for viewing the phrase, “one people”, as part of an argument for independence through employing British Empire theory. The peoples of the thirteen separate colonies had been “one people” in the sense that they had been united in their common submission to the King. With the Declaration of Independence, however, the colonies were mutually

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declaring independence from the King and, hence, dissolving their former bond of unity that had previously linked them constitutionally to one another. This, in turn, rendered them thirteen utterly separate and sovereign States, which were each constituted by thirteen separate and sovereign peoples.

It is highly plausible that Jefferson also had such a view. Like Franklin, Jefferson believed that the colonies were (1) separate “parts of the Empire” and (2) merely united to the other “several parts” through submission to the “same common Sovereign.” All this is seen in the following passage from Jefferson’s 1774 writing, *A Summary View of the Rights of British America*:

> [O]ur ancestors, before they emigrated to America, were the free inhabitants of the British dominions in Europe, and possessed a right which nature has given all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote the public happiness… That settlement having been made in the wilds of America, the emigrants thought proper to adopt that system of laws under which they had hitherto lived in the mother country, and to continue their union with her by submitting themselves to the same common Sovereign, who was thereby made the central link connecting the several parts of the Empire thus new multiplied.218

As Becker points out, Jefferson’s writing is clearly a later evolution of the colonies’ developing polemic against Parliament’s authority to impose burdensome legislation on them. Instead of relying on questionable precedent and positive law (as Franklin does), Jefferson seems to articulate the colonies’ argument in terms of natural rights theory.219

Nevertheless, Jefferson still sees the matter similar to Franklin: the colonies are “several

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219 Ibid., 103-105 and 115-117.
parts of the Empire” are merely united to one another and to “mother” Britain via all such “parts” having “the same common Sovereign…” (i.e., the King).

Based on this similarity between Jefferson and Franklin, it is very plausible that the two also viewed the “one people” phrase within the 1776 Declaration in a similar manner. This interpretation of “one people” has already been explicated above, but for the sake of clarity it is repeated here: The peoples of the thirteen separate colonies had been “one people” in the sense that they had been united in their common submission to the King. With the Declaration of Independence, however, they were mutually declaring independence from the King and, hence, dissolving their former bond of unity that had previously linked them constitutionally to one another. This, in turn, rendered them thirteen utterly separate and sovereign States, which were each constituted by thirteen separate and sovereign peoples. Given the close and highly influential relationship that Jefferson and Franklin had in drafting the document, it is highly plausible that the “one people” phrase was intended to help communicate such nuances. Such an interpretation of the “one people” phrase in the opening sentence of the Declaration is clearly compatible with the Declaration’s concluding statement, which provides a lucent representation of how the Continental Congress and Colonial/State governments understood the relevant facts (i.e., the thirteen colonies were each becoming a “Free and Independent State…”).

This thesis obviously contradicts the view of national origin and organic theory of union posited by President Abraham Lincoln:
Descending from these general principles, we find the propositions that, in legal contemplation, the Union is perpetual, confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association of 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution, was “to form a more perfect union.”….  

Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal.  

In contrast to this dissertation’s above analysis, Lincoln asserted that the Union predated the States. The Union was formed through establishing the Continental Congresses, and it was this Union that had declared and, thus, established America’s independence. The States were, in turn, created by and after the Union. The Union continued to evolve into more advanced forms- i.e., the Union under the Articles of Confederation, the Union under the Constitution.  

In the interest of truth and fairness, I must suggest that Lincoln’s theory is incorrect. In addition to all the contrary evidence already cited, additional historical evidence and considerations also refute Lincoln’s case. First, after the States established their independence (which made them new separate, independent, and sovereign States) and before the enactment of the Articles of Confederation, the States’ collaboration in Congress and the War was voluntary and informal, for there was no positive legal agreement (e.g., no legal compact or treaty) among the colonies that made the enactments and resolutions of the First and Second Continental Congress legally binding for the

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colonies/States. Before the enactment of the Articles of Confederation, Congress was merely an inter-State diplomatic body lacking the formal delegated legal authority that it would later receive when the States compacted under the Articles. As a result, each of the States could voluntarily participate in and/or ignore actions of Congress without violating legal obligations owed to the other States. Congress merely facilitated voluntary cooperation among the colonies/States. So, Congress’ enactment of the Declaration of Independence was not an exercise of formal delegated authority, for Congress did not yet possess this. Thus, Congress’ enactment of the Declaration cannot be viewed as a positive law imposing legal obligations on the colonies/States; hence, the Declaration cannot be interpreted as establishing a legal obligation on the States to be in union with one another.

This, then, helps to illuminate the meaning of the phrase, “united States”, in the Declaration of Independence document. The new States were only united in the sense of an informal and non-legally binding collaboration to achieve various common goals such as fighting for and achieving recognition of their sovereign independence. For the reasons stated above, the Declaration cannot be viewed as establishing a legal bond of union. Although the new sovereign States were united to one another, this “union” was purely informal and lacking in legal obligations. Each State clearly retained full independence and sovereignty, regardless of their participation in this “union.”

Contemporary readers who have been so conditioned by Lincolnian-historiography may be surprised at the evidence from early America to support this fact. As James Kirkpatrick shows, even rabid Federalists like Justice Samuel Chase recognized each state to be fully independent and sovereign (in their relation to each other and rest of the world). Chase articulated this as follows in his opinion in Ware vs. Hylton (1796): “[A]s a declaration [the Declaration of Independence], not that the colonies jointly, in a
As already briefly discussed in an above note, the text of the Declaration itself shows this to be a purely voluntary, informal, and legal bond of union among the States. Forrest McDonald discusses this as follows:

The third part is the actual declaration proper, in which the precise language is crucial: “We, therefore, the Representatives of the united States of America… do in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare” themselves to be “FREE AND INDEPENDENT STATES,” and as such “they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.” The plural language is used throughout. In addition, in keeping with an eighteenth-century convention, nouns in the document are capitalized, and what the delegates represent are United States— that being not a name, but “united” being merely an adjective describing the stance of the states in opposition to Britain.223

In addition to noting the obvious “plural language” description of the new sovereign “STATES”, McDonald emphasizes the Declaration’s great attention to eighteenth-century convention” of capitalizing “nouns” in contrast to its failure to capitalize the word “united” in the phrase “united States.” According to McDonald, then, this term, “united”, is clearly an adjective, and it renders the phrase, “united States”, to merely be “describing the stance of the states in opposition to Britain…”— i.e., they have Britain as a collective capacity, were independent States, etc., but that each of them was a sovereign and independent State, that is, that each of them had a right to govern itself by its own authority, and its own laws without any control from any other power on earth.” Kirkpatrick continues quoting Chase as follows: “From the Fourth of July, said Chase, ‘the American States were de facto and de jure in the possession and actual exercise of all the rights of independent governments….I have ever considered it as the established doctrine of the United States, that their independence originated from, and commenced with, the declaration of Congress, on the Fourth of July, 1776; and that no other period can be fixed on for its commencement; and that all laws made by legislatures of the several States, after the Declaration of Independence, were the laws of sovereign and independent governments.” See James Kirkpatrick, The Sovereign States: Notes of a Citizen of Virginia (Chicago: Henry Regnery Company, 1957), 5-6.

223 Forrest McDonald, States Rights And The Union: Imperium in Imperio, 1776-1876, (Lawrence, Kansas: University Press of Kansas, 2000), 10.
common enemy and are united to fight against her (albeit, this “union” has not yet taken the form of a legal treaty).\textsuperscript{224}

The new States’ common victory in the war for independence corroborated the truth of their self-asserted statuses as independent and sovereign States. Most importantly, it resulted in the new States’ main challenger, Great Britain, formerly recognizing their separate, independent, and sovereign status. In the Treaty of Paris (1783), which is quoted here via James Kirkpatrick, Great Britain recognized the sovereignty of the new States in plural form:

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; that he treats with them as such.\textsuperscript{225}

\textsuperscript{224} In discussing this, McDonald seeks to undermine the Lincoln thesis that the Declaration shows the “Union” as existing prior to and even creating the States. See McDonald, \textit{States Rights and the Union}, 9.

One additional complication must also be addressed. The “u” in “united States” is in lower case; however, in the Declaration’s concluding paragraph, the “U” in “United Colonies” is in upper case. How can this discrepancy be explained? One probable answer is that, as British colonies before their political independence, they were still technically under one government- i.e., the King as the head of the British Empire; however, after each of them authorized its political independence from Britain, they ceased to be legally “united” with one another. Each was now a separate sovereign State. Such new political entities were “Free and Independent States” in non-legal union with one another due to their common struggle against Great Britain.

This view of the non-legal union among the new States at the time of independence is corroborated by Daniel Boorstin’s commentary in his book, \textit{The Americans: The National Experience}. Boorstin suggests that the Independence was not the beginning of an American nation: “Before independence, Americans were both British subjects and citizens of Massachusetts, New York, Virginia, or some other colony. After Independence, they ceased to be Britons, but had not yet become Americans. There was not yet an American nation to command their loyalty. Still they remained Virginia, or colonists of some other stripe, and their primary and continuing loyalty remained to their own colony.” See Daniel Boorstin, \textit{The Americans: The National Experience} (New York: Vintage Books, A Division of Random House, 1965), 401.

\textsuperscript{225} Kirkpatrick, \textit{The Sovereign States}, 7.
The plural language, again, implies that each of the States was now regarded as “free, sovereign, and independent”; each was seen as its own separate sovereignty within the international system. Even before the Treaty of Paris with Britain, other sovereign nations had begun referring to the new states in this plural form. Forest McDonald also elucidates this fact: “The 1778 Franco-American treaty of alliance also used the plural: ‘The Most Christian King and the United States of North America, to wit: New Hampshire, Massachusetts Bay, Rhode Island…’”). Hence, France recognized each of the States as being independent and sovereign.

As for Lincoln’s nationalist thesis on the Declaration that he expressed in his Gettysburg Address, we can find solidarity and agreement with Gary Wills’ view that thesis was a historical travesty with little real grounding in the Constitution that Lincoln had sworn to uphold. Wills implies this while suggesting that Lincoln “remade” America and the Constitution:

Lincoln is here not only to sweeten the air at Gettysburg, but to clear the infected atmosphere of American history itself, tainted with official sins and inherited guilt. He would cleanse the Constitution— not, as William Lloyd Garrison had, by burning an instrument that countenanced slavery. He altered the document from within, by appeal from its letter to the spirit, subtly changing the recalcitrant stuff of that legal compromise, bringing it to its own indictment. By implicitly doing this, he performed one of the most daring acts of open-air sleight-of-hand ever witnessed by the unsuspecting. Everyone in that vast throng of thousands was having his or her intellectual pocket picked. The crowd departed with a new thing in its ideological luggage, that new constitution Lincoln had substituted for the one they brought there with them. They walked off, from those curving graves on the hillside, under a changed sky, into a different America. Lincoln had revolutionized the Revolution given people a new past to live with that would change their future indefinitely.\(^{227}\)

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\(^{226}\) McDonald, *States’ Rights and The Union*, 10-11.

In discussing Wills’ commentary, Barry Shain asks a trenchant question: “‘Should we continue to look the other way, or should the quest for truth impel us, in opposition to compelling reasons counseling silence, to report this theft?’”\textsuperscript{228} The answer, of course, is that we should be honest, and we should admit that Lincoln’s insidious vision of America is a fallacious myth and has no authority for us today. Lincoln had \textbf{no} constitutional authority to remake the United States and its Constitution in accordance with his nationalist vision. Such a power is reserved to the sovereign State-peoples through the amendment process and/or secession. All federal power in the United States must be properly grounded in the Constitution in order for it to be legally justifiable. A powerful President determined to act extra-Constitutionally (through his words and/or powers) is just playing the illegal, arbitrary tyrant, and all his powers can never remove the unconstitutionality of his act. Since Lincoln’s nationalist intimations at Gettysburg and elsewhere were historically and legally incorrect, since no amendment has fundamentally changed the \textbf{federal} nature of the “Union” of the various State-peoples, the State-peoples are still legally sovereign entities (i.e., each has all the of the legal rights and powers of a sovereign entity) today just as they were before and \textbf{after} they ratified the Constitution. More will be said to corroborate these points in the next chapter.

\textit{Why the Declaration cannot be viewed as a thick-level American Creed:}

\textsuperscript{228} Shain, “Rights Natural and Civil in the Declaration of Independence”, 145.
Since the Declaration (and the Resolution) explicitly recognizes the birth of thirteen separate and sovereign States (and not the beginning of one single nation), it is impossible to view the Declaration to be elucidating a morality for the thirteen colonies/States together as a new single nation. The Declaration of 1776 was not even the beginning of the United States as a federal union. As will be discussed in the next chapter, the ultimate union that developed was merely that of a confederation (federal union) among sovereign States (i.e., both under the Articles, which lacked a federal government, and the Constitution, which established a federal compact with delegated powers).

Even when recognizing such logic, however, it is still possible that Declaration articulates a moral perspective that the peoples of each of the thirteen colonies would still recognize and embrace. This insight, then, allows us to question whether the Declaration articulates a thick-level morality that each of the peoples in the thirteen American colonies/states were in agreement about. Ultimately, we can persuasively answer this question in the negative. The Declaration does not reveal thick-level moral agreement. It may, however, suggest some thin-level agreement about very general natural rights/law concepts that were politically useful during the eighteenth century but had very different specific meanings and applications for various peoples in the different colonies/States. This answer is developed in remaining part of our discussion on the Declaration.

Our first step entails examining the natural law and natural rights language, which the Declaration explicitly makes reference to. The major portion of such language is articulated at the beginning of the Declaration of Independence:
WHEN IN THE COURSE OF HUMAN EVENTS, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed; That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness…

This expounds the view that a “people” can, under certain circumstances, declare their political autonomy from other peoples to whom they have previously been politically connected. When this occurs, the “people” are declaring political independence are assuming “the separate and equal station to which the Laws of Nature and of Nature’s God entitle them…” In other words, such “people” are merely asserting their right to self-governance that can be found in the “Laws of Nature” (i.e., those that are discovered and identifiable within nature) and that are ultimately provided for by “Nature’s God” (i.e., Providence or God as the ultimate creator of nature and the laws entailed in it; so, He is also the ultimate law-giver for mankind). Furthermore, the “Creator” has made all men “equal” and “endowed” them with “certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.” Such rights are, again, included in the rights of nature that God (as “Creator”) gives to men via creating humanity and the natural world in specific ways. To protect such natural rights, “Governments are instituted among Men, deriving their just powers from the consent of the governed.” Thus, government, whose

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229 *Declaration of Independence*, July 4, 1776, ed. Friedrich and McCloskey, 3.
power is granted by the “consent of the governed,” is also part of the mechanisms within
the natural world for “protecting” the natural rights of human beings. The “people” also
have a natural right (in principle, albeit maybe not according to prudence) to “alter or to
abolish” a particular government when it “becomes destructive of these ends”, which are
the natural rights of the “people” like “Life, Liberty, and the pursuit of Happiness”. After
abolishing a “destructive” government, the “people” are entitled “to institute new
Government, laying its foundation on such principles and organizing its powers in such
form, as to them shall seem likely to effect their Safety and Happiness…”

What do such references to natural law and natural rights suggest? Becker
discusses the relationship between natural rights philosophy and the Declaration’s
employment of it in the following passage:

Not all Americans, it is true, would have accepted the philosophy of the Declaration, just
as Jefferson phrased it, without qualification, as the ‘common sense of the subject’; but
one may say that the premises of this philosophy, the underlying preconceptions from
which it is derived, were commonly taken for granted. That there is a ‘natural order’ of
things in the world, cleverly and expertly designed by God for the guidance of mankind;
that the ‘laws’ of this natural order may be discovered by human reason; that these laws
so discovered furnish reliable and immutable standard for testing the ideas, the conduct,
and the institutions of men- these were the accepted premises, the preconceptions, of
most eighteenth century thinking, not only in America but also in England and France.
They were, as Jefferson says, the ‘sentiments of the day, whether expressed in
conversation, in letters, in printed essays, or the elementary books of public right.’ Where
Jefferson got his ideas is hardly so much a question as where he could have got away
from them.230

According to Becker, then, the natural rights language and philosophy, which is
employed in the Declaration (see the above paragraph) was widely accepted among the

educated persons within America, England, and France when the Declaration was drafted during the eighteenth century.

This view and above statement, however, needs to be significantly qualified when applied to the peoples of America. Even if we grant that philosophy of nature had widely infiltrated the thought and language of eighteenth century western thought, its appearance in America wasn’t clearly manifest until the latter half of the eighteenth century. Both Becker and Noll in their separate works provide evidence for this. Becker’s citations of natural rights references by Americans suggest that such language begins to appear within American writing and addresses during the latter half of the eighteenth century. Moreover, this seems in accord with Mark Noll’s observations about republican ideas and language being employed by orthodox (Protestant) Christians in America, starting at the same time. Noll seems to be including John Locke’s political theory in this observation, and Becker’s citations of late eighteenth century Americans who use natural rights philosophy clearly include various republican thinkers like Algernon Sidney and John Milton. Thus, both Becker and Noll seem to be referring to the same new language that was being employed by Americans in the mid to late eighteenth century.

According to the gist of Noll’s analysis, American orthodox Christians began using

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America would still have been largely constituted and populated by orthodox Protestant Christians during the latter half of the eighteenth century. Although church membership and ‘church adherence’ (i.e., reasonably regular attendance) declined gradually from 1700 to the time of the American Revolution…” (Mark A. Noll, “Christianity and Culture In America,” In Kee et al., 632), this is a decline within colonies with overwhelmingly high numbers of orthodox Protestant Christians of many sectarian stripes and denominations. Thus, it is difficult to imagine that the gradual secularization trends of the 18th
such language primarily in response to the warfare and political turmoil that began in the mid eighteenth century.\textsuperscript{236} This, then, suggests the possibility that they were searching for new and effective political expressions for articulating their concerns. Becker also suggests this when discussing the colonists’ struggle against Great Britain in the late eighteenth century:

Whenever men become sufficiently dissatisfied with what is, with the existing regime of positive law and custom, they will be found reaching out beyond it for the rational basis of what they conceive ought to be. This is what the Americans did in their controversy with Great Britain; and this rational basis they found in the underlying preconception which shaped the thought of their age- the idea of natural law and natural rights.\textsuperscript{237}

Thus, for Becker, the colonists’ employment of “natural law and natural rights” during “their controversy with Great Britain” was largely an attempt to adequately justify their discontent with the British’s “law and custom” towards their American colonies.

According to this line of reflection, then, the widespread American use of natural rights language and concepts may have primarily entailed using them as a political tool. This (in turn) raises questions about whether there was also widespread embrace the thick-level implications of the nature philosophy (i.e., the epistemological assumption that the best knowledge of God is derived through examining nature via reason) that underpin the eighteenth century philosophy about natural rights, or whether many American colonists’ merely employed the natural rights language and concepts \textit{without} also accepting (or even really examining) such deeper implications, that were largely antithetical to their

\textsuperscript{236} Noll, \textit{America’s God}, 81 and 85-86.
\textsuperscript{237} Becker, \textit{The Declaration of Independence}, 134.
orthodox (especially Protestant) Christian beliefs about the proper sources of God’s revelation.

It seems possible to answer such questions. The acceptance of many questionable thick-level assumptions from the philosophy of nature (i.e., that nature, as understood through reason, was the best source of God’s revelation) was probably very limited among orthodox Protestant Christians who used the natural rights language. Further analysis of this is provided in Appendix B. For orthodox Protestant believers, the Bible (and, implicitly, their respective theological traditions) was still the best sources of God’s revelation. They believed (and still believe) that reason is always a subordinate source of revelation, and there are many ways (especially according to the more traditional and early Reformation-minded Protestants) in which human reason can be defective and lead its users to falsehood and error.²³⁸

With this mind, the heart of Becker’s above passage needs to be qualified. The questionable facet of this passage is provided below:

[O]ne may say that the premises of this philosophy, the underlying preconceptions from which it is derived, were commonly taken for granted. That there is a ‘natural order’ of things in the world, cleverly and expertly designed by God for the guidance of mankind; that the ‘laws’ of this natural order may be discovered by human reason; that these laws so discovered furnish reliable and immutable standard for testing the ideas, the conduct, and the institutions of men- these were the accepted premises, the preconceptions, of most eighteenth century thinking, not only in America but also in England and France.²³⁹

Although it may be true the Americans employed eighteenth century natural rights theory for its useful political language and concepts, it is very doubtful that all Protestant

Christians who did so proceeded to also accept the view implied in the above passage that
the “human reason” was sufficient for discovering God’s will and laws for “mankind.”
Thus, aside from some Latitudinarian Anglicans in Virginia, it is highly doubtful that late
eighteenth century American acceptance of natural rights language also implied
widespread acceptance of thick-level assumptions about the efficacy of reason and its
supreme role in how human beings discover God’s law.

Furthermore, we can also doubt the thick-level nature of Americans’ employment
of natural rights from another angle. Although there may have been widespread
agreement among educated Americans about the appropriateness of using natural rights
theory (albeit, probably not the thick-level philosophical assumptions behind it), there
were still different views about the specific content and ways to articulate such rights.
Moreover, such different views about the specific content of rights seemed to correspond
to differences in locality and religion. Becker suggests this when discussing how
colonists, like Jefferson and many others, were intuitively drawn to the natural rights
language and concepts from Locke’s political theory:

It was Locke’s conclusion that seemed to the colonists sheer common sense, needing no
argument at all. Locke did not need to convince the colonists because they were already
convinced; and they were already convinced because they had long been living under
governments which did, in a rough and ready way, conform to the kind of government for
which Locke furnished a reasoned foundation. The colonists had never in fact lived under
a government where ‘one man…may do to all his subjects whatever he pleases.’ They
were accustomed to living under governments which proceeded, year by year, on a tacitly
assumed compact between rulers and ruled, and which were in fact very largely
dependent upon ‘the consent of governed.’ How should the colonists not accept a
philosophy, however clumsily argued, which assured them that their own governments,
with which they were well content, were just the kind that God had designed men by
nature to have!
The general philosophy which lifted this common sense conclusion to the level of a cosmic law, the colonists therefore accepted, during the course of the eighteenth century, without difficulty, almost unconsciously. That human conduct and institutions should conform to the will of God was an old story, scarcely to be questioned by people whose ancestors were celebrated, in so many instances, for having left Europe precisely in order to live by God’s law. Living by God’s law, as it turned out, was much the same as living according to ‘the strong bent of their spirits.’ *The strong bent of their spirits, and therefore God’s law, had varied a good deal according to the locality, in respect to religion more especially*; but so far as one could judge at this late enlightened date, God had showered his blessings indifferently upon all alike- Anglicans and Puritans, Congregationalists and Presbyterians, Catholics, Baptists, Shakers, and Mennonites, New Lights and Old Lights. Even Quakers, once thought necessary to be hanged as pestilent blasphemers and deniers of God’s will, now possessed a rich province in peace and content. Many chosen peoples had so long followed God’s law by relying upon their own wits, without thereby running into destruction, that experience seemed to confirm the assertion that nature was the most reliable revelation of God’s will, and human reason the surest interpreter of nature.240 (Italics and bold faced type added)

The Italic and bold faced line in the above passage is especially important for our analysis: “*The strong bent of their spirits, and therefore God’s law, had varied a good deal according to the locality, in respect to religion more especially*…” This suggests that different local cultures and sectarian perspectives resulted in different intuitive and spiritual promptings and, hence, different interpretations of God’s law.

Although the above passage proceeds to suggest that “at this late enlightened date” (i.e., the time of Declaration) God was viewed to have given all the various Christian sects “his blessings indifferently” by revealing the “peace and content” of His law through “nature” as interpreted by “human reason,” part of this statement seems to be problematic for the same reasons discussed above. Specifically, Becker seems to go too far when suggesting that the colonists had come to realize “that nature was the most

reliable revelation of God’s will, and human reason the surest interpreter of nature.”\textsuperscript{241} In fact, this was probably only true for various heterodox Christians (e.g., some of Virginia’s Latitudinarian Anglicans) and/or educated non-Christians (e.g., Deists). For, many American Christians in the eighteenth century still probably believed “that most reliable revelation of God’s will” was the Bible and/or (at least, for the Catholics) their Church’s theological tradition.\textsuperscript{242} Although the Quakers believed that God’s revelation was not limited to Biblical Scripture because the Holy Spirit could continue to reveal new insights to believers, this was \textit{not} an assertion “that nature was the most reliable revelation of God’s will, and human reason the surest interpreter of nature.”\textsuperscript{243} So, assuming (for the sake of argument) that Becker is correct in asserting that colonial Americans had a favorable experience of following God by relying on their own judgment/ conscience, for many (other than some Latitudinarian Anglicans in Virginia) this must be understood in terms of viewing the Bible as the most authoritative source of God’s revelation. This, then, suggests that Becker is incorrect in viewing the colonists’ favorable experience with self-reliance as conditioning them to view their own employment of reason (to interpret nature) as the \textit{best} revelation of God’s will. Instead, this was probably only true for (1) for some Latitudinarian Anglicans in Virginia and (2)

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\textsuperscript{241} Becker, \textit{Declaration of Independence}, 74.
people with non-Christian theistic beliefs (e.g., professing Deists). Many orthodox Christians (e.g., most Presbyterians, Baptists, traditional Congregationalists, more traditional Anglicans, etc.) could not accept nature and reason as the primary basis of revelation, which were the thick-level assumptions of nature philosophy. Thus, their employment of natural rights language/concepts would probably function more as thin-level practical device, which (as discussed above) was used for its efficacy in expressing and justifying the colonists’ political concerns during the late eighteenth century.

The above reflection, then, suggests the following. First, the different local cultures and sectarian perspectives in colonial America resulted from different intuitive and spiritual promptings and, hence, different interpretations of God’s law (albeit, for many this process was still connected with the Bible as the primary source of God’s revelation). Second, widespread agreement among colonists about the appropriateness of using natural rights language did not entail thick-level agreement about the tenets of natural philosophy, which asserted and stemmed from the view that human reason (via examining nature) is the best revelation of “God’s will.” Instead, agreement about such language probably was a thin-level veneer that covered their significant thick-level disagreements about moral-theology due to their different sectarian spiritual promptings and interpretations of God’s law, which was based on studying Biblical Scripture (and implicitly, if not explicitly, being guided by their theological tradition). Third, the above passage and reflection suggests that the colonists’ thick-level disagreement about moral-

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244 Actually, some secular Latitudinarians were very unorthodox nominal Christians. Thomas Jefferson may be a good example. He was a nominal member of the Church of England in Virginia who personally held non-Christian theistic beliefs.
theology may have also contributed to them developing different specific concepts and applications of the natural rights even though they might agree about the general (thin) level meaning of such rights. This analysis will now elaborate on this third implication.

Another line of inquiry also suggests that possible general agreement about natural rights/law language (e.g., some of the Declaration’s use of this) coexisted with significant disagreement about how to specifically articulate and apply these norms of nature.\(^{245}\) It seems possible that the rights of the Declaration are the corporate rights of peoples, rather than the rights of individual persons. This perspective draws on the logic on the British Empire theory, which has been previously discussed.

George Carey helps to elucidate this in a recent essay on the Declaration.\(^{246}\)

According to Carey, the Declaration’s language of “one people” asserting their natural right to political autonomy (i.e., “to assume among the powers of the earth, the separate

\(^{245}\) The subsequent analysis will continue arguing for this. Here it is helpful to note how other scholars have also come to this conclusion through their own analysis of the Declaration of Independence. One example is David Hackett Fischer, who writes about the development of and rights implied in the Declaration in his book, *Liberty and Freedom*: “But which rights, and for whom? And what idea of liberty and freedom? On these great questions, other ambiguities appeared in the Declaration of Independence. Some were not of Jefferson’s making. Several were added to his draft as it worked its way through the Congress…One revision was important for New England. In 1776, Jefferson himself held an idea widely shared in the southern colonies and backcountry, that liberty meant independence for nations and individuals. In his first draft of the Declaration he wrote that ‘all men are created equal and independent [sic].’ His New England colleagues in the Congress agreed that the ‘united colonies’ should be independent from Britain, but the idea that all men were created independent was inconsistent with New England’s tradition of ordered freedom and its institutions of collective belonging such as the town meeting. After discussions with three native-born New Englanders on the drafting committee, Jefferson’s idea that all men were ‘independent’ disappeared from the document.” David Hackett Fischer, *Liberty and Freedom*, 125-126. As already discussed, Fischer also shows how Jefferson’s language in another phrase was the following: “we hold these truths to be sacred and undeniable”. Ibid., 126. According to Fischer’s, this change was made due to objections made by the Quakers about “sacred and undeniable”. Fischer maintains that “self-evident” was more in keeping with Quaker ideas of “religious liberty”, “separation of church and state”, and the “Quaker idea of reason as a self-evident ‘light within.’” Ibid., 126.

\(^{246}\) Professor George W. Carey generously provided me with an early draft of this essay. It has since been published in the *Ave Maria Law Review*. See George Carey, “Natural Rights, Equality, and the Declaration of Independence”, *Ave Maria Law Review* 3, no. 1 (Spring 2005), 45-67.
and equal station to which the Laws of Nature and of Nature’s God entitle them…”) suggests that the rest of the document “should be read in a ‘corporate’ sense; that is, that with the ‘all men are created equal’ clause, Americans are asserting an equality as a people with the British people.”247 As Carey further elaborates on this perspective, the Declaration’s “‘unalienable rights’ are those that belong to the people in their corporate or collective capacity…”248 Moreover, according to the logic of this interpretation, such “unalienable rights” (“’life, liberty,’ ‘pursuit of happiness’)” lose their “unalienable status” once “government is established,” for “a majority of whatever sovereign powers there be, in keeping with the natural law, may regulate these rights to promote the well being of society.”249 In citing evidence for this interpretation, Carey quotes *Britannus Americanus*, the pamphleteer, who wrote (about a decade before the Declaration) “that the ‘indefeasible rights’ of the ‘people of New England’ are the same as those of ‘Old England,’ ‘they being fellow subjects, and standing on equal footing’…”250

Finally, after also considering the possible antithesis (i.e., that the language of the Declaration posits rights of individuals or “all men,” not the corporate rights of a people), Carey seems to conclude that the overall purpose of the document is more in accord with the corporate-rights thesis:

Having said this much, however, it is clear that even if the clause {“all men are created equal”) is given the most expansive meaning, as applying to men in undifferentiated fashion [(i.e., “all men, perhaps best understood as the entire universe of men undifferentiated with regard to national or social groupings of identification.”)]}, its purpose is clearly to advance the proposition the Americans (as presumably are other

248 Ibid.
249 Ibid.
250 Ibid.
peoples) are as entitled as the British to unalienable rights. Consequently, the corporate view is, in effect, not very far from the surface, even given this undifferentiated understanding. So much is evident from the political landscape at the time the Declaration was written, as well as its express purpose and the internal logic of its argument.\textsuperscript{251}

A modified version of Carey’s insights about the corporate-rights thesis can be employed within our current analysis. To accomplish this, it is helpful to briefly recall the previous conclusions about the Declaration’s “one people” phrase. As already discussed, this phrase is very limited in scope and meaning: The peoples of the thirteen separate colonies had been “one people” in the sense that they had been united in their common submission to the King. With the Declaration of Independence, however, they were mutually declaring independence from the King and, hence, dissolving their former bond of unity. This, in turn, rendered them thirteen utterly separate and sovereign States, which were each constituted by thirteen separate and sovereign peoples. Such an interpretation of the “one people” phrase in the opening sentence of the Declaration is clearly compatible with the Declaration’s concluding statement, which provides an accurate representation of how the Continental Congress and Colonial/State governments

\textsuperscript{251} Ibid. Assuming that Carey is correct about the overall superiority of the corporate right’s thesis, it is still interesting to observe that religious minorities within both Massachusetts and Virginia quickly learned how to make natural rights appeals for themselves (as individuals) during their power struggle against both the established Puritan Congregationalism in Massachusetts and established Anglicanism in Virginia. See Noll, \textit{America’s God}, 82 and Alden, \textit{The South In The Revolution}, 320-321. This further suggests that natural-rights-talk was the American “political football” of the late eighteenth century; one’s use of natural rights on either the corporate-level or individual-level seems to largely have been contingent upon the nature and level of one’s “oppressor” (e.g., whether one’s colony was fighting the “oppression” of a nation such as Great Britain; or whether one was a religious minority who was fighting the “oppression” of the established religious sect within a colony). This, then, provides even more credence to our previous view that the new use of natural rights language by Americans in the late eighteenth century was more of a thin-level linguistic political tool, which was developed and employed to respond to the significant social changes and turmoil during the latter half of that century. Such natural rights language and concepts didn’t really suggest widespread American embrace of the thick-level philosophical worldview of Newtonian and Lockean philosophy of nature.
understood the relevant facts (i.e., the thirteen colonies were each becoming “Free and Independent” States).

With this in mind, we might argue the following. If Jefferson’s argument for independence in the first part of the Declaration is to be viewed as actually communicating the meaning of natural rights that was widely adhered to within the American colonies, then it also needs to be understood in terms compatible with the American colonists’ agreement about the thirteen colonies becoming “Free and Independent” States (i.e., sovereign and separate States). What would such a “new” interpretation look like? Since the Declaration is, in fact, declaring the political autonomy of thirteen separate sovereign States, its mention of corporate natural rights should be interpreted as applying to each “people” from each of the thirteen States that are declaring independence. Thus, the “people” of Massachusetts, for example, have a set of corporate natural rights, and they are exercising some of these rights via dissolving their ties with Great Britain and developing their own politically independent and sovereign State. Similarly, the Declaration is also declaring the same act of separation and creation of independent sovereignty for each of the other twelve colonies/States. The Declaration of Independence (July 4th) and the Resolution of Independence (July 2nd) both entail a “united” declaration of independence by the thirteen colonies who (through this mutual act) were thereby becoming thirteen separate and sovereign “States.”

In fact, this alternative view of corporate rights within the Declaration seems in accordance with various instances of historical evidence from the Revolutionary period. First, it seems more in accord with the logic of Britannus Americanus’ comments “that
the ‘indefeasible rights’ of the ‘people of New England’ are the same as those of ‘Old England,’ ‘they being fellow subjects, and standing on equal footing’…252 The citation suggests that corporate rights are possessed by a “people” group (e.g., the region of New England) that is smaller in scale than an artificial conception of American “people” (e.g., the peoples of all thirteen colonies/States lumped together as an aggregate unit). If we assume that corporate rights are possessed by a “people” unit that is smaller in scale than the American “people” as a whole, then the Declaration’s concluding and accurate representation of thirteen separate and sovereign States being realized (not a single and unified country) would suggest that the proper conception of a “people” unit is the “people” of each new State (i.e., of each former colony). This, in turn, suggests that properly employing the natural-rights facets of Jefferson’s argument for independence (within the first part of the Declaration) would entail applying it to mean the “people” of each colony/State. Second, as demonstrated by Donald Lutz, this very interpretation of “‘a people’” as being the people of a single colony/State is, in fact, used within “a letter to the editor of the Boston Gazette of July 15, 1765…”253:

Another variation on equality is found in a letter to the editor of the Boston Gazette of July 15, 1765, in which the author states “that the subjects of America are upon an equal footing with regard to Liberty and Right, with those in Britain.” Then, in an interesting variation, he asks why the people of the other colonies do not argue for their equality as strongly as the people of Virginia. In effect, each colony is viewed as “a people” carried forward by their respective majorities.254

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254 Ibid., 235.
So, Lutz here demonstrates that our re-appropriated notion of “one people” as the people of a single colony/state was in fact understood and employed during the revolutionary period and before the Declaration (i.e., almost eleven years before the Declaration). Given this reflection about the connotations of “a people” during the revolutionary period (but before the Declaration), our attempt to view Jefferson’s “people” phrases in this new way seems in keeping with the Declaration’s historical context.

Therefore, in developing a historically complete picture, the Declaration’s reference to “one people” should be understood in two ways. First, with this phrase, the Declaration appears to be connoting a very limited unity among the colonies, and this unity merely consists of their common allegiance to the British Crown. It does not connote an alternative cultural and political unity. Moreover, in declaring independence from the Crown, the limited unity among the colonies is dissolved, and they become thirteen separate “Free and Independent” States. Second, the natural rights language within the Declaration should probably be viewed as applicable to the corporate rights of the “people” in each State. Based on this, the “one people” phrase should be applied to the people of each of the thirteen colonies/States. Each of these thirteen peoples is viewed as being holder of the corporate natural rights that Jefferson suggests within the Declaration. So, the “people” of Massachusetts (as well the “people” in each of the other twelve colonies/States) is now exercising its corporate natural right as a “people” to “dissolve the political bands which have connected them with” the “people” of Great Britain.
Therefore, once it is recognized that readers are justified in retrospectively viewing the Declaration as elucidating corporate rights of multiple peoples (i.e., each of the thirteen peoples who are declaring political independence from Great Britain), the document can be viewed as claiming thirteen separate sets of natural rights. These sets of rights are probably identical as general principles (i.e., the general rights elucidated in the Declaration like “Life, Liberty, and the pursuit of Happiness”; rights to “alter or abolish governments”; a “people[‘s]” rights to “assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them”; etc.), but it is also possible that each of the thirteen people had or would develop a different specific articulation, meaning and application for these rights based on their local circumstances and (especially religious) culture. Thus, it is certainly possible that the people of Massachusetts will have a different understanding of their rights to “Life, Liberty, and the pursuit of Happiness” than the people of Virginia, and the people of Pennsylvania. In fact, Chapter Two’s review of the differences in politics, society, religion, etc., among these colonies strongly suggests that the peoples of these different States did conceptualize their corporate natural rights differently.

Perhaps it will help to illustrate this with a few examples. On the issue of religious liberty, it seems certain that the people of Pennsylvania had a different conception of this right than did the peoples of Massachusetts and Virginia. In the case of all colonies/States, each would probably claim that its people had a corporate right to freedom of religion, and this meant that a foreign people or government (e.g., Great Britain) could not justly impose upon its people’s self-determined religious establishment
or established policy concerning religion. In other words, all three colonies/states probably viewed this right to be a collective right of people to self-determine the colony’s/state’s religion. Pennsylvania, however, interpreted and applied this general right much differently than Massachusetts and Virginia.

From the beginning, Pennsylvania exercised this right in a manner that allowed significant religious tolerance, even though the Quakers retained an established connection with the colonial government (i.e., the Quakers had significant control and influence until the mid to late eighteenth century). As previously discussed, the Quaker Pennsylvania colony provided freedom of religion to all theists and extended civil liberties to Christian theists. Moreover, the Quaker’s religious tolerance seemed grounded in their thick-level moral-theological beliefs about the inherent dignity of all human persons as possessors of “Inner Light” and, hence, able to commune with God.

In contrast, the people of Virginia and Massachusetts conceptualized and applied their corporate rights to religious liberty very differently. They viewed and employed this right as an opportunity to self-determine the particular religion that would be practiced, supported, and defining within their societies. Also, connecting state and religion was an important part of moral-theology of the dominant sects within these colonies/States. The Reformed Puritans of Massachusetts (and Connecticut) viewed such a connection as being completely compatible with their Christian identity as a people or nation in covenant with God; moreover, discouraging religious dissenters was an important part of both protecting the elect from backsliding and successfully realizing the kind of truly
reformed society that could not be attained in England. Similarly, the Anglicans, who were legally connected to the state of Virginia, also believed that their religion should continue to have official status and support within the colony. This was probably due (in part) to Anglicanism’s closer (compared to other Protestant sects) connection to the Catholic tradition; it had more links to old-world European catholic thinking about the importance of helping to protect, enforce, and encourage religious truths contained within the apostolic tradition through the secular authority of the state.

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256 In discussing the Anglican Church in early Virginia, Wesley Frank Craven (in The Southern Colonies In The Seventeenth Century: 1607-1689) mentions some similarities and differences between the new and old worlds. As may seem obvious, the major differences were typical of those between well-established and frontier societies. Specifically, newly established Virginia lacked the resources to support all the high-church elements that were present in the Anglican Church in England, which was “an ancient institution” with an “elaborate organization” including “ecclesiastical courts that existed in England for the enforcement of orthodoxy and the exercise of a jurisdiction covering things as marriages, wills, and probates.” See Wesley Frank Craven, The Southern Colonies In the Seventeenth Century 1607-1689, in A History Of The South, Volume I, (Baton Rouge, Louisiana: Louisiana State University Press, 1970), 178-179. To make up for this, “the ordinary courts of the colony at an early date assumed or were granted superintendence over all such matters.” Ibid., 179. Moreover, colonial parishes “often coincided in extent and its boundaries with the county, and its population was subject to many shifts and changes. As would be expected, the vestry showed a marked duplication in membership with the county court, which exercised a general superintendence over parish activities, and the two bodies were not always careful to keep themselves apart. Chief among officers of the vestry were the churchwardens, men charged with the collection of parish levies and the making of presentments for trial on complaints of drunkenness, swearing, sabbathbreaking, recusary, fornication, adultery, bastardy, and other such offences. Indictments necessarily were brought before the civil courts, and principally those of the county court, if indeed they acted at all...” Ibid., 181. Craven discusses as evidence that Virginia lacked England’s “close-knit unit of community life, and of ecclesiastical and lay administration, that was the English parish...” Ibid. However, the above facts that Craven cites may not show this. The Anglican Church in America was intimately tied to the political authority of the “county court.” The local county courts administered some the activities that the Church traditionally had done in England, and the Church members also served as “churchwardens” that monitored and prosecuted impious activities within civil courts. Thus, it seems that the newly established Anglican Church in Virginia depended on and was helped by the local political authority. Contrary to Craven’s interpretation, this seems to have entailed a very “close-knit” system between “ecclesiastical and lay administration.”

Furthermore, Craven also admits that other than these and other established versus frontier society differences, “these early Virginians held true to a great spiritual tradition. The Book of Common Prayer and the King James Version of the Bible remained unchanged.” Ibid., 182. Thus, Anglicanism in the Virginia was similar to the high church ways and traditions of the Church in England other than the necessary modifications stemming from its situation in the new world: (1) the clergy and churches more modest
These alternative interpretations of the corporate right to religious liberty, which seemed connected to the different moral-theological beliefs of the dominant religious sects within Massachusetts and Virginia, were compatible with legally “discouraging” (and even persecuting) non-establishment sects. As previously mentioned, Baptists were being jailed in Virginia as late as the 1770’s, and Massachusetts had a long history of banning and/or discouraging sectarians that differed from the Puritan establishment.\(^{257}\)

By the time of the Declaration, Anglicanism still exerted significant influence in Virginia, and the Church was not legally separated from the State until 1786.\(^{258}\) Similarly, at the time of the Declaration, the established Congregationalist churches still exerted significant influence on the State of Massachusetts, and this continued (in lesser and declining degrees) into the early nineteenth century.\(^{259}\)

A similar illustration can be developed with respect to the corporate rights of State-peoples and the issue of slavery. Even if all the different peoples of the seceding colonies believed that they had natural rights to “Life, Liberty, and the pursuit of Happiness,” each would have understood and conceptualized these rights differently when it came to the issue of slavery. The Quakers, as the founding sect within Pennsylvania, for example, were strongly opposed to slavery. Fox and other Quaker


\(^{258}\) Alden, *The South In The Revolution*, 320-322.

\(^{259}\) Hatch, *Democratization of American Christianity*, 59; Noll, *America’s God*, 151; Jefferson to Adams, Monticello, October 28, 1813, ed. Peterson, 1307; and Noll, “Christianity and Culture In America,” in Kee et al., 644.
leaders opposed the institution of Slavery during the late 1600’s, and there were no Quaker slaveholders by the year 1776. Moreover, the Quakers were active in educating Blacks during the late 1700’s, and they actively participated in the Underground Railroad and the Abolition movement. Similarly, John Dickenson, the delegate from neighboring Delaware to the Constitutional Convention, opposed efforts to create and protect any right to import slaves for the peoples of the southern states. In his Notes Of The Debates In The Federal Convention, Madison records Dickenson’s concerns in the following manner:

Mr. Dickenson [(i.e., delegate from northern state of Delaware)] considered it as inadmissible on every principle of honor and safety that the importation of slaves should be authorized to the States by the Constitution. The true question was whether the national happiness would be promoted or impeded by the importation, and this question ought to be left to the National Government not to the States particularly interested. If England and France permit slavery, slaves are at the same time excluded from both these Kingdoms. Greece and Rome were made unhappy by their slaves. He could not believe that the Southern States would refuse to confederate on the account apprehended; especially as the power was not likely to be immediately exercised by the General Government.

For the southern colonies/states, however, the matter was different. Although Virginia seemed far less concerned about attempts to ban the importation of slaves, younger southern States like North Carolina, South Carolina, and Georgia still needed the slave trade for developing their agricultural economies. Not surprisingly, John Rutledge, as a delegate to the Constitutional Convention from South Carolina, strongly countered Dickenson’s comments with the following (as paraphrased by Madison):

260 Howard Brinton, Friends For 350 Years: The history and beliefs of the Society of Friends since George Fox started the Quaker movement (Wallingford, Pennsylvania: Pendle Hill Publications, 2002), 179.

Mr. Rutledge [(i.e., delegate from the southern state of South Carolina)] . If the
convention thinks that N.C. S.C. & Georgia will ever agree the plan, unless their right to
import slaves be untouched, the expectation is vain. The people of those States will never
be such fools as to give up so important an interest.262

Such differences in opinion seem to demonstrate how at the time of the Declaration (and
approximately a decade afterwards) the peoples of various States would have different
specific conceptualizations and applications of their natural rights with respect to the
issue of slavery. The peoples of various southern States viewed themselves to have a
natural “right to import slaves”; whereas, it is doubtful that the peoples of northern States
like Pennsylvania and Delaware would have agreed.

All this suggests that the supposed widespread eighteenth century agreement
about natural rights philosophy implied in the Declaration of Independence did not entail
thick-level moral agreement. Such agreement about natural rights could not be thick-level
in nature because there were significant differences among the thirteen peoples
concerning the specific articulation, content, and application of these rights. The
Declaration had elucidated the same set of general rights for each of the thirteen peoples
of America, so it might be possible that the Declaration implies some thin-level moral
agreement. Nevertheless, each of the thirteen peoples probably had a different way of
understanding and applying the specific content of such general rights. Therefore, the
natural rights (and laws), which the Declaration assigns to each of the thirteen peoples,
are actually (in their specifics) very different; so, the document can not be viewed as

articulating or proving the existence of a thick-level morality that was widely adhered to throughout America.
Chapter 4, Reflection on the States’ Constitutional Compact of 1787-1790: Why the States remained sovereign after they created the Constitution and why the United States were not a nation with a thick-level common good.

This chapter will argue for the following: (1) the States had full and sole sovereignty before and after the Constitution’s ratification; and (2) the Constitution neither established (nor is it compatible with) a national community of citizens (i.e., an “American people”) nor did it create a thick-level common good for the United States as a whole. The thesis will be defended through analyzing the following: (A) the Constitution’s contextual relationship to the Articles of Confederation, early foreign treaties, and the Declaration of Independence; (B) the language of the Constitution; (C) other relevant evidence from the ratification period; and (D) how A to C imply that the Constitution neither established (nor is it compatible with) a national community of citizens (i.e., an “American people”) nor did it create a thick-level common good for the United States. In developing this, the paper adopts an original understanding jurisprudence that seeks to identify the original meaning of the language of the Constitution. Moreover, it presumes that a careful consideration of the above three factors and how they relate to one another should be given priority when attempting to identify the Constitution’s original meaning.

The last (or third) of the above factors needs further specification. This dissertation assumes an authoritative ordering of the various opinions and intentions expressed during the Framing and Ratification. Specifically, the States as state-peoples (i.e., the people of each state) are the law-givers, and their sovereignty enacts and defines
the terms of the Constitution as positive law. This is suggested by the fact that only the States could and did make the Constitution into positive law; whereas, the Framers of the Philadelphia Convention (and the Congress under the Articles) merely recommended the Constitution as a candidate for becoming the law. Since only the States had the authority to make the Constitution into a positive law that was shared by all the States, the intentions of the State-peoples (in contrast to those influential, but individual, Framers) seem most relevant for determining the original meaning of the Constitution. M.E. Bradford cites James Madison’s articulation of this view: “‘[T]he meaning of the Constitution is to be sought …not in the proceedings of the body that proposed it, but in those of the state conventions which gave it all the validity and authority it possesses.’”

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263 It is important to understand that the notion of each “state” as a “people” is well understood during (and even before) the early years of United States history. In response to Patrick Henry’s critical questioning of the phrase “We the people” in the Preamble of the Constitution, James Madison argued that this referred to the “people as composing thirteen sovereignties.” By this, he suggests that the locus of sovereign authority is found in the “people” of each State, “not the people as composing one great body...” (i.e., not an aggregation of the peoples from all the States). See James McClellan “Introduction,” in New Views of the Constitution of the United States, by John Taylor of Caroline, Virginia, ed. by James McClellan (Washington, DC: Regnery Publishing, Inc., 2000), xxxi-xxxii. See Patrick Henry, Speech to the Virginia Ratification Convention, Wednesday, June 4, 1788, Vol. 3 of The Debates In the Several State Constitutions on the Adoption of the Federal Constitution, 2nd ed., With considerable additions, Collected and Revised From Contemporary Publications, Edited by Jonathan Elliot (Washington, DC: United States Congress, 1836), 22. Made accessible online by the Library of Congress, A Century of Lawmaking For a New Nation: U.S. Congressional Documents and Debates, 1774-1875, http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ed0037)) (Accessed December 26, 2008). See also James Madison, Speech to the Virginia Ratification Convention, Friday June 16, 1788, in Elliot, Vol. 3, U.S. Congress, 94, http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ed0039)) (Accessed December 26, 2008). I also employed and referenced another publication of this material; see Vol. 3 The Debates In the Several State Constitutions on the Adoption of the Federal Constitution, 2nd ed.?, edited by Elliot, Jonathan (Philadelphia: J.B. Lippincott Company, 1836?), 22 and 94. Madison continues draw upon this understanding of “people” in his “Report of Virginia House of Delegates.” Here he claims that “states” (as basic parties to the constitutional compact) refers to “the people composing those political societies, in their highest sovereign capacity.” See James Madison, Report of Virginia House of Delegates, in The American Republic, ed. Bruce Frohnen, 409.

264 See James Madison quote in M.E. Bradford, Original Intentions, 15. James Madison, M.E. Bradford, and Forrest McDonald all discuss this issue. Bradford cites Madison’s words approvingly (as
In contrast, the opinion of the Framers is only secondarily helpful, and it is only so to the extent it is compatible with and elucidates the views of the States. The Framers’ opinions differed significantly during the Philadelphia Convention. Moreover, there are noteworthy inconsistencies within Publius’ treatment of the federal union in The Federalist. Thus, not only is the opinion of these Framers less authoritative than that of the State-peoples due the to Framers’ lower status, the Framers’ opinion on the issue of union is riddled with problems and inconsistencies. More will be said on this point later.

A. The Constitution’s contextual relationship to the Articles of Confederation and the Declaration of Independence.

With these preliminaries in mind, the first of the above points will now be considered: (1) the Constitution’s contextual relationship to the Articles of Confederation, early foreign treaties, and the Declaration of Independence. This factor suggests that the States as state-peoples maintain their independent sovereignty as seen above) and, then, suggests that the state ratification can help guide us to recover the Constitution from contemporary “‘inventions and concoctions’” of judicial distortions. See M.E. Bradford, Original Intentions: On the Making And Ratification of the United States Constitution. (Athens, Georgia: The University of Georgia Press, 1993). 16. McDonald elaborates on Bradford’s view in his “Forward” to Original Intentions: “[W]hat he [Bradford] sets out to discover is what the American lawgivers had in contemplation when they established the instrument. Customarily, when scholars tackle that question, they turn to the records of the proceedings of the Great Convention that drafted the Constitution during the summer of 1787. But the fifty-five men who participated in the drafting were not, could not have been, the lawgivers, for they had no authority to make law. As was pointed out in the convention by James Wilson (not Bradford’s favorite Framer), the delegates were ‘liberty to propose any thing,’ but were ‘authorized to conclude nothing.’… Those who did have the authority were the people of the several states, acting separately through delegates to separate ratifying conventions. They had the authority because the states were political societies which antedated the existence of the United States and which had expressly reserved their sovereignty when agreeing to the Articles of Confederation; and also because to adopt the Constitution was to amend each of the state constitutions, and in the nature of things the people of one state could have no power to change the constitution of another. For these reasons Bradford has opted to follow the dictum of James Madison (likewise not his favorite Framer) and to focus mainly upon the deliberations in the several states.” Forrest McDonald, “Forward”, in Original Intentions, by M.E. Bradford, ix-x.
political societies with and after the ratification of the Constitution. According to Sir William Blackstone, sovereignty is supreme power. Forest McDonald quotes Blackstone’s famed Commentaries on the Laws of England on this point: “’[T]here is and must be” in every state “a supreme, irresistible, absolute, uncontrolled authority, in which the jura summi imperii, or the rights of sovereignty, reside.’” Furthermore, John Taylor for Caroline Virginia further defines sovereignty to mean “will to enact, and a power to execute…” The two views are compatible and can be synthesized; sovereignty as a political term implies having the supreme (or ultimate) authority over a people in a definable geographic territory, and it is expressed by having both the “will to enact” and the “power to execute” positive law for a definable territory.

The Declaration of Independence was the former colonies’ joint proclamation to the world that they were now sovereign States (or State-peoples). The concluding paragraph of the document formally declares the former colonies’ separation from Great Britain:

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions do in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare. That these United Colonies, solemnly publish and declare themselves to be Free and Independent States; they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.”

265 McDonald, States Rights And The Union, 1.  
267 Declaration of Independence, July 4, 1776, ed. Friedrich and McCloskey, 6-7.
More will be said about this momentarily. Here one should observe how the language implies each of the new “Free and Independent States” has full powers (e.g., “Power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do…”) of a sovereign State within the international system.

After the States declared independence (which made them new separate, independent, and sovereign States) and before the enactment of the Articles of Confederation, the States’ collaboration in Congress and the War was voluntary and informal, for there was no positive legal agreement (e.g., no legal compact or treaty) among the colonies that made the enactments and resolutions of the First and Second Continental Congress legally binding for the colonies/States. Before the enactment of the Articles of Confederation, Congress was merely an inter-State diplomatic body lacking the formal delegated legal authority that it would receive when the States compacted under the Articles. As a result, each of the States could voluntarily participate in and/or ignored actions of Congress without violating legal obligations owed to the other States. Congress merely facilitated voluntary cooperation among the colonies/States. So, Congress’ enactment of the Declaration of Independence was not an exercise of such formal delegated authority, for Congress did not yet possess this. Thus, Congress’ enactment of the Declaration cannot be viewed as a positive law imposing legal obligations on the colonies/States; hence, the Declaration cannot be interpreted as establishing a legal obligation on the States to be in union with one another.
This, then, helps to illuminate the meaning of the phrase, “united States”, in the Declaration. The new States were only united in the sense of an informal and non-legally binding collaboration to achieve various common goals such as fighting for and achieving recognition of their sovereign independence. For the reasons stated above, the Declaration cannot be viewed as establishing a legal bond of union. Although the new sovereign States were united to one another, this “union” was purely informal and lacking in legal obligations. Each State clearly retained full independence and sovereignty, regardless of its participation in this “union.”

Furthermore, as discussed in the previous chapter, there is compelling evidence from the text of the Declaration that this union is a purely voluntary, informal, and non-legal bond among the States. For the sake of clarity, it is helpful to briefly review this material. Forrest McDonald argues for the above thesis as follows:

The third part is the actual declaration proper, in which the precise language is crucial: “We, therefore, the Representatives of the united States of America… do in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare” themselves to be “FREE AND INDEPENDENT STATES,” and as such “they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do

268 Contemporary readers who have been so conditioned by Lincolinian-historiography may be surprised at the evidence from early America to support this fact. As James Kirkpatrick shows, even rabid Federalists like Justice Samuel Chase recognized each State to be fully independent and sovereign (in their relation to each other and rest of the world) after secession from Britain. Chase articulated this as follows in his opinion in Ware vs. Hylton (1796): “[A]s a declaration [the Declaration of Independence], not that the colonies jointly, in a collective capacity, were independent States, etc., but that each of them was a sovereign and independent State, that is, that each of them had a right to govern itself by its own authority, and its own laws without any control from any other power on earth.” Kirkpatrick continue quoting chase as follows: “From the Fourth of July, said Chase, “the American States were de facto and de jure in the possession and actual exercise of all the rights of independent governments….I have ever considered it as the established doctrine of the United States, that their independence originated from, and commenced with, the declaration of Congress, on the Fourth of July, 1776; and that no other period can be fixed on for its commencement; and that all laws made by legislatures of the several States, after the Declaration of Independence, were the laws of sovereign and independent governments.” See Kirkpatrick, The Sovereign States, 5-6.
all other Acts and Things which Independent States may of right do.” The plural language is used throughout. In addition, in keeping with an eighteenth-century convention, nouns in the document are capitalized, and what the delegates represent are united States- that being not a name, but “united” being merely an adjective describing the stance of the states in opposition to Britain.269

In addition to noting the obvious “plural language” description of the new sovereign “STATES”, McDonald emphasizes the Declaration’s great attention to eighteenth-century convention” of capitalizing “nouns” in contrast to its failure to capitalize the word “united” in the phrase “united States.” According to McDonald, then, this term, “united”, is clearly an adjective, and it renders the phrase, “united States”, to merely be “describing the stance of the states in opposition to Britain…”- i.e., they have Britain as a common enemy and are united to fight against her (albeit, this “union” has not yet taken the form of a legal treaty).270

Victory in this war of independence corroborated the truth of the States’ assertion of themselves as independent and sovereign States. Most importantly, it resulted in the new States’ main challenger, Great Britain, formerly recognizing their separate,  

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269 McDonald, States Rights And The Union, 10.
270 In discussing this, McDonald seeks to undermine the Lincoln thesis that the Declaration shows the “Union” as existing prior to and even creating the States (McDonald, States Rights and the Union, p. 9). As previously mentioned, although the “u” in “united States” is in lower case, the “U” in “United Colonies” is in upper case. How can this discrepancy be explained? One probable answer is that as British colonies before and at the time of declaring independence, they were still technically under one government- i.e., the King as the head of the British Empire; however, just after they declare independence, they cease to be legally “united” with one another as new States. Instead, they are now “Free and States” in non-legal union with one another due to their common struggle against Great Britain.

This view of there being a non-legal union among the new States at the time of Independence is corroborated by Daniel Boorstin’s commentary in his book, The Americans: The National Experience. Boorstin suggests that the Independence was not the beginning of an American nation: “Before independence, Americans were both British subjects and citizens of Massachusetts, New York, Virginia, or some other colony. After Independence, they ceased to be Britons, but had not yet become Americans. There was not yet an American nation to command their loyalty. Still they remained Virginia, or colonists of some other stripe, and their primary and continuing loyalty remained to their own colony.” See Boorstin, The Americans: The National Experience, 401.

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independent, and sovereign status. In the Treaty of Paris (1783), which is quoted here via James Kirkpatrick, Great Britain recognized the sovereignty of the new States in plural form:

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; that he treats with them as such.\textsuperscript{271}

The plural language, again, implies that each of the States was now regarded as “free, sovereign, and independent”; each was seen as its own separate sovereignty within the international system. Even before the Treaty of Paris with Britain, other sovereign nations had begun referring to the new States in this plural form. Forest McDonald also elucidates this fact: “The 1778 Franco-American treaty of alliance also used the plural: ‘The Most Christian King and the United States of North America, to wit: New Hampshire, Massachusetts Bay, Rhode Island…’).\textsuperscript{272} Hence, France recognized each of the States as being independent and sovereign.

Although the Articles of Confederation, which were drafted in 1777 and formally ratified in 1781, instituted a legal compact of “Union” among sovereign States that previously had no such legal bond, the nature of this union was that of a confederation constituted by international treaty among sovereign States. The States compacted with one another to enter into “perpetual Union” (i.e., the legal bond did not expire after a certain time). However, in entering into this compact with the other States, each State

\textsuperscript{271} Kirkpatrick, \textit{The Sovereign States}, 7.
\textsuperscript{272} McDonald, \textit{States’ Rights and The Union}, 10-11.
retained its full “sovereignty, freedom, and independence in every power, jurisdiction, and right.”

Thus, the States’ did not transfer any portion of their sovereignty to the new “Union.”

The nature of the Articles of Confederation as a compact among sovereign States was further corroborated by its plural language, which is similar to that found in the Declaration of Independence, Treaty of Paris, and other international treaties considered above. As Forrest McDonald observes, this can be seen in the following passage from the Articles stating how the “Delegates of the United States”:

agree to certain articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts-bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia in the Words following, viz. “Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts-bay, Rhode Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia…”

There is an important implication to this listing of the multiple States here in the Articles: it further shows how this was treaty (or compact) among independently sovereign States who were agreeing to confederate with one another (i.e., enter into federal union, which connoted a good faith united relationship among still independently sovereign States).

This is similar to the treaty format of the above mentioned treaties with European States (e.g., France and Great Britain). In those cases, however, each treaty document actually contains multiple treaties between the European State and each of the thirteen sovereign States.

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273 McDonald, States’ Rights and The Union, 10.
274 Articles of Confederation, Written in 1778 and enacted in 1781, in The American Republic, ed. Bruce Frohnen, 200. See also McDonald, States’ Rights And The Union, 10.
Although the Congress under the Articles had established delegated authority (unlike the Congress after the Declaration and before the enactment of the Articles) according to the terms of the Articles as a treaty among sovereign States, it mostly lacked direct control over individual citizens, and Congress depended on the States to enforce and wield much of its delegated power. This was especially noteworthy in the area of taxes and commerce. Specifically, Congress was dependent upon the States to attain revenue to fund Congress’ budget, and Congress lacked the ability to effectively regulate interstate commerce. This, in turn, resulted in Congress having problems functioning effectively in both areas.

Although Congress’ powers had been legally established by the Articles, it lacked the ability to operationalize and wield these powers independently of the States. In this sense, Congress was analogous to the “United Nations”; it was a legally instituted treaty organization among sovereign States, but its de-facto power was largely dependent upon the States’ cooperation.

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277 Examples of this are provided by Forrest McDonald in his book, A Constitutional History of The United States. With respect to revenue, collection McDonald suggests the following: “The foreign creditors of the United States- the government of France and private bankers in Holland who had lent money to support the cause of independence- could not count on repayments from a Congress with no source of revenues except the voluntary contributions of states, which came in trickles.” See Forrest McDonald (With the Assistance of Ellen S. McDonald), A Constitutional History of the United States (New York: Franklin Watts, 1982), 22. With respect to international trade, he writes: “International problems arose from a variety of sources, and Congress was powerless to deal with them. Off the Barbary Coast of North Africa, pirates plundered American shipping. Spain, whose American empire included Florida and the territory west of the Mississippi River, harassed American frontiersmen by closing navigation of the river and inciting Indians against them.” Ibid., 22.

278 Boorstin makes this very point in his, The Americans: The National Experience: “Independence had created not one nation but thirteen. And if the Articles of Confederation produced a “United States,” it
Given the various problems that bedeviled the Union under the Articles, a new compact of Union was drafted in 1787 by a small convention of delegates from every State but Rhode Island. At the conclusion of its work in framing a proposed Constitution, this Philadelphia Convention “recommended that Congress forward the document to states” for them to ratify. Congress proposed it to the States, and all the States appointed conventions to decide whether to ratify it. The Constitution was ultimately ratified by all thirteen States. This rendered the Constitution to be the second legal compact of Union among the original thirteen states; hence, it replaced the Articles of Confederation, which had been the original legal compact.

279 Forrest McDonald makes an important case for why Article VII, which provided for nine States as sufficient for enacting “this Constitution between the States so ratifying the Same...”, was not “illegal” or a “usurpation” even though Article VII (when considered on its own and in isolation of other facts) “by-passed the prescribe method for amending the Articles of Confederation.” In *Novus Ordo Seculorum*, McDonald argues the following: “In a resolution appended to the Constitution and ‘laid before Congress,’ the convention recommended that Congress forward the document to the states and that ‘it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification.’ Congress unanimously resolved to follow that recommendation, and the legislatures of all thirteen states voted to abide by it. In so doing, Congress and the legislatures approved article 7 of the Constitution and thereby constructively amended the Articles of Confederation in regard to the amendment process; and they did so in accordance with the stipulations in the Articles themselves.” See McDonald, *Novus Ordo Seculorum*, 279

Nevertheless, it is important to realize how the historical facts could raise questions about McDonald’s above analysis. Specifically, the Articles require that all the State legislatures approve the proposed amendment. With respect to the Constitution, however, Rhode Island didn’t formerly vote to abide by Article VII until May of 1790, which was several months after the Constitution’s new federal government was in operation. Although Rhode Island legislature put the Constitution to a popular vote, which lost badly, before this time, this process was not in conformity with Article VII that stipulated approval by State conventions. Furthermore, one can question whether the States’ mere acquiescence with Article VII was really tantamount to approving a formal amendment to the Articles.

Even if such facts raise the possibility of the Articles being “illegally” jettisoned by the States, such a move would only reinforce the notion that the States were independent and sovereign entities capable of entering and withdrawing from compact treaties with one another. Just as a sovereign State is capable of entrusting or delegating certain of its powers to the Congress of multiple States, so such a sovereign State can reclaim these powers, terminate its participation in a multiples State compact, and re-enter the international state of nature.
There was a key difference between the Articles and the Constitution. With respect to the Articles, the central organization of federal authority was a Congress that was largely dependent upon the States to realize its powers. In contrast, the Constitution created a federal government that had very limited, but effective, sovereign powers over the citizens in each of the States, and this provided the new federal government with some independent ability to enact and enforce its own legislation. In other words, the Constitution created a federal government among confederating States that could independently operate and wield its powers.\(^{280}\) Whereas, under the Articles, Congress functioned as a treaty organization for facilitating the confederation’s purposes and cooperative endeavors; however, real de facto power was still held by the States (e.g., only the States could directly tax individual citizens).

What is notable, however, is that the new constitutional compact did not alter the nature of the States’ sovereignty. It was still a legal compact among sovereign and independent States, and these States maintained their sovereignty after the constitutional compact was enacted and went into effect. The above commentary on the Declaration of Independence and Articles of Confederation has laid out the rationale for so viewing the States as sovereign before the Constitution. The reflection below will now show how the States possessed their sovereignty during the framing/ratification period of the Constitution.

The States were still fully sovereign during the framing and ratification processes, and this can be seen in the relation of the States to both events. It was the States who authorized and established the framing of the Constitution. The Philadelphia Convention was composed of delegations sent by the States. Although the delegates departed from their explicit mandate when they framed a new compact (rather than merely revising the old), their authority to frame and propose recommendations for a new compact was still derived from and remained contingent upon the States. Each State-delegation only had one vote during the Convention, and the delegates voted as parts of their delegations (not as individual members). If, for example, a delegate voted for a proposition but the majority of the delegation voted against it, the State’s vote would oppose the proposition. Finally, at its conclusion, the Convention handed over its recommendation for a new compact to the Congress, which forwarded it on to the States to determine whether the proposal would be accepted, for the convention had no authority of its own to make positive law. 281

Only the States had the authority to both (1) enact the Constitution’s legally binding existence and (2) choose to enter into this compact. This can be seen in the Constitution’s Article VII, which has already been considered above. This stipulated that nine States would need to ratify the Constitution in order for it to become enacted, and it would only be a compact “between” those States who so ratified it. Thus, in no way could nine (or more) States make the Constitution effective for the other four (or less) States who might not have ratified it, for the sovereignty of each State was recognized and

respected. This is no surprise, for the Articles had explicitly recognized the States as being “sovereign.” Such facts suggest that the States had both Blackstone’s condition of “supreme” power and also Taylor’s condition of “the will to enact, and a power to execute” before and at the time of the Constitution’s ratification, for only the States had the high and final power to choose whether to continue and “perfect” their union by enacting the Constitution as a new legal compact (i.e., replacing the Articles as the original compact) among one another.

**B. The language of the Constitution.**

The States’ sovereignty is also clearly recognized within the language of the Constitution. As previously discussed in an above footnote, the Preamble’s phrase, “We the people of the United States”, actually has the same plural implication as the plural language in the Declaration, the Articles, and the early foreign treaties. According to Madison, the phrase, “We the people of the United States”, in the Preamble of the Constitution refers to the “people as composing thirteen sovereignties.” By this, Madison claims that the locus of sovereign authority is found in the “people” of each State, “not the people as composing one great body...” (i.e., *not* the people from all the States as “one great body” or nation).\(^{282}\)

\(^{282}\) James McClellan “Introduction,” in *New Views of the Constitution of the United States*, by John Taylor of Caroline Virginia, xxxi-xxxi. Also, see both (1) Patrick Henry, Speech to the Virginia Ratification Convention, Wednesday, June 4, 1788, in Elliot, U.S. Congress, 22, and (2) James Madison, Speech to Virginia Ratification Convention, Friday June 16, 1788, in Elliot, U.S. Congress, 94. This interpretation is further verified by other participants in the Virginia ratifying convention who corroborated Madison’s answer to Patrick Henry. James Kilpatrick describes this in his book, *The Sovereign States*: “Colonel Henry Lee took the same point of view in responding to Patrick Henry. Light Horse Henry Lee...
Forrest McDonald also shows the very practical rationale for why all the States were not included after “We the People of the United States” in the Preamble of the Constitution:

[T]he Framers could not have said, “We the People of the United States, viz. New Hampshire…” for in the summer of 1787, no one could predict which states would ratify and which would not, and it was expected that a few would refuse for a long time and perhaps forever. The course of events bore out that expectation. New Hampshire’s convention refused to ratify when it met in February 1788, though it did approve when it reconvened in June. As it happened, New Hampshire became the ninth state to ratify, activating the Constitution for those nine that had approved. Virginia and New York followed shortly afterward, creating a union of eleven members. But North Carolina flatly rejected the Constitution and did not vote to join the reconstituted entity until several months after the government had been in operation. The Rhode Island legislature at first refused even to call a ratifying convention, and that state did not ratify until May 1790.283

The explicit delineation of all the States in the Preamble could not have been done because no one knew whether all the States would ratify the Constitution. Thus, instead of explicitly listing all of the States by name, the “We the People” is followed by “of the United States.” In this last phrase, “States” is a plural noun, and “United States” connotes all the “States” choosing to enter into union with one another. Thus, “United States” functions as a place-holder for nine or more sovereign States that would elect to ratify the Constitution. Hence, it still implies a multiple listing of States like what is found in the Articles of Confederation.

spoke as other proponents of the Constitution did, in irritation and perplexity. He could not comprehend why Henry’s question should even be asked. Obviously, the ‘we the people’ mentioned in the preamble—the ‘we the people’ there and then engaged in ratifying the Constitution—were we ‘the people of Virginia.’ If the people of Virginia ‘do not adopt it, it will always be null and void as to us.’…Here Lee touched and tossed aside what doubtless was so clear to others that they could not understand what Henry was quibbling about. Of course, ‘we the people’ meant what Madison and Lee found so obvious: It meant ‘we the people of the States.’ Why argue about the point? ‘I take this,’ said Randolph testily, ‘to be one of the least and most trivial objections that will be made to the Constitution.’” See Kilpatrick, The Sovereign States, 16-17.

283 McDonald, States Rights and the Union, 21-22.
Furthermore, according to Madison, “We the People of the United States” in the Preamble of the Constitution refers to the “people as composing thirteen sovereignties.” By this, Madison suggests that the Constitution itself recognizes that the locus of sovereign authority resides in the “people” of each state (“not the people as composing one great body...”). All of this suggests that the term “People” has a plural connotation in the Preamble phrase in question. For the sake of clarity, it is helpful to restate the term as “Peoples”. The Preamble phrase, then, implies: “We” the different peoples from the distinct sovereign States entering into a federal union with one another. It does not refer to a “People” as a single nation.284

Furthermore, it is important to recognize the many other ways that the text of the Constitution implies that it is a federal compact among sovereign State-peoples, not the expression or establishment of a single people as a national entity. James Kilpatrick elucidates many examples of this in his book, The Sovereign States.285 He refers to Article I: Section 1: “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” With respect to this, Kilpatrick observes that “Congress” is the name also given to the inter-state deliberative body that existed during and before the Articles of Confederation.287 Moreover, John Taylor of Caroline, Virginia reflects on how the term “Congress implies a deputation of sovereignties, and was expounded by the

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284 Calhoun, A Discourse on the Constitution and Government of the United States, 96.
286 U.S. Constitution, art. 1, sec. 1, cl. 1.
confederation…” Next, Kilpatrick comments on the description of Congress provided in Article I, Section 2: “The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.” As to this, Kilpatrick maintains the following:

[T]he framers encountered an opportunity to choose between a ‘national’ and a ‘federal’ characteristic: They might have established uniform national qualifications for the franchise, but they did not. Electors qualified to vote for candidates for the House of Representatives are to have “the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”

Kilpatrick also discusses the federal implications of Article I, Section 3 and 4, which read as follows:

(3). Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least on

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288 Taylor, *New Views of the Constitution*, 213-214. Taylor also analyzes how the term, “state”, implies that state sovereignty continued under the 1787 Constitution: “The meaning of the word ‘state’ accords with that of the words associated with it. Used in reference to individuals, it comprises a great variety of circumstances, but in reference to the publick, it means a political community. Johnson thus expounds it, and adds, that it implies a republick, or a government not monarchial. What other words was more proper to describe the communities recognized by the declaration of independence, the union of 1777, and the union of 1787? Can the same word have been intended to convey an idea in the last, inconsistent with the idea it conveys in the two first instruments? Neither monarchy nor aristocracy would have fitted the case, and the word republick itself would have been exposed to uncertainties, with which the word state is not changeable; because it has been applied to governments discordant with those which were established by our revolution. As no word more explicitly compromises the idea of a sovereign independent community; as it is used in conjunction with a declared sovereignty and independence; as it is retained by the union of 1787, and in all the operations of our governments; and as sovereign powers only could be reserved by states; there seem to be no sound argument by which it can be deprived of its intrinsick meaning, contrary to these positive construction.” See Taylor, *New Views of the Constitution*, 7-8.

289 U.S. Constitution, art. 1, sec. 2, cl. 1.

Representatives; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

(4). When vacancies happen in the representatives from any State, the executive authority thereof shall issue writs of election to fill such vacancies.291

For Kilpatrick, the crucial point is that the “Representatives and direct taxes are apportioned… ‘Among the several States which may be included within this Union, according to their respective Numbers.’”292 He also focuses on how the “‘actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.’ (Emphasis supplied.)”.293 Kilpatrick emphasizes that “the antecedent they is not ‘Congress,’ but ‘United States.’ Nowhere in the whole Constitution or in any subsequent amendment is the United States an ‘it.’ The singular never appears.”294

Kilpatrick is, thus, emphasizing how the Constitution always refers to the “United States” as a plural entity. This suggests that it is still and remains a confederate (i.e., federal) union. It does not become a single “people” or national entity after the ratification or at any subsequent time of operation, for the Constitution (in the above discussed passage from Article I, Section 3) implies that “they” or the State-peoples continue to retain their individual status as separate peoples even though they act together in unity according to the terms of their compact.

291 U.S. Constitution, art. 1, sec. 2, cl. 3 and 4.
293 Ibid., 20-21.
294 Ibid., 20-21.
Furthermore, Sections 3 and 4 contain other “tells” of the Constitution’s federal nature. Kilpatrick notes the following:

We find that “each State shall have at least one Representative,” whereupon follows a roll call of the States themselves: “Until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight,” and so forth. And when vacancies happen “in the Representation from any State,” the Governor thereof is to issue a writ of election…

Kilpatrick proceeds by demonstrating how all seven of the original Articles imply the federal essence of constitutional compact. Those discussed are just a few of the examples from his analysis of the House of Representatives in Article One.

The above points are further corroborated when reflecting on the federal character of the concepts implied in the phrase, “United States.” As John Taylor of Caroline, Virginia suggests, “the word state implies a sovereign community.” If this is true, then the very notion of a “union” of States implies a federation of sovereign communities. So, the name “United States” suggests that the ultimate constitutional union of thirteen States is federal in nature. Daniel Boorstin shows how the concept of “‘federal’ union” during the framing and ratification period usually meant the “drawing together of sovereign states.”

The term “federal” often meant “treaty…to describe a relationship resting on good faith…”, and this is and was a common way to describe sovereign States entering into agreements with one another. Realizing a federal union, then, implies that the member communities maintain their sovereignty. Thus, the phrase “United States” as a

296 Ibid., 18-27.
299 Ibid., 415.
name for the federally natured constitutional union of the States suggests that all these
States still retain their sovereignty after entering into this “federal” union with one
another.

Through reflecting on both the Preamble and Article VII, John C. Calhoun argues
that the States retained their sovereignty after ratification - i.e., they did not divest their
sovereignty by ratifying the Constitution. This argument is made through demonstrating
“by whom, it [the Constitution] was ordained and established; for whom, it [the
Constitution] was ordained and established; for what, it [the Constitution] was ordained
and established; and over whom, it [the Constitution] was ordained and established.” 300

According to Calhoun, “by whom” the Constitution “was ordained and
established” is clear from the phrase “We the People of the United States.” Here he
employs similar considerations as have been discussed above. The Constitution was
“ordained and established” by “the people who ratified the instrument; for it was the act
of ratification that established it.” Moreover, it was the sovereign peoples of the States
who ratified the Constitution:

[I]t was ratified by the several States, through conventions of delegates, chosen in each
State by the people thereof; and acting, each in the name and by the authority of its State:
and, as all the States ratified it- “We, the people of the United States”- mean- We, the
people of the several States of the Union… 301

The State-peoples who ratified were demonstratively sovereign when they ratified, for
they were members of “members of the confederacy [under the Articles of

300 Calhoun, A Discourse on the Constitution and Government of the United States, 92.
301 Ibid., 93.
Confederation]…” and the Articles clearly maintained that “each State retains its
sovereignty, freedom and independence…”\textsuperscript{302}

Furthermore, the Constitution “was ordained and established…for- ‘The United
States of America’…”\textsuperscript{303} As Calhoun notes, this is made evident by the Preamble.
Specifically, it is seen in the last phrase of the Preamble: “for the United States of
America.”\textsuperscript{304} The addition of “America” does not alter the meaning or the above
implications, for this just follows the “the style of the then confederacy…”\textsuperscript{305} Also, it
seems safe to presume that “‘United States’ bears the same meaning in the conclusion of
the preamble, as it does in its commencement…”\textsuperscript{306} Thus, in identifying the “United
States of America” at the conclusion of the Preamble as being synonymous in meaning to
the “United States” at the commencement of the Preamble, Calhoun reasons that “the
constitution was ordained and established \textit{for} the people of the several States, \textit{by} whom, it
was ordained and established.”\textsuperscript{307} Thus, the Constitution was established to benefit the
several peoples of the several States (i.e., the State-peoples) entering into union with one
another.

In what ways was Constitution established to benefit the State-peoples? Calhoun
shows “\textit{for what}” the Constitution was “ordained and established” through examining the

\textsuperscript{302} Ibid., 93. Since the “United States” in the Constitution is the same “United States” in the
Articles of Confederation and since the States were recognized by the Articles as maintaining their
sovereignty even though they were also in legal Union with one another, it seems logical (with respect to
the Constitution) that the States would also retain their sovereignty, albeit also in legal Union with one
another. This thought is somewhat inspired by Calhoun, \textit{A Discourse on the Constitution and Government
of the United States}, 93.

\textsuperscript{303} Ibid.

\textsuperscript{304} Ibid., 93; and U.S. Constitution, Preamble.

\textsuperscript{305} Calhoun, \textit{A Discourse on the Constitution and Government of the United States}, 93.

\textsuperscript{306} Ibid.

\textsuperscript{307} Ibid.
“objects” that the “preamble enumerates…”308 These “objects” are “to form a more perfect union, to establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” To “effect” or advance these goals:

they ordained and established…’the constitution for the United States of America’—clearly meaning by “for,” that it was intended to be their constitution; and that the objects of ordaining and establishing it were, to perfect their union, to establish justice among them— to insure their domestic tranquility, to provide for their common defense and general welfare, and to secure the blessing of liberty to them and to their posterity.309

Since the Constitution was ordained and established by each of the States as sovereign peoples, for the benefit of such States, and in order to realize the above “objects” for such States, it can be viewed as creature and auxiliary of the States-peoples. In accordance with this, the federal government, which was created by the Constitution, should be viewed as a subordinate creature to the States-peoples who created the Constitution.

Calhoun suggests his latter point when arguing that the Constitution was “ordained and established…over the government which it [the Constitution] created”.310 His first step in establishing this is to reflect upon how Article VII logically implies that the Constitution was “not over the several States…”, for this “declares, that the ratification by nine States shall be sufficient to establish the constitution between the

308 Calhoun, A Discourse on the Constitution and Government of the United States, 93.
309 Ibid., 94.
310 Calhoun, A Discourse on the Constitution and Government of the United States, 94-95.
States so ratifying…” Calhoun reflects upon what is implied by Article VII’s language and meaning of the term “between”:

“Between,” always means more than “over”- and implies in this case, that the authority which ordained and established the constitution, was the joint and united authority of the States ratifying it; and that, among the effects of their ratification, it became a contract between them; and, as a compact, binding on them- but only as such. In that sense the term, “between,” is appropriately applied. In no other, can it be. It was, doubtless, used in that sense in this instance…

Since the sovereign States who established the Constitution in a “joint and united capacity” were the authorities that “ordained and established the constitution…” the Constitution exists as “a contract between them…” As “a compact” it is “binding on them” only “as such”- i.e., only as a defined set of contractual obligations owed to the other equal members (other States) of the compact. Hence, the Constitution exists as a compact “among” equal partners, and it is not “over” them.

This is further manifested by reasoning about authority relationships between creature-and-creator. Calhoun describes this as in the following passage:

Reason itself, if the constitution had been silent, would have led, with equal certainty, to the same conclusion. For it was the several States, or, what is the same thing, their people, in their sovereign capacity, who ordained and established the constitution. But the authority which ordains and establishes, is higher than that which is ordained and established; and, of course, the latter must be subordinate to the former- and cannot, therefore, be over it.

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311 Calhoun, A Discourse on the Constitution and Government of the United States, 94.
312 Ibid.
313 Furthermore, the contractual obligations that the sovereign peoples of the States have to one another are not absolute and binding, for any one of the sovereign peoples (qua its possession of sovereignty) has the authority to dissolve its participation in the compact, if it deems such divorce to be warranted. The issue of secession will be discussed later in this chapter.
314 Calhoun, A Discourse on the Constitution and Government of the United States, 94.
Since “the authority which ordains and establishes, is higher than that which is ordained and established…”, the “several States…in their sovereign capacity who ordained and established the constitution…” have a higher authority than the Constitution. Thus, the authority of the constitution “must be subordinate” to the authority of the States and, hence, “cannot…be over it.”

After eliminating the possibility that the Constitution is “over” the States, Calhoun reasons that it must be over the federal government that is created by the Constitution. Again, this follows from the above proof showing how an authority that ordains and establishes another authority is superior to that created authority. The States created the Constitution, and the Constitution creates and defines the entire authority of the federal government. The Constitution is “over” the authority of the federal government…and all its functionaries in their official character…” The federal government has no authority beyond what is delineated in the Constitution, and all the federal government’s authority is generated by the States delegating this power through their ratification of the Constitution. All this suggests that the authority of the State-peoples is higher than that of the Constitution, and the authority of the Constitution is higher than that of the federal government. By logical implication, then, the authority of the State-peoples is also higher than that of the federal government.

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Calhoun, A Discourse on the Constitution and Government of the United States, 94-95. In an intellectually honest fashion, Calhoun also develops the implication of this. The Constitution is also “over…the individuals composing and inhabiting the several States, as far as they might come within the sphere of the powers delegated to the United States.” Ibid., 94-95.
Finally, Calhoun draws all his above arguments together to show how (after ratification of the Constitution) the “several States of the Union” still retained their “confederated character” that they had with the Articles:

[T]he several States of the Union, acting in their confederated character, ordained and established the constitution; that they ordained and established it for themselves, in the same character; that they ordained and established it for their welfare and safety, in the like character; that they established it as a compact between them, and not as a constitution over them; and that, as a compact, they are parties to it, in the same character. I have thus established, conclusively, that these States, in ratifying the constitution, did not lose the confederated character which they possessed when they ratified it, as well as in all the preceding stages of their existence; but, on the contrary, still retained it to the full.  

Since this portion of the Calhoun’s argument is meant to show how each of the States (after the Constitution was enacted) retains its full sovereignty, the above passage suggests an important implication: Since the States retained their “confederated character” (which they had with Articles) after enacting the Constitution and since this “confederated character” entailed the States being full sovereign entities, the States who entered the constitutional compact would still have their full sovereignty even after this compact was enacted.  

The Constitution itself clearly manifests the States’ supreme authority in Article V, where it explicates the States’ final authority to amend the constitutional compact. As Article V makes clear, only the “three forths” of the States (either by their Legislatures or  

316 Calhoun, A Discourse on the Constitution and Government of the United States, 95.  
317 One can also reflect upon the how the very notion of confederacy implies federal, and federal implies a union of sovereign parts. As discussed above, Daniel Boorstin shows how the term, “federal”, during framing and ratification period meant a good faith uniting relationship among independently sovereign States. Realizing a federal union, then, implies that the member communities maintain their sovereignty. So, confederacy also seems to connote a union among sovereign political societies. Indeed, as suggested above, this is what the term implied in the Articles of Confederation.
by Conventions) can “ratify” (or enact) “Amendments to this Constitution”. 318 Both (through overwhelming majorities) Congress can propose Amendments and State legislatures can initiate a new constitutional convention, but (according to Article V) only the States can corporately make such proposals part of the constitutional compact. 319

Even if the states corporately possess ultimate sovereign power over the compact (e.g., only the States together can authoritatively change or abolish the constitutional compact), what about each state as an individual unit? Since the Constitution is necessarily an agreement among equal authorities, no individual State can unilaterally change the terms of the contract. Thus, no State alone (nor can States acting together outside of the Article V parameters) alter the Constitution. Does this suggest that an individual State within the constitutional compact lacks true sovereignty?

318 U.S. Constitution, art. 5.
319 Calhoun, A Discourse on the Constitution and Government of the United States, 113, 200-211.
A negative answer can be given to the above question. Each individual State-
people retains its true sovereignty because each State-people can dismiss the federal
government, which is its creature-agent that has been entrusted with certain delegated
powers to govern individual citizens within the State on certain matters. In other words, a
State-people can reclaim the powers that it delegated to the federal government through
withdrawing from the constitutional compact. Of course, it would, then, have to rely
solely on its own intra-State governing resources (e.g., granting all sovereign powers to
its own State government) in order to independently function as a sovereign State. As a
sovereign authority that was free to enter (or not enter) the constitutional compact and
due to absence of a higher unit of authority in the constitutional system, a State-people

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320 In addition to the proof for this that follows in the above text, one might consider Calhoun’s argument for why each State maintains its sovereignty even though Article V allows for changes to the Constitution via less than a unanimous vote: “Thus far, the several States, in ordaining and establishing the constitution, agreed, for their mutual convenience and advantage, to modify, by compact, their high sovereign power of creating and establishing constitutions, as far as it related to the constitution and government of the United States. I say, for their mutual convenience and advantage; for without the modification, it would have required the separate consent of all the States of the Union to alter or amend their constitutional compact; in like manner as it required the consent of all to establish it between them; and to obviate the almost insuperable difficulty of making such amendments as time and experience might prove to be necessary, by the unanimous consent of all, they agree to the modification. But that they did not intend, by this, to divest themselves of the high sovereign right (a right which they still retain, notwithstanding the modification) to change or abolish the present constitution and government at their pleasure, cannot be doubted. It is an acknowledged principle, that sovereigns may, by compact, modify or qualify the exercise of their power, without impairing their sovereignty; of which, the confederacy existing at the time, furnishes a striking illustration. It must reside, unimpaired and in its plentitude, somewhere. And if it does not reside in the people of the several States, in their confederated character, where- so far as it relates to the constitution and government of the United States- can it be found? Not, certainly, in the government; for, according to our theory, sovereignty resides in the people, and not in the government. That it cannot be found in the people, taken in the aggregate, as forming one community or nation, is equally certain. But as certain as it cannot, just so certain is it, that it must reside in them as separate and distinct communities; for it has been shown, that it does not reside in them in aggregate, as forming one community or nation. These are the only aspects under which it is possible to regard the people; and, just as certain as it resides in them, in that character, so certain is it that ours is a federal, and not a national government.” See Calhoun, A Discourse on the Constitution and Government of the United States, 100-101. The text below will further elaborate on Calhoun’s above premise that sovereignty “must reside, unimpaired and in its plentitude somewhere...” (i.e., sovereignty is indivisible and held in full).
can exercise its sovereign authority through dissolving its membership in the constitutional compact (i.e., union with other States).

Madison recognized this possibility in *Federalist* # 43 when arguing for the legitimacy of the States to dissolve their membership in the Articles of Confederation. He starts by rhetorically asking the question: “On what principle the confederation, which stands in the solemn form of a compact among the states, can be superseded without the unanimous consent of the parties to it?” Madison, then, answers this question as follows:

The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature’s God, which declares that the safety and happiness of society, are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.

This dramatic answer might sound like a high hurdle. However, when reviewing the historical case that Madison applies it to, one can see that it is relevant to most situations in which a sovereign State decides to break a compact with other States for the sake of advancing its self-interest. Acting to abandon the Articles of Confederation was hardly an “absolute necessity”, a matter of “self-preservation”, or somehow necessary for their “safety and happiness” in the strict senses of these phrases. As Forrest McDonald argues, the States actually flourished during their years under the Articles of Confederation, and

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most were content with the status-quo. The real impetus abandoning the Articles and developing Constitution seemed to come from those “who were concerned about the nation’s honor, or were concerned that the nation be great, or were concerned lest the experiment in republicanism should fail.” With this in mind, one must interpret Madison’s above description of urgency in *Federalist* # 43 as hyperbolic. Although it might be possible to say that the States had a net-interest in abandoning the Articles and accepting the Constitution, it is difficult to maintain that this choice was compelled by necessity, self-preservation, safety, or happiness. If such a modified interpretation of Madison is correct, then the real argument seems to be that States can legitimately terminate compacts with other states when they judge it to be in their interest. The instability of this, however, would be somewhat maintained by the fact that States will probably only rarely identify such a sufficient interest, for the wiles of the international state of nature would likely be worse than most inconveniences suffered in the compact.

In further examining a State’s right to secession, it is helpful to recognize that there is no higher authority in the system that could justifiably require a State to refrain from this. The federal government does not qualify, for its authority is ultimately found

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323 In *Novus Ordo Seclorum*, McDonald writes the following: “Objectively, the first decade of the history of the United States was a whopping success. The greatest achievement, of course, was the winning of independence, but there was more. Despite certain postwar economic dislocations, most Americans were prospering. It is true that the country had no national government and that after 1783 the Confederation Congress all but dissolved, there rarely being enough members in attendance to constitute a quorum. The vast majority of people, however, would probably have agreed that they had no need for a stronger union. To be sure, there were assorted complaints, but not enough to shake most people from the conviction that the states were adequate to perform all the necessary functions of government except national defense, and that problem appeared to be solved by the perpetual treaties of friendship and alliance that had been signed with France in 1778. Furthermore, if anyone questioned the attractiveness of American freedom and opportunity, he needed only to go to the port cities of Scotland, Wales, and Ireland, where he could see tens of thousands of emigrants setting sail for the new nation.” See McDonald, *Novus Ordo Seclorum*, 143-144.

324 McDonald, *Novus Ordo Seclorum*, 144.
subordinate to that of a State’s sovereign authority; albeit, as Calhoun observes, the federal government has authority over individual citizens of the States “as far as they might come within the sphere of the powers delegated to…” it. Moreover, federal powers are limited to those that have been delegated by the States, and the power to prevent States from exiting the “Union” is not among those delegated. It would even be difficult to make a good case for this being an “implied” power, especially if one employs sound (strict constructionist) jurisprudence.

The Constitution itself doesn’t have legitimate authority to prevent a State from seceding, for its creature-level authority is also subordinate to a sovereign State-people’s creator-level authority. Even (for the sake of argument) if the Constitution was sufficiently authoritative, the terms of the Constitution do not preclude a State’s secession from the compact. There is no directive within the Constitution that mandates a State to permanently remain in the compact, so presumably the power to secede is retained (as implied by the 10th Amendment) by each State-people.

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325 Donald Livingston further corroborates this as follows: “Neither the central government nor the states have the Constitutional authority to coerce non-complying or a seceding state. The central government can coerce individuals in any state of the federation under its enumerated powers, but not a State itself, and certainly not one that has recalled its representatives and senators and left the federation.” See Donald W. Livingston, “The Southern Tradition and Limited Government” Modern Age 49, no. 4 (Fall 2007), 453.

326 Calhoun argues that the Tenth Amendment implies a State-people’s sovereign power to adopt, amend, or eliminate the powers granted to both the federal and State governments. When discussing the meaning of “reserved powers” mentioned in the Tenth Amendment, he says the following: “But it may be asked- why was the reservation made both to the States and to the people? The answer is to be found in the fact, that, what are called, “reserved powers,” in the constitution of the United States, include all powers not delegated to Congress by it- or prohibited by it to the States. The powers thus designated are divided into two distinct classes- those delegated by the people of the several States to their separate State governments, and those which they still retain- not having delegated them to either government. Among them is included the high sovereign power, by which they ordained and established both; and by which they can modify, change or abolish them at pleasure. This, with others not delegated, are those which are
Furthermore, one or more States do not have legitimate authority to prevent one or more other States from seceding from the “Union.” Each State is equal in authority to the other States, so one State cannot justifiably stop another from seceding. There is no provision or implication of the Constitution that enables compacting States to overcome the sovereignty of one another. The fact that a three-fourths (or more) majority of States can pass amendments (against the will of a minority of States) is not an indication that States within the constitutional compact have been divested of their sovereignty, for (in true principle) States can reclaim all their sovereign powers via secession.

Also, the Constitution gives evidence of the limits of itself as a compact. As Article VII suggests, the Constitution recognizes that each State has freedom not to be in the compact. Although all original thirteen States ultimately chose to enter the constitutional compact, Article VII still shows the constitutional conceptualization of the possibility of American States existing outside the federal union.

Finally, there is strong evidence that the original understanding of the Constitution does not affirm the power of either the States or the federal government to coerce a State into compliance. Even the most ardent of nationalists (during the founding period), Alexander Hamilton, recognized that a central government should not forcefully compel a non-complying State. Hamilton expressed this view during the New York State reserved to the people of the several States respectively.” See Calhoun, *A Discourse on the Constitution and Government of the United States*, 104. In terms of changing federal powers in a manner different from how they are enumerated in the Constitution, this would obviously have to stem from the constitutional amendment process specified in Article V. Thus, this reserved power of each State-people would have to be exercised in collaboration with a sufficient number of other State-peoples (e.g., three-fourths of the States). However, in terms of wholly abolishing federal powers over a single State, this power is reserved by the respective State-people, but the State-people would then have to function as an independent State not-in-union with the United States.
Ratification Convention in which he and other Federalists sought to persuade the

Convention to adopt the Constitution:

Suppose Massachusetts, or any large state, should refuse, and Congress should attempt to compel them, would they not have influence to procure assistance, especially from those states which are in the same situation as themselves[.] What picture does this idea present to our view? A complying state at war with a non-complying state; Congress marching the troops of one state into the bosom of another; this state collecting auxiliaries, and forming, perhaps, a majority against its federal head. Here is a nation at war with itself. Can any reasonable man be well disposed towards a government which makes war and carnage the only means of supporting itself- a government that can exist only by the sword? Every such war must involve the innocent with the guilty. This single consideration should be sufficient to dispose every peaceable citizen against such a government.

But can we believe that one state will ever suffer itself to be used as an instrument of coercion? The thing is a dream, and it is impossible. 327

The fact that Hamilton, who was the advocate (during the Philadelphia Convention) for consolidating the States into subsidiary wards of a centralized government, publicly recognizes the intolerableness of a central government employing warfare to compel non-complying States implies that such nationalists conceded that the proposed federal government under the Constitution would not have this domestic war-making power. If, by contrast, the federal government were to have such power (i.e., a power that Lincoln would presume it to possess about seventy years later), then it would be within the category of government that Hamilton here condemns. Moreover, Hamilton’s condemnation seems to also extend to the possible case of other States trying to militarily

327 Alexander Hamilton, Speech to the New York Ratification Convention, Friday, June 20, 1788, in Elliot, Vol. 2, U.S. Congress, 233, http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ed0027)): (Accessed December 26, 2008). I also used and referenced a different publication of the same work; Vol.1 of _The Debates In The Several State Conventions on the Adoption of the Federal Constitution_, ed.?, edited by Jonathan Elliot (Philadelphia: : J.B. Lippincott Company, ?), 233. Also, see Donald Livingston’s citation of this Hamilton quotation in “The Southern Tradition and Limited Government”, 453. Thanks to Don Livingston for this article; it made me aware of this quote from Hamilton.
compel a non-complying State; Hamilton also regards such a possibility as intolerable and, hence, not in accordance with the Constitution that he advocates. This, then, seems to serve as powerful evidence that neither the States nor the central government were originally understood (e.g., by this nationalist proponent of the Constitution) as being constitutionally authorized to militarily compel non-complying States (e.g., to abide by the constitutional compact).

Many readers might still be resistant to the above claims (especially given the current dominance of what Donald Livingston terms as “Lincolnian historiography” within American political thought). Nevertheless, the constitutionality of secession was widely accepted in the early history of the United States.

In addition to what has already been said above, Livingston presents additional evidence suggesting that a State’s right to secession was part of the authoritative original understanding of the Constitution. According to Livingston, “States can secede because they are sovereign political societies. Everyone in 1789 understood this, as a matter of international law…” Most importantly, the States (as the law-givers whose understanding during ratification gives the Constitution its original and authoritative meaning) seemed to clearly believe that secession was legitimate, for Virginia, New York, and Rhode Island claimed “the right to withdraw powers they had delegated to federation and secede” within their “ordinances” to enact the Constitution.

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329 Ibid., 453.
330 Ibid.
Moving beyond the founding period, both Boorstin and Livingston show how prominent leaders during the early nineteenth century accepted (if not embraced) secession. According to Boorstin, for example, the “early 19th century” saw “imaginative American statesman” who believed “that all North America, following the Latin American example, should form itself into several independent and self-governing nations.”

In the 1820’s, many “leading Americans- including Albert Gallatin, James Monroe, William H. Crawford, Henry Clay, Thomas Hart Benton, and probably James Madison” shared Thomas Jefferson’s “vision” for “an independent Pacific republic (i.e., an Oregon republic).” Furthermore, as Livingston describes, Jefferson grandly envisioned new and independent western nations spinning off from the United States’ territory across the North American continent:

Jefferson thought that, as Americans went West and formed new states, the same logic of secession and division that had characterized American conduct so far would be carried out on an even larger scale. New Unions of states would be formed which would secede from the mother Union just as the colonies had seceded from the mother empire. Jefferson wrote Joseph Priestly in 1804 that he would welcome a Mississippi Confederacy on the West bank of the Mississippi alongside of the old Atlantic Confederacy. And he imagined that still other Unions of states would form as Americans moved to the Pacific. These would constitute what he called an “empire of liberty.” “Free and independent Americans, unconnected with us but by ties of blood and interest, and employing like us the rights of self-government.”

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331 Boorstin, *The Americans: The National Experience*, 270. Also, see Livingston, “The Southern Tradition and Limited Government”, 457 and 462. Thanks to Livingston for his article, which introduced me to this point in Boorstin’s narrative.


Such a view of the legitimacy of secession is, no doubt, surprising for contemporary Americans, but it was welcomed by the above mentioned great Americans in an earlier period.\textsuperscript{334}

Although the right to secession is an important touchstone of the sovereignty of each of the States, readers might still be confused about the distinction between the States delegating some of their sovereign powers to federal government and, yet, still retaining their full sovereignty. Thus, it is helpful to examine this conceptual difference. James Kilpatrick discusses this in his book, \textit{Sovereign States}:

There is a distinction between “sovereignty” and “sovereign power.” The power to coin money, or levy taxes, is a sovereign power, but it is not sovereignty. Powers can be delegated, limited, expanded, or withdrawn, but it is through the exercise of sovereignty that these changes take place. Sovereignty is the moving river; sovereign powers the stone at the mill. Only while the river flows can the inanimate stone revolve. To be sure, sovereignty can be lost- it can be lost by conquest, as in war; the extent or character of sovereignty can be changed, as in the acquisition or relinquishment of territory or the annexation of new peoples; sovereignty can be divided, when two States are created of one. But properly viewed, sovereignty is the cause; sovereign powers the effect: The wind that blows; the branches that move. Sovereignty is the essence, the life spirit, the soul: And in this Republic, sovereignty remains today where it was vested in 1776, in the people. But in the people as a whole? No. In the \textit{people-as-States}.\textsuperscript{335}

The idea here is that “sovereignty” entails having supreme authority over a given territory and people; whereas, “sovereign power” merely derives from this authority. Thus, it is possible for an entity with “sovereignty” to delegate or withdraw “sovereign power”;

\textsuperscript{334} Livingston also develops an excellent account of the geographically diverse American States that have engaged (or come close to engaging) in interposition, nullification, and/or secession. His point is that this tradition is \textbf{not} limited to just antebellum Southerners. It has been embraced by various Americans and regions, especially before the Civil War. See Livingston, “The Southern Tradition and Limited Government”, 452-462.

\textsuperscript{335} Kilpatrick, \textit{The Sovereign States}, 14-15.
such control over “power” derives from the entity’s “sovereignty.” For, “sovereignty is the cause; sovereign powers the effect.”

Furthermore, it is important to realize that “sovereignty” as supreme authority over a given territory and people cannot be divided. Kilpatrick also shows the important pedigree of this insight:

Now, the argument here advanced is this- it is the argument of John Taylor of Caroline and John Randolph of Roanoke- that sovereignty, like chastity, cannot be surrendered “in part.” This was the argument also of Calhoun: “I maintain that sovereignty is in its nature indivisible. It is the supreme power in a State, and we might just as well speak of a half a square, or half a triangle, as of half a sovereignty.” This was the position, too, of the bellicose George Troupe of Georgia, of Alexander Stephens, of Jefferson Davis.336

This position is extremely logical. Sovereignty means “supreme” authority over a people and territory. When one attempts to evenly divide such authority, the result is two co-equal authorities over a people and territory. Neither one could be viewed as being the supreme authority in the system, for neither would have the power to be the final or highest authority for the system as a whole. Supreme authority, however, implies that there is a highest authority, and this necessarily is a single entity. Kilpatrick also illustrates this point:

It is the position of plain common sense: Supreme and ultimate power must be precisely that. Finality knows no degrees. In law, as in mountain climbing, there comes a point at which the pinnacle is reached; nothing higher or greater remains. And so it is with the States of the American Union. In the last resort, it is their prerogative alone (not that of Congress, not that of the Supreme Court, not that of the “whole people”) to make or unmake fundamental law.337

336 Ibid., 14.
337 Kilpatrick, The Sovereign States, 14.
As we have already discussed in the above analysis, one touchstone of each State’s ultimate authority (i.e., sovereignty) to make and unmake fundamental law is that each can choose to enter and withdraw from the federal union and constitutional compact.

The State-peoples possessed their sovereignty independent from and outside of the Constitution, and the Constitution was not necessary for them to have sovereign powers. In creating and enacting the Constitution, the State-peoples delegated certain of their sovereign powers to the federal government who functioned as their agent, but (as a creature-agent) the federal government’s authority is subordinate to the authority of each of the State-peoples as creators. The State-peoples also both granted certain sovereign powers to their respective State governments and retained many powers for themselves; both cases are connoted in the Tenth Amendment’s concept of “reserved powers.” As discussed above, only an entity with “sovereignty” could so grant and retain powers in this manner.

Thus, the Constitution implies that State-peoples have “sovereignty” (and, hence, full sovereignty) because the Constitution shows how the State-peoples demonstrated this through both (1) creating and delegating power to the federal government and (2) reserving powers for their intra-State government. These principles are clearly intrinsic to

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338 This is explicated by Calhoun in his commentary, which has been discussed above, on the meaning of “reserved powers” in the Tenth Amendment: “But it may be asked- why was the reservation made both to the States and to the people? The answer is to be found in the fact, that, what are called, ‘reserved powers,’ in the constitution of the United States, include all powers not delegated to Congress by it- or prohibited by it to the States. The powers thus designated are divided into two distinct classes- those delegated by the people of the several States to their separate State governments, and those which they still retain- not having delegated them to either government. Among them is included the high sovereign power, by which they ordained and established both; and by which they can modify, change or abolish them at pleasure. This, with others not delegated, are those which are reserved to the people of the several States respectively.” See Calhoun, A Discourse on the Constitution and Government of the United States, 104.
the nature of the Constitution. All the federal government’s authority is entirely
“delegated” by the State-peoples, and it does not exceed such enumerated delegations of
power that the State-peoples made through ratifying the Constitution.339 In his dissenting
opinion (which was joined by former Chief Justice Rehnquis, Justice O’Connor, and
Justice Scalia) in *U.S. Term Limits, Inc. v. Thornton*, Justice Thomas clearly articulates
this:

Because the people of the several States are the only true source of power, however, the
Federal Government enjoys no authority beyond what the Constitution confers: The
Federal Government’s powers are limited and enumerated. In the words of Justice Black:
“The United States is entirely a creature of the Constitution. Its power and authority have
no other source.” Reid v. Convert…340

The Tenth Amendment further upholds this: “The powers not delegated to the United
States by the Constitution, nor prohibited by it to the States, are reserved to the States
respectively, or to the people.”341 As suggested above, such “reserved powers” are all
those (1) that each of the sovereign State-peoples grants to its respective “State…”
government or (2) that a State-“people” retains for itself (e.g., “the high sovereign power,
by which they ordained and established both [the federal and State governments]; and by

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339 Calhoun argues that the word “delegated” was used in the Tenth Amendment rather than
“granted”, which is used to introduce the legislative powers in Article I, in order to remove any possible
confusion that might be associated with the term, “granted”. Such confusion might entail the following:
viewing the mere conditional and revocable delegation, or entrusting, of power to be an absolute an
irrevocable ceding of power. See Calhoun, *A Discourse on the Constitution and Government of the United
States*, 104-106.

340 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); readers can access this online at

341 U.S. Constitution, Amendment 10.

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which they can modify, change or abolish them at pleasure.”). Before the Tenth Amendment (and an important impetus for adding it), seven of the original thirteen States demanded that the Constitution be amended so as to stipulate that States (and/or State-peoples) retain all powers not delegated to the federal government.

This helps to further clarify the notion of entrusting sovereign powers. With respect to the Tenth Amendment, this concept is connoted in both the notions of “delegated” powers and the part of “reserved” powers entrusted to State governments. As discussed above, “delegated” powers are those that sovereign State-peoples entrusted to the federal government and realized through compacting with one another in the Constitution. The facet of “reserved” powers entrusted to the “States” implies those that a State-people entrusts to its State government. In both cases, the federal and State governments are mere agents of each of the sovereign State-peoples, and each of the sovereign State-peoples maintains its full sovereignty (supreme authority) and, hence, the power to take reclaim the sovereign powers entrusted to its federal or State governing agents. The power entrusted to federal and State governments is only power over individual citizens within a State. It is not power over a State-people, which is fully sovereign and, hence, is the highest level of political power over itself.

Finally, it is helpful to show how both Madison and Hamilton as Framers were mistaken in asserting that the new Constitution created a system of dual-sovereignty in

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342 Calhoun, A Discourse on the Constitution and Government of the United States, 104.
343 These seven States were Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island. The States ratification of the Constitution and recommendations for the content of the Tenth of Amendment can be seen in Charles Callen Tansill ed., The Making of the American Republic: The Great Documents, 1774-1789 (New Rochelle, New York: Arlington House, 1972), 1009-1059.
which both the States and the Federal Government were sovereigns within their separate spheres. Madison frequently suggests this in references to the new system being partly federal and partly national/consolidated. Indeed, this is a major thesis of his writing in Federalist # 39: “The proposed constitution, therefore, even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal constitution; but a composition of both.” Madison seems to make the same point at the Virginia ratifying convention: “In some respects it is a government of a federal nature; in others, it is of a consolidated nature.” Hamilton also suggests in Federalist #9:

The proposed constitution, so far from implying an abolition of the state governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the senate, and leaves in their possession certain exclusive, and very important, portions of the sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.

Here Hamilton does not seek to distinguish between “sovereign power” and “sovereignty”, so the reference to the States having “sovereign power” implies that they are one part of a system of dual-soverignty.

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344 Madison (as Publius), Federalist #39, in The Federalist, ed. Carey and McClellan, 199.
345 James Madison, Speech to the Virginia Ratification Convention, Friday June 16, 1788, in Elliot ed., 94. Here Madison tries to strike a delicate balance in this response to Patrick Henry at the Virginia convention. He holds to his thesis of the regime being partly federal and partly “consolidated” (or national) in character, but he also argues that the “The people” mentioned in the Constitution is “not the people as composing one great body; but the people as composing thirteen sovereignties.” Ibid., 94. The analysis in this dissertation suggests that such a balance is impossible. For the notion of federal union necessarily means one of multiple sovereignties; whereas, the notion of a national or consolidate regime is one in which sovereignty is located in a national people and/or a central government (e.g., a government that represents the national people). Since sovereignty (which is distinct from the concept of sovereign power) is indivisible and cannot be divided, this balance inherently involves a contradiction; hence, it cannot be successfully maintained. The muddle may have short-term persuasive efficacy, but it cannot provide a sound theory of authority for the constitutional compact.
346 Hamilton (as Publius), Federalist #39, in The Federalist, ed. Carey and McClellan, 41.
347 Forrest McDonald elaborates on how Hamilton developed this amended view of the concepts: “Hamilton was able to reverse himself in that manner because he—along with Wilson, Ellsworth, and various others—had conceived of a means of attacking the problem in an ingenuous new way. The key to
The problem with such notions has already been discussed above. The concept of “sovereignty” is only intelligible as an indivisible entity. Sovereignty means supreme authority, and logically there can only be one supreme authority, for if there are only multiple co-equal authorities, then none of them are supreme. Moreover, there is a hazard in positing two separate authorities (with different spheres of jurisdiction) over a given group of people in a definable territory and, then, pretending that their both “supreme” authorities. For, it is impossible to maintain such an arrangement without recognizing (at least) a true de-facto supreme authority for resolving inevitable conflicts between the two. Thus, a single sovereign authority becomes both logically and practically necessary.

If Framers like Madison and Hamilton really believed that the new Constitution created a system of dual sovereignty in which both States and the Federal government existed as sovereign entities within separate spheres, then they were interpreting it to entail an unworkable contradiction. Such an unworkable construction could only be

the new approach was the proposition that sovereignty embraced a large number and a wide variety of different specific powers: obviously these specific powers could be assigned to different governments, to different branches of the same government, or to different persons serving within the same branch of a government. Hamilton spelled out the implications in his opinion on the constitutionality of the Bank of the United States. ‘The powers of sovereignty,’ Hamilton wrote, ‘are in this country divided between the National and State Governments,’ and ‘each of the portions of powers delegated to the one or to the other...is...sovereign with regard to its proper objects.’” See McDonald, Novus Ordo Seclorum, 278.

There is some debate about whether this is the case. During the Philadelphia Convention, Hamilton and Madison both seemed to favor a nationalist means of resolving State vs. Federal conflicts. Madison’s Virginia Plan had a provision for a national legislature to veto odious State legislation. Hamilton and Madison may have also favored another nationalist means of checking the States: the federal judiciary. Federalist # 39 seems to suggest that the Supreme Court is the final arbiter of State vs. Federal disputes. Federalist # 78 also suggests that the Supreme Court has the power of judicial review. Nevertheless, it is questionable whether they intended this to be the “full-throated” judicial review that actually developed during the Marshall Court (e.g., Marbury v. Madison, Virginia v. Cohens). For a discussion of the framer’s uncertainty about the extent of judicial review, see Robert G. McCloskey, The American Supreme Court, 4th ed., revised by Sanford Levinson (Chicago: University of Chicago Press, 2005), 3-5.

Furthermore, Federalist # 33 and # 46 also suggest that “constituents” would resolve such disputes and check illegitimate power incursions. Some have argued that this implies an electoral check on
fixed via recognizing sovereignty, which implies “supremacy”, in one body. Given that the State-peoples are the recognized sovereigns who enacted the Constitution as positive law, their understanding of the locus of sovereignty would seem to govern. Based on the careful guardedness with which the majority of thirteen States proceeded in ratifying the Constitution (only doing so after stating reservations and calling for strict limits on federal powers), it is quite reasonable to presume that such State-peoples viewed themselves as the locus of sovereignty, not the federal government. For the sake of Congress who serves as the people’s agent for resolving Federal-vs-State disputes. See George W. Carey, In Defense of the Constitution, Revised and Expanded Edition, (Indianapolis, Indiana: Liberty Fund, 1995), 115-116. Also, there is much to say about Madison’s waffling between nationalism and a more State’s rights sympathy. Ibid., 80-121. I am inclined to believe that it includes multiple “constituent” activities—e.g., electoral activity in both State and Federal office selection. Moreover, since the Constitution is inherently federal in nature (see prior text above for this argument) and Madison (when arguing with Henry in the Virginia Convention) ultimately concedes that “the People” are really the various State-peoples, one might try to generously interpret one-side of Madison as recognizing Representatives, Senators, and State legislatures to be the agents of State-peoples. Such agents, in turn, would (theoretically) protect the State-peoples interests when threatened by a dispute over the constitutional boundaries of Federal powers. This might include various forms of State interposition, which seems contemplated in Federalist # 28 and 46. See Hamilton (as Publius), Federalist #28, in The Federalist, ed. Carey and McClellan, 139; James McClellan’s “Introduction” in Taylor, New Views of the Constitution of the United States, p. xxvii; and Madison (as Publius), Federalist # 46, in The Federalist, ed. Carey and McClellan, 245-246. Madison even later advocates such means through his involvement in the Virginia Resolutions and The Report of 1800. Furthermore, State-peoples work together to change the constitutional status-quo via the amendment provisions in Article V.

One should note that even if Hamilton and Madison envisioned “delegating” the task of resolving Federal vs. State disputes to a department in the Federal government, this could still be compatible with State sovereignty if they acknowledged that States also had the ultimate right to reclaim such delegated powers via secession. In such a case, a State-people delegates (or entrusts) power to resolve Federal-vs-State disputes to a department in the Federal Government (e.g., the Supreme Court); however, it also can unilaterally reclaim this power through deciding to withdraw from the Union of States and, hence, terminate its participation in the constitutional compact. Here each State-people is an independent locus of sovereignty in the system, for (as a supreme authority) each can reclaim all power that it has delegated to the federal government, which is the creature-agent for each of the State-peoples. If (hypothetically) Hamilton and Madison did not have this view, then they were advocating de-facto national sovereignty (e.g., the locus of sovereignty being in a national people represented by a national government). Either way, there can be only one supreme authority that has the final decision on a Federal-vs-State dispute (e.g., if each State-people has such supreme authority, then its right to final decision will include deciding whether to break with the constitutional compact and leave the federal union), for it is impossible to claim that both the States and Federal Government are supreme authorities with the final say.
argument, even if a few (a minority of) States viewed themselves as retaining their sovereignty when entering the compact, these few States would still be sovereign because they would be the rightful arbiters of their status in the compact, which was made among equal sovereign states with no higher authority standing above them. In addition to these considerations, it is reasonable to presume that already constituted sovereignties would remain sovereign authorities over a system that they created.

The States as supreme authorities in the system have the ability to make final judgments about the compact. Each State has the right to terminate its participation in the compact; however, the State must then face the wiles of the State of nature. Thus, each State has the supreme authority over its involvement with the compact. When any State decides to reclaim the powers it has delegated to the federal government to govern over the individual citizens in its territory, the State can do so. For example, such reclaiming of powers and termination of the compact might arise due to the State’s dislike for how the federal government exercises its delegated powers (e.g., frequently conflicting with the State government).

C. Other relevant evidence from Ratification.

The above analysis has examined both (A) the relation of the Constitution to the Articles and Declaration and (B) the language of the Constitution. Now it is helpful to consider (C) how relevant evidence from the ratification period establishes this chapter’s working thesis. As discussed at the outset, this dissertation assumes an authoritative ordering of the various opinions and intentions expressed during the Framing and
Ratification. Specifically, the States as State-peoples (i.e., the people of each State) are
the law-givers, and their sovereignty enacts and defines the terms of the Constitution as
positive law. This is suggested by fact that only the States could and did make the
Constitution into positive law; whereas, the Framers of the Philadelphia Convention (and
the Congress under the Articles) merely recommended the Constitution to the States as a
candidate for becoming the law. Since only the States had the authority to make the
Constitution into a positive law shared by all the States, the intentions of the State-
peoples that persuaded them to ratify the Constitution have the most relevance in
determining the original meaning of the Constitution. M.E. Bradford cites James
Madison’s articulation of this view: “[T]he meaning of the Constitution is to be sought
…not in the proceedings of the body that proposed it, but in those of the state
consventions which gave it all the validity and authority it possesses.”

When turning to some conventional evidence for how the States understood the
Constitution during ratification, it is also important to realize that the States’ true
understanding may have been somewhat misrepresented by the record-keeping done at
the State conventions. James Hutson indicates this in his article, “The Creation of the
Constitution: The Integrity of the Documentary Record”. The “single source” of
“information about the proceedings in the state ratifying conventions” is “Jonathan
Elliot’s The Debates in the several State Conventions, on the adoption of the Federal

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349 Bradford, Original Intentions, 15.
Constitution, as recommended by the General Convention at Philadelphia.” According to Hutson, however, the reliability of this source is questionable on at least two grounds: (1) the reporters’ difficulties in recording the debate via “shorthand”; and (2) the questionable partisan leanings of the reporters. With respect to the first, Hutson writes: “[T]he technique of shorthand was in its infancy in the United States and did not provide the means of recording public discourse accurately.” Hutson is probably being too picky here. Although this problem compels readers of the Elliot’s Debates not to view them as equivalent to court recordings, they can still be viewed as revealing the content of many (if not virtually all) of the important arguments made during the State conventions, especially given the inevitable repetition of points by interlocutors going back and forth. The previously discussed example of Patrick Henry’s numerous exchanges with Madison and other Federalists over the Constitution’s phrase, “We the People”, during the Virginia ratification convention is a good example. Moreover, the fact that there were often different persons covering the various State conventions and that they still reported similar types of arguments serves as internal collaboration that the shorthand reporting was recording many of the views at the State conventions.

The second problem that Hutson observes, however, presents a more serious challenge to those attempting to use Elliot’s Debates. Most of the reporting of the State conventions seems bias in favor of the “Federalist” advocates seeking to enact the

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351 Ibid., 159.
Constitution. According to Hutson’s review, this may have been a problem in the reporting on the New York, Pennsylvania, Maryland, Virginia, and North Carolina.\textsuperscript{352}

Having said this, it is also important to realize that such nationalist-leaning sources, in themselves, provide evidence for the strong advocacy within the States for protecting their rights as sovereign entities. Regardless of the nationalist bias of the recordings, these sources still show very strong States’ rights arguments and sentiments among delegates at the conventions. In fact, some of these States’ rights arguments presented by Federalists (e.g., Madison, Hamilton, Iredell, and Wilson) assuaging fears of concerned Anti-Federalists. Such Federalists often maintained that the federal government’s powers would be strictly limited to what was delegated in the Constitution.\textsuperscript{353} Thus, when readers realize that Elliot’s \textit{Debates} tend to \textit{understate} the State-peoples’ concerns expressed at the conventions about whether they would maintain their powers and sovereignty, it seems reasonable to assume that such States’ rights concerns probably were even stronger and more widespread. This, then, further militates against presuming that a States’ ultimate ratification of the Constitution implies the State-people endorsed the Federalist ideology (e.g., a nationalist interpretation of the Constitution). Instead, one should be aware of the possibility that whatever degree the Elliot’s \textit{Debates} suggest that States’ rights were important and central to the States at the time they ratified the Constitution, the actual reality of the States’ understanding of the


\textsuperscript{353} Examples of this include James Madison’s assurances to Patrick Henry at the Virginia Convention and Hamilton’s implication that federal government and States would not have constitutional power to militarily compel non-complying States. See past text for Madison and Hamilton on these points.
Constitution was probably even more States’ rights oriented. The States viewed the Constitution to be even more States’ rights oriented than the Elliot’s Debates portray.

Based on this analysis, Elliot’s Debates do seem quite employable in the task of exploring the States’ intentions when ratifying the Constitution. In fact, one excellent study of the States’ understanding of the Constitution has been conducted by M.E. Bradford in his book, Original Intentions: On the Making and Ratification of the United States Constitution. Bradford examines both the Elliot’s Debates and some other collections of original accounts of the States’ conventions (e.g., Debates and Proceedings in the Convention of the Commonwealth of Massachusetts, Held in the Year 1788, and which Finally Ratified the Constitution of the United States).

In conducting his examination, Bradford elucidates an important point. Five small States quickly ratified the Constitution: “Delaware (December, 7 1787), New Jersey (December 18, 1787), Georgia (January 2, 1788), Connecticut (January 9, 1788), or even by a latter affirmation in Maryland (April 28, 1788).”354 This was largely due to their sense of relative weakness (e.g., “immediate dangers- economic, social, military- faced by these communities”) and desire for “any plan of government that would protect” their interests.355

The real test for the Constitution, however, was not with such States who had acted from a sense of necessity, for their ratifications of the Constitution were not ideologically motivated. The decisions were prompted out of real-politick survival

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354 Bradford, Original Intentions, 37.
355 Ibid.
instincts. Instead, the ideological character and original understanding of the Constitution would be formed through the deliberation of seven out of the other eight States who could have survived outside of the union. These seven States were Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island.\textsuperscript{356}

There is evidence from many of these States and even from some of those who ratified early that they understood the Constitution to be compatible with the States retaining their full sovereignty. Four States, in particular, made this understanding manifest in their ratification statements: Virginia, New York, Rhode Island, and South Carolina.

The most explicit was the claim made by South Carolina that the States have “sovereignty”:\textsuperscript{357}

And Whereas it is essential to the preservation of the rights reserved to several states, and the freedom of the people under the operations of a General government that the right of prescribing the manner time and places of holding the Elections to the Federal Legislature, should be for ever inseparably annexed to the sovereignty of the several states.\textsuperscript{358}

As an expression of such sovereignty, South Carolina proceeds to authoritatively assert that the Constitution should be strictly constructed with respect to the federal government’s delegated powers:

This Convention doth also declare that no Section or paragraph of the said Constitution warrants a Construction that the states do not retain every power not expressly relinquished by them and vested in the General Government of the Union.\textsuperscript{359}

\begin{footnotes}
\item[356] Ibid., 37-38.
\item[358] Ibid.
\item[359] Ibid.
\end{footnotes}
Other facets of South Carolina’s ratification statement claim other qualifications and interpretations in the form of resolutions. Here is one example:

Resolved that the general Government of the United States ought never to impose direct taxes, but where the monies arising from the duties, imports, excises, are insufficient for the public exigencies nor then until Congress shall have made a requisition upon the states to Assess levy and pay their respective proportions of such requisitions.  

In all, the State of South Carolina seems to recognize its own sovereignty, employing it to assert how it understands the Constitution. In doing so, it states its conditions for participating in the constitutional compact.

Although more implicit, Virginia, New York, and Rhode Island clearly assert that they retain their sovereignty even after entering into the constitutional compact. This is seen in their ratification statements when they claim the right to secede and discontinue participating in the constitutional compact. Most dramatically, Virginia claims the right to secession for all the State-peoples:

We the Delegates of the People of Virginia duly elected in pursuance of a recommendation from the General Assembly and now met in Convention having fully and freely investigated and discussed the proceedings of the Foederal Convention and being prepared as well as the most mature deliberation hath enabled us to decide thereon Do in the name and in behalf of the People of Virginia declare and make know that the powers granted under the Constitution being derived from the People of the United States may be resumed by them whereinsoever the same shall be perverted to their injury or oppression and that every power not granted thereby remains with them and at their will…

When the above claim, “powers granted under the Constitution being derived from the People of the United States may be resumed by them whereinsoever the same shall be

360 Ibid.
perverted to their injury or oppression...”, is read within its historical context, its meaning becomes clear. It is referring to each of the State-peoples (not a singular national people) resuming powers that they have delegated or “granted” under the terms of the “Constitution.” Evidence for this is found in the Virginia ratification convention from which the above document derives. As already discussed, the Federalists (e.g., James Madison) conceded to the Anti-Federalists (e.g., Patrick Henry) that the meaning of the “People of the United States” refers to each of the State-peoples. In the Virginia Convention, Madison is reported as saying: “The people” mentioned in the Constitution is “not the people as composing one great body; but the people as composing thirteen sovereignties.”362 Based on this, the above statement can be viewed as claiming that the State-people of Virginia, as well as all other State-peoples of the United States, have authority to reclaim the powers that they have delegated under the Constitution (e.g., those delegated to the federal government). Since each State’s legal union with the other States is wholly based on it compacting with them through ratifying the Constitution and, hence, delegating powers under the Constitution to the federal government, the process of reclaiming delegated powers under the Constitution logically entails seceding from the federal union and, hence, re-entering the international state of nature. In recognizing that it retains this right, the State-people of Virginia is asserting that all the State-peoples maintain supreme authority (sovereignty) over themselves and their territory even after entering into the new constitutional compact.

New York also claims the right to reclaim the powers delegated to the new
government:

We the Delegates of the People of the State of New York, duly elected and Met in
Convention, having maturely considered the Constitution of the United States of
America...Do declare and make known... That the Powers of Government may be
reassumed by the People, whenever it shall become necessary to their Happiness; that
every Power, Jurisdiction and right, which is not by the said Constitution clearly
delegated to the Congress of the United States, or the departments of the Government
thereof, remains to the People of the several States, or the respective State Governments
to whom they may have granted the same...

Here the latter reference to "People" is the abbreviated version of "People of the State
New York", so the above statement implies that the State-people of New York can
"reassume..." the "Powers of Government." Moreover, the sequel sentence makes clear
that the phrase, "Powers of Government", means the powers delegated to the federal
government: "Power, Jurisdiction, and right,...delegated to the Congress of the United
States, or the departments of the Government thereof...". In all, then, the phrase implies
that the State-people of New York can reclaim the "Powers" that it delegates to the
federal government (i.e., Congress or any other of the "departments"). As with Virginia,
the assertion of the right to "reassume..." delegated powers from the federal government
implies a right to withdraw from the constitutional compact (i.e., secede from the union);
hence, the State-people of New York (like Virginia) recognizes that they maintain
supreme authority (sovereignty) over itself and its territory within the new constitutional
system.

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363 State of New York, Ratification Statement, in The Making of the American Republic: The
Great Documents, 1774-1778, ed. Charles Callan Tansill (New Rochelle, New York: Arlington House,
1972), 1034.
Finally, Rhode Island also asserts its sovereignty in a similar manner. As with New York, this is accomplished through declaring its right to “reassume…” powers granted to the Federal government:

We the Delegates of the People of the State of Rhode Island, and Providence Plantations, duly elected and met in Convention, having maturely considered the Constitution for the United States of America…do declare and make known… 2d That all power is naturally vested in, and consequently derived from the People; that magistrates therefore are their trustees and agents, and at all times amenable to them… 3d That the powers of government may be reassumed by the people, whencesoever it shall become necessary to their happiness:- That the rights of the States respectively, to nominate and appoint all State Officers, and every other power, jurisdiction and right, which is not by the said constitution clearly delegated to the Congress of the United States or to the departments of government thereof, remain to the people of the several states, or their respective State Governments to whom they may have granted the same… 364

The wording in clause “3d” is so similar to the corresponding clause in the New York statement that there is no need to repeat the above analysis and conclusion. It is sufficient to mention that Rhode Island’s statement of its right to “reassume” the powers that it grants to the federal government also implies recognition of its sovereignty over itself.

What is new about the Rhode Island statement, however, is the “2d” clause, which reads as follows: “2d That all power is naturally vested in, and consequently derived from the People; that magistrates therefore are their trustees and agents, and at all times amenable to them…” This is further evidence that the State-people of Rhode Island understood themselves as retaining sovereignty. It implies that “all power” of government is “derived from the People” of Rhode Island, and governments (i.e., “magistrates” as

government officials) are mere “trustees and agents” of the State-people and, hence, are always “amenable” to the State-people.

A fifth State, Georgia (which was among the five States to ratify the Constitution early), articulated its understanding of its retained sovereignty a few years after ratification. This occurred in response to the *Chisholm v. Georgia* (1793) case in which Alexander Chisholm tried to sue the State of Georgia on behalf of Robert Farquhar so as to recover property taken during the Revolutionary War. The State of Georgia’s officials believed that the State could not adhere to the Supreme Court’s directives in the case because this would undermine Georgia’s retained sovereignty. The State House of Representatives made the following claim about the case in 1792:

> [Adhering to the Court] would effectively destroy the retained sovereignty of the States, and would actually tend in its operation to annihilate the very shadow of State government, and to render them but tributary corporations of the government of the United States.  

Georgia’s governor did not appear before the Supreme Court, despite being directed to do so. He stated his reasons (in 1793) for so refusing: “‘[t]his would have introduced a precedent replete with danger to the Republic, and would have involved this State in complicated difficulties abstracted from the infractions it would have made on her retained sovereignty.’” Such sentiments were obviously shared by the State of Georgia,

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366 Kilpatrick *The Sovereign States*, 5. See also Message from Governor Edward Teifair, November 4, 1793, *The Agusta Chronicle and Gazette of the State*, Saturday, November 9, 1793, in *State Documents On Federal Relations: The States and The United States*, ed. Herman V. Ames (New York: Da Capo Press, 1970), 9. This is ex-post facto evidence cannot definitively prove that Georgia recognized its retained sovereignty at the time of ratification. However, these statements were made just five to six years after Georgia ratified the Constitution, and this relatively brief interlude opens the possibility of Georgia
for it and 11 other States (i.e., 12 out of 14 States) successfully ratified the 11th Amendment, which foreclosed the possibility of federal “judicial power…extend[ing] to any suit in law or equity commenced or prosecuted against one of the United States, by citizens or another State, or by citizens or subjects of any foreign state.”\(^{367}\)

In addition to the above mentioned five States that explicitly or implicitly recognized their retained sovereignty, circumstantial evidence suggests that North Carolina also understood itself as remaining sovereign after joining the constitutional compact. In the first place, the State-people of North Carolina initially rejected (in July of 1788) the Constitution and, then, remained outside of the federal union until November 1789, which was well after the new federal government became operational. The fact that North Carolina initially rejected and remained independent of the new federal union suggests that it recognized itself to be a sovereign entity.

Furthermore, evidence from North Carolina’s ratifying convention suggests that the Federalists presented an Anti-Federalist-like construction of the Constitution to the North Carolina convention. In doing so, they were attempting to assuage the Anti-Federalists’ fears about North Carolina losing its political authority to an external entity. M.E. Bradford provides a helpful explication of this Anti-Federalist concern about external power:

That North Carolina Antifederalism in its most important manifestations worried about encroachment on the principles of local control and limited government than it did about the “rights of man” is, on the whole, better demonstrated by what the advocates of

ratification in Hillsborough pleaded for the Constitution than by what its critics objected against it. Federalists understood very well what were (given the fierce Regulator localism of most Tarheel communities) the greatest fears of their neighbors. And these were not fear of Tory reaction or foreign invasion, not mere enthusiasm for paper money, suspension of debt, and mad democracy. In fact, very little had changed since 1766-71: since the Regulators had successfully identified local manifestations of the power of the general government in western North Carolina as an intrusive, exploitive, subjugating force. Schemes of overgovernment for purposes of empire or to enforce a colonial policy not checked by local authority had little local support- and seemed a suprising innovation. Such folk as these Carolinians would not, in 1788, wish to introduce a remote, arbitrary, and sometimes hostile power into their midst so soon after having expelled such a power from their world.\footnote{Bradford, Original Intentions, 75-76.}

So, concern about maintaining their authority made the Tarheels extremely skeptical about the proposed Constitution.

The Federalist efforts to assuage these fears entailed portraying the constitutional system (with its federal government) as being compatible with maintaining State authority. M.E. Bradford describes the modus operandi of the North Carolina Federalists in the following passage:

[O]nce they had dispensed with nonsensical objections to specific provisions in its text, Iredall and Davie, Governor Johnston and Archibald Maclaine all set out to identify the proposed Constitution with what the serious Antifederalists said they wanted, insisting at every stage in their discussions that the great fear of the Antifederalists, of a new model government that contained a potential for limitless expansion, was unfounded…\footnote{Bradford, Original Intentions, 75.}

Among the many concessions made by the Federalists was their assurance that the Constitution would not interfere with North Carolina’s (i.e., State-people’s) authority:

Each state, insisted Judge Iredell, “must be left to the operation of its own principles.” For as General Davie insisted, “There is no instance that can be pointed out wherein the internal policy of the state can be affected by the judiciary of the United States.” Nor could other branches intrude where they do not belong. And to the same effect Governor Johnston maintained that any law made in conflict with the Constitution would not be “an
actual law.” And supporting this view, Archibald MacClaine thundered, “The general
government cannot intermeddle with the internal affairs of the state governments.”- can
“never intermeddle where no explicit power is given.” Such was the central theme of
the Federalists in Hillsborough- the right of their society within itself to persist in its own
chosen way, the commitment of the Constitution to that purpose.\textsuperscript{370}

This States’ rights construction of the Constitution, which was being offered by the
Federalists, still failed to carry the day in 1788, for the Antifederalists were too numerous
and probably too skeptical. However, the North Carolina Federalists’ pro-States’ rights
presentation of the Constitution in July of 1788 provides perspective on the type of
federal union that would be palpable to North Carolinians. Thus, North Carolina’s
ultimate decision to compact with other States and enter the federal union probably
entailed a States’ rights understanding of the Constitution- e.g., viewing the constitutional
compact as compatible with it retaining its sovereignty.\textsuperscript{371}

Finally, it should be noted how North Carolina clearly viewed the powers that it
and other States delegated to the Federal government to be strictly limited to what is
articulated in the Constitution. This becomes apparent when reviewing its ratification
statement, the bulk of which is a “Declaration of Rights” and “Amendments to the
Constitution” (only the wee-last paragraph of the document actually states ratification):

\textsuperscript{370} Ibid., 76.
\textsuperscript{371} This also seems true from the fact that North Carolina, like Rhode Island, seems to have been
pressed into ratifying the Constitution by the new federal government. The United States Congress had
passed a hostile tariff on Rhode Island and North Carolina, and it was scheduled to go into affect by
January 1790. North Carolina averted this via ratifying the Constitution in November 1789; however, given
its already demonstrated preference for remaining independent, North Carolina’s view of constitutional
construction should be interpreted as having an extreme leaning towards maintaining State-authority. So,
whenever a dispute between the State of North Carolina versus federal power arose, North Carolina’s
original understanding of the Constitution entails maximizing its own State authority in relation to that of
the Federal Government.
2d That all power is naturally vested in, and consequently derived from the people; that magistrates therefore are their trustees, and agents, and at all times amenable to them.\textsuperscript{372}

I.THAT each state in the union shall, respectively, retain every power, jurisdiction and right, which is not by this constitution delegated to the Congress of the United States, or to the departments of the Federal Government.\textsuperscript{373}

The first of the above passages, beginning with “2d”, is from the documents “Declaration of Rights.” It suggests an understanding of delegated powers as “trust-powers.” The powers delegated to government (i.e., government officials) are “derived from the people”, and the government (i.e., government officials) are merely the “trustees, and agents” of the people. Hence, governments (i.e., government officials) are “at all times amenable” to the people. Such an understanding of delegated powers is tantamount to a recognition of “the people” retaining sovereignty even though they entrust powers to the government, whose officials always serve as the people’s “trustees, and agents…” The second passage shows North Carolina’s understanding that “each state in the union shall, respectively, retain every power, jurisdiction and right, which is not by this constitution delegated” to the Federal government. In addition to being a strict construction of how the Constitution limits federal powers, this clause can be read in light of the above claim suggesting sovereignty is still retained even after delegating (or entrusting) powers to government as “trustees, and agents” of the “people.” When viewed together, the claims might suggest that North Carolina as a State-people entrusts (via ratifying the Constitution) some constitutionally limited “power, jurisdiction, and right” to the Federal


\textsuperscript{373} Ibid., 1047.
government, but the Federal government (i.e., its officials) are merely the “trustees, and agents” of the North Carolina “people” who still possess their sovereignty. The Federal government’s power is “derived” from the North Carolina “people”, and the Federal government (i.e., its officials) are always “amenable” to this State-people. 374

Finally, there is also some circumstantial evidence raising the possibility that Massachusetts and/or New Hampshire may have deemed themselves to remain sovereign after entering into the Constitutional compact. In their ratification statements, both State-peoples articulate a clear understanding of the strictly limited nature of the federal government’s delegated powers in relation to each State’s expansive reserved powers:

First That it be explicitly declared that all Powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised. 375

First That it be Explicitly declared that all Powers not expressly & particularly Delegated by the aforesaid Constitution are reserved to the several States to be, by them Exercised.- 376

374 A possible counter-factual to the above argument might be found in another clause from North Carolina’s “Amendments To The Constitution”: “XII. That Congress shall not declare any state to be in rebellion without the consent of at least two-thirds of all members present of both houses.” See State of North Carolina, Ratification Statement, Declaration of Rights, and Amendments, in The Making of the American Republic, ed. Tansill, 1049. Some might initially view this to be recognition that States do not have the right to secede. However, it might also be viewed as a mere pragmatic prevention of gratuitous intrusions of federal powers into internal State affairs. On this theory, “rebellion” would be tantamount to Congress’ enumerated power of Art. I, Sect. 8, Cl. 15, “calling forth the militia to…suppress insurrections…” See U.S. Constitution, art. 1, sec. 8, cl. 15. Such an “insurrection” would be an internal disturbance within a State; it would not be referring to a formal and lawful act of a State-people seceding from the Union. Here North Carolina is simply trying to make it difficult for Congress to exercise this enumerated power to get involved in a State’s internal affairs; it is not denying a State’s right to secede from the Union.


Based on above analysis, one might presume that such statements imply an understanding that State-peoples retain sovereignty because only a sovereign could both (1) “delegate” or entrust powers to the federal government as an agent and (2) “reserve” certain powers for itself and/or its intra-State agent (i.e., the State government).

With respect to Massachusetts, additional evidence is provided by the fact that Massachusetts joined Georgia’s interposition response to the Chislom case, and it concurred with Georgia’s concerns about how the Court was threatening the authority retained by each of the States. The Massachusetts legislature declared the Supreme Court’s claim of power to be “dangerous to the peace, safety, and independence of the several States…”

If all of the above are cases of States explicitly or implicitly recognizing their retained sovereignty, then they suggest that seven to eight of the original thirteen States had this view at ratification. This, in turn, would mean that a majority of the States had this original understanding of their authority in relation to the new Constitution and federal government; thus, this original understanding should be a governing rule when interpreting the constitutional compact. According to original understanding jurisprudence, it would suggest (among many things) that all State-peoples retain final

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See Herman V. Ames, ed., *State Documents On Federal Relations: The States and The United States*, 8. In the context, the use of “independence” implies independent authority. This was not an explicit statement of sovereign authority (especially when compared to Virginia’s statement), but it is evidence that Massachusetts recognized the States as having a high level of authority.

Also, on this point, it is important to note that the Connecticut legislature also agreed with Georgia’s claims about the Court threatening State authority; like Massachusetts and Georgia, the Connecticut legislature proposed an constitutional amendment to protect States from similar situations, and it ultimately ratified the 11th Amendment. Ibid., 8.
authority over their participation in the constitutional compact; hence, they can decide to
reclaim powers delegated to the federal government and discontinue membership in the
federal union.

A final note that is appropriate for this sub-section. M.E. Bradford elucidates how
the ultimate outcome of the State conventions likely would have been different if they
had occurred and acted in a different sequence. Specifically, the Constitution may not
have been ratified if some of the Anti-Federalist States like North Carolina had initially
rejected it sooner than it did:

Suppose the struggle over ratification had been governed by a different strategy among
the Antifederalists, and New Hampshire and North Carolina had been brought to make
early decisions on the Constitution- decisions in the negative. Suppose then further that
New York and Virginia had rushed to judgment immediately following the votes against
ratification in the two other states. It is reasonable to assume that one or both of the big
Antifederalist strongholds would have under such circumstances have also refused to
approve the instrument under consideration. Under these circumstances Massachusetts
would have voted “no” had it come next in the sequence. Maryland would have followed
after Virginia; and nothing would then have served to get Rhode Island to change its
mind. In this hypothetical scenario of how ratification could have been prevented, it
would signify nothing at all if Delaware, New Jersey, Georgia, and even Pennsylvania
continued to approve the Constitution as we know it. 378

This shows, as Bradford also suggests, that “Political dynamics are not the same thing as
intellectual substance.” 379 The fact that the Constitution was successfully ratified does not
mean that the States embraced the ideology of the Federalists. In fact, the evidence
suggests otherwise. To this, the same political dynamics that were discussed above in the
case of North Carolina seemed to be repeated in all the battleground States: the
Federalists in such States presented a fairly Anti-Federalist construction of the

378 Bradford, Original Intentions, 39.
379 Ibid., 39-40.
Constitution (i.e., a “‘minimalist’” one) because this was necessary to generate sufficient support for ratification. Bradford describes this as follows:

During the various ratifying conventions and in the recommended amendments that brought about the Bill of Rights, the Antifederalists had required their neighbors to specify that there was nothing hidden in the silences of the Constitution, that “everything not granted is reserved.” Said Colonel Joseph Varnum of Massachusetts, “no right to alter the internal relations of the states” exists under the new government. To the same effect, his old counterpart Samuel Adams (quoting Governor Hancock) added, “all powers not expressly delegated to Congress are reserved to the states, to be by them exercised.” We hear the same thing from James Wilson of Pennsylvania in his State House Yard Speech of October 6, 1787; from General William R. Davie of North Carolina; from Justice Iredell of the same state; and from Madison and Pendleton of Virginia and John Lansing of New York—which is only a partial listing of participants in this litany. 380

Such evidence suggests that the original understanding of the Constitution possessed by the State-peoples was very close to the States’ rights, strict construction that was defended by the Jeffersonians (e.g., Jefferson and Taylor). Again, Bradford’s commentary seems to support this conclusion:

That the powers of the new government are few and explicit is in the ratifying conventions the central theme of the Federalist defense of the United States Constitution and a primary explanation of why the sequence of ratifications went as it did. If we would understand these results and the enthusiasm with which an essentially conservative people looked forward with hope to life under the new government that they made possible, then we should find ground for them in “minimalist” interpretations of the authority that was thus created. 381

Even more, such a “‘minimalist’” construction is “a measure of how different from what was intended our fundamental law has become, and of the difficulty we fall into in attempting to read into it the ideological fashions of our own time.” 382

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380 Bradford, Original Intentions, 40-41.
381 Ibid., 41.
382 Ibid.
D. How Sections A-C imply that that Constitution neither established (nor is it compatible with) a national community of citizens (i.e., an “American people”) nor created a thick-level common good for the United States.

In maintaining their independent sovereignty, the State-peoples maintained their identity as distinct political societies. Ratification and actualization of the Constitution did not merge the separate State-peoples into a single “American people” or a national community of individuals.

Section “A” discussed (1) the rise of the thirteen separate sovereign States, which had formerly been British North American colonies; (2) the realization of a legal “Union” among these sovereign State-peoples through the Articles of Confederation, which merely had a confederation congress for implementing the terms of the Articles in a manner analogous to the “United Nations”; and, finally, (3) the creation of a new legal “Union” among the sovereign State-peoples via the Constitution, which provided for a federal government that the State-peoples entrusted with coercive power over the individual citizens of the States. The complete sovereignty of each of the State-peoples was maintained through all three of these periods.

Furthermore, section “B” of this chapter elaborated on how the text of the Constitution shows the State-peoples as maintaining their sovereignty, albeit being in federal union with one another. There it was shown that the Constitution’s reference to “the People” meant multiple State-peoples, not a single national people. As was discussed, Madison (at the Virginia ratifying convention) claims that “We the People of the United States” in the Preamble refers to the “‘people as composing thirteen sovereignties.’” This suggests that the term “People” has a plural connotation in the
Preamble phrase in question. For the sake of clarity, it is helpful to restate the term as “People[s]”. The Preamble phrase, then, implies: “We” the different peoples from the distinct sovereign States are entering into a federal union with one another. It does not refer to a “People” as a single nation.\(^{383}\)

Finally, section “C” showed how the notion of states maintaining their sovereignty was probably held by a majority of the States around the time that they ratified the Constitution. This, in turn, suggests that such an interpretation should be viewed as part of the authoritative original understanding of the Constitution.

Hence, the “Union” was not a national community of citizens with single common good; rather, it was only a union of State-peoples as distinct and basic sovereign units. All State-peoples had the federal government as a part of their various systems of governance, but the federal government had very limited functions (e.g., those concerning issues related to foreign policy and some inter-State relations). The commonality of “Union”, then, was a common good among State-peoples; the several State-peoples as corporate entities, not the individual citizens throughout the different States, were united in federal union with one another. Thus, there was not a national common good shared among individual citizens of the different States. Even more so, it was impossible to conceptualize individual citizens of different States as sharing a national thick-level common good (i.e., one involving the sharing of a set of thick-level values).

\(^{383}\) See an elaboration of this in Calhoun, A Discourse on the Constitution and Government of the United States, 96.
CHAPTER FIVE, Centralization and Its Negative Implications: The decline of social cohesion at the local-level within the American system.

The last chapter (Chapter Four) examined the compact nature of the 1789 constitutional system that continued the federal union among sovereign States. According to the terms of this compact, these sovereign States entrusted limited powers to a federal government that, in turn, functioned as creature-agent for each the States. This chapter will jump ahead to the contemporary period, well over 200 years after the realization of the constitutional compact. The first section will briefly outline the changes that have occurred within the federal system of the United States during the last two hundred years. The second section will examine various normative problems with the centralization of social, economic, and/or political powers within the United States.

A. On unconstitutional changes to the federal system:

Many important political events have occurred between the founding period and today. One thing that makes the contemporary period so distinct is the character of its de facto political system, which is dramatically different from what it was at the founding. The political system of the United States has changed from a constitutionally limited federal union into a de facto, but not legally authorized, unitary system in which the federal government has a virtual monopoly over real powers. In other words, the federal government now can control all real power in the system. Even powers still held by state governments can now be taken by the federal government with little struggle through Congress, Federal Bureaucratic Agencies, and or the Federal Courts.

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The explanation for how the system was so transformed is long and complicated, and the constraints of the current dissertation preclude its full elaboration. In the remaining paragraphs of this sub-section, only the following items will be elaborated: (1) the original understanding of the parts of “reserved” powers that State-peoples entrusted to their State governments; (2) how the delegation of federal powers was strict and very limited; (3) how State governments often allowed inner-State localities a relative degree of autonomy; and (4) the various stages of the system’s transformation into a unitary system.

With respect to the original understanding of the powers entrusted to State governments, it is helpful to review the following list developed by Theodore Lowi in his article, “Why Is There No Socialism in the United States?“:


This, in turn, can be compared to Lowi’s listing of the federal government’s domestic powers: “Internal Improvements, Subsidies (mainly shipping), Tariffs, Public Land Disposal, Patents, [and] Currency.”\(^{385}\) As Lowi seems to note, given the very few domestic powers entrusted to the federal government by the States in ratifying the

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\(^{385}\) Ibid. Here Lowi’s inclusion of “internal improvements” in this listing of federal powers is highly questionable. Madison and other Jeffersonian-Republican presidents actually vetoed bills providing for this when they came out of Congress. See McDonald, *States Rights And The Union*, 74-76.
Constitution, it is obvious that State governments were far more of an important
governing factor in the everyday lives of individual citizens.

Furthermore, it is important to recognize how the States’ reserve powers are
expansive; whereas, the delegated powers of the federal government are strictly limited
by the enumerations in the Constitution and the implied powers “necessary and proper”
for implementing such enumerations.\footnote{In contrast to much Supreme Court doctrine (especially McCullough v. Maryland), the federal
government’s implied powers are limited only to what is truly “necessary and proper” and, hence, only
what is strictly required for carrying out an expressly delegated power. This means that the federal
government has no implied power to act in manner that is merely convenient (but not required) for carrying
out its expressly delegated powers. This also means that the States reserved powers cannot be truncated by
claims that the federal government has a constitutional power to carry out broad implied powers.}
Thus, any truly new area of power for
government arising out of changing historical conditions belongs to the States and is
constitutionally forsworn from the federal government.\footnote{This insight was drawn from reflecting upon an essay by Richard S. Kay, “Adherence to the
Original Intentions in Constitutional Adjudication: Three Objections and Responses”, in Modern
Constitutional Theory: A Reader, 4th ed., edited by John H. Garvey and T. Alexander Aleinikoff (St. Paul,
Minnesota: West Group, 1999), 152-153.}

In further examining the powers of State governments, it was common to find
systems in which States entrusted their localities with a certain degree of autonomy. This
is discussed by Lowi in the same article:

Local governments do not exist in the Constitution of the United States. Local
governments are mere conveniences of state governments. Counties, cities, villages, etc.
were chosen as the local units of state administration, for the implementation of state
regulatory laws, state public works, and so on. Moreover, the local governments were
given considerable discretion to adapt state laws to local needs. As a consequence, local
governments operated under considerable advantages in that their city councils and
county legislatures were spared the burden of making fundamental social choices but
were left relatively free to adapt general state laws to local demands. State regulations
became patronage in the hands of local officials, again in the original sense of the verb to
\textit{patronize}. If some particular conduct- such as using a private home as a boardinghouse or
operating in restaurant or cab- was forbidden or restricted under state law, it could be

\begin{footnotesize}
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handed back as a matter of privilege through local licensing. By definition, a license is a permission by a government to do something that is otherwise illegal. Licensing was an almost never-ending source of patronage in the hands of local governments. Other patronage of course included the letting of contracts for public works and the granting of access and rights-of-way in the use of public and private property. 388

Maintaining such a system is very important for preserving thick-level agreement among people in localities where face to face interaction is possible. States have had an instrumental role in facilitating the possibility of cohesion in their towns and localities. They provide the conditions that help a town accomplish this. One method of providing such conditions could include imposing strict laws (e.g., morals laws that uphold various moral traditionalist views on abortion and sexual ethics) that encourage those who dissent from the State-people’s dominate morality to leave the State. Another method might be allowing a municipality to impose strict codes within its geographical limits. Such codes could even diverge from a majority in the State. This might, for example, be relevant in a State where there is a majority of traditionalist residents, but this majority is composed of a coalition of two religious sects (e.g., Baptists and Mormons). Suppose further that one sect has greater statewide numbers than other, but it still needs the minority sect to control the State’s government. Since protecting thick-level local agreement within local communities might require additional laws and ordinances establishing a sectarian religion within a locality’s geographical boundaries, it is possible that the majority and minority sect could workout an arrangement where the majority sect establishes its thick-level religious beliefs statewide except for in select towns or counties well populated by the minority sect. In fact in such towns, the minority sect could establish its own thick-

level religious beliefs. Since the two sects share many similar traditionalist moral values (i.e., both are motivated to keep allied to defend the State from being infiltrated by dissenters advocating permissive moral values) and both want to further protect their particular sectarian thick-level religious beliefs within their respective local-level communities, they might be well motivated to accommodate one another in this manner. It is conceivable that some such combination of statewide laws and municipal ordinances might both preserve the statewide ideological coalition while also fostering thick-level agreement in the State’s varying local communities. This issue will be discussed more in this dissertation’s conclusion.

When considering this, one realizes how the loss of each State’s reserved powers through centralization has damaged its ability to protect (in the manner described above)

389 Similarly, this argument can be extended to possible majorities within a State having either thick-level agreement (e.g., in colonial Massachusetts) or coalitional moral agreement about significant number of issues (e.g., a state of moral traditionalists from different religions- e.g., Mormons and Christians). Again, in such circumstances it is conceivable that the State legislature could enact moral laws that protect the majority’s agreement from the spread of dissenters within the State (e.g., the spread of advocates of permissive morality). This, in turn, would protect the thick-level agreement among traditionalists living in towns, for they will not have to worry about a higher State authority mandating their toleration of resident dissenters (e.g., people living morally permissive lifestyles). Furthermore, State legislation would be even more helpful if it allowed localities to publicly protect their thick-level agreement via local ordinances establishing the majority’s specific moral-religious agreement. Thus, such a State’s laws would protect general points of the State majority’s coalitional agreement; however, the State would tolerate localities’ autonomy to specifically protect the different types of thick-level religious-moral agreements that compose the State’s majority coalition. As long as dissenters in towns and/or the State are free to leave, this State-and-its-localities scheme of public regulation would seem to be an acceptable implication of a Nozick-like argument. See Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974), 297-334.

390 Although the above is conceivable and although American history shows various examples in which the people of a colony/State possess a thick-level cultural identity (e.g., many colonies/States in Puritan New England), it is also possible for States to be too geographically large and/or culturally diverse (e.g., California) to successfully facilitate preservation of thick-level cultural identity in its localities. In such cases, it might be appropriate for such states to divide themselves into smaller units that would better allow for this goal. Such divisions are permissible under the terms of the constitutional compact. See U.S. Constitution, art. 4, sec. 3, cl. 1.
the thick-level agreement within its localities. First, the ever increasing federal usurpation of State governments’ reserve powers to enact morals laws (e.g., prohibiting abortion, homosexual sodomy, etc.) precludes them from developing and protecting a dominant traditionalist or permissive governing coalition within the State. For, this prevents possible majorities of either permissive or traditionalist coalitions in the State from enacting morals laws that deter dissenters from entering the State and encourage already settled dissenters to leave the State. Since States are losing (or have lost) ability to control this, they remain vulnerable to becoming mixtures incompatible moral ideologies. This, in turn, is an absolute deterrent for developing cohesion, and it is a constant source of inner-State turmoil. Second, since (due to “Incorporation” of the First Amendment) States now lack the reserve power to establish religions, they are precluded from employing the above combination strategy of statewide and local ordinances for allowing each sect in the State’s governing coalition to establish its own sectarian religion in a local-level community. This, in turn, damages a local community’s ability to protect its thick-level moral and religious agreement.

With respect the various stages of transformation, these can be categorized as follows. First, there was an early conflict between the nationalists (e.g., Alexander Hamilton, John Adams, John Marshall and Joseph Story) and States’ rights advocates (e.g., Thomas Jefferson, James Madison, and John Taylor of Caroline Virginia). 391

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391 During this period, the federal government established several precedents for usurping the States’ constitutionally reserved powers. First, the Federalist Party’s loose interpretation of the Necessary and Proper Clause (“necessary” as including “useful, or conducive to…”) was first defended by Treasury Secretary, Alexander Hamilton, when he contradicted his own earlier defense of a strict construction of the clause in Federalist #33 (i.e., “all necessary and proper laws. If there be any thing exceptional, it must be
sought for in the specific powers, upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.”) See Alexander Hamilton, “Opinion as to the Constitutionality of the Bank”, in The American Republic, ed. Bruce Frohnen, 478-479; Hamilton (as Publius), Federalist #33, in The Federalist, ed. Carey and McClellan, 159. This nationalist interpretation was later upheld to be constitutional by Chief Justice John Marshall who largely paraphrased Secretary Hamilton’s defense of loosely interpreting the term “necessary” in the clause while ignoring Publius-Hamilton’s strict interpretation in Federalist #33. See McCullough v. Maryland 4 Wheat. 316 (1819); readers can review this case in The Supreme Court and The Constitution: Readings in American Constitutional History, ed. Stanley Kutler, 55-56. See also Thomas Wood Jr.’s similar analysis of Marshall’s treatment of Necessary and Proper Clause in Woods’ article, “American Conservativism and the Old Republic”, Modern Age 49, no. 4 (Fall 2007), 434-442. Second, the Federalist majority in the first Congress adopted the 1789 Judiciary Act with its infamous Section 25, which claimed that the Supreme Court had appellate jurisdiction over State court rulings addressing the United States Constitution, treaties, and federal laws. This move was unconstitutional because it entailed one department of the federal government (which is merely an entrusted agent of the sovereign States) attempting to usurp the States’ sovereignty by giving another department of the federal government (which, again, is a mere agent of the sovereign States) power to continually undermine the States’ reserved powers, trump the States’ exercise of power during conflicts with the federal government, and trespass on each State government’s power (which had been bestowed by its sovereign State-people) to make final judicial determinations concerning its state laws when doing so would also have bearing on how the Constitution and federal law would be interpreted within the state. As Calhoun intimates, this was a nationalist attempt to change the relations between a state government and the federal government from that of co-equals (empowered with co-equal governing authorities by each sovereign State-people in the union) to that of the State governments being subordinate to a master federal government. See Calhoun, A Discourse on the Constitution and Government of the United States, 224-227; McDonald, States Rights and the Union, 76-80; and Taylor, New Views of the Constitution of the United States 172-174. Not surprisingly, nationalists like Joseph Story and John Marshall produced Supreme Court decisions in Martin v. Hunter’s Lease 1 Wheaton 304 (1816) and Cohens v. Virginia 6 Wheaton 264 (1821) that upheld Section 25; readers can review in Stanley I. Kutler, The Supreme Court and The Constitution: Readings in American Constitutional History, 36-49. Third, in Gibbons v. Ogden, nationalist jurists further sought to damage to States Rights through ignoring the sound theory of States and the federal government having concurrent powers over interstate commerce. This theory of concurrent powers emphasizes that (1) the Constitution did not forbid States this concurrent power, (2) the States’ concurrent power over interstate commerce could be viewed as logically and practically compatible with Congress’ enumerated power over commerce (e.g., the States controlling all interstate commerce and purely intra-state commerce at and within their borders in all cases except where explicitly prohibited by the Constitution), and (3) all such additional powers (e.g., such as the above described concurrent power over interstate commerce) were not delegated to Congress and, hence, are reserved to the States. See U.S. Constitution, art. 1, sec. 8, cl. 3; art. 1, sec. 9 and 10; and Amendment 10. See Maurice G. Baxter, “Gibbons v. Ogden”, in The Oxford Guide To United States Supreme Court Decisions, ed. Kermit L. Hall (Oxford, U.K.: Oxford University Press, 1999), 104. See Thomas Woods Jr., “American Conservativism and the Old Republic” Modern Age 49, no. 4 (Fall 2007), 436.

Aside from the above notions of concurrent powers over interstate commerce, some have criticized Marshall’s Gibbons decision on grounds that it was an obvious departure from the original understanding of “Commerce…among the several States…” See U.S. Constitution, art. 1, sec. 8, cl. 3. Raoul Berger, for example, argues that Marshall ignored significant evidence from Dr. Johnson, whose work was considered important for ascertaining common understandings of words at the time of the founding, that commerce ultimately means “traffick,” “the interchange of anything,” that is, of merchandise.” Moreover, Berger argues that Marshall erred in viewing “among the several States” to mean “intermingled with…”; this allowed Marshall to further argue that Congress’ power to regulate commerce “among” the States entailed power over issues within a State’s borders if these were part of interstate commerce.
Second, there was an antebellum sectionalist conflict in which northern and western States with their non-slave interests began to gain majority control over the federal government, and southern States with their slave interests were reduced to a minority and, hence, grew increasingly defensive about federal encroachments on their States’ rights.  

Third, the southern States’ military loss to the Federal Government in the “War Between the States” or the War of Southern Independence has obstructed the States’ ability to defend their sovereignty via nullification and/or ultimate secession.

Fourth, commerce. In contrast, Berger argues that “among” really just implies “between” when this concept is extended to more than two parties. So, Congress only has power to regulate commerce “‘from one’” State “‘to another…’”; the Commerce Power does not imply “federal governance of internal commerce…” (i.e., commerce within a State’s interior). See Raul Berger, Federalism: The Founders Design (Norman, Oklahoma: University of Oklahoma Press, 1987), 123-128.


Finally, it is important to recognize how sectional conflict among the States was foreseen by Brutus during the debate over whether to ratify the Constitution. In fact, one of his arguments against the proposed Constitution was that it would be impossible to maintain a truly republican central government within a union of such diverse sections: “In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be constantly string against those of the other. This will retard the operations of government, and prevent such conclusions as will promote the public good. If we apply this remark to the condition of the United States, we shall be convinced that it forbids that we should be one government. The United States includes a variety of climates. The productions of the different parts of the union are very variant, and their interests, of consequence, diverse. Their manners and habits differ as much as their climates and productions; and their sentiments are by no means coincident. The laws and customs of the several states are, in many respects, very diverse, and in some opposite; each would be in favor of its own interests and customs, and, of consequence, a legislature formed of representatives from the respective parts, would not only be too numerous to act with any care or decision, but would be composed of such heterogeneous and discordant principles as would constantly be contending with each other.” See Brutus, Essay # 1, in The Essential Antifederalist, ed. W.B. Allen and Gordon Lloyd, associate ed. Margie Lloyd (Lanham, MD: University Press of America, 1985), 109.

This point is made directly by Nobel Laureate public-choice theorist, James Buchanan: “[T]he threat of potential secession offered a means of ensuring that the central government would, indeed, stay within those boundaries of political action defined by the general interests of all citizens in the inclusive territory.” According to Buchanan, however, “Lincoln’s decision to fight to preserve the union can be viewed as breaking of the implicit contract that had established the federal structure. The ultimate victory ensured that secession was no longer a viable option for citizens of the separate states, individually or in
the events in the twentieth and early twenty-first centuries (e.g., the Progressive Era, New
Deal, World Wars, Great Society, and general increase in the United States’ role as a
global/military power) have further exacerbated centralization and the weakening of the
States’ reserved powers.\footnote{Excellent analysis of this is provided in the following works: (1) Robert Nisbet argues that radical centralization in the United States coincided with its involvement in first world war and, then, was further exacerbated by World War II; see Robert Nisbet, \textit{The Present Age: Progress and Anarchy in Modern America} (New York: Harper and Row, 1988); (2) Ronald J. Pescritto’s and William J. Atto’s \textit{American Progressivism: A Reader} (Lanham, MD: Lexington Books, 2008) is an excellent anthology of speeches and essays by Progressives like Theodore Roosevelt, Woodrow Wilson, and Herbert Croly; (3) the following books provide strong accounts of the how the New Deal era and later Supreme Court decisions opened the door to highly nationalistic interpretations of the Commerce Clause (e.g., \textit{NLRB v. Jones and Laughlin Steel Corp}, \textit{United States v. Darby Lumber Company}, and \textit{Wickard v. Filburn}) and Tax and Spending Clause (e.g., \textit{Helvering v. Davis}); Robert A. Levy and William Mellor’s \textit{The Dirty Dozen}:}
In all of these four periods, the federal government aggrandized its powers through unconstitutionally intruding upon the States’ reserved powers; albeit, some of the increase in federal power was also the result of constitutional amendments (e.g., Amendments 13-17). Although the original Constitution is the same with exception of several amendments, its original meaning (even when accounting for the above amendments) has been obscured by nationalists interpretations of key articles and clauses (e.g., the Commerce Clause, the Spending Clause, the Necessary and Proper Clause, Supremacy Clause, the Incorporation interpretation of 14th Amendment’s Liberty and the Due Process Clauses, the 10th Amendment’s Reserved Powers Clause, the Judiciary’s Authority in Article III, and the Executive Powers of Article II). More will be said about this in Appendix C.

The discussion that follows in this and the next chapter will consider the normative implications of the above described centralization of the United States’
political system. It has been constructed so as to intentionally avoid the term “nationalization”. In place of this, the word “centralization” (i.e., the concentration of political, social, and/or economic power at a centralized location within a given geographical unit of analysis) is employed. This is intentionally done to avoid creating the impression that the United States has become a nation.

The United States are wholly the construction of the constitutional compact, and the authoritative original understanding of this document still mandates viewing the United States as a mere federal union (or confederation) of sovereign states. The United States government is wholly constituted and authorized by the constitutional compact among the sovereign states. All of its delegated powers are entrusted to it by the States, and the States should be able to reclaim them at will.

It is here conceded that the United States may “appear” to be a single nation due to how Americans have been socialized (via the trappings of the American civil religion); however, such perception is only an appearance, not reality. For example, although we are taught to say the “Pledge of Allegiance”, which contains the false notion of United States as a nation (“I pledge allegiance to the flag of the United States of America, and for the Republic, for which it stands, one nation under God, *indivisible*...”), each “American” is fundamentally a member of one of the State-peoples in which he or she resides. Through this primary citizenship in a State-people, each American also has secondary citizenship in the United States of America; however, this is wholly derivative upon his or her State-people continuing to participate in the constitutional compact. In being derivative citizens of the United States, people from different states are politically...
affiliated with one another; however, this affiliation or relationship merely entails the commonality of having the federal government participate in their different State systems according to the terms of the constitutional compact that each State-people has entered and can exit.

**B. On normative problems with centralization in United States:**

In turning now to the normative discussion, one problematic implication of centralization has been the decline of social cohesion at the local-level. The first chapter discussed how social cohesion was associated with the necessity of local community and often generated by political participation. With the rise of centralization, both characteristics are threatened; local community diminishes in importance, and (correspondingly) political participation in local community also decreases. The decline of local community and, hence, diminishing political participation in such community diminishes the possibility of social cohesion, which was more possible in earlier history. The malign normative implications of this entail the following: (1) the loss of a mode of community that was instrumentally necessary for successfully meeting many people’s social and psychological needs; (2) the loss of a mode of community that is intrinsically valuable to the human person and, hence, perfects his or her being; and (3) the loss of community necessary for resolving many “sensitive” public policy issues. This chapter will elaborate on the first two of these concerns, but the third implication will be examined in the next chapter.
Before beginning, however, one should be mindful about the limitations of explaining complicated phenomena in terms of a single variable. Social reality is often far too complex for this. Thus, one should not expect centralization to be the sole cause of the decline of socially cohesive local community and its malign implications. In fact, Tocqueville identifies the rise of democratic conditions in the modern world to be an overall cause for both trends.

With this warning in mind, the discussion can proceed. It will begin with reviewing Robert Nisbet’s analysis in *The Quest for Community: A Study in the Ethics of Order and Freedom* (1953). Here Nisbet argues that the rise of centralization undermines a central characteristic of social cohesion: local community. This is problematic because local community and institutions are important for servicing important moral and psychological needs. This insight is corroborated by the similar perspectives from Nelson Polsby and various agrarian and localists like Wendell Berry, John Crowe Ransom, Richard Weaver, and Bill Kauffman. Marvin Olasky also shows how centralization can usurp more effective local efforts to meet people’s moral and psychological needs.

The discussion will, then, turn to considering how Tocqueville both corroborates and qualifies Nisbet’s findings. Furthermore, the chapter will examine how the loss of political power at the local-level due to centralization has caused both (1) the loss thick-level moral agreement necessary for social cohesion and (2) the loss of political participation that can serve as a catalyst for generating social cohesion. Finally, this examination will reflect on two of the problematic consequences stemming from damage to local-level community by centralization.
Reflection on Nisbet and Other Analyses:

Nisbet argues that rapid centralization occurred during the nineteenth to early twentieth centuries within many western countries. The modern state and private institutions with a centralized scope have gained power and importance by swallowing the functions of smaller (intermediary) communities (e.g., townships, churches, families).\(^{395}\) Nisbet argues for this by examining the popular ideas within cultural mentalities during the beginning and later stages of this centralizing phenomenon. He finds that nineteenth century was greatly optimistic about the implications of individualism and rationalism; during this period we find “such words as individual, change, progress, reason, and freedom were notable not merely for their wide use of linguistic tools in books, essays, and lectures but for their symbolic value in convictions of immense numbers of men.”\(^{396}\) After about a century of centralization, however, Nisbet observes great pessimism and insecurity toward society and human existence within the mentalities of his time:

Today a different set of words and symbols dominates the intellectual and moral scene. It is impossible to overlook, in modern lexicons, the importance of such words as disorganization, disintegration, decline, insecurity, breakdown, instability, and the like.\(^{397}\)

For Nisbet, the key explanation of this disparity is the difference between what elites (during the nineteenth century) had hoped centralization would bring and what it actually

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\(^{396}\) Ibid., 3.

\(^{397}\) Ibid., 6.
brought (as seen from the vantage point of the mid twentieth century). Nineteenth century elites detested the parochial problems and oppression in local communities of their time and in earlier times. They saw how individuals were coerced into conforming to the central values and ways of the community; sometimes this cajoling precluded the spread of important innovation, and it even involved some unjust and needless stifling of individual diversity. Thus, the elites reacted by praising the values of individualism and rationalism. Furthermore, they sought to inculcate these values into the modus operandi of society.\footnote{Nisbet, *The Quest for Community*, 3-6.}

By Nisbet’s time (in the mid twentieth century), centralization had been extensively realized, but people’s attitude about their security and the state of society was pessimistic and discontented. Twentieth century people (i.e., those who had experienced the effects of centralization) had not attained the satisfaction and happiness that the nineteenth century elites had hoped to realize. Nisbet argues that such insecurity and pessimism has caused the burgeoning of a new sense of community, which can be contrasted to the hopeful individualism of the nineteenth century. He observes the popularity of words like: “\textit{Integration, status, membership, hierarchy, symbol, norm, identification, group.}”\footnote{Ibid., 21} Unlike community-spirit of old, however, this new sense of “community” is directed at the aggregate-level.\footnote{With respect to the United States, this federation is not even a real community but a mere political association of sovereign States (i.e., the people of different States are not really in community with one another, rather they are only politically affiliated due to sharing connection with the same federal government).} According to Nisbet, this turn toward a synthetic aggregate-level “community” is due to both the innate needs that can only be
satisfied within true community and the fact that aggregate-level institutions (especially the modern state and national politics) have replaced the functions of (and, hence, are looked at to take the place of) local-level (intermediary) communities:

The image of community may be seen behind certain types of political action in present Western society. It is hard to overlook the fact that the State and politics have become suffused by qualities formerly inherent only in the family or the church. In an age of real or supposed disintegration, men will abandon all truths and values that do not contain the promise of communal belonging and secure moral status. Where there is widespread conviction that community has been lost, there will be a conscious quest for community in the form of association that seems to promise the greatest moral refuge. In one age of society, for example in the early Middle Ages, this quest may end in the corporate church, or in the extended family or village community. But in the present age, for enlarging masses of people, this same quest terminates in the political party or action group. It is the image of community contained in the promise of absolute, communal State that seems to have the greatest power.\textsuperscript{401}

Nisbet views this trend to be an impetus for much of the twentieth century’s totalitarian ideologies and regimes. He cites the example of how Communist ideologues and regimes manipulate human desire for community: “And, above all other forms of political association, it is the totalitarian Communist party that most successfully exploits the craving for moral certainty and communal membership.”\textsuperscript{402}

This new sense of a centralized “community”, however, is a symptom of the loss of community at the local-level, which had historically performed invaluable service to people for many centuries before the age of centralization:

Behind the growing sense of isolation in society, behind the whole quest for community which infuses so many theoretical and practical areas of contemporary life and thought, lies the growing realization that the traditional primary relationships of men have become functionally irrelevant to our State and economy and meaningless to the moral aspirations of individuals. We are forced to the conclusion that a great deal of the peculiar character

\textsuperscript{401} Nisbet, \textit{The Quest for Community}, 29.
\textsuperscript{402} Ibid.
of contemporary social action comes from the efforts of men to find in large-scale organizations the values of status and security which were formerly gained in the primary associations of family, neighborhood, and church. This is the fact, I believe, that is revealing of the source of many of our contemporary discontent as it is ominous when the related problems of political freedom and order are considered.  

How did local-level community (e.g., “the primary associations of family, neighborhood, and church”) provide people with the desired status and security? Nisbet believes that such local-community has powerful moral and psychological influences on the individual:

This is the area of association from which the individual commonly gains his concept of the outer world and his sense of position in it. His concrete feelings of status and role, of protection and freedom, his differentiation between good and bad, between order and disorder and guilt and innocence, arise and are shaped largely by his relations within this realm of primary association.

In making twentieth century society one in which only centralized institutions have efficacy and practical importance in people’s lives, these old time-tested primary associations of local community cannot provide the same moral and psychological functions for individuals. As a consequence, such local associations loose their sense of relevance to people’s lives, even though people still need their functions. People’s resulting sense of missing something important is fuel for their quest of community, which they now seek to satisfy through integration into centralized institutions.

It is helpful to further analyze and understand the meaning of the last few sentences. Since the primary associations (e.g., “family, neighborhood, and church”) of local-community provide important moral and psychological functions for the individual,

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403 Nisbet, The Quest for Community, 44-45.
404 Ibid., 45.
people in society presumably experience a significant sense loss (or “missing something”) and/or insecurity due to the decline of such local associations. This sense of loss and/or insecurity is what Nisbet seems to observe in the “words and symbols” that “dominates the intellectual and moral scene” of modern twentieth century society: “words as disorganization, disintegration, decline, insecurity, breakdown, instability, and the like…” Moreover, there is a correlation between this phenomenon and that of centralization. As centralized institutions have increased in efficacy and practical importance, many people have tended to regard the old time-tested primary associations of local community with less value. One obvious example of this is seen in the contemporary obsession with federal-level politics and the modest and dwindling interest in local-level politics. Although practical necessity (e.g., concerns with safety, schools, etc.) compels people to pay some attention to the politics of their locality, most eyes are now drawn by the gravitational pull of federal politics, which has the real power to determine how important controversial issues (e.g., abortion, same-sex marriage, religious establishment) are to be resolved at the local level. To some extent, this correlation is probably causal in the sense that the centralized institutions tend to crowd-out the important local-level institutions. Given finite time and resources, people have less opportunity and incentive to participate/value local-community associations as their world and social circumstances increasingly compel focus/participation in centralized institutions. Nevertheless, people still need to satisfy their moral and psychological personal needs. So, as people participate less in local-community’s primary associations, 

405 Nisbet, The Quest for Community, 6.
they must look to something else as a mechanism for fulfilling such needs. Nisbet seems to believe that these dynamics result in people ultimately looking to centralized institutions; they seek to satisfy their moral and psychological needs via integrating into the institutions at the aggregate level.

Nisbet’s insights here are corroborated by reflection from Nelson Polsby in his essay, “Prospects for Pluralism in the American Federal System: Trends in Unofficial Public-Sector Intermediation,” and Alexis de Tocqueville in his book, *Democracy In America*. After considering the importance of media and what he sees to be the decline of political parties within the pluralist centralized system (i.e., interest group competition), Polsby concludes that the United States’ centralized society offers people a plethora of opportunities to alter their lives and commitments at the cost of diminishing people’s ability to find stability, comfort, and satisfaction from their local communities:

What individuals cannot choose, of course, is a society in which they retain the right to move about as they like or need, exercising their options to change their jobs, marital status, geographic location, names, hair, lifestyles, political commitments, while others hold still and provide them with the comforting support systems- stable neighborhoods, lifelong friendships, personalized and unbureaucratic professional services- of a more stable, confining, and less resourceful age. This tragic fly in the ointment of modern American social life dooms traditionalists with democratic ideals to a certain amount of nostalgia, often mistaken for neoconservative crotchets. But it seems to be inescapably the case that the price of more pluralism is a less orderly political life. And this, no doubt, is one reason otherwise level-headed analysts with egalitarian values occasionally observe that we are doing better and feeling worse.\[406\]

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Polsby’s commentary suggests that an unavoidable cost of a centralized society, which provides opportunities for wealth generation and liberal freedom, is the destruction of local communities that provide valuable and irreplaceable benefits to the individual.

Additional perspective about this is gleaned from various Agrarian and localist authors who emphasize the destabilizing impact of commercial centralization and how it disconnects the human person from land and local place. In the “Unsettling of America”, Wendell Berry argues that macro industrial economy encourages exploitation of local land, communities, and resources:

One cannot help but see the similarity between this foreign colonialism and the domestic colonialism that, by policy, converts productive farm, forest, and grazing lands into strip mines. Now, as then, we see the abstract values of an industrial economy preying upon the native productivity of land and people. The fur trade was only the first establishment of this continent of a mentality whose triumph is its catastrophe.

For Berry, “domestic colonialism” represents the attempts by large industries (e.g., interstate industries) to transform relatively self-sustaining local economies into dependent parts of the macro economy. Just as “foreign colonialism” destroyed the American Indian’s self-sufficient mode of local life and relation to the land via making

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407 In “The Southern Tradition”, Richard Weaver describes the importance of connection of local place in the Southern mind and how this is a virtue: “The Southerner is a local person- to a degree unknown in other sections of the United States.” Such “provincialism is a positive force, which we ought to think about a long while before we sacrifice too much to political abstractionism. In the last analysis, provincialism is your belief in yourself, in your neighborhood, in your reality. It is a patriotism without belligerence. Convincing cases have been made to show that all great art is provincial in the sense of reflecting a place, time, and a Zeitgeist.” Weaver continues by citing Stark Young: “’[P]rovincialism proper is a fine trait. It is akin to a man’s interest in his own center, which is the most deeply rooted consideration he has, the source of his direction, health, and soul….People who give up their own land too readily need careful weighing, exactly as do those who are so with their convictions.’” See Richard Weaver, “The Southern Tradition”, in The Southern Essays of Richard M. Weaver, ed. George M. Curtis, III and James J. Thompson, Jr. (Indianapolis: Liberty Fund, 1987), 224-226. In this way, the Southern mind recognizes that attachment to one’s locality is important for human psychology and morality.

the Indian dependent upon industrial goods from Europe, so now “domestic colonialism” also makes local communities and farms dependent upon federal-level and global markets as the means for both selling local “products” and buying necessary and luxury goods.409

Berry views this phenomenon as fatal for local farming and country communities. In “Conservation and Local Economy”, Berry describes how his own town of Port Royal, Kentucky is dying due to its evolution from a local and self-sustaining economy to one dependent upon the federal-level and global economies.410 Although Port Royal “has never been much bigger than it is now”, its economy and vitality has changed drastically. Before “World War I, there were sixteen business and professional enterprises in the town, all serving the town and the surrounding farms.” By “the years before World War II, the number had been reduced to twelve, but the town and its tributary landscape were still alive as a community and as an economy.” In the contemporary period, however, “the town has five enterprises, one of which does not serve the local community.” Moreover, there “is now no market for farm produce in the town or within forty miles. We no longer have a garage or repair shop of any kind. We have had no doctor for forty years and no school for thirty. Now, as a local economy and therefore as a community, Port Royal, is dying.”411 The decline of Port Royal means the decline of local community and, hence, its institutions for nourishing individual members.

409 Wendell Berry, “Unsettling of America”, 38.
410 Wendell Berry, “Conservation and Local Economy”, in The Art of the Commonplace: The Agrarian Essays of Wendell Berry (Emeryville, CA: Shoemaker and Hoard, A Division of Avalon Publishing Group, 2002), 197
411 Berry, “Conservation and Local Economy”, 197.
For Berry, the cause of such declining local communities is their integration into the federal and global economies. Such integration involves local communities not using their local resources to service their own needs; instead, they buy from external producers and sell to external companies and/or consumers:

We in Port Royal are part of an agricultural region surrounded by cities that import much of their food from distant places. Though we urgently need crops that can be sustained for tobacco, we produce practically no vegetables or other goods for consumption in our region. Having no food economy, we produce less and less diverse food supply for the general market. This condition implies and virtually requires the abuse of our land and our people, and they are abused.\textsuperscript{412}

In short, local needs are serviced by goods produced in other places, and these are purchased with money attained through selling a commodity crop, tobacco, to external companies and ultimately consumers within the federal and international economies.\textsuperscript{413}

These business and economic issues are related to political centralization. In fact, both Berry and other agrarian-localists see instances where damaging commercial centralization has been advanced by central government policy. After noting how the “Civil War made America safe for the moguls of the railroads and of the mineral and timber industries who wanted to be free to exploit the countryside…” and how in contemporary times “the proposed revisions in the General Agreement on Tariffs and Trade are intended solely to further this exploitation…”, Berry claims that the “business of the American government is to serve, protect, and defend business; and that the business of the American people is to serve the government, which means to serve

\textsuperscript{412} Berry, “Conservation and Local Economy”, 198.
\textsuperscript{413} Ibid.
business. In other words, Berry views the aim of government policy as being the advancement of business interests, not country people’s interests in having local community.

The classic Southern Agrarians have also observed how industrialization, which burdens local farmers, has been advanced by the United States government. John Crowe Ransom described this in his essay, “Reconstructed But Unregenerate”, which is published in *I’ll Take My Stand: The South and the Agrarian Tradition*:

The agrarian discontent in America is deeply grounded in the love of the tiller for the soil, which is probably, it must be confessed, not peculiar to the Southern specimen, but one of the more ineradicable human attachments, be the tiller as progressive as he may be. In proposing to wean men from this foolish attachment, industrialism sets itself against the most ancient and the most humane of all the modes of human livelihood. Do Mr. Hoover and the distinguished thinkers of Washington see how essential is the mutual hatred between the industrialists and the framers, and how mortal is their conflict? The gentlemen at Washington are mostly preaching and legislating to secure the fabulous “blessings” of industrial progress; they are on the industrial side.

Ransom also makes clear that he is discussing how government encourages farmers to industrialize:

All the solutions recommended for their [the farmers] difficulties are really enticements held out to them to become a little more cooperative, more mechanical, more mobile- in short, a little more industrialized.

Although Ransom is responding to the central government of an earlier time, his description corresponds with Berry’s own analysis. Like Berry, Ransom suggests that the central government has sought to advance the interests of industrialists rather than the true interest of farmers and their communities.

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416 Ibid., 19.
Other writers point to more contemporary examples of government policy discouraging small farms and the self-sufficiency of local farming communities.

Contemporary author Michael Pollan recently mentioned this in an interview with Rod Dreher in the *The American Conservative*:

For the last 40 years at least, our agricultural policy has been driven by an alliance of agribusiness interests and people in Congress. Farm policy has been organized around driving prices down, which is certainly not in the interest of farmers. It is in the interest of people buying their products—Archer Daniels Midland, Cargill, McDonald’s and Coca-Cola. They are the beneficiaries to the way we’ve organized our agriculture.

Some farmers see this; many don’t. We have this institution called the Farm Bureau, which is believed to represent farmers, but they do nothing of the kind. They tend to represent agribusiness. And the States in their regulations, have tended to favor the biggest interests against the people trying to do smaller things like raw milk operations.  

In the sequel, Pollan discusses a particular example of federal policy discouraging small farmers in the process of advancing the interests of large agribusiness:

The USDA is also very much organized around promoting the interests of the largest meat packers. Four of them control 82 percent of the market, and all the rules are designed for them. Now, I can understand it from their point of view; one inspector at a national beef plant can inspect 400 carcasses in an hour. If you send him to a small regional plant that is only doing four carcasses in a day, that looks like bad business. But in fact, that small plant is supporting farmers in the community and putting out higher quality meat.

So the deck is really stacked against family farmers and people trying to build local food economies. The federal regulator regime is choking out some really vital start-ups in an important corner of the American economy.  

According to Pollan’s testimony, the centralization of agribusiness and the stifling of the small farmer and community is well supported and encouraged by government policy.

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417 Rod Dreher and Michael Pollan, “Table Talk: Michael Pollan chats with Rod Dreher about how food culture can transcend the Left-Right divide”, *The American Conservative* (June 30, 2008), 9.

418 Ibid.
Agrarians and localists have also observed how the centralizing forces of government, industrialization, and cosmopolitanism damage life at the local-level. In populist fashion, Bill Kauffman of Batavia, New York portrays both a stark dichotomy between one centralist/cosmopolitan-America and another localist-America and how the former inflicts injury on the latter:

There are two Americas: the televised America, known and hated by the world, and the rest of us. The former is a factious creation whose strange gods include HBO, accentless TV anchorpeople, Dick Cheney, reruns of Friends, and the National Endowment of Democracy. It is real enough- cross it and you’ll learn more than you want to know about weapons of mass destruction- but it has no heart, no soul, no connection to the thousand and one real Americans that produced Zora Neale Hurston and Jack Kerouac and Saint Dorothy Day and the Mighty Casey who has struck out.

I am of the other America, the unseen America, the America undreamt of by foreigners who hate my country without knowing a single thing about it. Ours is a land of volunteer fire departments, of baseball played without payment or sanction, of uncut maples and unpasteurized cider…

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419 Bill Kauffman, Look Homeward America: In Search of Reactionary Radicals and Front-Porch Anarchists (Wilmington, DE: ISI Books, 2006), 171-172. Here it should also be noted that Southern Agrarians tend to view the phenomenon that Kauffman calls “cosmopolitan-America” as a metastasizing of certain vices peculiar to the historic culture of Northern States. Richard Weaver, for example, suggests that the favorable American view of “progress” viewed as urbanization and industrialization has its origins in the Northern mind: “The Northern attitude, if I interpret it correctly, goes much further toward making man the center of significance and the master of nature. Nature is frequently spoken of as something to overcome. And man’s well-being is often equated with how extensively he is able to change nature. Nature is something thought of as an impediment to be got out of the way. This attitude has increasingly characterized the thinking of the Western world since the Enlightenment, and here again, some people will say the South is behind the times, or even that it here is an element of the superstitious in the regard for nature in its originally given form. But however you account for the attitude, you will have to agree that it can have an important bearing upon one’s theory of life and conduct. And nowhere is its influence more decisive than in the corollary attitude one takes toward ‘Progress.’” Weaver intimates that the Northern view of dominating/overcoming nature has become central to the American view of “progress”, which connotes “industrial civilization” and, hence, urbanization and cosmopolitanism. This seen in the sequel where Weaver discusses the South’s opposition in principle to such “progress”: “One of the most widely received generalizations in this country is that the South is the ‘unprogressive section.’ If it is understood in the terms in which it is made, the charge is true. What is not generally understood, however, is that this failure to keep up with the march of progress is not wholly a matter of comparative poverty, comparative illiteracy, and a hot climate which discourages activity. Some of it is due to a philosophical opposition to Progress as it has been spelled out by industrial civilization. It is an opposition which stems from a different conception of man’s proper role in life.” See Weaver, “The Southern Tradition”, 221-222.
Kauffman, then, implies that cosmopolitan-America injures localist-America through the
government elites of the former involving the United States in wars that
disproportionately and unfairly burden the latter:

Yet we [(the localist Americans)] are the America that suffers in wartime: we do the
dying, the paying of taxes, we supply the million unfortunately sons (and now daughters)
who are sent hither and yon in what amounts to a vast government uprooting of the
populace. Militarism and empire are the enemies of small-town America, not only
because some native sons come home in bodybags but also for the desolating fact that
many never come home at all. They are scattered to the winds, sent out- by force or
enticement of state- in the great American diaspora, never to return to the places that gave
them nurture.\footnote{Kauffman, \textit{Look Homeward America}, 172.}

More will be said below about how warfare is both a means of centralization and is
tantamount to “a vast government uprooting of the populace”- i.e., destruction of
valuable local-level communities. Here it is just important to note Kauffman’s deep
concern for how the centralizing forces of America inflict damage on the local-level.

\[\text{Tocqueville also agrees with this common insight of Polsby, Berry, Ransom,}
\text{Pollan, Kauffman, and Nisbet of how centralization damages local-level communities and}
\text{institutions that nurture important human qualities. However, probably due to his}
\text{progressive nineteenth century vantage point, Tocqueville focuses on the lost ability to}
nurture more dynamic characteristics:}\]

\[\text{I think that administrative centralization only serves to enervate the peoples that submit}
to it, because it constantly tends to diminish their civic spirit. Administrative}
\text{centralization succeeds, it is true, in assembling, at a given time and place, all the}
available resources of the nation, but it militates against the increase of those resources. It}
\text{brings triumph on the day of battle, but in the long run diminishes a nation’s power. So it}
can contribute wonderfully to the ephemeral greatness of one man but not to the}
\text{permanent prosperity of a people.}\footnote{Tocqueville, \textit{Democracy In America}, 88.} \]
By “administrative centralization,” Tocqueville is referring to the central government expanding its power over the details of local affairs such that significant public policy decisions about the course of local problems and issues are resolved at the central level. He views this as problematic, but he is also careful to contrast this with a more benign mode of centralization that he calls “governmental centralization,” which entails the central government enacting “general laws” that affect the federal union as an aggregate whole (e.g., those concerned with raising tax revenue to fund the central government, regulating interstate commerce, etc.) and “the nation’s relations with foreigners, are common to all parts of the nation.”

In the above passage, then, Tocqueville maintains that the “administrative” centralization (i.e., a concentration of power in the central government to enact policy for the local-level) weakens the “civic spirit” and diminishes a country’s (e.g., the U.S. federal union’s) “power” and ability to increase its “resources.” Grounds for this view are found in Tocqueville’s general theory that local-level political association fosters habits of association that, in turn, spawn countless instances of civil association. Since this civil association accomplishes more than anything possible by a centralized regime and since “administrative” centralization depletes such civil association, “administrative” centralization tends to diminish a country’s aggregate spirit, power, and resources.

A classic case study of how “administrative” centralization has damaged the United States is Marvin Olasky’s examination of the 1960’s welfare programs in his

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Tocqueville, *Democracy In America*, 87.
book, *The Tragedy of American Compassion*. Here Olasky documents how this massive expansion of the federal government, which attempted to implement President Johnson’s War on Poverty, actually hampered the aim of decreasing poverty. Such centralized, anti-poverty programs debilitated more effective poverty elimination programs already operating at the local-level, and LBJ’s Great Society policies tended to exacerbate and encourage dependence on the government.\(^{423}\) The War On Poverty entailed the creation of the Office of Economic Opportunity (OEO) and many new anti-poverty programs that were funded by federal aid (e.g., Job Corps, Neighborhood Youth Corps, VISTA, Head Start, and the Legal Service Program). Olasky describes how these new federal programs intentionally created difficulty for and undermined the local-level organizations and offices already distributing relief benefits to their local poor:

OEO’s Legal Service division clearly perceived the situation that way. Not only did Legal Services groups provide office space to NWRO, but over 1,800 mostly young, mostly energetic lawyers fought test cases for NWRO causes, brought class action suits before sympathetic judges, and became “lead actors in bringing about a new welfare era.”\(^{424}\)

The sequel describes how this federally sponsored legal onslaught, in turn, undermined much of the established rules for encouraging personal responsibility and self-sufficiency:

Soon, with all the legal horse power revved up, rules that allowed categorization and discernment- tasks that government officials were not likely to handle well even without enormous pressure- were no more. Rules that welfare officials, without extensive hearings, could declare a person employable and require him to take a job, were struck down. Rules that women receiving AFDC could not have a “man in the house” were

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\(^{424}\) Olasky, *The Tragedy of American Compassion*, 181.
struck down. Rules that recipients suspected of fraud had to answer questions or else face possible loss of subsidy, were struck down. A welfare official who demanded recipients to present information that might reduce their grants was seen as violating their Fifth Amendment rights.425

This, in turn, resulted in over-running and impeding local welfare offices’ effective distributions of benefits to the deserving needy:

Since the American welfare system had relied to some extent on self-restraint and investigation, it had few defenses before the entitlement attack. OEO neighborhood legal attorneys taught welfare recipients to request more hearings, each of which required five to eight hours of work from a hearing officer. Most local officials learned to give in so they could avoid time-consuming activities. “In this new climate, many intake workers, the ‘gate-keepers’ of the system, have tended to make more liberal decisions,” backers of the new order reported jubilantly. These officials who were slow to acquiesce faced frequent demonstrations. Sit-ins and sleep-ins at welfare departments made the lives of administrators difficult. Look magazine reported in 1968 the patter that had emerged: “Welfare officials tend to cave in, if possible, before reporters arrive, and quick victories rouse the timid to fight.”426

Ultimately, this resulted in increasing the number of people receiving welfare benefits:

The result was a welfare population explosion: “Acceptances rose sharply in the middle and late 1960’s, and client protests were undoubtedly one cause.”…Statistics suggest the scope of that explosion. During the 1950s AFDC rolls rose by 110,000 families, or 17 percent- but during the 1960s the increase was 107 percent, or 800,000 families. About three-fourths of that increase occurred from 1965 to 1968 alone, during a time of general prosperity and diminishing unemployment. Slicing the numbers a different way, the overall AFDC population increased from 4.3 million in 1965 to 10.8 million in 1974. Administrators were astounded by the sudden leap. Year after year officials muttered that the increase “can’t go on, it can’t go on, but it does.” By 1970, applicants and subsidies reached “levels that would have been unimaginable two or three years ago.”427

Thus, even with massive increases in government programs and spending to alleviate poverty, welfare rolls expanded beyond the expectations of the government officials who developed such programs.

425 Olasky, The Tragedy of American Compassion, 181.
426 Ibid., 182.
427 Ibid., 182-183.
Olasky argues that such unexpected increases can mostly be explained by how the new government programs re-socialized the poor to desire receiving welfare benefits:

Instant explanations for the explosion varied: some spoke of continued migration for the black poor from the South and others noted the deterioration of black family structure. All of these had an impact, but studies showed that, surprisingly, the size of pool of eligible people did not change much during those years. The major change was that a much higher percentage of those who were eligible suddenly decided to take advantage of the welfare benefits. An increase in formal benefit levels and a simplification of the process of signing up probably had some impact, but officials observed that a prime reason for the surge was “a changing outlook among many poor and the near poor.” They had been taught by organizers that welfare is “nothing to be ashamed of.”

Prior to such re-socialization, there was a stigma associated with being on welfare and not being self-sufficient, but the new federal program’s intervention taught that welfare was not shameful. This made being on welfare more desirable than working in lower paying jobs for similar benefits:

Before the push of a Great Society began, recipients themselves often viewed welfare as a necessary wrong, but not a right. Two gatekeepers- the welfare office and the applicants own conscience- scrutinized each applicant. A sense of shame was relied upon to make people reluctant to accept “the dole” unless absolutely necessary; for those without shame, welfare officials were to ask hard questions and investigate claims…With dependency considered dishonorable, government- and self-imposed restrictions meant that, as late as the mid-1960’s, only about half of those eligible for welfare payments were receiving them, and many of the enrolled were taking only part of the maximum allowance.

If all of this is correct, then the Great Society’s War On Poverty can be viewed in the following three ways: (1) it was a huge failure; (2) it is an excellent example of how centralization can crowd out more effective organizations operating at the local-level; and (3) in undermining more effective local-level organizations, it actually psychologically

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429 Ibid., 167-168.
and sociologically weakened the poor and vulnerable because its programs encouraged the poor to become dependent upon financial aid, rather than working to attain individual self-sufficiency and empowerment.

Nisbet’s analysis of the crowding-out effect of centralization for socially cohesive local community (where important moral and psychological needs are met) seems to keep good company with Polsby’s, Tocqueville’s, and Olasky’s insights on how centralization obstruct the benefits people receive from local-level community. These writers along with Berry, Ransom, Pollan, Weaver, and Kauffman, who observe how centralizing forces destroy valuable local-level communities, all suggest that a problematic normative implication follows from centralization’s damage to local institutions: There is a loss of community that is effective in providing for and satisfying important moral and psychological needs.

In concluding this evaluation of the various treatments of centralization, it is important to consider whether all of the insecurity that Nisbet observes can actually be blamed on centralization. Many wars and/or security threats also occurred during the twentieth century (e.g., the two world wars, the Cold War, etc.), and these might also explain widespread angst. Nisbet, however, suggests that centralization has actually spurred much of the warfare that has been experienced within the modern world: “modern populations depend increasingly on the symbolism of war for relief from civil conflicts and frustrations.”430 As centralized institutions displace local ones and important psychological and moral functions go unfulfilled, atomized humans feel isolated,

430 Nisbet, The Quest for Community, 33.
insecure, and long for community. The State as the architechtone central-level institution attempts to manipulate these feelings in order to generate loyalty among the masses. War is one of the central mechanisms for accomplishing such manipulation:

One of the most impressive aspects of contemporary war is the intoxicating atmosphere of spiritual unity that arises out of the common consciousness of participating in a moral crusade. War is no longer simply an affair of military establishments and material soldiers. It is now something more nearly akin to the Crusades of medieval Europe, but in the name of the nation rather than of the Church. The clear tendency of modern wars to become ever more closely identified with broad, popular, moral aspirations: freedom, self-determination of the peoples, democracy, rights, and justice. Because war, in the twentieth century, has become rooted to such an extent in the aspirations of peoples and in broad moral convictions, its intensity and range have vastly increased. When the goals and values of war are popular, both in the sense of mass participation and spiritual devotion, the historic, institutional limits of war tend to recede further and further into the void. The enemy becomes not only a ready scapegoat for all ordinary dislikes and frustrations; he becomes the symbol of total evil against which the forces of good may mobilize themselves into a militant community.  

This view of war, as being a needed means for generating loyalty among the masses towards a centralized system, may explain why the twentieth century has seen multiple global wars among centralized-states. Warfare is not a cause of centralization; rather, centralization (and the goal of achieving centralization) is a cause of the warfare.

Reflection on Tocqueville’s Analysis:

In a similar manner, Tocqueville also recognizes (as Nisbet acknowledges) how war is an attractive strategy for the state to solidify and expand its centralization:

I think that extreme centralization of political power ultimately enervates society and thus, in the end, weakens the government too. But I don’t deny that with the power of society thus centralized, great undertakings can be carried through at a given time and for a specific purpose. That is especially true of war, in which success depends much more

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431 Nisbet, The Quest for Community, 34-35.
on the capacity to bring all one’s power to bear quickly at a given point than on the actual extent of one’s resources. Hence it is chiefly in time of war that people wish, and often need, to increase the prerogatives of the central government. All men of military genius are fond of centralization, which increases their strength; and all men of centralization are fond of war, which forces nations to put all power in the hands of the state. For this reason the democratic tendency constantly to multiply the prerogatives of the state and diminish those of individuals takes effect more quickly and continuously in democracies exposed by their position to great and frequent wars than in any other.  

As can be partially seen by the passage, Tocqueville’s discussion of the causal link between war and centralization is, of course, linked with his overall study of how democratic regimes are prone to centralization. Moreover, when examining the Tocqueville passage, one notices how his causation account goes both ways between the variables: centralization and warfare. In other words, he believes that both phenomena reinforce one another. This is an important qualification. It still, however, leaves open the possibility maintaining a variant of Nisbet’s conclusion: even though both centralization and warfare have caused a sense of insecurity during the modern period, centralization has actually been a primary cause of the warfare. Nevertheless, Tocqueville (in the above passage) also seems to encourage readers to fathom how the causes of social phenomenon often involve nuance and cannot merely be isolated to one grand variable.

Similar conclusions can be reached about the correlation between the rise of democracy and the rise of centralization. A review of Tocqueville (and even Nisbet in light of Tocqueville) suggests that, as with the variable of warfare, the causation proceeds both ways between increasing democratization and increasing centralization such that the two trends mutually reinforce one another. For Tocqueville, increasing democratization is

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432 Tocqueville, *Democracy In America*, 677.

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a primary cause of centralization and other major social phenomena in the modern world. Part of this will be discussed momentarily. For now, however, it is helpful to examine the analysis of how centralization causes democratization. As seen above in Nisbet’s analysis, centralization crowds-out local intermediary institutions (or associations) and, hence, makes them ineffective in meeting people’s important needs. As such local institutions become weaker, they decline in their authority and influence over people’s lives. Since power and efficacy is found at the central (and not the local) level, local people are not as likely to respect and heed the authorities at the local-level. Moreover, finite time and resources will naturally preclude people from participating in local-level institutions when their world and circumstances demand that they participate in centralized institutions. Due to some combination of these factors, traditional local hierarchies lose their influence over people within their domain. As this occurs, there is a rise in the equality of conditions at the local level. The old vertical distinctions in rank and status at the local level are diminished, and localities become aggregations of more horizontally related people. All of this entails democratization (or rise in the equality of conditions) in Tocqueville’s sense.

Tocqueville’s analysis implies that centralization can cause democratization. He observes how centralization can strip away the efficacy of local institutions in meeting people’s needs. In describing pre-revolutionary France, Tocqueville notes how increasing state centralization diminished the power and efficacy of local intermediary political authorities of the old feudal order. In the The Old Regime (within an edited volume by
Stone and Mennell), Tocqueville discusses how this occurred among traditional church and aristocratic authorities at multiple levels:

In the eighteenth century all that touched the parish, the rural equivalent of the township, was under control of a board of officials who were no longer agents of the seigneur or chosen by him. Some were nominated by the Intendant of the province, others elected by the local peasantry. Amongst the many functions of these officials were those assessing the tax to be paid by each member of the community, of keeping churches in repair, of building schools, of summoning and presiding over the parish assemblies. They supervised the municipal funds, decided how these were to be expended, and in litigation to which the parish was a party acted as its representatives. Far from controlling the administration of parish affairs the lord had no say at all in them. All the members of the parish councils were ex officio public servants or under the control of the central power… As for the lord, he rarely figured as the King’s representatives in the parish or as an intermediary between him and its inhabitants. He was no longer expected to see to the maintenance of law and order, to call out the militia, to levy taxes, to publish royal edicts, or to distribute the King’s bounty in times of shortage. All these rights and duties had passed into the hands of others and the lord was in reality merely one of the inhabitants of the parish, differentiated from the others by certain exemptions and privileges. His social rank was higher, but he had no more power than they. In letters to their subdelegates the Intendents were careful to point out that the lord was only “the first resident.”… When we turn from the parish to the larger territorial unit, the canton, we find the same arrangement; the nobles play no part, collectively or individually, in the administration of public affairs… 433

This passage discusses how increasing state centralization resulted in various church and aristocratic authorities being stripped of their powers and duties over local affairs. It should be noted that this was tantamount to uprooting the hierarchy and, hence, proper function of the local intermediary institutions. The very fact that traditional aristocrats were being defrocked of real power by the state’s centralization entailed an instance of centralization causing equality of conditions, for the nobles were being cast down to a similar power-level with the commoners. Not surprisingly, such hindering of local

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intermediary institutions (via hindering its traditional elites and hierarchy) resulted in them failing to provide needed services to the local inhabitants. In *The Old Regime* Tocqueville discusses this while also including some editorial comments about the inherent injustice of the feudal system even before it was derailed by centralization:

When the nobles had real power as well as privileges, when they governed and administered, their rights could be at once greater and less open to attack. In fact, the nobility was regarded in the age of feudalism much as the government is regarded by everyone today; its exactions were tolerated in view of the protection and security it provided. True, the nobles enjoyed invidious privileges and rights that weighed heavily on the commoner, but in return for this they kept order, administered justice, saw to execution of laws, came to the rescue of the oppressed, and watched over the interests of all. The more these functions passed out of the hands of the nobility, the more uncalled-for did their privileges appear- until at last their mere existence seemed a meaningless anachronism.  

As the passage suggests, the failure of the traditional aristocracy to perform meaningful functions for the local people resulted in the local people becoming intolerant of the aristocracy’s noble “privileges.” This ultimately resulted in the revolutionary spread of equality in conditions; the aristocracy was forcefully leveled during the French Revolution.

Although Tocqueville seems to recognize how centralization’s leveling of the intermediary institutions can cause equality of conditions, he is also aware of how equality of conditions can exacerbate the state’s centralization. This can be seen in Tocqueville’s concern (in *Democracy In America*) about the rise of “despotism” and regimes lacking in significant freedoms during periods of democratization:

I noticed during my stay in the United States that a democratic state of society similar to that found there could lay itself peculiarly open to the establishment of a despotism…

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think that the type of oppression which threatens democracies is different from anything there has ever been in the world before. Our contemporaries will find no prototype of it in their memories. I have myself vainly searched for a word which will exactly express the whole of the conception I have formed. Such old words as “despotism” and “tyranny” do not fit. The thing is new, and as I cannot find a word for it, I must try to define it.\footnote{Tocqueville, \textit{Democracy In America}, 690-691.}

In the sequel Tocqueville paints an ominous picture of how equality of conditions can isolate citizens from one another:

I am trying to imagine under what novel features despotism may appear in the world. In the first place, I see an innumerable multitude of men, alike and equal, constantly circling around in pursuit of petty and banal pleasures with which they glut their souls. Each one of them, withdrawn into himself, is almost unaware of the fate of the rest. Mankind, for him, consists in his children and his personal friends. As for the rest of his fellow citizens, they are near enough, but he does not notice them. He touches them but feels nothing. He exists in and for himself, and though he still may have a family, one can at least say that he has not got a fatherland.\footnote{Ibid., 691-692.}

Tocqueville, then, describes an insidious despotic state that wins the loyalty and dependence of citizens who have been isolated from one another by the equality of conditions:

Over this kind of men stands an immense, protective power which is alone responsible for securing their enjoyment and watching over their fate. That power is absolute, thoughtful of detail, orderly, provident, and gentle. It would resemble parental authority if, fatherlike, it tried to prepare its charges for a man’s life, but on the contrary, it only tries to keep them in perpetual childhood. It likes to see the citizens enjoy themselves, provided that they think of nothing but enjoyment. It gladly works for their happiness but wants to be the sole agent and judge of it. It provides for their security, foresees and supplies their necessities, facilitates their pleasures, manages their principal concerns, directs their industry, makes rules for their testaments, and divides their inheritances. Why should it not entirely relieve them from the trouble of thinking and all the cares of living? Thus it daily makes the exercise of free choice less useful and rarer, restricts the activity of free will within a narrower compass, and little by little robs each citizen of the proper use of his own faculties. Equality has prepared men for all this, predisposing them to endure it and often even regard it as beneficial.\footnote{Ibid., 692.}
Lest there be any doubt that about the stealth-like enslaving tendencies of such a political regime, Tocqueville seeks to eliminate it with more well-crafted prose:

Having thus taken each citizen in turn in its powerful grasp and shaped him to its will, government then extends its embrace to include the whole of society. It covers the whole of social life with a network of petty, complicated rules that are both minute and uniform, through which even men of the greatest originality and the most vigorous temperaments cannot force their heads above the crowd. It does not break men’s will, but softens, bends, and guides it; it seldom enjoins, but often inhibits, action; it does not destroy anything, but prevents much being born; it is not at all tyrannical, but it hinders restrains, enervates, stifles, and stultifies so much that in the end each nation is no more than a flock of timid and hardworking animals with the government as its shepherd.438

When reviewing these passages, one observes how the oppressiveness of such a state is limited to its centralization (i.e., “administrative centralization”). One sentence from the last passage reveals this clearly: “It covers the whole of social life with a network of petty, complicated rules that are both minute and uniform, through which even men of the greatest originality and the most vigorous temperaments cannot force their heads above the crowd.” Inundating “the whole of social life” with regulations means that the state has enveloped local affairs under its domain. It has usurped matters that were formerly (and could well remain) in the hands of local-level political and civil institutions. Through so aggrandizing its own power at the expense of the local-level, the central government (according to Tocqueville) stifles the development of individual citizens and makes them increasingly dependent on the political sphere for meeting the needs of life.

438 Tocqueville, Democracy In America, 692.
Moreover, Tocqueville explicitly describes how such a state of affairs can be common in a democratic form of government that many people view as the ultimate symbol of self-rule and freedom:

Our contemporaries are ever a prey to two conflicting passions: they feel the need of guidance, and they long to stay free. Unable to wipe out these two contradictory instincts, they try to satisfy them both together. Their imagination conceives a government which is unitary, protective, and all-powerful, but elected by the people. Centralization is combined with the sovereignty of the people. That gives them a chance to relax. They console themselves for being under schoolmasters by thinking that they have chosen them themselves. Each individual lets them put the collar on, for he sees that it is not a person, or a class of persons, but society itself which holds the end of the chain. Under this system the citizens quit their state of dependence just long enough to choose their masters and then fall back into it. A great many people nowadays very easily fall in with this brand of compromise between administrative despotism and the sovereignty of the people. They think they have done enough to guarantee personal freedom when it is to the government of the state that they have handed it over. That is not good enough for me. I am less interested in the question of who my master is than in the fact of obedience.\(^{439}\)

In the above reflection, readers can seen how Tocqueville supplements Nisbet’s analysis. Nisbet focuses on how state centralization crowds out the local-level intermediary institutions and, hence, renders them impotent in fulfilling important moral, social, and psychological needs. Tocqueville supplements this by describing the interplay between centralization, equality of conditions (i.e., democratization), and leveling of the local-level institutions.

It is possible to develop the above insight of Nisbet and Tocqueville by reflecting on how the loss of power at the local-level due to centralization can contribute to both of the following: (1) the loss of thick-level agreement necessary for social cohesion and (2) the loss of political participation that can serve as a catalyst for generating social

\(^{439}\) Tocqueville, \textit{Democracy In America}, 693.
cohesion. As real power to determine the extent of citizens’ civil liberties has been transferred away from the localities and given to the central government of the United States (e.g., to the federal judiciary), localities have lost their former ability to regulate the morals of their denizens. Concomitantly, such localities have lost important means of discouraging people who conflict with the dominant morality from residing there, and violators now have more opportunity to carry on with their iconoclastic and offensive behavior. The implications of this are two-fold. First, an increasing number of localities (some more than others) have lost the thick-level agreement necessary to maintain their social cohesion. Second, the transfer of power from the local to the central levels serves as a disincentive to local political participation. Since local-level politics has lost much of its significance in settling important issues, citizens are now tempted to bypass political participation at the local-level and focus their limited time, energy and resources on the central-level as the new seat of power to determine important issues. Both of these implications undermine social cohesion at the local-level.

Reflections on Malign Implications:

All of this can have malign implications. The above commentary discusses Nisbet’s analysis of a problematic normative implication resulting from the central-level stifling the local-level. There has been a (1) loss of such community as an effective means for providing for and satisfying important moral and psychological needs.

Two other lamentable implications have also been briefly mentioned: (2) the loss of a mode of community that is intrinsically valuable to the human person (i.e., perfects
his or her being) and (3) the loss of community necessary for resolving many “sensitive” public policy issues. This dissertation will reserve its discussion of the third implication for the next chapter. Here it is appropriate to briefly elaborate on the second negative implication.

To accomplish this, it is helpful to recall previous reflection in Chapter One. There we noted how socially cohesive community can only be found in local-level associations where face-to-face relationships are possible. Aristotle elucidates how cohesion (i.e., “political friendship”) is local in nature. He implies this in a very subtle, matter-of-fact way: “Concord also seems to be a friendly relation. For this reason it is not identity of opinion; for that might occur even with people who do not know each other…”440 It is the last sentence of this passage, which is of interest to us. Here Aristotle rules out the possibility that “identity of opinion” can be synonymous with “concord” because it would be possible to have this among “people who do not know each other”; thus, he implies that the condition of “knowing” (i.e., personal acquaintance via face-to-face interaction or association) is a requisite for having concord. In other words, people must have association and personal acquaintance with those whom they are in concord with. On the issue of such concord existing within (among the members of) a community, this can only occur in a local-community setting like a small town (or a neighborhood of a city) because only in such local-community is it possible to have the face-to-face association and personal acquaintance with the other members. Thus, if association in

local community is eliminated, then it is not possible to have concord (or social cohesion) within community.

Furthermore, it should be recalled that a socially cohesive community is intrinsically valuable. This was also discussed in Chapter One. There Budziszewski’s interpretation of Aristotle’s definition of “concord” was elucidated:

Civic concord means much more than the absence of faction. It means that the citizens are neighbors instead of strangers, supporting each other in a close-woven fabric of crisscrossing bonds. It means that they delight in small sacrifices for the common good and are not so obsessed with keeping score. It means that voluntarily and without direction they teach the young, provide for the old and look out for each other. 441

According to this interpretation, “concord” resembles the description of intrinsically valuable community (i.e., one that is valued for its own sake) that Robert George attributes to Patrick Devlin in the famous Hart-Devlin debate:

It is community considered as something intrinsically valuable - a state of affairs which is marked by a distinctive self-understanding among members who in fact identify their own interests and well-being with that of others with whom they live and to whom they are thus integrally related... 442

The parallels between George’s description of Devlin’s view of community and J. Budziszewski’s interpretation of Aristotle’s “concord” suggest that Aristotle might also view “concord” as being an intrinsically valuable mode of community. He views concord as being valued for its own sake by the members of the community, and such concord gives community members a basic and irreducible reason for associating with one another.

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441 Budziszewski, Written On The Heart: The Case for Natural Law, 43.
442 George, Making Men Moral, 69.
This consideration can be supplemented through recognizing how realizing intrinsically valuable human goods perfects the human person. This notion comes from the Aristotelian and Thomistic perfectionist traditions. One contemporary group of such scholars (i.e., New Natural Law theorists- Germain Grisez, John Finnis, Joseph Boyle, and Robert George) has done an excellent job articulating how intrinsically valuable goods perfect the human person. They classify intrinsically valuable goods as basic goods. Such goods provide an ultimate reason, which is grasped through the human power for practical reasoning, for acting to realize them; thus, it is unnecessary and impossible to identify any super-reason above these goods themselves for so acting. This, then, is part of the epistemological and moral conception (i.e., how we know them; and how they affect our moral deliberations) of basic goods. What about their ontology? What is the nature of such goods? As Robert George concisely answers these questions in the following passage of *Making Men Moral*:

> [T]he basic human goods are fundamental aspects of human well-being and fulfillment of flesh and blood human beings. They are not Platonic forms that somehow transcend, or are in any sense extrinsic to, the persons in whom they are instantiated. Nor are they means to human flourishing considered as a psychological or other state of being independent of the basic human goods that provide reasons for action. Rather, they are constitutive aspects of the persons whom they fulfill.  

Thus, the nature of a basic human good consists entirely of it being a “constitutive” facet of human perfection or well-being. When a human being realizes a basic human good, one says that he or she has instantiated part of his or her fulfillment (i.e., perfection or fulfillment) as a human person.

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Based on this, it is possible to say that socially cohesive local-level community, which is by definition intrinsically valuable, is a particular instantiation of a basic human good. Moreover, to make this more precise, one says that it is a particular instantiation of the basic human good of “friendship” described by Aristotle or “sociability” that John Finnis suggests. Finnis’ description of this basic good is concise and helpful for the current discussion:

E. Sociability (friendship)...Fifthly, there is value of that sociability which in its weakest form is realized by a minimum of peace and harmony amongst men, and which ranges through the forms of human community to its strongest form in the flowering of full friendship. Some of the collaboration between one person and another is no more than instrumental to the realization by each of his own purposes. But friendship involves acting for the sake of one’s friends’ purposes, one’s friend’s well-being...

Socially cohesive local-level community is intrinsically fulfilling precisely in that it entails “acting for the sake of one’s friends’ purposes, one’s friend’s well-being…” As Robert George describes the intrinsically fulfilling essence of such community, it is community “marked by a distinctive self-understanding among members who in fact identify their own interests and well-being with that of others with whom they live and to whom they are thus integrally related…”

From these facts, it logically follows that a decline in local-level association will result in a decline in socially cohesive community, which is intrinsically valuable. Thus, a decline in local-level association will result in the normatively undesirable second implication described above: the loss of a mode of community that is intrinsically valuable to the human person (i.e., perfects his or her being).

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Conclusion:

Through the course of this chapter, then, the reader has encountered many topics. First, the issue of changes to the federal system was discussed. Second, this chapter began considering the issue of a State’s instrumental role in securing the possibility of thick-level agreement and social cohesion among the localities within its borders.

Third, the chapter discussed some of the normative problems associated with centralization. It considered how centralization crowds out and debilitates local-level community. This was revealed through reflecting on the work of both Nisbet and Tocqueville. Also, readers saw how the causal-story cannot simply be laid at the feet of centralization; the spread of the equality of conditions during the democratic age has also contributed to both the rise of centralization and the leveling of local-level intermediary institutions. Finally, the chapter considered how the damage done to local-level intermediary institutions has resulted in two (of ultimately three) problematic implications: (1) the loss of a mode of community that was instrumentally necessary for successfully meeting many people’s social and psychological needs; (2) the loss of a mode of community that is intrinsically valuable to the human person (i.e., perfects his or her well-being). The next chapter will examine how centralization contributes to the third problematic implication that has already been mentioned above: (3) the loss of community necessary for resolving many “sensitive” public policy issues.
Chapter Six, Reflections on the declining ability to resolve sensitive public policy, on subsidiarity, and on the natural Law obligation to respect constitutional law.

As the United States has become centralized, there has been a loss of the ability to enact public policy for “sensitive” issues in a manner that settles them (renders them acceptable to the people affected by them). In many ways this is not surprising, for stable resolution of such issues requires thick level agreement and social cohesion, and the federal union lacks these. Indeed, as discussed in the last chapter, the very idea that the federal union is a single American nation is a fallacy, it is no more than a mere confederation among sovereign states. Centralization has transferred power to determine policy for sensitive issues from the local level to the aggregate level; however, the federal union as a whole does not have the thick-level agreement for achieving settling-resolutions for “sensitive” or controversial issues.

This chapter will continue examining the issues of social cohesion, thick-level agreement, sensitive issues, and central versus local power. I will also relate these to the subsidiarity principle (i.e., allowing lower or more local level organizations to perform functions when they can do so with equal or greater appropriateness compared to higher or more distant level organizations). Also, such themes will be considered within various normative arguments against centralizing sensitive issues, but these arguments are developed near the end of this chapter.

Social Cohesion, Thick Level Agreement, and Sensitive Issues:
In beginning this examination, it is helpful to understand the importance of social cohesion and thick-level agreement for communities faced with the task of collectively resolving sensitive issues. A sensitive or controversial issue is one that is highly important to a community (i.e., it has a tremendous impact on how citizens live in and view their society) and is highly controversial due to its moral nature (i.e., it inherently involves moral questions that are often debated and whose various answers require one to assume certain thick-level beliefs). The debate about whether abortion should be legally permitted or prohibited by government is one such example. Other examples include how marriages are defined and recognized by government (e.g., whether government recognition should be extended to same-sex couples) and whether contraception is legally permitted or prohibited.

When examining sensitive issues, one should consider the central vs. local level question. More specifically, one should evaluate the comparative efficacy of politics at the national-level versus politics at the local level for resolving such sensitive issues. When focusing in this manner, one finds that federal-level institutions have failed to resolve such issues; whereas, association at the local level can provide successful resolution, if sufficient thick-level moral agreement and social cohesion are in place.

Partial evidence for the above statement is provided by contemporary America’s experience with the abortion issue. The central government’s (e.g., the Supreme Court’s) attempts to resolve the abortion issue have only resulted in its hyper-politicization. The “pro-life” and “pro-choice” federal level factions are forever arm-wrestling over the ideological make-up of the federal judiciary (especially the Supreme Court) with the aim
of affecting the outcome of future court opinions about the legal status of abortion. The issue is never settled or resolved with finality, and the politics involved in selecting the judiciary continue to deteriorate.

In returning to the theoretical examination of sensitive issues, one identifies several difficult questions that must be answered to resolve such issues. With respect to abortion, for example, one must consider the following: (1) whether abortion (given the particular circumstances) is moral or immoral; (2) whether the human life that is terminated has equal value to the life of a more developed human organism (such as a new-born infant), which is obviously granted legal protection; (3) what constitutes human personhood (i.e., the main source of one’s individual value and grounds for legal protection); (4) when human personhood really begins; and (5) whether other relevant facts about unborn human life helps with recognizing its intrinsic value. Such questions are inherently philosophical and/or theological, and intellectually rigorous arguments can be presented for both sides of this debate.\(^{446}\) Moreover, a community’s answer to these questions will be contingent upon the community sharing sufficiently similar views about the nature of reality (e.g., eternal and temporal reality; divine and human reality; etc.). Ultimately, this entails the community having thick-level moral agreement (i.e., the same specific moral views, which require and are arrived at through possessing the same theological and/or philosophical views on divine and human reality).

\(^{446}\) In commenting on the sophisticated arguments for both sides, I am not adopting a relativist view of abortion. As with all moral issues, there are morally real and true answers to the questions involved in the abortion issue.
As previously intimated, it is such thick-level agreement about morality that helps facilitate and is required for people to integrate with one another in a manner that produces social cohesion. Thus, there cannot be real social cohesion within a community unless there is also such a thick-level agreement about morality.

Based on this, it is possible to see a causal connection between social cohesion and resolution to sensitive issues. As noted above, social cohesion necessarily entails having thick-level moral agreement. One of its other conditions is that it is local by nature. When social cohesion is considered to entail both of these conditions together, we begin to see how it can cause resolution to sensitive issues. In a local face-to-face community where there is significant agreement about specific moral values, members of the community can enter into social cohesion with one another. Such cohesion involves members integrating with one another around their shared thick-level moral and religious/philosophical beliefs, and this integration is the basis for the community’s common answers and positions on sensitive issues. Moreover, through integrating with one another around shared thick-level beliefs, community members can mutually identify with one another’s well-being and interest. They identify others’ well-being and interests with their own. This, in turn, motivates members of the community to agree on answers that will be good for both themselves and their fellows whom they have identified with. Thus, they are not wholly motivated by advancing their own thick-level moral view; rather, they want to advance a given thick-level moral view because it is both their own and the view of their fellows. This, then, functions to mitigate the possible pride and envy that can hinder actualizing agreement among parties who have the same requisite
underlying beliefs. In fact, integration around shared thick-level moral beliefs (and mutual identification of well-being and interests) can produce a common answer to a controversial question soon after the question is even posed and understood by the community. Controversial questions about sensitive issues are usually not very controversial (and, hence, not very sensitive) for a local community marked by thick-level agreement.

*Dealing with Sensitive Issues in the United States:*

With this in mind, it is possible to examine the issue of resolving sensitive issues within the United States. As already discussed, during the colonial and founding periods it was possible to find thick-level moral and religious agreement (and, thus, the possibility of social cohesion) at the local level. This could be contrasted to the lack of community, common good, and thick-level agreement among individual citizens in the federal union as a whole, which some nationalists have erroneously attempted to describe as an “American people” or “single nation”. It is logical, then, to conclude that resolution to sensitive issues could occur within local-level communities (where social cohesion is possible), but such a settling resolution could not be attained by the central government for the federal union as a whole.

The above insights and conclusions can be corroborated when reviewing Donald Lutz’s essay, “Liberty and Equality from a Communitarian Perspective”, which is included in Elazar and Kincaid’s edited volume, *The Covenant Connection*. As already discussed in Chapter Two, Lutz corroborates some of this dissertation’s conclusions.
about early American local-level communities. Specifically, he discusses how such community was partially defined and constituted by its members sharing a common conception of morality; thus, these local communities possessed the thick-level requisites for realizing “social cohesion.” Moreover, similar to this dissertation’s findings, Lutz (as we have seen) also observes a connection among local-level community, shared morality, and democratic politics.

What is even more interesting and relevant is that Lutz further corroborates this dissertation’s analysis when he elucidates a communitarian position for maintaining local-level autonomy over major issues that affect people’s lives. In doing so, he shows how the communitarian position can take direct aim at liberals who seek to advance equality and liberty in local communities via the means of central government intervention. Following the tradition of the Federalist and Anti-Federalist, Lutz attributes his communitarian argument to a pseudonym, Tom Taciturn. In summarizing Tom’s position, Lutz says the following:

The interest-group politics we pursue is the very definition of corruption for Tom. It is clear that he does not like the way we practice politics today whether liberal or conservative, Democratic or Republican. At the same time his distaste does not arise from specific policies we have chosen to pursue. How we treat women, Blacks, the handicapped or the poor should be left up to the community, and the community expresses its will through the legislature acting as the agent of the majority, only after careful deliberation of what is best for the entire community. The communitarian perspective as such does not incline us toward any specific set of public policies. Hence, Tom Taciturn is careful to show us how we could arrive at certain policy recommendations not how we must arrive at them. Always, he says, the policy must be justified by reference to the good of the community and approved by the majority.447

The key to the above passage is the last sentence: “Always, he says, the policy must be justified by reference to the good of the community and approved by the majority.” The communitarian criteria for determining public policy is whether the “majority” views a policy option to sufficiently advance the “good of the community.” Thus, a community’s decision will be contingent upon what the majority deems best to advance the community’s particular common good (i.e., set of commonly shared interests, values, etc.). This is appropriate even for “sensitive” policy issues like how equality is realized through the treatment of “women, Blacks, the handicapped or the poor.” Since each community has its own unique set of values, interests, and conception of rights, each community should also be given the appropriate autonomy to determine the possible resolution to equality-issues (and other sensitive issues) that will best advance its own local-level common good.

Lutz admittedly is not “completely in agreement with the communitarian perspective,” but his reluctance seems to be limited to a few “serious problems.” He summarizes them in the following passages:

In a secular society in which there is not general agreement on some moral standard or transcendental set of values against which the majority can compare its proposed actions, what is to prevent majority tyranny or majority viciousness? The communitarian perspective, after all, assumes a true community, one with commonly held values, interests, and rights. To the extent we lack such a community, the communitarian perspective places us at the mercy of unguided, on might say unbridled majorities.448

Also, there is the matter of where we are to place our community attachments. Is it possible to erect a national community in the communitarian sense of the word? At the time Tom Taciturn was writing community sentiments were focused upon town and county. That is why communitarians like Tom Taciturn could not construct a viable town

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alternative to the Articles of Confederation with a few minor adjustments. Since the community was at the local level, a strong national government threatened the local communities and their local majorities. If we were today to attempt to disperse more power to local majorities, at what point would we simply reproduce the situation of governmental stalemate that Tom Taciturn says we now have? But instead of competing group interests we would have competing geographical interests.\(^{449}\)

Lutz’s objections, then, boil down to two points. In the first passage, he suggests that we no longer have “true community, one with commonly held values, interests, and rights…” In other words, we lack a sufficient thick-level conception of the common good that can serve as sufficient criteria for majorities that would determine public policy. In the second passage, he emphasizes the problem of federalism or how we are to distribute power between the central and local levels. Lutz suggests that the communitarian sense of community is only possible at the local-level. If, however, power was distributed to “local majorities” in accordance with the communitarian perspective, there would be “governmental stalemate” in the form of “competing geographical interests,” and this would merely be a different kind of problem than what is now plaguing the current status-quo of “competing group interests.”

In addressing the second problem ahead of the first, one might respond that Lutz seems to present a false dichotomy. It is possible to conceive of a middle alternative that eliminates Lutz’s stark choice between a loose confederate-system like that under the Articles of Confederation (i.e., which lacked a federal government with adequate powers over individual citizens and, hence, was totally dependent upon state governments to make it operational) and a highly unitary system like the current American system (i.e., in

which the majority of real policy-making power has been concentrated at the federal-
level by a central government, which has or can attain de facto control over the states’
exercise of their powers). A middle-ground alternative would be in accordance with the
true constitutional compact of 1789. This is the system where the local-level
(coordination scheme between state, county and municipal levels) has “reserve powers”,
which includes most of the significant power over domestic affairs, corresponding with
local communities’ thick-level agreement and common good. It is also the system where
the central government only has its “delegated” powers (i.e., very limited power over
domestic affairs) that were entrusted to it by each of the States when they entered into
constitutional compact. Although this middle alternative is far from our current de facto
situation, it was a viable governmental system, and it is still legally sanctioned and
required by the Constitution as the fundamental law of the federal union. Thus, since it
relies on a false dichotomy, Lutz’s second criticism of the communitarian perspective is
invalid.

In returning now to Lutz’s first objection, however, one can see the validity of his
concern about a lack of true community (i.e., one with sufficiently similar values,
interests, and rights) for guiding a majority’s determination of public policy. This is a
trenchant critique of the contemporary United States, and it is similar to what was
suggested earlier in the third negative implication of the previous chapter (Chapter Five):
*the loss of community necessary for resolving many “sensitive” public policy issues.*
There the discussion of this was tabled. Now, it is appropriate to resume the issue. One of
the problematic facts about centralization is how it crowds out and damages local
community. Not only has centralization taken policy-making for sensitive issues away from socially cohesive communities (and, hence, made such issues difficult to resolve), but it has also destabilized the social cohesion of local-level communities—i.e., the places where it has been (or, at least, was) possible to resolve sensitive issues. Thus, centralization has succeeded in taking sensitive issues away from their former and rightful home at the local level, locking them away within the usurping and non-cohesive federal level, and (finally) diminishing the possibility of returning to a state of affairs in which a settling resolution for such issues can be realized at the local level because the centralizing process has already damaged the social-cohesion required for such successful resolution.

Lutz appropriately recognizes that we currently have a supposed “society” that lacks “general agreement on some moral standard or transcendental set of values against which the majority can compare its proposed actions…” However, one should take into context the various nuances between the federal and local levels and the differences between the colonial/founding periods and the present. At the time of the founding, Lutz’s “general agreement on some moral standard or transcendental set of values…” could be found within the United States. However, such agreement was not monistic in nature (i.e., agreement about a single “moral standard or transcendental set of values…” possessed by the United States as a whole); instead, it entailed multiple agreements found in multiple localities. Each agreement was to be found within a local-level community, and such agreement on morality and theology was very specific, differentiated, and

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grounded in particular views about reality (e.g., divine and temporal). In contrast, this thick-level agreement on specific moral and theological worldviews could not be found at the federal level. Although there may have been some agreement among State-peoples about certain general and vague moral norms (e.g., possibly those of the Declaration of Independence), there was no thick-level moral agreement (i.e., agreed adherence to a specific moral and theological worldview). Finally, the contemporary United States seems to largely lack Lutz’s implied notion of thick-level agreement (“moral standard or transcendental set of values”), and this is true for both the federal and local levels; albeit, there are still a few local communities that seem to have thick-level agreement similar to the local communities of early America (e.g., today’s Amish and Mennonite communities).

The local level lacks the requisite thick-level moral agreement partially due to the destruction wrought on it by the crowding-out effect of centralization. As discussed in the last chapter, centralization has made local-level institutions less relevant to people’s lives. As this has occurred, people have paid less attention to them, and they have been less of a factor for individual decision-making. So, if an individual is deciding whether to begin living in a given community, now he or she does not need to consider the community’s dominate values because local communities have very limited actual power to compel compliance with the established morality. Instead, it is the federal government that now determines the extent of an individual’s civil liberties (e.g., the right to privacy entailed the freedom to have an abortion, etc.). With the doctrines of Incorporation of the Bill of Rights and an expansive Commerce Clause, the Supreme Court and Congress have taken
away the autonomy of States and their localities to be the arbiter of personal freedoms. This seems to be a clear example of how centralization crowds-out the local-level. Since the local level no longer has the power to enforce its morality and since people with contravening moralities are not legally compelled to take account of the morality held by a majority at the local-level, local communities have increasingly become a residence for many who contradict one-another’s moral and theological beliefs. Like the federal level, then, the local-level has become more of a heterogeneous moral sphere. Thus, we can apply Lutz’s words to describe much of contemporary local-level community in America; it has become part of “secular society in which there is not general agreement on some moral standard or transcendental set of values against which the majority can compare its proposed actions…” 451

Normative Considerations of Subsidiarity and Preserving Social Cohesion:

It is helpful to continue this chapter by considering additional normative concerns with centralizing sensitive issues. In doing so, two problems seem very important: (1) whether centralizing such controversial issues is a violation of subsidiarity; and (2) how to preclude further damage to the basic good of social cohesion.

With respect to the first, it is possible to derive the following conclusion: the central government’s usurpation of policy-making-power on sensitive issues, which took this power away from the local-level where such issues had previously been resolved more efficiently, seems to have violated the subsidiarity principle. Before getting to the

violation, however, it is helpful to understand the principle. John Finnis describes as


Some recent political thinkers have given this principle the name ‘subsidiarity’, and this name will be convenient provided we note that it signifies not secondariness or subordination but assistance; the Latin for help or assistance is *subsidium*. As we shall see (VII.3), the principle is one of justice. It affirms that the proper function of association is to help the participants in the association to help themselves or, more precisely, to constitute themselves through the individual initiatives of choosing commitments (including commitments to friendship and other forms of association) and of realizing these commitments through personal inventiveness and effort in projects (many of which will, course, be co-operative in execution and even communal in purpose). And since in large organizations the process of decision-making is more remote from the initiative of most of those many members who will carry out the decision, the same principle requires that larger associations should not assume functions which can be performed efficiently by smaller associations.\(^{452}\)

According to Finnis, then, subsidiarity is pregnant with meaning. First, in saying that the “the proper function of association is to help participants in the association to help themselves or, more precisely, to constitute themselves through individual initiatives of choosing commitments…and of realizing these commitments through personal inventiveness and effort in projects…”, Finnis suggests that associations have the “aim” or “end goal” of realizing the well-being of the individuals who participate in them; their aim is not the good of the association or group in-and-of-itself. In other words, the final unit of value is the well-being of the individual, not the group. Second and more importantly, Finnis suggests that “larger associations should not assume functions which can be performed efficiently by smaller associations…” because larger organizations have decision-making processes that are “more remote from the initiative of most of those many members who will carry out the decision.” Since the concern is on protecting

\(^{452}\) Finnis, *Natural Law and Natural Rights*, 146.
the “initiative of the members” from being swallowed by the operation of the group, such concern seems to be a form of the previous admonition about the priority of the individual well-being over that of the group when viewed strictly as a collective-entity.

Commitment to appropriately respecting the subsidiarity principle is ultimately grounded in a concern about allowing individuals to truly realize basic human goods for themselves. As discussed previously, a basic human good is one that is intrinsically valuable and, hence, provides its own justification for acting to realize the good; a human person does not need to further demonstrate that the good is useful for accomplishing another objective, etc. As Finnis notes, however, realizing basic human goods does not always entail experiencing the pleasure consummated through them, but it does necessarily entail taking real action that will realize them. Finnis discusses this in relation to the subsidiarity principle as follows:

What is the source of this principle? I touched on it when I discussed the ‘experience machine’: IV.5. Human good requires not only that one receive and experience benefits or desirable states; it requires that one do certain things, that one should act, with integrity and authenticity; if one can obtain the desirable objects and experiences through one’s action, so much the better. Only in action (in the broad sense that includes the investigation and contemplation of truth) does one fully participate in human goods. No one can spend all his time, in all his associations, leading and taking initiatives; but one who is never more than a cog in big wheels turned by others is denied participation in one important aspect of human well-being.453

Finnis’ reference here to the “‘experience machine’: IV.5” is from the last section of his fourth chapter, which examines the variety and characteristics of basic human goods.

There Finnis employs Robert Nozick’s heuristic “thought-experiment”:

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453 Finnis, *Natural Law and Natural Rights*, 147.
Suppose you could be plugged into an ‘experience machine’ which, by stimulating your brain while you lay floating in a tank, would afford you all the experiences you choose, with all the variety (if any) you could want: but you must plug in for a lifetime or not at all. On reflection, is it not clear, first, that you would not choose a lifetime of ‘thrills’ or ‘pleasurable tingles’ or other experiences of that type? But, secondly, is it not clear that one would not choose the experiences of discovering an important theorem, or of winning an exciting game, or of sharing a satisfying friendship, or of reading or writing a great novel, or of seeing God…or any combinations of such experiences? The fact is, is it not, that if one were sensible one would not choose to plug into the experience machine at all. For, as Nozick rightly concludes, one wants to do certain things (not just have the experience of doing them); one wants to be a certain sort of person, through one’s own authentic, free self-determination and self-realization; one wants to live (in the active sense) oneself, making a real world through that real pursuit of values that inevitably involves making one’s personality in and through one’s free commitment to those values.454

Finnis further elaborates on this line of reflection to establish how “doing” and “action” can participate in the basic human goods independently of experiencing pleasure:

The experiences of discovery (‘Eureka!’) or creative play of living through danger are pleasurable, satisfying, and valuable; but it is because we want to make the discovery or to create or to ‘survive’ that we want the experiences. What matters to us, in the final analysis, is knowledge, significantly patterned or testing performances (and performing them), beautiful form (and appreciating it), friendship (and being a friend), freedom, self-direction, integrity, and authenticity, and (if such there be) the transcendent origin, ground, and end of all things (and being in accord with it). If these give pleasure, this experience is one aspect of their reality as human goods, which are not participated in fully unless their goodness is experienced as such. But a participation in basic goods which is emotionally dry, subjectively unsatisfying, nevertheless is good and meaningful as it goes.455

When reflecting on Finnis’ comments about the necessity of individual action for participating in basic human goods and the relation of this concept to subsidiarity, one can see the profundity of his analysis. When considering the relation of associations to the individual and his or her well-being, the most important function of the association is

454 Finnis, *Natural Law and Natural Rights*, 96.
455 Ibid., 96-97.
to merely assist individuals “constitute themselves through the individual initiatives…”
In other words, the value of associations is subordinate to the higher values entailed in
individuals instantiating basic human goods, which are ultimately realized through
individual initiative. This suggests that special rules should regulate associations so as to
ensure that they do not unreasonably stifle individual initiatives. One such rule is the
subsidiarity principle. It recognizes that the functions and relative inflexibility of larger
associations offers less opportunities for individual initiatives than do smaller
associations; thus, the principles require larger associations not to assume tasks that can
be performed equally (or more) appropriately by smaller institutions. When associations
honor this rule, more opportunity is provided for individuals to take initiatives (via
participation in associations) that instantiate the basic human goods and, hence, the
individuals’ well-being.

With respect to the central government’s usurping policy-making power on
controversial issues from the local-level, this seems to have been a violation of the
subsidiarity principle. When the federal government (i.e., a higher or more distant-level
of organization) assumes control over issues that had previously been in the hands of the
States and their localities (i.e., lower or more local-level organizations), this can only be
justified to the degree the federal level is indeed more efficient (than the States and their
localities) at resolving the issues. Unfortunately, this has not been the case with respect to
determining policy to settle sensitive issues (i.e., develop policies that are acceptable to
citizens of a community). In fact, with respect to sensitive issues, the States and their
localities are much more efficient than the federal level at performing these functions.
Since sensitive issues can only be resolved (in a manner that is acceptable to the community) in socially cohesive community, they can only be so resolved within communities at the local-level. As we have previously discussed, the federal level has always lacked social cohesion and, hence, never has been able to effectively perform this function. Thus, in this respect, there does seem to be a violation of the subsidiarity principle.

In another respect, however, it is questionable whether local control over sensitive issues is always in accord with subsidiarity. In addition to the goal of merely settling sensitive issues, another important objective entails acting in a manner that is in accordance with moral truth. The two goals sometimes conflict with one another. Sometimes a policy that settles a sensitive issue within a community might entail authorizing or mandating action that is not in accordance with moral truth. This may result from the thick-level moral agreement within a community actually contravening tenets of moral truth due to the false moral beliefs of the community. With this in mind, the goal of acting in accordance with moral truth may be undermined by giving a community power to determine policy on sensitive issues (especially those issues involving moral truths that will be violated unless the issues are resolved in a fairly specific and narrow manner). With respect to the goal of realizing moral truth, the subsidiarity principle may not dictate giving local communities full autonomy over a controversial issue, for it may be possible that a State and its localities will enact policy that contravenes one (or more) of the dictates of moral truth. In other words, from the
perspective of truth, it is possible that the subsidiarity principle might direct giving the federal government authority to determine policy for some sensitive issues.

Some may view slavery and subsequent race relations as a paramount example of this. Before the “War Between the States”, the Southern States were proponents of slavery, which (objectively speaking) is morally wrong. Local-level communities within the Southern region of the United States were unable to bring their public policies concerning slavery into accord with moral truth about respecting the equal dignity of all human beings. Furthermore, after the war, the Southern States’ ultimately developed various systems for segregating Blacks from Whites. This, in effect, created a Black underclass within the South, which Whites employed to provide cheap labor and services. Again, this was an example of local-level communities failing to appropriately make their public policies conform to truth about respecting the equal value of human beings.

In both cases, the federal government seemed to be better able (than the local-level communities of the southern States) to identify public policy that appropriately conformed to the relevant moral truths. Slavery was ended by a combination of President Lincoln’s Emancipation Proclamation, the Union Army’s victory in the “War Between the States”, and the Thirteenth Amendment, which was framed and introduced by Congress. Post-reconstruction segregation was ended via a combination of Supreme Court rulings (e.g., Brown v. Board of Education) and Congress’ enactment of the Civil Rights Act of 1964. Grass-roots political demonstrations and pressure, which were employed by the Civil Rights movement in the 1960s, probably also encouraged the federal government’s anti-segregation policies. The relevant point, however, is that the
federal government was able to better identify (in contrast to the Southern States and their localities) public policy that appropriately conformed to truth about respecting the equal dignity of human persons.

Ultimately, then, both local-level control and centralization may be more in accordance with the subsidiarity principle depending on what goal is referenced. On the one hand, centralization of some sensitive issues might better realize the subsidiarity principle with respect to the goal of having policy realize moral truth. On the other hand, local-level control of sensitive issues will better realize the subsidiarity principle with respect to the goal of settling sensitive issues for a community.

When it comes to a conflict between the goal of maintaining intrinsically valuable social cohesion and the goal of appropriately respecting moral truth, the latter must be deemed superior. The normative reasons provided by the intrinsic value of social cohesion are just one of many factors that must be accounted for in determining whether action (both individual and corporate) is compatible with moral truth. Robert George suggests that social cohesion is a valuable goal, but he claims that it is subordinate to advancing moral truth. On this issue, George is very critical of Devlin for condoning of moral relativism. George acknowledges that precluding harm to social cohesion due to breaching society’s dominant morality is, indeed, a prima facie consideration for enacting morals legislation:

456 Devlin’s moral relativism entails protecting society’s dominant morality, regardless of whether or not it is true. According to Devlin’s theory, the harm to a society’s social cohesion via breaching any part of its dominant morality, regardless of whether this morality is objectively moral or immoral, is a sufficient justification for legally prohibiting this violation to societal morality. See George, Making Men Moral, 73-74.
I do not deny that the maintenance of social cohesion and the avoidance of social disintegration are legitimate public interests; nor do I doubt Devlin’s claim that these interests are adversely affected by acts of immorality regardless of whether they cause direct, palpable harm to non-consenting parties.  

For George, however, such an initial consideration is not sufficient, for a society’s morality must be objectively true in order to justify it being legally defended. It cannot be a false morality (e.g., a polygamous morality on marriage) that is somehow popular within a society. Thus, if (hypothetically) centralization of sensitive issues would bring society more into accord with moral truth, it is possible that such a superior goal would (in principle) justifiably trump the importance of realizing/maintaining intrinsically valuable social cohesion at the local level. So, if the cost of centralizing sensitive issues only entails harming the realization/maintenance of intrinsically valuable social cohesion, and if such centralization also realizes moral truth, it is possible that centralizing sensitive issues would (in principle) be normatively permissible if not obligatory.

Nevertheless, there are a host of relevant practical reasons that undermine this initial conclusion. The prima facie basis for centralizing sensitive issues for the sake of realizing moral truth is ultimately undermined by various prudential concerns that render such centralizing to be imprudent.

First, there is the difficulty of government ascertaining moral truth given the moral and religious pluralism of contemporary western culture. Unfortunately, it is possible that many objectively real and absolute moral truths may only be recognizable to human beings who are open to and/or accept certain truths and facets of human

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458 Ibid., 71-82.
experience. This, of course, presumes that common human reason and experience alone may not be sufficient for fully accessing the scope of moral truth. Certain starting assumptions and beliefs about speculative/empirical knowledge may also be required, for such beliefs may be necessary for sufficiently preparing a person to recognize basic reasons for action. This recognition process involves employing one’s practical intellect to engage in non-inferential acts of understanding that grasp the basic reasons for action (i.e., the many and various instantiations of basic human goods, which are intrinsically valuable). Such basic reasons must be so recognized in order to also derive sound moral conclusions through additional acts of practical reasoning.

This issue was already discussed in the Chapter One of this dissertation. As can be recalled from that discussion, the basic good of human life is an important example of this phenomenon. People seem to require sufficient reflection on the unique nature of man in order to ascertain that the life of a human being, like themselves, has intrinsic value (i.e., valued for its own sake, without appeal to or inference from a higher reason). Here various qualities of human personhood seem important. Man has certain cognitive, emotional, and spiritual capacities and components that distinguish him from the other animals and organic life and make him similar to God and the Angels. Moreover, human personhood also includes a bodily nature, and the spiritual nature is uniquely fused to this bodily nature. Through recognizing such insights, one becomes able to ascertain how such a human life (with these unique human capacities and components—bodily, spiritual,

459 The human organism’s being entails the inseparable union of body (physical) and soul (spiritual). As discussed by John F. Crosby in his article, “Human Person,”: “We human persons are not purely spiritual, like Divine Persons and even the angelic persons; we are incarnate persons, and ours is an embodied personhood.” See John F. Crosby, “Human Person”, 309.
cognitive, and emotional) is intrinsically valuable. This basic evaluative judgment is not deduced from the theoretical/speculative knowledge (e.g., empirical, metaphysical, and religious truths) about man’s nature; however, reflection on such truths can prime one’s practical reason for making this non-inferential act of understanding. Inaccessibility to this and other similar practical insights (e.g., the intrinsic value of human life as entailing personhood that includes both body and spirit in union) arises from the fact that many people in contemporary western culture refuse to accept such metaphysical and religious assumptions, which constitute such requisite theoretical/speculative knowledge. Most naturalists and atheistic/agnostic secular humanists, for example, probably would not accept the premise that human beings have an immaterial spiritual capacity and component within their nature. Furthermore, even among Christian theists, there are serious differences about the immaterial spiritual capacity and component of human nature. Catholics and Orthodox are willing to accept the thesis that humans have an immortal soul sometime between conception and birth; whereas, many Protestants view this to be mere extra-Biblical theological speculation that is unreliable and irrelevant for evaluating the life of post-conception and pre-birth modes of human beings (e.g., embryos and fetuses). Such sectarian differences on the moral-theology of abortion are further elaborated in Chapter Seven. Since embryos and fetuses clearly lack the emotional and cognitive components and capacities of human personhood, their possession of bodily and spiritual components and capacities becomes vital for evaluating their intrinsic value. The lack of openness that many Protestants have to the “Tradition” component of Catholic and Orthodox theology (e.g., belief in “ensoulment”) make it
difficult for them to ascertain the intrinsic and equal value of embryos and fetuses; albeit, conservative Protestants’ socialization in and identification with traditional Christianity often render them stalwart defenders of such new human life, even though their view of theological authority severely hinders their moral theology. This is an important example of how the inaccessibility and non-openness to various metaphysical and religious truths can hinder proper ascertainment of basic human goods (e.g., the full scope of human life as a basic good). Such access may also require accepting certain premises that are unique to a particular type of human experience: the experience of receiving God’s revelation about eternal realities, the spiritual ontology of the human being, and the moral obligations/duties that result from such eternal and spiritual realities.

With this difficulty in mind, one must question the prudence of both (1) legally compelling moral truth in a pluralistic community in which a large block of citizens may be disconnected from such truth and (2) centralizing sensitive or controversial issues for the sake of legally compelling moral truth within a pluralistic national community. With respect to the first, it is possible that some instances of genuine moral truth are only recognizable to a limited number of people who possess the requisite experience and speculative beliefs necessary for making relevant non-inferential acts of understanding about the basic reasons for action (those that must be so recognized to derive sound moral conclusions via further practical reasoning) within a pluralistic society. The corollary of this is that such genuine moral truth may be largely unrecognizable to a majority of people within that society.
This, then, raises questions about whether it would be prudent to legally compel such a morally ignorant majority to appropriately respect the dictates of moral truth that they do not recognize. According to Robert George’s interpretation of Aquinas, prudential considerations suggest that this question can be answered in the negative:

The limits of legal prohibition of vice, for Aquinas, are not based on any supposed moral right of those whose actions might otherwise be prohibited. He does not suppose that people have a moral right to the legal liberty to perform immoral acts. He cites no principle of political morality which is transgressed by legislators who bring the coercive force of the law to bear against, say, putatively victimless immoralities. Rather, he judges it morally right to refrain from legally prohibiting vice where, given the condition of the people, the prohibition is likely to be futile or, worse yet, productive of more serious vices or wrongs. Citing Isidore, he holds that laws, if they are to serve the common good of leading the people to virtue, must be ‘according to the customs of the country’, and ‘adapted to place and time’.  

Here George suggests that Aquinas sees a normative basis for not “prohibiting vice” in cases “where, given the condition of the people, the prohibition is likely to be futile or, worse yet, productive or more serious vices or wrongs.” In the sequel, George interprets Aquinas as focusing this insight on “laws” that are “too difficult” for the people of a community to “comply with”:

What Aquinas appears to have in mind is that laws which the multitude of a people generally find too difficult to comply with will produce a negative attitude toward the law in general, and lead to resentment and hardening of hearts, and possible even rebellion. If, as Aristotle thought, the project of leading people to virtue requires that the law ‘calm them down’, and habituate them to doing the right thing, then the law imposed on them toward these ends must be laws that they can bear. If a law provokes resentment and rebelliousness, then, far from calming passion-driven people so that they can become virtuous, the law will enflame their passions and make them less virtuous. Hence, the prudent legislator will be careful to make the law fit the condition of the people, and not make legal prohibitions too onerous.  

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461 Ibid.
According to George’s interpretation of Aquinas, such “prudential” considerations are significant justifications for not enacting laws that ban immorality where and when large segments of the population deem such laws to be “onerous”. Such legal prohibitions risk “enflame[ing]…” people’s “passions” and, hence, can “make them less virtuous.” In these cases, legal compulsion can also undermine the institution of law by “produc[ing]…a negative attitude toward the law in general, and lead[ing]… to resentment and hardening of hearts, and possible even rebellion.” According to this interpretation of Aquinas, although there is a prima facie basis for employing “the law” to (“as Aristotle thought,”) “calm…down and habituate them [(i.e., the people of the polity)] to doing the right thing,” there are more weighty normative reasons for not prohibiting moral vices in cases where such “a law provokes resentment and rebelliousness…” In these cases, morals laws (which large segments of the population will regard as “onerous”) cannot realize the “calming” and “habituating” purposes that initially might have justified them.

The second major set of prudential problems directly relates to centralizing controversial issues within a pluralistic federal union for the sake of legally encouraging moral truth. Such problems can be briefly listed as follows: (1) there is reasonable ambiguity about whether the federal government would be more effective than the State governments in identifying and advancing moral truth; (2) assuming (for the sake of argument) that the federal government could be more effective than the States in advancing moral truth with respect to a particular sensitive issue, there is still reasonable concern about whether giving requisite powers to the federal government to govern such
a sensitive issue would result in the federal government also acquiring power over other controversial issues with respect to which the States could better realize moral truth; (3) there is reasonable concern that the transfer of power from the local to the federal level would be one-way (i.e., historical experience suggests that power is usually transferred from the States to the federal government, but rarely from the federal government to the States). Such one-way transfer of power could obstruct subsidiarity in cases where the federal government became less capable than the States in advancing moral truth with respect to the issues over which the feds had previously gained control.

The first problem stems from skepticism, which seems largely justified by United States history, about whether the federal government would be more effective than the State governments in identifying and advancing moral truth. Historically, both the State and federal levels have been subject to biases and inclinations that seem to blind or otherwise obstruct them from advancing moral truth on sensitive issues. As previously discussed, many State governments in the South were unable to realize moral truth with respect to the sensitive issue of slavery. In this case, the economic and cultural interests that were served by slavery seemed to blind or obstruct such States from enacting policy that advanced moral truths that dictate respecting equal value and dignity of all human persons and proscribing acting to the contrary (e.g., “requirements of practical reasonableness” like the “Golden Rule of fairness”, “the so-called Pauline Principle which forbids the doing of evil that the good may come”, and the “moral norm…enjoining us to treat…every human life as an end rather than a mere
However, since the late part of the twentieth century, the federal government has also proved unable to effectively advance moral truth with respect to the sensitive issue of abortion. The United States Supreme Court has wrongly ruled State laws, which proscribe abortion, to be unconstitutional; hence, it has seriously curtailed local-level communities’ ability to protect human life. In this case, the federal government has obstructed policy-making that would have appropriately advanced similar moral norms that were also relevant in the case of slavery and racism (see above examples).

Moreover, as was true with the Southern States before the “War Between the States”, the Federal Court’s action seems motivated by the views and biases of a culture that pervades and dominates the institution of American constitutional law. This is an elite culture of left-leaning ideologies such as contemporary liberalism. Robert Bork discusses this in the following passage from his book, *The Tempting of America: The Political Seduction Of The Law*:

The constitutional culture- those who are most intimately involved with constitutional adjudication and how it is perceived by the public at large: federal judges, law professors, members of the media, public interest groups- is not a cross-section of America politically, socially, or morally. The truth is that the judge who looks outside the historic Constitution always looks inside himself and nowhere else. And when he looks inside himself he sees an intellectual, with, as often as not, some measure of intellectual class attitudes…The wide disparity between left-liberal values of the intellectual class and the dominant values of bourgeois culture has existed and been widely recognized for a long time. For almost all of this century the “political weight of American intellectuals…has been disproportionately on the progressive, liberal, and leftist side.”

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Here Bork describes how the institutions of constitutional law are dominated by members of the intellectual class, who tend to be left-leaning in their ideology. When the “federal judges, law professors…” who are part of the “constitutional culture” stray from ascertaining how “the historic Constitution” governs the adjudication of cases, they tend to make decisions that reflect their own subjective views and biases as intellectuals. These, in turn, are often heavily influenced by the left-leaning cultural perspectives of the intellectual class to which they belong.

Bork also reveals how Constitutional judges’ biases and views that seem part of this left-leaning perspective:

[T]he Court has also partially adopted the other prong of left-liberal ideology, moral relativism or the privatization of morality. This may be seen very dramatically in the Court’s creation of the “right to privacy,” which has little to do with privacy but a great deal to do with the freedom of the individual from moral regulation. When privacy is not a plausible concept in the circumstance of a case, various Justices have, we have seen, invented other rights to free the individual from community standards: the right not to conform, the right to dignity, and right to be left alone. All are expressions of rampant individualism and hence moral relativism. The Constitution does protect defined aspects of an individual’s privacy and it does privatize specified areas of moral behavior. The fourth amendment’s protection of the privacy of the home from unreasonable searches is an illustration of the former, as is the first amendment’s protection of the free exercise of religion of the latter. But the Court has erected individual autonomy into a constitutional principle that sweeps far beyond any constitutional provision, as it did in cases forbidding the regulation of the sale of contraceptives and drastically restricting the ability of state legislatures to regulation abortion. The relativity of morality was certainly expressed by the four Justices who voted that a community may not express its sexual morality in a law prohibiting homosexual conduct.  

Here Bork frequently describes federal judges’ permissiveness toward abortion, contraception, and homosexuality as moral relativism. This might be true, but maybe such judges actually adhere to a left-leaning mode of moral realism (e.g., one that values

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individual freedom as dominate perfectionist value to be advanced) that is antithetical to the traditionalist moral realism. Regardless, the above description seems to accurately reveal how the Supreme Court justices’ left-leaning biases and views contribute to obstructing the advancement of moral truth (e.g., on abortion and contraception) via proscribing the possibility of state legislation that appropriately prohibits and/or regulates such immorality.\footnote{A more specific example of this is the ulterior rationale for the Court’s decisions in \textit{Griswold v. Connecticut} (1965) and \textit{Eisenstadt v. Baird} (1972). Contrary to how Justice Douglas framed the Court’s opinion so as to focus on protecting the “institution of marriage”, Robert Bork argues that “the protection of marriage was not” the true “point of \textit{Griswold}. The creation of a new device for judicial power to remake the Constitution was the point.” See Bork, \textit{The Tempting of America}, 99. Bork views “\textit{Griswold}” to entail assuming “judicial power unrelated to the Constitution” in a manner similar to “\textit{Lochner}”, which (according to Douglas’s own words) entails the Court functioning “‘as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.’” Ibid., 99. According to Bork, the “Court majority said there was now a right of privacy but did not even intimate answer to the question, ‘Privacy to do what?’” Ibid. The “truth is that ‘privacy’ will turn out to protect those activities that enough Justices to form a majority think ought to be protected and not activities with which they have little sympathy.” Ibid. Robert Bork continues his analysis of Court’s privacy rulings in later pages of \textit{Tempting of America}: “\textit{Griswold v. Connecticut} invalidated a law prohibiting the use of contraceptives on the ground that government must not enter the marital bedroom. The focus, spurious as it was, at least seemed to confine the ‘right to privacy’ to areas of life that all Americans would agree should remain private. But almost at once a Court majority began to alter the new right’s rationale and hence to expand its coverage in unpredictable ways.” Ibid., 110. The first of the Court’s mutations occurred with its ruling in \textit{Eisenstadt v. Baird}, which struck down a Massachusetts law that both “regulate[ed] the distribution rather than the use of contraceptives” and “provided that married persons could obtain contraceptives to prevent pregnancy on prescription only, and single persons could not obtain contraceptives for the purpose of preventing pregnancy but only to prevent the spread of disease.” Ibid. The Court “invalidated the statute under the equal protection clause of the fourteenth amendment and began the transformation of the right of privacy…” Although “\textit{Griswold} did not, of course, deal with distribution of contraceptives but with a prohibition of use,” the Court claimed that “under \textit{Griswold} the distribution of contraceptives to married persons cannot be prohibited…”’ Ibid., 110-111. Was this just an honest mistake? According to Bork, \textit{Griswold}’s “rhetorical appreciation of marriage” was “dropped because the Massachusetts statute treated married couples and single persons differently, and the Court wanted to strike down the law as to unmarried people.” Ibid. 111. The underlying theme, which Bork identifies in his analysis of Eisenstadt, is a powerful example of the Court adjudicating constitutional law according to left-leaning ideological biases and views: “Significantly, the argument of the Court shifted from the sanctity of a basic institution, marriage, to the sanctity of individual desires. The unmarried individual has, as a matter of fact, the freedom to decide whether to bear or beget a child, of course, because he or she has the right to choose whether or not to copulate. But that did not seem enough to the Court, perhaps because copulation should not be burdened either by marital status or by abstinence from its pleasures. There may or may not be something to be said for this as a matter of morality, but there is nothing to be said for it as constitutional law. The Constitution simply does not address the subject.” Ibid.}
If both the State and federal governments are subject to various biases that tend to blind or otherwise obstruct them from advancing moral truth on sensitive issues, how can one be more trusted over the other to advance moral truth with respect to sensitive issues? Historical experience suggests that neither level of government can be viewed as an infallible (or even a reliable) arbiter of moral truth. The policies of each are merely a function of the interests and perspectives of the people who dominate the relevant policy-making departments of such governments. If such people have various biases and interests that blind or obstruct them from pursuing moral truth, then we can expect them to implement their policy-making influence in a manner that similarly hinders the advancement of moral truth.

The above reflection might suggest a compromise: giving each level the ability to govern the particular sensitive issues that each has historically been superior at handling. Unfortunately, such an efficient division has historically proven to be impossible. This becomes evident when we examine the second of the above listed problems: assuming (for the sake of argument) that the national government could be more effective than the States in advancing moral truth on some sensitive issues, there is still reasonable concern that allowing the federal government to govern such issues would result in it also acquiring power over other issues on which the States could better advance moral truth through their governance.

One of the most telling examples of this has been the history of the 14th Amendment, which was adopted to protect a certain limited scope of individual rights from State intrusions. Several decades after this amendment was enacted the Supreme
Court began employing its “due process” and “liberty” clauses as a means of applying the Bill of Rights (the content of which the Supreme Court interprets) to the States. Such “Incorporation” resulted in the Supreme Court positing both (1) Constitutional rights that individuals have against State governments and (2) duties that State governments have in relation to the individuals within their domain. This has been criticized by various legal scholars and historians (e.g., Charles Fairman and Charles Rice). These critics maintain that such “Incorporation” of the Bill of Rights was not intended by those who adopted the Fourteenth Amendment in 1868. Along these lines, Supreme Court Justice Miller’s majority opinion in the Slaughter-House Cases suggests that the Thirteenth, Fourteenth, and Fifteenth Amendments were merely intended to apply to freeing and securing the freedoms of Africans Americans (as the former “slave race” in America) and any other racial group that might hypothetically become similarly enslaved:

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most causal examination of the language of these amendments, no one fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth. We do not say that no one else but the negro can share in this protection. Both the language and the spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly
and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of the African descent. ⁴⁶⁶

Though “Incorporation” does not seem to be part of the original understanding of 14th Amendment, it has become an accepted part of Constitutional Law, and the Supreme Court has struck down many State laws due to their lack of congruence with various “rights” to liberty that the Supreme Court “finds” in the Bill of Rights. Charles Rice observes how the Court has employed Incorporation to expand its jurisdiction over sensitive policy issues (e.g., contraception and abortion) that had long been governed by the States:

The Court has interpreted the Bill of Rights so as to also rights not specified therein, which rights, arising from its own interpretation, it has proceeded to apply against the states. For example, in 1965 the Supreme Court struck down as unconstitutional a Connecticut law prohibiting the use of contraceptives. To accomplish this, the Court had to find a right of reproductive privacy in the Bill of Rights so as to hold that the due process clause of the Fourteenth Amendment forbids Connecticut to violate it. Less resourceful jurists might have said, as Justice Black did in dissent, that the framers did not have reproductive privacy in mind when they proposed the Bill of Rights and therefore the Connecticut law did not violate the Fourteenth Amendment. The majority of the Court, however, discovered such a right of privacy in the “penumbras formed by emanations from the Bill of Rights.” This ruling was the precursor of Roe v. Wade, in which the Supreme Court held that the unborn child is not a person for purposes of the Fourteenth Amendment and that the right of privacy prevents the states from prohibiting abortion. Even in the third trimester the state cannot prohibit abortion in any case where it is sought for physical or mental health of the mother. In view of the elasticity of mental health as a criterion, the rulings are thus a warrant for elective abortion at every stage of pregnancy, right up to the time of birth. As a result, every year we kill by legalized abortion more than 1.5 million babies. The point here is not to analyze the abortion issue itself. Rather, the purpose is to discuss the error involved in the Supreme Court’s holding that the first eight amendments of the Bill of Rights are strictly applied against the states through the Fourteenth Amendment. This error affects areas as diverse as defamation,

school prayer, search and seizure, self-incrimination, capital punishment, pornography, and homosexual activity.\textsuperscript{467}

As made evident by Rice’s above analysis, the Court has employed Incorporation of the Bill of Rights in a manner that contravenes important moral truths that condemn abortion.\textsuperscript{468} Such moral truths underlie the justification for legally prohibiting abortion in a similar manner to how the state prohibits the killing of other human beings after their birth. A similar indictment might be made about the Court’s rulings against State laws prohibiting contraception.\textsuperscript{469}


\textsuperscript{468} These moral truths include “‘requirements of practical reasonableness’” like the “Golden Rule of fairness”, “the so-called Pauline Principle which forbids the doing of evil that the good may come”, and the “moral norm… enjoining us to treat… every human life as an end rather than a mere means…” See George, Making Men Moral, 11 and 17.

\textsuperscript{469} The issue of morals laws against contraception is less certain than those prohibiting abortion. On the one hand, one might believe that the Court’s permissiveness toward contraception in Griswold v. Connecticut, which proscribed states from prohibiting the use of contraceptives, is unjustified because contraception is clearly immoral. Contraception violates moral norms like those demanding “treat[ing]… every human life as an end rather than a mere means…” and prohibiting “the doing of evil that the good may come”. See George, Making Men Moral, 11 and 17. As George makes clear in an article co-authored by Gerard Bradley, contraception is “non-marital and morally bad…”, for “all non-marital sex suffers from at least one grave moral defect: Sex that is not for the intrinsic good of marriage itself- sex, that is to say, which is wholly instrumentalized to pleasure or some other goal- damages personal (interpersonal) integrity by reducing persons’ bodies to status of means to extrinsic ends.” See Robert George and Gerard Bradley, “Marriage and the Liberal Imagination”, in In Defense of Natural Law, by Robert P. George (Oxford, U.K.: Oxford University Press, 1999), 147. If contraception is clearly immoral, then there is a prima facie basis for laws that ban it, especially if one assumes (as do many natural law theorists) that law and state coercion can be used to discourage immoral acts. Nevertheless, there are contravening reasons why morals laws against contraception might be imprudent, and George suggest this as follows: “A huge variety of prudential considerations enter into the questions of whether and how the state should act against any immoral conduct, especially conduct that typically involves little or no injustice. Such considerations might militate strongly in favor of legal immunity for married couples to use contraceptives.” Ibid., 150. One such prudential concern might be the fact that an overwhelming block of the American population would not agree with and might even rebel against such a law, due to their disagreement with the law’s presupposition that contraception is immoral.

Nevertheless, regardless of one’s ultimate conclusion about the prudence of laws banning contraception, Robert Bork seems correct in his assessment that the Court wrongly decided Griswold v. Connecticut: “None of the amendments cited, and none of their buffer or penumbral zones, covered the
14th Amendment and the fact that many States would probably handle the relevant sensitive issues in a superior manner (e.g., a State’s restrictive policy on abortion versus the Court’s federally mandated permissive policy on abortion), one concludes that giving policy-making power to the States concerning such issues would be a more efficient means of realizing moral truth.

Based on such reflection, the above examples serve as evidence that granting requisite powers to the federal government to govern certain sensitive issues (e.g., race relations) can result in it also acquiring power over other sensitive issues (e.g., abortion and sexual ethics) with respect to which the States can realize moral truth more appropriately. This, then, is a serious prudential problem with allowing federal government to control select sensitive issues.

Finally, there is the third of the above problems that results from selectively dividing policy-making powers over sensitive issues between States and the federal government (according to the historical ability of each to realize moral truth). Specifically, it is reasonable to believe that the transfer of power from the local level to the federal level would be one-way (i.e., historical experience suggests that power is usually transferred from the States to the Federal government, but rarely from the Federal
government to the States), and a one-way transfer would obstruct subsidiarity in cases where the federal government becomes less capable than the States in advancing moral truth with respect to the issues it gains control over. Examples of this are not hard to imagine. In the area of race relations, for example, the federal government could change from having a relatively superior ability (compared to the States) in advancing moral truth to having an inferior ability. Such a hypothetical might occur if the federal government (e.g., the Supreme Court) mandated certain draconian and unjust measures for the purpose of “equalizing” conditions and benefits among the races.

Here we also see a problem with the possibility of Congress enacting policy over sensitive issues. Unlike the Supreme Court, Congress is less subject to the intellectual class biases that seems to frequently blind the Court from appropriately identifying moral truth. Although Congress is vulnerable to various democratic biases and views that are contrary to moral truth, this is also true of the State legislatures. In fact, it is possible for Congress to have an advantage over States in identifying moral truth due to the multiple and varying interests among State-peoples in the United States as a federal union. This often forces many compromises in Congress in an attempt to develop a working consensus among competing State-peoples. 470 Thus, various conflicts will only allow the

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470 Although this resembles James Madison’s view of multiplicity and diversity of interests in Federalist # 10 and # 51, it is different. Madison seems to focus on interests that cut across the State-peoples, rather than on the competition among different State-peoples. In truth, this was probably part of his and Hamilton’s attempt to interpret the United States system and the new Constitution as being partly federal and partly national. The reality, however, was that the State-peoples were in a continual struggle to control the federal government. The various State-peoples quickly developed into competing geographical coalitions (e.g., North and South) as a means of accomplishing this goal. Although the federal government’s military defeat of the Southern States and its progressive robbing of the State’s effective autonomy has (along with the 13th-17th Amendments) weakened Representatives’ and Senators’ attachment to their State-peoples and allowed various trans-State interests to have greater impact on federal policy,
development of lowest common denominator agreement. This can function to filter-out many biases that might more easily blind the States’ smaller governing bodies from identifying moral truth. Some of the biases so filtered may include the biases and interests of various localities and/or regions, like previous pro-slavery and racist biases of the Southern States that correlated with their long-time dependence on slave labor and, then, the cheap labor of freed blacks.471

Nevertheless, this analysis also proves too much. For even though the diversity of State-peoples represented in Congress may make it less likely to enact immoral legislation relative to individual State legislatures with more limited constituencies who have regional/local biases, this factor also can preclude Congress from taking sufficient policy action on sensitive issues. Since Congress represents diverse State-peoples, their competition in Congress over policy-direction would preclude it from enacting sufficiently numerous and effective morals laws necessary to uphold moral truth. It is very doubtful, for example, whether Congress could amass a sufficient majority to enact legislation imposing bans across the federal union on all abortion (except cases where continued pregnancy seriously threatens the life of the mother), homosexual sodomy, and/or contraception (assuming, for the sake of argument, that such issues had not constitutionally Congress still represents the various State-peoples and much of contemporary federal politics still hinge on combinations of regional coalitions among State-peoples (e.g., Southern States, West Coast States, upper Midwestern States, lower Midwest States, Northeastern States, and Mountain States). Despite all the noise to the contrary, this is seen clearly at climax of every presidential election.

471 The various diverse State-peoples represented within Congress will not guarantee the realization of moral ends or the absence of all immorality in policy, but it can function to filter-out some of the immorality. Historically, Congress has occasionally participated in immoral policies that bedeviled some of the States. One example is Congress’ enactment of the Fugitive Slave Law of 1850, which set up procedures for arresting and returning runaway slaves.
already been ruled off-limits by the federal judiciary). Thus, even though the diversity of State-peoples in Congress may make it less vulnerable than a State legislature (with a limited and possibly corrupt constituency) to produce bad or immoral legislation (e.g., laws promoting abortion or allowing drug use), this asset turns into liability when it comes to taking sufficient legislative action to uphold so many of the areas of moral truth that are undermined and threatened within contemporary society. As the legislature of a diverse federal union, Congress is just not equipped to sufficiently employ its legal powers to combat several objectively valid moral truths that are subjectively rejected by many State-peoples of the contemporary federal union.

Since both the federal government and the States can have various difficulties realizing moral truth and since there are many practical problems with giving the federal government control over sensitive issues for which it might better realize moral truth, the most reasonable strategy (with respect to realizing moral truth) appears to be returning policy power over sensitive moral issues back to the States (and the States retaining such power to the extent that they already possess it). This is verified when assuming the reasonableness of choosing a scenario that both maximizes reward and minimizes risk. If the federal government attains power over sensitive issues, it is likely that the best or worst outcomes could arise with respect to the goal of realizing moral truth. The best outcome would entail the federal government attaining such power and, then, using it to correctly advance moral truth via uniform federal policies. However, as demonstrated both (1) by America’s twentieth century experience of the Supreme Court (in effect) developing bad policy on sensitive issues and (2) by the probable insufficient action by
Congress on sensitive issues, such a **best** outcome is improbable. Also, it is doubtful that there is currently a sufficient coalitional majority among the State-peoples for amassing political pressures (via Congressional impeachment/oversight and Presidential appointments) to move the Court in a socially conservative policy direction (i.e., either forcing the Court to allow Congress to realize moral truth by mandating social conservative policies or the Court, itself, mandating such social conservative policies). Instead, twentieth century history of the Court suggests that the **worst** scenario outcome is probable if the federal government attains power to resolve the sensitive issues. The Court has ignored and (in some cases) usurped the States’ reserved powers and, then, ruled in a manner that both fails to promote realization of moral truth and even advances a false alternative (e.g., rulings that create precedent and/or policy that affirms homosexuality and allows abortion). Moreover, since Congress probably would not act to advance moral truth on many sensitive issues (e.g., banning abortion and homosexual sodomy), the Court would probably fill this void.

On the other hand, if the States have requisite power to resolve sensitive issues, a **median** outcome will probably result: some States will enact policies that are in accordance with moral truth, and some States will fail in this endeavor. The governments of Heartland States, for example, like those in the lower Midwest, upper Rocky Mountains, and the South will likely advance moral truth through morals legislation (e.g., laws that prohibit abortion and discourage homosexual lifestyles). In contrast, West Coast States (maybe with the exception of Alaska) and Northeastern States probably will not do this. This **median** outcome ensures that some State regimes will be hospitable to moral
truth; albeit, it also concedes that others will not. As long as this system of State-determination of sensitive issues is supplemented by the freedom of individuals and groups to move away from States that conflict with their moral sensibilities and, then, re-settle in other States that are more normatively compatible, such a system seems like a just manner of appropriately maximizing governments and policies that are in accordance with moral truth.\textsuperscript{472} The locus of power to determine policy is disseminated to the governments of States, and this increases the possibility of maximizing the realization of moral truth by allowing common adherents of moral truth to congregate with one another (e.g., migrating to or remaining in States with majorities that advance moral truth), organize themselves politically, and democratically pressure their local-level governments to enact policies that are in accordance with and foster moral truth. The realization of moral truth is maximized by ensuring (through the above combination) that some local-level communities will be able to enact policies that uphold moral truth.\textsuperscript{473} At

\textsuperscript{472} This is a particular federalist institutional manifestation of the libertarian “framework” vision that Nozick develops in the last section of his book, \textit{Anarchy, State, and Utopia}. The following passage from this book is telling: “If the ideas must actually be tried out, there must be many communities trying out different patterns. The filtering process, the process of eliminating communities, that our framework involves is very simple: people try out living in various communities, and they leave or slightly modify the ones they don’t like (find defective). Some communities will be abandoned, others will struggle along, others will split, others will flourish, gain members, and be duplicated elsewhere. Each community must win and hold the voluntary adherence of its members.” See Nozick, \textit{Anarchy, State, and Utopia}, 316. A possible contrast can be made between Nozick’s theoretical assumptions here and those of this dissertation. Nozick may view federalist experimentation as a possible means for discovering the good. This dissertation, however, views federalism as a means of maximizing the realization of already knowable objective moral goods.

\textsuperscript{473} Somewhat similar to this, a confederational mode of realizing cultural goods (and obstructing the spread of cultural corruption) is also discussed by David Hume in his essay, \textit{“The Rise of Arts and Sciences.”} Hume argues that “the divisions into small states are favorable to learning, by stopping the progress of authority as well as that of power… [W]here a number of neighboring states have a great intercourse of arts and commerce, their mutual jealousy keeps them from receiving too lightly the law from each other, in matters of taste and of reasoning, and makes them examine every work of art with the
the same time, this strategy surrenders some communities where succeeding at this goal is improbable. Finally, such a strategy eliminates the risk of morals legislation being controlled by an elite class of ideologically similar people who infiltrate the legal institutions (e.g., law schools, the bar association, and judgeships) and push the federal judiciary to impose uniform policies (on sensitive issues) that are not in accordance with moral truth. It also appropriately precludes the possibility that moral truth will not be sufficiently acted upon by Congress whose representation of diverse State-peoples can paralyze it from banning many grave moral evils (e.g., abortion).

With all of the above in mind, we can summarize various conclusions as follows. Centralization of sensitive issues for the sake of subsidiarity with respect to advancing moral truth seems imprudent and unreasonable when its cost/benefits are compared to greatest care and accuracy. The contagion of popular opinion spreads not so easily from one place to another. It readily receives a check in some state or other, where it concurs not with the prevailing prejudices. And nothing but nature and reason, or at least what bears them a strong resemblance, can force its way through all obstacles, and unite the most rival nations into an esteem and admiration of it.” See David Hume, “The Rise of Arts and Sciences”, in Essays: Moral, Political, and Literary, ed. Eugene F. Miller, 120. Thus, there is an advantage in having separate sovereign States trade and interact with one another. Through this process, separate and rivaling national identities can function as filters against bad foreign ideas and art, while only allowing good foreign culture to take root. Hume believes that history demonstrates this in the cases of ancient Greece and modern Europe: “GREECE was a cluster of little principalities, which soon became republics; and being united both by their near neighborhood, and by the ties of the same language and interest, they entered into the closest intercourse of commerce and learning. There concurred a happy climate, a soil not unfertile, and a most harmonious and comprehensive language; so that every circumstance among the people seemed to favour the rise of the arts and sciences. Each city produced its several artists and philosophers, who refused to yield the preference to those of neighboring republics: Their contention and debates sharpened the wits of men: A variety of objects was presented to the judgment, while each challenged the preference to the rest: and the sciences, not being dwarfed by the restraint and authority, were enabled to make such considerable shoots, as are, even at this time, the objects of our admiration.” With respect to Modern Europe, Hume has a similar view: “Europe is at present a copy at large, of what GREECE was formerly a pattern in miniature. We have seen the advantage of this situation in several instances. What checked the progress of the CARTESIAN philosophy, to which the FRENCH nation shewed such a strong propensity towards at the end of the last century, but the opposition made to it by the other nations of EUROPE, who soon discovered the weake sides of that philosophy?” Ibid., 121.

Here I want to thank Professor Donald Livingston for suggesting the applicability of Hume’s above insights to this part of my dissertation.
that of the States having power to resolve sensitive issues. So, the consideration of centralization for the sake of subsidiarity for advancing moral truth (i.e., centralization to the extent the federal government can advance moral truth more efficiently) holds little (if any) weight against the already discussed consideration of providing for local-level (e.g., combination of a State and its localities) control over sensitive domestic issues (which accords with the original constitutional system whereby the States have expansive reserve powers) for the sake of fostering a subsidiarity in settling sensitive issues (i.e., finding resolutions that the local community can abide with- i.e., that settles the issues for the local community). With this in mind, one can see how concern for advancing moral truth does not undermine or refute the case for providing the local-level with sufficient policy-making power over sensitive issues in order to realize a subsidiarity in settling such issues.

Furthermore, the central government’s usurping of the States’ reserve powers to resolve sensitive issues is probably an overall violation of the subsidiarity principle in general. It clearly violates subsidiarity with respect to the goal of settling sensitive issues. Moreover, centralization of sensitive issues was not justified according to the subsidiarity for the sake of realizing moral truth (i.e., with the assumption that the federal government is more efficient than the States in realizing moral truth), for there are several practical reasons (discussed above) why centralization of sensitive issues is not (in the long-term and all things considered) more efficient in realizing moral-truth than local-level control over such issues.
In violating the subsidiarity principle in this manner, the central government has not appropriately valued its citizens’ individual pursuits of well-being. This can be seen when applying Finnis’ above comments, which (for convenience) are cited here again:

[S]ince in large organizations the process of decision-making is more remote from the initiative of most of those many members who will carry out the decision, the same principle requires that larger associations should not assume functions which can be performed efficiently by smaller associations.\(^{474}\)

Thus, assuming that the collective issues can be resolved equally as efficiently at local versus federal levels, individuals’ initiatives to realize their well-being are generally better served when the resolution-power for such collective issues remains (or is given to) at the local-level (i.e., a lower level that is closer to the individual participants).

Individual well-being will be better served when collective issues are resolved at the local level, especially if the local level is more efficient at resolving the collective issues. Since the latter case is most relevant to our current discussion (i.e., the local level is more efficient for resolving policy on sensitive issues), we can say that the central government’s above described violation of the subsidiarity principle entailed the central government not appropriately valuing citizens’ individual pursuits of well-being. This, then, serves as a prima facie normative basis for deeming the extent of centralization within the American system as problematic and wrongly done.

The second of the above listed normative considerations is the following: the possibility of further damaging the good of social cohesion during the process of centralizing sensitive issues seems like an additional reason against allowing such

\(^{474}\) Finnis, *Natural Law and Natural Rights*, 146.
centralization to increase and/or be maintained in the status-quo. Although the possibility of social cohesion has already been severely damaged at the local level, care should be taken to preclude further damage of this good. So, it is important to preclude further undermining the viable conditions for social cohesion. Through centralization of sensitive issues, one takes away from the local level the power to create/sustain conditions for the thick-level moral agreement necessary for social cohesion. Such power includes the ability of the local level to compel compliance with behavior related to sensitive issues in accordance with the thick-level moral and religious beliefs of the local community. Such local laws will both (1) tend to attract people who adhere to the local community’s thick-level beliefs and (2) tend to detract those who dissent from such beliefs. In this way, community agreement about thick-level beliefs will be protected and even strengthened, and such conditions can foster the good of social cohesion.

In contrast, centralization entails the federal government assuming the power to regulate sensitive issues. Thus, it eliminates the local-level’s ability to so regulate such issues in accordance with a local community’s thick-level beliefs and, hence, works to undermine the thick-level agreement at the local-level that is a necessary condition for social cohesion. When this is considered in conjunction with the fact that (as has already been discussed) the pluralistic federal union cannot create/sustain social cohesion within itself, the existence of social cohesion is threatened by centralizing sensitive issues. Thus, the ultimate result of such centralizing is damaging the good of social cohesion. Precluding further damage to social cohesion (even though it has already been
significantly damaged by centralization) is another important reason against further centralizing sensitive issues.

Finally, since centralization of sensitive issues for the sake of realizing moral truth is ultimately unjustifiable according to the above prudential grounds, centralization for the sake of advancing moral truth cannot serve as a reason against allowing local control over sensitive issues for the sake of protecting the good of social cohesion (even though the goal of realizing moral truth outweighs the importance of realizing social cohesion when the two goals are considered in isolation from all other factors). The above considerations form a potent normative argument (1) against the centralization of sensitive issues and (2) in favor of allowing the local-level to determine policy on sensitive issues (e.g. abortion and sexual ethics).

A Natural Law Argument Against Unconstitutional Deviations From The Constitutional Compact: Why Violating the Constitution’s Federalism is Normatively Problematic

It is worth observing that the above normative considerations and argument coincides well with the federalism of the constitutional system. The federal government only has a limited set of delegated powers, and these can only be expanded through a formal change to the Constitution via Amendments. The States have expansive reserve powers that encompass all other sovereign powers, and these include any possible new powers stemming from changing cultural conditions.

With respect to sensitive issues, such a federalist system seems to be sufficiently in accord with the subsidiarity principle. The States’ reserve powers includes authority to
resolve sensitive issues, and this seems to both maximize the practical possibilities for realizing moral truth and best ensuring that sensitive issues can be settled (i.e., resolved in a manner deemed acceptable by the local community).

The above commentary suggests that the subsidiarity principle is sufficiently upheld with respect to the goals of settling sensitive issues and realizing moral truth (when one considers the relevant practical and historical character of the American system), even though the Constitution’s recognition of the States’ expansive reserved powers and the federal government’s strictly static and limited delegated powers only allows for limited subsidiarity. Nevertheless, it seems worthwhile to question whether there might be a strong normative basis for violating the constitutionally established federalism if both (1) the above practical/historical considerations, which render such a violation to be imprudent, were either resolved or deemed insufficiently weighty and (2) a more complete subsidiarity could be ensured through so violating the Constitution’s federalism. This sub-section will employ Robert George’s essay, “Natural Law and

\[475\] In summary, the above reflection suggests that the truncated constitutional opportunity for realizing subsidiarity is actually beneficial and prudent with respect to sensitive issues, given the relevant factors and long-terms considerations. Specifically, the constitutional system in which States retain expansive reserve powers that encompass most (if not all) sensitive issues (e.g., family law, marriage law, abortion law, etc.) both achieves subsidiarity with respect to the goal of settling sensitive issues and maximizes the realistic possibilities (maxi-minimum strategy) for achieving subsidiarity with respect to the goal of realizing moral truth. Albeit, respecting the local-level’s power to resolve sensitive issues in accordance with the States’ reserve powers given by the constitutional system does not ensure that moral truth will be realized in all of the States and their local communities. Nevertheless, the practical alternative entails entrusting sensitive issues to federal institutions of government (e.g., Congress and/or the Judiciary) that can impose uniform, federal policies, and this would decrease the practical probability of maximizing moral truth. For, the Judiciary is dominated by persons of left-leaning ideology who largely seem mentally divorced from many facets of moral truth, and the Congress represents diverse and competing factions whose infighting would preclude the legislative body as a whole from enacting sufficiently numerous and effective morals laws that would uphold the moral truth.
Positive Law”, to answer this question in the negative through showing how violating the authorized federalism of the Constitution entails violating the natural law.

In beginning, it is helpful to recall a possible scenario where violating the Constitution might achieve more complete subsidiarity. For the sake of argument, let one assume and consider the following. First, Congress might be the fairest and most disinterested government institution for resolving sensitive issues (when compared to other institutions like the States and the federal judiciary that determine policy for sensitive issues). Second, for the sake of the argument, this dissertation will temporarily suspend the above objection about how the diverse State-peoples represented in Congress would prevent it from enacting morals legislation that sufficiently upholds moral truth (e.g., banning abortion and regulating sexual behavior). Moreover, this dissertation will temporarily assume the seemingly impossible- i.e., that Congress could enact enough morals laws to appropriately uphold moral truth. Third, consider the possibility of Congress increasing its power over sensitive issues by violating the constitutional bounds of its delegated powers (e.g., the interstate “commerce” and the “necessary and proper” clauses of Article I, Section 8). In fact, this third hypothetical actually has historical precedent, for Congress seemed to violate the constitutional bounds of its “commerce” power for the purpose of nationally resolving the sensitive issue of racial segregation when it passed the Civil Rights Act of 1964. Now, this dissertation will ask the following question: If the “fairest” governmental institution for resolving sensitive issues was able to attain the power to resolve such issues in an un-constitutional manner, might this be the best way to advance subsidiarity with respect to moral truth?
A good answer to this question is “No.” Even if Congress was the “fairest” institution and could best maximize subsidiarity with respect to upholding moral truth via it unconstitutionally usurping jurisdiction over sensitive issues, such unconstitutional action would itself be a violation of moral truth (and, hence, would entail committing a moral wrong for the sake of realizing other instances of moral right). Specifically, such unconstitutional Congressional action would violate the principles of “Rule of Law” and the directives of an “authoritative ‘determinatio’.”

This can be demonstrated by applying Robert George’s analysis in the article “Natural Law and Positive Law” from his book In Defense of Natural Law of the moral implications entailed in realizing the natural law within the positive law (e.g., the constitutional law of a particular country).

In this article, George elaborates on the relation of natural law (as moral truth) to positive law. Part of his discussion is as follows:

In cases of certain principles, the legislator translates the natural law into the positive law more or less directly. So, for example, a conscientious legislator will prohibit grave injustices such as murder, rape and theft by moving by a process akin to deduction…In a great many cases, however, the movement from the natural law to the positive law in the practical thinking of the conscientious legislator can be so direct…Unlike the case of murder, the natural law does not determine once and for all the perfect scheme of traffic regulation. A number of different schemes- bearing different and often incommensurable costs and benefits, risks and advantages- are consistent with the natural law. So the legislator must exercise a kind of creativity in choosing a scheme. He must move, not by deduction, but rather by an activity of the practical intellect that Aquinas called determinatio.

So, George employs the term, “determinatio”, to describe the “creativity in choosing a scheme” for realizing the “natural law” within “positive law”. He, then, continues to

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477 Ibid., 108.
develop this analysis by discussing how “determinatio” entailed in creating “positive law” has a “moral purpose”:

[T]he creation of law (and a system of law) has a moral purpose. It is in the order of ‘doing,’ (the order, not of technique, but rather of free choice, practical reasoning and morality- the order studied in ethics and political philosophy) that we identify the need to create law for the sake of the common good. The lawmaker creates an object- the law- deliberately and reasonably subject to technical analysis- for purpose that is moral, and not itself merely technical. To fail to create this object (or to create unjust laws) would be inconsistent with the requirements of the natural law, it would be a failure of legislative duty precisely in the moral order. 478

Determinatio, thus, has a moral telos. Although the creating of positive law entails “making”, the basis or end for which this creating is performed is inherently within the realm of morality and practical reasoning. 479

If appropriately engaging in determinatio through creating “a system of law” has a moral purpose, then there are also moral reasons against violating such appropriately performed (i.e., authoritative) determinatios of positive law. If it is morally right for the legislator to engage in determinatio of positive law, there will be a moral problem with violating such authoritative determinatio of positive law after its enacted.

Finally, George argues against violating the authoritative determinatios of systems of positive law. This is seen in George’s argument that judges should not exceed their constitutionally defined role by acting as legislators:

Natural law theory treats the role of the judge as itself fundamentally a matter for determinatio, not for direct translation from the natural law. It does not imagine that the judge enjoys (or should enjoy) as a matter of natural law a plenary authority to substitute his own understanding of the requirements of the natural law for the contrary understanding of the legislator or constitution maker in deciding cases at law. On the

479 Ibid.
contrary, for the sake of the Rule of Law, understood as ordinarily a necessary (albeit not sufficient) condition for a just system of government, the judge (like any other actor in the system) is morally required (that is, obligated as a matter of natural law) to respect the limits of his own authority as it has been allocated to him by way of an authoritative determinatio.\textsuperscript{480}

The natural law does not give “judges” a “plenary authority” to override “the legislator or constitution maker” when “deciding cases at law.” Moreover, the “Rule of Law”, which is the principle that law (and not the capricious will of men) functions to govern the system, demands that “the judge” appropriately “respect[s] the limits of his own authority as it has been allocated to him by way of an authoritative determinatio…” of the positive system of law (i.e., the system’s constitution).

In largely affirming Robert Bork’s views (1) “that there is a natural law…”, (2) that the American system has not “given judges the authority to enforce it”, and (3) that “judges” do NOT “have greater access to that law than do the rest of us…”, George argues against judges usurping the role of legislators within the American system:

If Bork’s view is sound (and subject, perhaps, to one or two minor qualifications I am prepared to believe that it is sound), that leaves us with the question of whether the natural law itself- quite independently of what the Constitution may say- confers upon the judge a sort of plenary power to enforce it. One of my central aims in this essay has been to argue that the correct answer to this question is ‘no.’ To the extent that judges are not given power under the Constitution to translate principles of natural justice into positive law, that power is not one they enjoy; nor is it one may justly exercise. For judges to arrogate such power to themselves in defiance of the Constitution is not merely for them to exceed their authority under the positive law; it is to violate the natural law in whose name they purport to act.\textsuperscript{481}

\textsuperscript{480} George, “Natural Law and Positive Law”, 110.
\textsuperscript{481} Ibid., 111.
Thus, when a federal judge in the United States goes beyond the constitutionally assigned limits of his or her office by assuming the role of the legislator, such a judge “violate[s] the natural law” and, hence, acts contrary to the dictates of moral truth.

The same type of argument can easily be applied to the question of Congress acting beyond its constitutional authority through exceeding the limits of its delegated powers in Article I, Section 8. If Congress acts beyond its delegated constitutional authority to encroach upon the States’ reserve powers, then it is violating the United States’s constitutional system of positive law. This is tantamount to violating an authoritative determinatio and the Rule of Law; hence, it entails violating the natural law (i.e., moral truth). In operating in accord with a flawed interpretation of the delegated powers in Article I, Section 8 (e.g., a “loose” view Congress’ powers to regulate “commerce” and to enact laws “necessary and proper” for executing its delegated powers), Congress goes beyond its delegated constitutional authority and encroaches upon the States’ reserve powers. Thus, such Congressional modus operandi violates the natural law (i.e., moral truth).

The normative importance of correct interpretation of the Constitution (i.e., one that follows the original understanding model delineated in Chapter Four and the compatible strict constructions in Chapter Five) should now be clear. Deviating from this (e.g., developing and/or employing more conducive, but flawed, Constitutional interpretations) is tantamount to a violating the natural law.
CHAPTER SEVEN, Conclusion.

The previous two chapters discussed how the United States has undergone centralization and how this has resulted in problematic normative implications. In response to these problems, how should the current system be changed or maintained? The process of answering this question will entail discussing the following items. First, it is important to consider the nature and extent of moral-religious heterogeneity in the United States today. Second, it is important to ascertain what is needed (e.g., re-federalization that returns power over sensitive issues to the states) for re-establishing true thick-level agreement and, hence, the possibility of social cohesion within local-level communities. Third, there will be an evaluation of whether re-establishing thick-level agreement and the possibility of social cohesion via re-federalization is practical and worthwhile. Fourth, since this re-federalization is ultimately found to be important, the chapter will identify some practical and/or policy steps for realizing this end, especially with respect to returning sensitive issues back to the States.

Morally Heterogeneous Contemporary America:

When reflecting on the differences between early American local communities (with their thick-level agreement and social cohesion) and today’s local communities in the United States, one is compelled to recognize how much the union has changed between then and now. Such local communities of history are quite rare in the contemporary period. We see a few instances among the Amish and Mennonites. There
are some small rural Mormon communities throughout the western mountain States. A new Catholic town, Ave Maria, is being developed in Florida. However, other than these and possibly a small number of similar examples, local level communities within the United States appear to be far more heterogeneous than they were during earlier periods.

Although this may partially be the result of the waves of immigration and different cultures that have continued to arrive and develop within the United States during its two hundred-plus year history, a large portion of the blame should ultimately be attributed to centralization. Without centralization (e.g., centralizing the power to make public policy on sensitive issues) localities could have legally immunized themselves (via strict morals and religious laws) from “deviant” settlers and migrants who refused to abide by the dominate morality of the local community. This would have been the ultimate check against disrupting the thick-level agreement and social cohesion at the local-level.

Moreover, such a locally compelled assimilation-or-leave policy (and the protection it would give to thick-level moral agreement and the possibility of social cohesion) would have been more in accordance with the natural human habits of association. People seem to naturally desire associations with others who share their thick-level beliefs. As we have previously discussed, “social cohesion” as a mode of the basic good of “friendship” or “sociability” requires integration around the same thick-level beliefs. Through this process, people realize a part of their perfection as human beings.
For most in contemporary America, however, the possibility of living in communities marked by thick-level agreement and social cohesion seems very remote. There are just too many thick-level differences and disagreements that differentiate people today from their rural and urban neighbors. Moreover, such differences and disagreements have multiplied during the course of the two hundred plus year history. Before examining this expansion, it is important to briefly review some of the thick-level moral disagreements and differences within early America. These were often rooted in different sectarian theological views. This dissertation has discussed various examples of how the specific theologies of sectarian communities (e.g., the Pennsylvania Quakers, Massachusetts Puritan Congregationalists, and Virginian Anglicans) have guided their moral beliefs (See Chapter 2).

Although such examples remind one of the significant thick-level moral differences and disagreements in early America, this list has only multiplied through progression of United States history. In the contemporary United States, such old thick-level differences, which are rooted in different traditional views on theology (largely different Protestant theological traditions), still exist. However, there are also many new thick-level differences. Specifically, there are serious moral disagreements about abortion, sexual liberation, homosexuality, and marriage between moral traditionalists and those who have adopted a “permissive morality” (e.g., post-moderns, secular humanists, egoists, etc.). Similar to the thick-level moralities of the Christian sects, those with thick-level “permissive” moral beliefs often have these beliefs rooted in a particular conception of ultimate reality (e.g., material or human reality). For example, a post-
modern “permissive” thick-level morality (e.g., the thesis that all moral norms are constructed by power arrangements, and they lack both an absolute grounding and objective foundational principles; thus, it is arbitrary and often not justifiable to impose significant restrictions on human behavior, especially private personal behavior that lacks clear social consequences) will most likely be grounded in a post-modern view of reality (e.g., the world and cosmos probably entails some mode of the strife and chaos of power forces, rather than a harmony and order of natural laws).

These new differences have resulted in interesting alliances among traditionalists, who historically have been in conflict with one another. Many traditionalist minded Protestants, Roman Catholics, Eastern Orthodox, and Jews seem to have a new found ecumenical spirit of love and unity (and habit of voting Republican) as they have been confronted by significant threats from various adherents of more permissive moralities.

Such new alliances among the traditionalists, however, should not be confused with true thick-level agreement. There are still many significant theological and philosophical differences among the various religions and sects within this camp, and this often causes them to have different thick-level moral beliefs. Such old theological/philosophical differences even affect the specific ways that moral-traditionalist sects or religious groups can view their common moral concerns (e.g., on the moral wrongs of abortion). This, in turn, raises questions about whether traditionalist allies could quickly resume disagreeing about their respective thick-level beliefs even though they currently share a public view about how to deal with certain moral issues in the face of their common adversaries.
With respect to traditionalists’ common concern about the moral problem of abortion, for example, there seems to be some key differences in the Protestant and Catholic arguments for opposing abortion. In contrast to the Eastern Orthodox, the Roman Catholic Church does not have an official affirmative position on “ensoulment” (i.e., the time when God creates and infuses an immortal soul into the body) occurring at the time of conception; however, it does suggest that this is a significant possibility and, hence, that the lives of fertilized ovums and fetuses during all stages should be respected as if they are ensouled. This is seen in the following passage, which is written by Robert Royal, from Russell Shaw’s edited volume, *Our Sunday Visitor’s Encyclopedia Of Catholic Doctrine*:

Today the Church recognizes that “from the time that the ovum is fertilized, a life is begun which is neither that of the father nor of the mother, it is rather the life of a new human being with his own growth” (Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion*, 12 [1974]). Science by itself cannot define the time of ensoulment, but it provides strong evidence that a living, developing member of the human species exists from the moment of conception. The Church does teach that each living human being should be treated with the respect due to an ensouled human person.\(^\text{482}\)

In congruence with this view, the Roman Church also views the possibility of ensoulment at the time of conception to be a serious moral objection to abortion, for killing a fertilized ovum or fetus at any stage would risk murdering a human person (with an immortal soul). This is seen in Richard Doerflinger’s writing on abortion in the same edited volume:

The Church acknowledges that science by itself cannot detect the presence or absence of an immortal soul. But modern scientific findings provide a sound basis for treating all human beings, from conception onward, with the dignity due to a human person. At the very least, deliberately interrupting embryonic development disrupts the process by which God was bringing a human person into the world. If one is unsure whether a very early member of the human species is a person already possessing an immortal soul, such uncertainty cannot justify directly killing that being— for to do so shows a willingness to risk murder in the event that he or she does turn out to be a person. Therefore, “from the standpoint of moral obligation, the mere probability that a human person is involved would suffice to justify an absolutely clear prohibition of any intervention aimed at killing a human embryo” (Evangelium Vitae, 60). 483

Furthermore, the Roman Church’s mystery about whether ensoulment occurs at conception may also correlate with its views on the role of baptism in purifying its recipient from sin and beginning “...new birth in the Holy Spirit.” 484 More specifically, the Church has special concern for children who die before being baptized. In such cases, the children “are commended to the mercy of the Lord” and the “faithful are permitted ‘to hope that there is a way of salvation...’” 485 Thus, if ensoulment occurs at conception, then abortion entails killing an unborn human being who is still in need of baptism and, hence, is at risk of limbo or eternal damnation.

In contrast to these relationships between Catholic opposition to abortion and the Roman Catholic Church’s theological doctrine, many Protestants have different theological ways of reflecting on abortion as a moral issue. Aside from some Lutherans, Anglicans (and possibly a few others), many Protestant sects (especially the low-church

484 Catechism of the Catholic Church, 2nd ed.. (Vatican: Libreria Editrice Vaticana, 1997), (point) 1262. Also, see Russell Shaw, ed., Our Sunday Visitor’s Encyclopedia Of Catholic Doctrine (Huntington, Indiana: Our Sunday Visitor Publishing Division, 1997), ?
485 Catechism of the Catholic Church, (point) 1261. See also Russell Shaw, ed., Our Sunday Visitor’s Encyclopedia Of Catholic Doctrine, 47.
Evangelicals) simply do not believe that baptism is necessary for the salvation of human souls. Thus, such Protestants would obviously disagree with Roman Catholic concern about the implications of aborting a possibly ensouled human being (from the time of conception on). Furthermore, some Protestants disagree (with Roman Catholic and Eastern Orthodox) that ensoulment is even relevant to the abortion debate. One such example is seen in the writing (Life In The Balance: Exploring The Abortion Controversy) of the evangelical Protestant philosopher, Robert Wennberg:

[W]e have no biblical grounds for the belief that God will choose to sustain the existence of fetal souls (assuming that there are such things). All talk of postmortem existence for fetal souls is at best theological speculation. It follows from this that we have no reason to believe that there is any postmortem existence for fetal souls, let alone there is a horrendous postmortem existence in store for them. Consequently, it would be gratuitous to make an abortion decision based on such a possibility.

Here Wennberg displays a prototypical Protestant mode of theological reasoning. Since the notion that “God will choose to sustain the existence of fetal souls” is not elucidated in the Bible, this view along with “[a]ll talk of postmortem existence for the fetal souls” is “at best” just “theological speculation.” In demoting such notions to extra-biblical “speculation,” Wennberg makes it clear that “we have no reason to believe” in them: “we have no reason to believe that there is any postmortem existence for fetal souls…” Similarly, he believes we have no sound basis for believing in a “horrendous postmortem existence in store for them…,” if they die before birth and, then, baptism. Finally, Wennberg concludes by dismissing the need to consider such questions about “fetal souls” when making “an abortion decision.” Wennberg’s argumentation within this

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passage clearly presumes the Protestant theological view that extra-biblical doctrine (e.g., on ensoulment) is either not really sound or (at least) too questionable to be used within important Christian theological and ethical theory.

Although Wennberg is not a moral traditionalist and although there are many Protestants who are closer to the Catholic moral-theological position on abortion, Wennberg’s mode of deriving moral implications from biblical insights is a very good example of a Protestant method of arguing about abortion and other moral-theological topics. Moreover, it is probable that many conservative Protestants would agree with Wennberg’s suggestion that extra-biblical ruminations about the possibility of humans being “ensouled” at conception is not relevant or valid when developing sound theological-moral arguments. For most conservative Protestants, “Sola Scriptura” is the only proper Rule-of-Faith or authoritative standard for deriving doctrine; thus, if a moral-theological view cannot validly be demonstrated to have an adequate biblical basis, then the view probably is not plausible.

487 Clifford E. Bajema is a Protestant intellectual who seems to develop a conservative anti-abortion argument via reasoning from biblical concepts. Bajema’s argument, from his book, Abortion and the Meaning of Personhood (Grand Rapids: Baker Books, 1974), is discussed in Robert Wennberg, Life In The Balance, 39. According to Wennberg, “Bajema holds that individuals are valuable not because they have certain capacities (say, the capacity to respond to God and know Him) but solely because they are declared to be valuable by a sovereign act of God: this is what gives them their unique status which in turn calls for special respect by others.” Ibid., 39. Bajema believes that the God given status of human beings is tantamount to them having the “‘image of God’” (not to be viewed as having various unique and special God-like capacities like advancing thinking, etc., but as status that is “‘conferred’” upon human beings “‘by pure agape love and grace.’”) Ibid., 39. Moreover, Bajema believes that all human life (regardless of potential for or actualized natural human capacities like the cerebral capacity for human reasoning) has this “‘image of God’” and is valuable and should be respected (Wennberg 39). Thus, his argument provides a basis for value and respecting human life from the point of conception. Furthermore, the concepts that he employs seem to be associated with the biblical themes of the “‘image of God’” (Genesis 1:26-27) and God’s love for man as an unmerited gift. See John 3:16-18 (New International Version) and other New Testament Books.
Aside from these moral-theological differences among orthodox Christians (i.e., Roman Catholics, Eastern Orthodox, and the Protestant sects), the Church of Latter Day Saints, as a conservative non-Christian sect, has a very different moral-theological position on abortion than the Roman Catholic Church and most politically conservative and religiously orthodox Protestant traditions. In contrast to Catholics whose thick-level moral-theological beliefs stem from both the Bible and the Church’s Apostolic Tradition and in contrast to most conservative Protestants who attempt to derive their moral-theology from the Bible alone, the Mormons’ moral-theology can be derived, changed, and abolished based on how their current and subsequent Prophets receive revelation from God. According to Isaiah Bennett (in his book, Inside Mormonism: What Mormons Really Believe), such freedom by elites to alter theological and moral doctrine has resulted in many contradictions within the Mormon Church’s position and teaching on abortion.\footnote{Isaiah Bennett, Inside Mormonism: What Mormons Really Believe (San Diego, CA: Catholic Answers, 1999), 141-149.} Bennett tracks how Mormonism’s position has changed over time. He quotes former Latter Day Saints Church President, Spencer W. Kimball’s strong categorical opposition to abortion:

“Abortion, the taking of life, is one of the most grievous sins. We have repeatedly affirmed the positions of the Church in unalterably opposing all abortions… Abortion is a calamity… one of the most revolting and sinful practices of this day… The Church of Jesus Christ opposes abortion and counsels all members not to submit to nor participate in any abortion, in any way, for convenience or to hide sins…Those encouraging abortion share guilt.”\footnote{Ibid., 141.}
Bennett, then, shows how Kimball’s successors (Benson and Hinckley) loosened the Mormon Church’s restrictions on many types of abortions:

Benson and Hinckley, apostles and presidents when these two editions were approved, apparently also gave their permission to the much more permissive stand presented in the 1992 version, which reads, “There is seldom any excuse for abortion. The only exceptions are when: 1. Pregnancy has resulted from incest or rape. 2. The life or health of the woman is in jeopardy in the opinion of competent medical authority; or 3. The fetus is known, by competent medical authority, to have severe defects that will not allow the baby to survive beyond birth” (Gospel Principles, 1992, 251).490

Based on this example (and several others within his book, Inside Mormonism: What Mormons Really Believe), Bennett believes that “Mormon ‘prophets’ base their ‘revelations ‘on the collective opinions of their internal governing authority, on social pragmatism and on political astuteness.’”491 In other words, Mormon doctrine is largely the product of the ever changing preferences and values of its leadership, people, and the wider society during the various periods of its history.

The series of above considerations reveal the inherent instability of agreements among Protestants, Catholics, Eastern Orthodox, and non-Christian religious sects about moral issues. The thick-level moral beliefs of such theological traditions are often linked to their respective theological views and opinions (Note: See Appendix E for additional discussion). Thus, since these different sects and religions inevitably have different theological views, their thick-level moral views will (to some degree) be different as well. Such thick-level moral differences can range from merely having different moral-theological justifications for the same practical conclusions to actually developing very

490 Isaiah Bennett, Inside Mormonism, 144.
491 Ibid., 146.
different moral conclusions (e.g., different positions about whether abortion is morally justified under various types of circumstances). Although such moral-theological differences may be temporarily de-emphasized during times of cooperation among the various sects and/or religions, such differences could resurface when the point or basis for cooperation ceases (e.g., if “permissive morality” ceases to be a practical threat).

Given such insights, it is crucial to remember how the apparent widespread agreement among traditionalists about the moral wrong of abortion overlie a vast range of moral disagreements about why, when, and to what extent abortion is morally wrong. So, such contemporary traditionalist agreement is not tantamount to thick-level moral agreement. Thus, it could not result in social cohesion. In other words, even if traditionalists all agreed that current policies on abortion are wrong, their lack of thick-level moral agreement and, hence their lack of integration from social cohesion, will often result in them positing slightly different answers to the various questions on abortion considered in the previous chapter.492

Thus, contemporary moral and religious heterogeneity in the United States renders most people very far removed from the thick-level moral agreement and possibility of social cohesion that was possessed by early Americans within local-level community. One can apply Donald Lutz’s words to describe much of contemporary local-level community in America; it has become part of “secular society in which there

492 For convenience, these questions are listed again as follows: (1) whether abortion (given the particular circumstances) is moral or immoral? (2) whether the human life that is terminated has equal value to the life of a more developed human organism (like a new-born infant), which is obviously granted legal protection? (3) what constitutes human personhood (i.e., the main source of one’s individual value and grounds for legal protection)? and (4) when does human personhood really begins?
is not general agreement on some moral standard or transcendental set of values against which the majority can compare its proposed actions…”[^1]

The next question, then, is whether it is possible to re-establish the thick-level moral agreement and possibility of social cohesion within local-level community during the contemporary period.

### Analysis of the requirements for re-establishing the possibility of thick-level agreement and social cohesion:

One can speculate about re-establishing local communities marked by thick-level agreement and social cohesion. Two of the conditions for such re-establishment are the following: (1) individual desire and resources to establish and develop municipal associations with others who share the same thick-level moral beliefs; and (2) enabling governmental organization and policies that allow such private initiative to occur.

Realizing the first condition may be quite feasible. This seems especially true because people have an impulse to associate with others of like mind and realize “social cohesion” as a way of perfecting their humanity.[^2]

[^2]: In his book, After Virtue, Alasdair MacIntyre seems to advocate developing local communities as a means of protecting and reconstructing cultural goods: “What matters at this stage is the construction of local forms of community within which civility and the intellectual and moral life can be sustained through the new dark ages which are already upon us. And if the tradition of the virtues was able to survive the horrors of the last dark ages, we are not entirely without grounds for hope.” See Alasdair MacIntyre, After Virtue: A Study in Moral Theory, 2nd ed. (Indiana: University of Notre Dame Press, 1984), 263.

[^3]: People with the same thick-level moral and religious beliefs can try to form such communities. Although this may result in widely different types of religious-sectarian communities, some of these will include local communities of people sharing more “truthful” moral and religious worldview. This, in turn, will allow “truthful” thick-level worldviews to be better preserved in the manner envisioned by MacIntyre. Although some false worldviews might also survive in other such local communities, truth-loving dissidents can always migrate (assuming a system of federalism that allows for such migration) to more truth-loving communities. Moreover, communities seeking to uphold “false” worldviews probably cannot be sustained in the long-term, for rebellion against reality tends to result in weakness and dysfunctionality.  

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[^4]: 308
The greater difficulty involves the second condition, for States and their localities now have very little autonomy to settle sensitive issues for themselves within the current political status-quo. Before twentieth century federal usurpations of State police powers, the existence of local communities with power to regulate sensitive issues was determined by the States who often negotiated an arrangement with the locality. If one State was not hospitable, a local community could migrate to another State that was more so. Now the federal government has already determined uniform policy on many sensitive issues, and this has made such previous intra-State federalism and migration strategies less effective, if not obsolete. Moreover, the centralizing momentum of the federal government continues to absorb new powers for determining uniform policy on sensitive issues. The federal courts have already usurped the States’ “reserve” powers to settle sensitive issues like abortion and contraception, and such courts can and will continue to obstruct new efforts of local communities seeking autonomy to regulate sensitive issues for themselves. In fact, many within the federal courts seem to be attempting to “judicially” determine policies on homosexual relations and mandating the States to recognize same-sex marriage.495

To make progress in re-vitalizing local communities, such centralization of sensitive issues must be stopped; moreover, much of the previous centralization must be reversed. The federal government must return such policy-making power back to the States. Once States regain their “reserve” powers to determine policy for sensitive issues,

495 State laws outlawing homosexual sodomy were finally overturned by the Supreme Court in Lawrence v. Texas. Although recent State courts have sought to overturn State laws prohibiting gay marriage, this has not yet been compelled on all the States by the federal courts.
they might also need to provide towns and counties dominated by religious sects that are part of the State’s governing coalition (but who also has a set of their own distinct thick-level beliefs) some degree of autonomy to determine policy for controversial issues (e.g., concerning religious establishment).

Given the current heterogeneous constituency of today’s local communities, such steps would likely result in many political struggles within States, counties, and towns between the people and groups with contravening thick-level moral beliefs. The traditionalists and the adherents of permissive morality would inevitably clash on many of the hot-button issues concerning morals-legislation on reproductive and sexual-behavior. This would probably reach a crescendo in the States and communities with very mixed populations of adherents from both sides.

Although this political struggle would cause incredible stress and difficulty, it also would have a beneficial effect. Within each State, one side would ultimately win and other would lose. The winners would attain the prize of being able to establish legal policies that uphold and require (a reasonable-level of) adherence to their thick-level moral beliefs. This would, in turn, encourage more people with similar thick-level beliefs to migrate there and seek residence. Moreover, it would result in the assimilation or outgoing migration of the losers; if they did not want to assimilate, they could move to states that are more accepting of their thick-level beliefs.

All of this would obviously entail moving to re-establish local communities whose members are closer to having thick-level moral agreement, but such progress still would not be sufficient. After States were transformed into either traditionalist-morality
or permissive-morality havens, the long-established thick-level differences among sects, who had just been in coalition with one another, might resume. Since this dissertation has already discussed some of these differences among the traditionalists, it will continue with that example. If Arizona, for example, was ultimately established as a traditionalist State, its traditionalist constituency would likely include a theologically-diverse coalition of different sects and religions. There would be conservative Roman Catholics, conservative Protestants, Mormons, and other morally conservative religious groups. Could these historically new moral and political allies maintain their allegiances after “permissive-morality” ceased to threaten their common traditionalist beliefs? It is very doubtful. As discussed above, there are probably many thick-level differences among such sects. Even given their public agreement on issues like abortion for the sake of cooperating to defeat permissive-morality, Catholics and Protestants will often have different arguments for and varied conclusions about such issues based on their different methods of engaging in moral-theology. Furthermore, both Catholics and Protestants will disagree with the moral positions of many Mormons concerning the status and value of female persons, valuing freedom of conscience, etc. In short, the constituents of this traditionalist coalition do not have thick-level agreement and, hence, could not realize social cohesion within a local-level community.

The above reflection suggests need for an additional step to re-establish communities with real thick-level agreement and possible social cohesion: local communities will need to be constituted by people with sufficiently similar theological/philosophical characteristics because thick-level moral agreement is so often
rooted in sufficiently similar theological/philosophical positions and views. We have already pointed to a few examples of contemporary theological communities among the Amish, Mennonites, Mormons, and the Catholics. These are communities with real thick-level agreement and possibilities for social cohesion. To re-establish more of these local communities throughout the United States, people with true thick-level moral agreement would need to purposively plan and commit to living in such local communities.

Moreover, even after an equilibrium was realized in which moral-permissive people migrated to and attained majorities in some States while moral-traditionalists had done the same in other States, each State would still have to give some degree of autonomy to each town that may be dominated by a different religious sect within the State’s governing coalition. This will be needed for such towns, in turn, to further establish ordinances that encourage/compel adherence to the dominance sect’s thick-level agreement and, hence, that discourage the residency of dissenters.

*Normative evaluation of re-establishing the possibility for thick-level agreement and social cohesion:*

Given the immense costs and upheaval entailed in implementing such measures, we must briefly consider whether widespread re-establishment of local-level communities with thick-level moral agreement and social cohesion would be worthwhile and/or practical. Since this largely entails re-federalization of the United States’ political system, the primary issue is whether such a process would be worthwhile. On the one hand, the re-federalization measures, which are suggested above, would be extremely
disrupting and chaotic. On the other hand, however, re-federalization can contribute to widespread re-establishment of local communities with this character.

Furthermore, re-federalization would move the system closer to what is specified by the constitutional compact: (1) major and sensitive domestic issues would be resolved by and within States; and (2) the federal government would only have a limited scope of “delegated” powers. Although the local-level is now both rarely marked by the thick-level moral agreement and social cohesion that it had during the colonial and founding periods and such communities often have significant diversity among people with utterly incompatible moral worldviews, re-federalization would help advance the goal of settling controversial issues because (as discussed above) it would allow for State-level winners and losers in the struggle between moral-traditionalists and morally-permissive forces.

This evaluation must also account for the thick-level moral disagreement among the different sects and religions, which (for example) compose the moral-traditionalist coalition. These might erupt and be a source of new political struggle (over different and moral-theological sensitive issues) within States where traditionalists had already won the previous political battle against morally-permissive forces. Many sectarian differences among traditionalists have been temporarily forgotten (or ignored) in the current environment where morally permissive forces pose a common threat and traditionalists need to stand together for the purpose of adequately responding to this. If, however, the permissive-moral threat was resolved, the old moral-theological differences would probably arise once again.
Nevertheless, this problem can be resolved through States providing counties and towns with sufficient autonomy to legally establish a dominant sect that is part of the State’s governing coalition. Within a traditionalist State, for example, there might be a Baptist town, a Mormon town, a Catholic town, etc. A traditionalist-minded State legislature would have sufficient incentive to do this in order to maintain its governing coalition and, hence, prevent the State from falling to the morally permissive horde dominating some other States (e.g., California).

Finally, it is important to observe how re-federalization would diminish serious strain on the forever non-cohesive federal union. Currently, the federal government now burdens under the stress and turmoil that is caused by bitter political fighting between the traditionalist and permissive forces who each seek to impose uniform (sensitive-issue) policies on the union as a whole. The lack of resolution on such issues entails a constant political fight to control the federal institutions responsible for determining the relevant public policies. One example of this can be seen in our current centralized system. Here the federal judiciary is often the ultimate “gate keeper” for sensitive civil liberties issues like those involving abortion, contraception, and sexual ethics.\textsuperscript{496} The lack of resolution on the abortion issue in contemporary politics, for example, causes perennial political

\textsuperscript{496} One can see this in Supreme Court decisions from the latter part of the twentieth century and in recent decades. This body has directly stripped the States of their constitutionally authorized reserve powers to resolve the sensitive issues of racial segregation and the privacy issues of contraception, abortion, and homosexual sodomy in many other decisions (e.g. \textit{Brown v. Board of Education of Topeka, Griswold v. Connecticut, Eisenstadt v. Baird, Roe v. Wade, Planned Parenthood of Southern Pennsylvania v. Casey, and Lawrence v. Texas}). For an excellent discussion of the development and problems with the right to privacy in constitutional law, see Gary McDowell, “The Perverse Paradox of Privacy,” in “A Country I Do Not Recognize”: The Legal Assault On American Values.” ed. Robert Bork (New York: The Free Press, 1990), 57-83.
struggle over the selection of federal judges (i.e., judges that will rule “correctly” on controversial issues).\textsuperscript{497} Moreover, concern about the federal judiciary also plays a large role in Presidential and Congressional selection processes.\textsuperscript{498} This tug-of-war begins (and, then, never ends) when controversial issues like abortion come under the purview of the federal judiciary or other departments of the federal government.\textsuperscript{499}

Such political warfare tends to escalate, even to the point of causing permanent damage to the federal governmental institutions. For example, ever new extremes are constantly being reached in the Senate’s perennial battle to confirm federal judges. It is quite possible that this will escalate to the point of destroying cooperation amongst the opposing political parties, even to the point that the Senate becomes entirely ineffective. This is what has been at risk in past threats to invoke the “nuclear option” (i.e., an attempt to disband Senate rules on filibustering so as to ensure a final vote on judicial nominees).

All things considered, then, there seems to at least be a thumb-on-scale in favor of re-federalization given the net local-level and national-level benefits that would result

\textsuperscript{497} One can review the evidence for this via merely recalling some of the Supreme Court confirmation controversies during the last few decades (e.g., Robert Bork, Clarence Thomas, Ruth B. Ginsberg, John Roberts, and Samuel Alito). Furthermore, one can recall the many Presidential versus Senate battles over the nomination and confirmation of lower level federal judges, which plagued both the William Clinton and George W. Bush Administrations.

\textsuperscript{498} This fact is also easy to recognize. Most presidential elections are influenced by strong factions seeking to change or maintain majorities on the Supreme Court and various lower-level federal judges. One major constituency of the Republican Party’s often winning coalition in presidential elections is the block of conservative Christian voters who hope to ultimately overturn Roe v. Wade and preclude the advancement of constitutional rights for practicing homosexuals. A similar phenomenon occurs within the Democratic Party’s national coalition; the Democrats seem to demand that their presidential candidates be pro-choice (i.e., committed to upholding Roe v. Wade when nominating judges).

\textsuperscript{499} It is plausible that many pivotal issues and political coalitions would change if the power over sensitive issues was permanently returned to the States. The federal-level battles (i.e., those concerning the selection of federal judges and the elected presidents and Senators who, respectively, nominate and confirm them) between religious conservatives and advocates of permissive social policy would subside.
from this. Since this is the case, it is helpful to consider various relevant institutional and practical considerations for how re-federalization might be implemented.

*One plan for implementing re-federalization:*

This dissertation would not be complete without some reflection on a strategy to re-federalizes America in terms of returning power over sensitive issues back to the States. So, this will now be attempted in what follows.

First and most importantly, the process of taking undue power away from the federal government, which has unconstitutionally usurped this from the States, probably cannot be realistically accomplished by the central government’s mere voluntary agency. Having the federal government voluntarily relinquish its own powers would require a sufficient number of officials within the federal government who were stubbornly determined to accomplish this goal (e.g., a remarkable majority of States Rights advocates in the Supreme Court, such a super-majority within Congress, and probably a President willing to sacrifice various acquired powers of his or her office). Moreover, it would probably require multiple decades of such a miracle government.

All of this seems unrealistic. The kind people willing to go through the extremely difficult process of becoming officials with relevant power in the federal government are usually not likely to surrender such power once in office, unless doing so will bring significant political benefits (e.g., the opportunity to attain more power by political advancement to higher office; strong belief that such surrendering will create a positive
historical legacy; etc.). In Federalist # 51, Publius relies on this assumption as part of his solution to maintaining separation of powers:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place.

In addition to officials’ “constitutional means” for “resist[ing] encroachments of the others” (i.e., giving the officials of each branch some control over the functions of the other branches- e.g., Presidents veto legislation, Senate confirms Presidential nominees, etc.), Madison emphasizes the importance of officials having “personal motives, resist the encroachments of the others.”

The officials of each branch must desire preventing officials in the other branches from encroaching on their powers; otherwise, their apathy might result in them not employing their “constitutional means” for resisting the power-grabs of the other branches. Madison, moreover, assumes that “those who administer each department” will have such a desire to resist the encroachments of other departments (e.g., the President will desire to resist encroachments by Congress and vice-versa). The person who desires and works to attain such political offices in the federal government will almost certainly be a person with significant political ambition. So, Madison envisions a system in which “Ambition must be made to counteract ambition.”

For the political animal who seeks and attains high-level offices in the federal

500 James Madison (as Publius), Federalist # 51, in The Federalist, ed. Carey and McClellan.
501 My understanding of Publius’ teaching on separation of powers was taught to me by Professor George Carey. His views on the subject can be found some of his fine books on American political thought- e.g., The Federalist: Design For A Constitutional Republic (Urbana, Illinois: University of Illinois Press, 1989) and In Defense of the Constitution.
government, his or her ambition for having and maintaining political power includes him or her possessing “interest[s]….” that are “connected with the constitutional rights of the place.” The officials’ political ambition to have and maintain power will motivate them to sufficiently employ their offices’ powers so as to resist the encroachments of the other departments of government. If this is an accurate picture of federal government officials, then it is very doubtful that the federal government will be willing to transfer its substantial powers (e.g., the power to resolve sensitive issues) back to the States.

If the federal government will not voluntarily relinquish its grip over sensitive issues, what event could force its hand? One option would be for the States to mobilize and demand a new constitutional arrangement for the United States. Such an option is listed within Article V of the Constitution:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid of all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourth of the several states, or by Conventions in three-fourths thereof, as the one or other Mode of Ratification may be proposed by the Congress.502

In addition to the possibility of “two-thirds of both Houses” of Congress voting to propose “Amendments”, the States can force Congress to “call a Convention for proposing Amendments” via “the Application of the Legislatures of two-thirds of the several States…” This is the ultimate and very constitutional check that the States have for changing the constitutional order of the American system. Such a “Convention for

502 U.S. Constitution, Article 5.
proposing Amendments” would be able propose a radical new direction for the Constitution.

This fact and its implied uncertainties would likely invoke grave fear among the members of Congress. So, to preclude such an attempt, they might muster the sufficient two-thirds majorities of both Houses to propose an Amendment that would appease the demands of the Legislatures within the likely “two-thirds of the several States.”

What might such an appeasement Amendment look like? If the States were determined to reverse some of the federal government’s encroachments on the States’ reserve powers over sensitive issues, they would need to seriously reorient and control the nature of the federal judiciary. This branch of unelected officials has been both an enabler and a frequent cause of the federal government’s control over sensitive issues.503 Moreover, since conventional wisdom suggests that the judiciary is entrusted with the final task of interpreting the meaning and implications of the Constitution, it is very doubtful that any viable contemporary action short of a constitutional amendment could compel the Judiciary to undergo the needed reform.504 So, the States would have to

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503 One merely has to review the history of the Supreme Court to ascertain this fact. This body has enabled Congress to assume power over the sensitive issue of racial segregation through some of its late twentieth century “commerce” power decisions (e.g., Heart of Atlanta Motel, Inc. v. United States, Katzenbach v. McClung, etc.). The Supreme Court has directly stripped the States of their constitutionally authorized reserve powers to resolve sensitive issues of racial segregation and the privacy issues of contraception, abortion, and homosexual sodomy in many other decisions (e.g. Brown v. Board of Education of Topeka, Griswold v. Connecticut, Eisenstadt v. Baird, Roe v. Wade, Planned Parenthood of Southern Pennsylvania v. Casey, and Lawrence v. Texas). For an excellent discussion of the development and problems with the right to privacy in constitutional law, see Gary McDowell, “The Perverse Paradox of Privacy”, 57-83.

504 Nevertheless, it is also possible that a serious push to reform the Judiciary by constitutional amendment would correlate with the Executive and Legislative Branches becoming more determined to pressure the Judiciary to curb its activism. One example might be Congress developing a sufficient
demand an amendment that compels needed reform within the Federal Judiciary. Here is a list of possible content for such an amendment: (1) curtail the Federal Judiciary’s independence by making Supreme Court and all other federal judgeships subject to periodic removal by an interstate committee consisting of one member per State (each State having one representative on the committee, each representative having one vote, and each representative being selected by his or her State’s legislature); (2) clearly mandate federal judges to employ an original understanding jurisprudence, which entails viewing (as a majority of States expected when they ratified the Constitution) every possible governmental power not clearly explicated or necessarily implied in the Constitution (with both qualifications worded and interpreted according to strict constructionist standards) is a reserve power belonging to the States, when deciding and issuing rulings of constitutional law; (3) ensure judges follow a strict-constructionist jurisprudential mandate by empowering the States’ interstate committee to frequently review judges’ rulings and remove the judges (before the expiration of their terms) by simple majority if they fail to follow this directive; (4) allow States to over-turn Supreme Court decisions (or federal judiciary decisions that reach finality in the lower courts) through a multi-stage process (i.e., one State can, via the State legislature, propose the decision to be overturned; if this issue is validated by one-third of the other State legislatures, then the decision by the federal judiciary is officially overturned and ceases to have any validity as constitutional law; such a Multiple-States-veto, then, can only be

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majority to begin impeaching various federal judges and Supreme Court Justices responsible for such destruction of States reserve powers.
reversed by a simple majority vote of all States in their legislatures); and (5) return the power to select Senators to the State Legislatures and eliminate the federal government’s income tax powers (i.e., eliminate the 16th and 17th Amendments).

Such a super amendment obviously deviates from the original terms of the constitutional compact. Unfortunately, some of the key men who helped frame the Constitution (e.g., Madison and Hamilton) possessed assumptions that now seem questionable from today’s vantage point. Interested readers can review such problematic assumptions in Appendix E. Since the views of the State-peoples who ratified the Constitution, and not the framers, are most relevant in determining the original (and authoritative) understanding of the Constitution, readers should keep in mind that this review of the Framers’ assumptions is just an insightful exercise, not an attempt to authoritatively interpret the Constitution.

Based on the above, one can see that remedying the significant deviations from the Constitution includes fairly radical action. Some might view such a path as not conservative. The author of this dissertation, however, views it as a true conservative restoration project. It entails (among other things) returning to and maintaining the “Rule of Law” that was instituted at the Constitution’s founding.
Appendix A

Reformed protestant churches can follow the logic of various passages from the Apostle Paul and St. Augustine suggesting that God mysteriously works through all events (good and bad) for the benefit of those He has chosen.\textsuperscript{505} In fact, traditional Reformed theology suggests that God’s saving grace is limited to the elect persons, whom God predestined.\textsuperscript{506} Those who hold this view would probably also affirm a very general common good of the community including the non-elect, but (in actuality) this seems to be relatively unimportant and scant-in-content when compared to the common good that only includes God’s elect.

Historical communities, which have been organized and constituted by Reformed Christians (i.e., those professing many of the basic tenets of Calvin), have always had this tension; however, since the entire community maintained some mode (and the same mode) of the Reformed faith, most people’s predestination-status was assumed based on either self-profession and/or a manifestation of them progressively displaying the fruits of the spirit. When a person committed a moral or theological sin(s), he or she was considered either a “backslider” or as possibly not one of the “elect.” In Elazar and Kincaid’s \textit{The Covenant Connection}, Thomas O. Hueglin describes what was entailed among early Calvinist communities:

The Calvinist communities of the first hour had by no means practiced the kind of tolerance for which they had rebelled against Catholicism. In Calvin’s Geneva, the church excommunicated not only true or alleged dissenters, but also those found guilty of merely departing from the rigid path of autocratically prescribed morality. Excommunication meant “religious damnation” as well as “social and economic ruin.” The covenant between God and His people was thus transformed into a system of licensed social existence which left little space for religious or civil liberty.\textsuperscript{507}

This suggests a radical intolerance for the non-elect; those found lacking were basically excluded from the community’s common good.

\textsuperscript{505} \textit{Romans} 8:28 (New International Version).
Some may wonder whether the seventeenth and eighteenth century New England colonies were similar in this regard. As we will see again in subsequent text of this dissertation, the laws of Massachusetts mandated severe punishment and often state execution of proponents of many alternative Christian sects (e.g., Quakers, Anabaptists, and Catholics).\footnote{Tocqueville, \textit{Democracy In America}, 42-43.} Again, such non-elect deviants were considered threats to the common good; hence, their only stake in the general good was limited to receiving punishment or permanent removal from the community via state-administered exile or execution.

All this is relevant to our analysis because it suggests that such Reformed theological communities basically viewed the socio-political common (or “general”) good to largely overlap with the “common” (or “general”) good of God’s elect. In fact, many New England Puritan communities made this assumption explicit through their system of local covenants among the converted (and the children of converted) Reformed Christians. In this system, such Reformed Christians could covenant among one another locally by forming local congregational churches, and the male members of these churches had the political right to vote.\footnote{Noll, “Christianity and Culture In America,” in Kee et al., 613} In this way, political membership in the common good of many New England communities was limited to those who seemed to be among the elect.

The exception to this, of course, was Roger Williams and his Rhode Island colony. Williams’ unique Puritanism emphasized the importance of religious freedom and toleration; thus, in Rhode Island, the common good must have explicitly been understood to include the elect and the non-elect. A description of the political facets of Roger Williams’ religious views is provided by Mark Noll in his writings on American Christianity, which are part of a broader collaborative text book on Christian history by Noll and his colleagues:

Roger Williams is known as America’s great early “democrat,” and that reputation is partly justified. Under his direction, Rhode Island became the first place in the North American colonies where freedom of religious worship was defined as a human right for (almost) all groups. It was also the first American colony to attempt a separation between institutions of religion and the institutions of state. Even more than a democrat, however, Williams was a thorough-going Puritan. His reasons for favoring soul liberty and the separation of church and state were themselves religious. Only God knew the heart, and only God could

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\footnote{Tocqueville, \textit{Democracy In America}, 42-43.}
\footnote{Noll, “Christianity and Culture In America,” in Kee et al., 613}
\footnote{323}
promote a truly spiritual life. Since that was so, ministers and magistrates must protect with greatest respect the relationship between God and his servants on earth.\textsuperscript{510}

Aside from Williams’ Rhode Island, however, many other Puritan New England colonies continued to maintain covenant connections among the levels of individual, church, and society (or nation). The old standard of full covenantal membership into church and political society for those who confessed regenerating experience of God’s grace was revised in the later part of the seventeenth century. This became necessary when a larger numbers of adults, who had been baptized as children but had not (as adults) publicly confessed an experience of “God’s saving grace…”, wanted their children (in turn) to be baptized.\textsuperscript{511} The new solution entailed allowing such “third-generation” children to be baptized, but “the Lord’s Supper and other privileges were, however, reserved for those who could testify to a specific work of God’s grace in their lives.”\textsuperscript{512}

Though later revisions to the Massachusetts charter secularized the criteria for having voting rights (i.e., “the right to vote for the colonial legislature was now determined by property rather than by church membership.”), both the “Half-way” covenant between individuals and churches and the New England Puritans’ notion of their society having a national covenant with God was still in place even as late as the latter part of eighteenth century.\textsuperscript{513} In \textit{America’s God: From Jonathan Edwards to Abraham Lincoln}, Mark Noll, however, argues that the “Puritan canopy” of “covenant language- from the individual through church to society as a whole…”, which protected the Puritan theology, was in decline. Jonathan Edwards rejected (in 1749-1750) the traditional Puritan idea of national covenant and, instead, advocated the concept of a “covenant of grace” (i.e., God’s covenant with all truly “regenerate” Christian believers from all nations who alone should partake in the sacraments of baptism and communion).\textsuperscript{514}

Here we might take a moment to evaluate the veracity of Noll’s position. There are several historical considerations that bring Noll’s thesis into question. First, as Noll himself reports, Jonathan

\textsuperscript{510} Noll, “Christianity and Culture In America,” in Kee et al., 617.

\textsuperscript{511} Ibid., 613-614.

\textsuperscript{512} Ibid., 614.

\textsuperscript{513} Ibid., 615; and Noll, \textit{America’s God}, 38-50.

\textsuperscript{514} Noll, \textit{America’s God}, 38-50.
Edwards was extremely unpopular at the time he started arguing against using the sacraments in a manner that helped reinforce the New England Puritan notion of national covenant.\(^{515}\) Edwards’ own scholarly cousin, Solomon Williams, arose as a “champion” for Edwards’ opponents on such issues.\(^{516}\) Williams attacked Edwards both on the notion of the sacraments being limited to the regenerate and the threatening impact of Edwards’ idea to New England’s ability to defend itself against various erroneous Christian sects (e.g., the “Arminian, Independent, and Antinomian Errors”).\(^{517}\) Given the strength and tenacity of the idea of national covenant during Edwards’ time (as evidenced by the outcry against Edwards’ critique), it probably remained influential among important segments of the New England Congregationalists in the decades that followed. In fact, Noll concedes this when suggesting that the “the Old Calvinist traditionalists” and the “Rationalistic Congregationalists” continued to defend some mode of the idea of national covenant after Edwards had passed from the scene.\(^{518}\) Two “Old Calvinist” examples were Nathanael Taylor and Ezra Stiles who maintained the traditional notion of the New England Puritan people having a national covenant with God; albeit, Stiles also applied this national-covenant language (e.g., referencing the ancient Hebrew people as a metaphor) to America’s Revolutionary leadership in 1783.\(^{519}\) Second, “New Light non-Separates like Edwards maintained formal allegiance to an integrated system of covenants…” (e.g., the notion that the New England Puritan people had a national or social covenant with God), but they denied “that membership in the social covenant conferred ecclesiastical privileges under the covenant of grace…” (i.e., membership in the national covenant did not mean that one was a member of the covenant of grace, and only members of the covenant of grace had privileges to the sacrament of Baptism and Communion).\(^{520}\) Thus, Edwards and his followers accepted a qualified notion of the New England Puritan people’s national covenant with God. Based on these considerations, it is quite conceivable that the sheer presence and inertia of the New England Puritan tradition of national covenant, which implied that a

\(^{515}\) Noll, America’s God, 45-48.  
\(^{516}\) Ibid., 46.  
\(^{517}\) Ibid., 46-47.  
\(^{518}\) Ibid., 48.  
\(^{519}\) Ibid., 133-134 and 136-137.  
\(^{520}\) Ibid., 48.
Puritan people’s colonial/state common good (e.g., the common good of Massachusetts) was tantamount to the common good of a nation in covenant with God, was still a cultural-force for Madison and other framers to wisely keep in mind.
Appendix B

The limited/low employment of “philosophy of nature” assumptions by orthodox Protestants can be proved through reflecting on two facets of Mark Noll’s study in America’s God. First, Noll acknowledges that large segments of American Christianity were very skeptical about the use of reason. In discussing both the Anglican Samuel Johnson and the Calvinist Jonathan Edwards, Noll suggests that these two mid eighteenth century Christian thinkers are representative of the fact that many American orthodox Christians had not really embraced the natural philosophy and theology that was becoming prevalent in the English speaking world. According to Noll, both Johnson and Edwards “protested against what they perceived as materialism latent in the popular uses of Newton’s mechanical view of matter.” As Becker makes clear, such Newtonian thought was inherently part of the eighteenth century philosophy of nature. Although some elements of natural theology were beginning to become apparent, this was still governed by and grounded in a very high view of humanity’s need of God’s grace to sustain both human existence and the ability to think and know. Noll suggests this as follows:

During the first half of the eighteenth century, clergyman throughout the colonies encouraged human striving toward God, but only fringe theologians held that humans assisted in their own salvation. Natural theology (or the effort to reason form contact with the physical world to the character of God) was beginning to assume a new prominence, but it still functioned mostly within a framework constructed by notions of active providence.

Noll quotes Anglican Samuel Johnson articulating an example of such Christian thinking: “In his sermon Johnson could affirm that ‘it was from the exertion of the Almighty will and power of God, that we at first came into being, and…it is from the continued exertion of the same Almighty will and power of God every moment that we continue to exist, to think and act.’” Moreover, Noll clearly suggests that Edwards and Johnson represented a traditional and leading theological approach of the mid-eighteenth century that opposed both the “the materialistic implications of Newton and Locke and the

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521 Noll, America’s God, 27.
523 Noll, America’s God, 28.
524 Ibid., 28.
anthropocentric tendencies of Hutcheson and Shaftesbury.” After such reflection, however, Noll begins to argue that American thought begins to incorporate the “new moral philosophy of common sense” that had a much more exalted faith in the power and reliability of human reasoning. Although Noll’s above comment appears to demarcate Newton’s and Locke’s materialism from Hutcheson as a primary developer of “common sense” philosophy, Noll’s description of the “new moral philosophy” (associated with Hutcheson and others) clearly demonstrates how he views it to entail a strong belief in the power of human reason to discover God’s law or “‘intentions for man’” via examining “‘human nature’”:

The form of ethical reasoning that became nearly universal in the new United States, which was promoted with special vigor by Protestant evangelicals, is known by several names. It was, first, a localized example of the ‘new moral philosophy’ of the seventeenth and eighteenth centuries, whose proponents set aside Aristotelian and scholastic Christian authorities in search for what they considered better axioms upon which to base theories of human nature, psychology, and morality. In the words of Norman Fiering, the premier student of the subject, ‘The guiding assumption behind almost all of the new work was the belief that God’s intentions for man, His expectations of human beings as moral creatures, could be discovered independently of the traditional sources of religious authority, through a close investigation of human nature.’ Generically considered, this new moral philosophy promoted ‘common sense reasoning,’ or an approach to ethics self-consciously grounded upon universal human instincts. It received fullest formal exposition from the great flourishing of creative thought in Scotland from the time of Francis Hutcheson’s professorship at Glasgow (1730-1746) to the death of Thomas Reid in 1796. The fullest popular spread of this commonsense reasoning, albeit in terms considerably altered from their Scottish origin, occurred in the early United States.

Nevertheless, Noll also seems to carefully distinguish the “new moral philosophy” from natural law reasoning, which (as we have discussed above) also has an epistemological underpinning that assumes the exploration of nature via human reasoning is the best way to discover God’s law for man. This is seen in Noll’s analysis of how Jonathan Mayhew (a “liberal Congregational minister”) phrased the assumption in more of an “intellectualist” manner:

Mayhew also proclaimed that ‘the law of nature’ and ‘the light of nature’ were especially important guides to behavior. The latter phrases were intellectualist rather than affectional; they bespoke an ethic more aligned with Aristotle and classic views—where reason was to govern passion—than the new moral philosopher’s understanding of affection intuiting the truth.

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525 Noll, America’s God, 99.
526 Ibid., 102.
527 Ibid., 94.
528 Ibid., 101.
Regardless, of this demarcation between common sense and natural rights philosophy, Noll’s analysis suggests that the common assumption (for both philosophies) about the power of human reason for discovering God’s will (i.e., discovering God’s “‘intentions’” via the examination of nature by human reasoning) probably did not become widespread among American Christians until sometime between the 1790’s and early 1800’s; thus, his analysis suggests that such an assumption was limited among Christians when the Declaration was being framed in 1776 and during the time of the United States founding in 1787. How is this so? Although Noll shows examples of various more liberal and heterodox Christian thinkers before the late 1780’s like Mayhew who viewed reason to be an accurate way of discovering God’s truth, Noll’s primary example of an orthodox Christian who adhered to this assumption before the Revolution appears to be John Witherspoon. Moreover, Noll seems to view Witherspoon as chief causal agent for spreading Scottish common sense philosophy of Francis Hutcheson to his influential students during the 1770’s. Noll argues, for example, that James Madison’s rationalistic approach to the “‘science of politics’” was the product of Witherspoon’s influence on both Madison’s “‘political science’” and Stanhope Smith’s “‘science of morals’”:

In early 1787 both Smith and Madison were putting to use the general habits of mind they had first learned as a part of Witherspoon’s course in moral philosophy at Princeton. For both, the most useful element of this teaching was its guidance concerning universals of human nature and the methods by which to discover such universals- for Smith it was directly a ‘science of morals,’ for Madison it was the ‘science of politics,’ or the ‘science of government,’ about which he and Alexander Hamilton would write in the *Federalist*. What this suggests, then, is that Witherspoon’s philosophical teaching was not widely employed by his prominent students until the late 1780’s. Moreover, Noll even finally suggests that widespread acceptance by “American Protestant thinkers” of the “new moral philosophy” (common sense philosophy) did not occur until the 1790’s: “American Protestant thinkers did not use extensively the categories of the new moral philosophy until the 1790’s, at which time apologists once again were able to take up theistic proofs as refurbished by commonsense epistemology.”

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530 Ibid., 105.
531 Ibid., 111.
The above reflection, then, seems to provide significant support for the conclusion employed in the above dissertation that most *orthodox* Protestants at the time of the Declaration and even at the time of founding would *not* have affirmed that the best source of God’s revelation about his will and law for man is found in nature (or human nature) as interpreted by the use of human reason.
Appendix C

Since many of the loose interpretations of Constitutional Clauses have already been elucidated in the dissertation’s text and footnotes, only the remaining few undiscussed items will be considered here: Incorporation of the Bill of Rights via the Fourteenth Amendment, the weakening of the Tenth Amendment’s protection of States’ reserved powers, and expansive interpretation’s of Presidential power in Article II. With respect to Incorporation, which the Supreme Court made part of constitutional law through its handling of *Gitlow v. New York* more than fifty years after enactment of the Fourteenth Amendment, strong evidence suggest that this was an arbitrary development that had little grounding in a proper conception of the Fourteenth Amendment’s original understanding. Both Charles Rice’s essay, “The Bill of Rights and The Doctrine of Incorporation” and Sullivan and Gunther’s book, *Constitutional Law*, discuss Charles Fairman’s view of there being a “‘mountain of evidence’” for the conclusion “the framers and ratifiers of the Fourteenth Amendment did not intend to make the Bill of Rights applicable against the states…”, and this stands in contrast to “‘the few stones and pebbles that make up the theory that the Fourteenth Amendment incorporated Amendments I to VIII.”532 One such weak source of contrary evidence that Fairman discounts is the view of Congressman John Bingham (who helped develop the Amendment in the 1860’s) that the Fourteenth Amendment “was intended to reverse the Barron decision.”533 According to the logic of Fairman’s analysis, Bingham’s view should be viewed as a minority opinion; it cannot be attributed to the whole body of framers and enactors. Along these lines, Supreme Court Justice Miller’s majority opinion in the Slaughter-House Cases (1873) suggests that the Thirteenth, Fourteenth, and Fifteenth Amendments were merely intended to apply to freeing and securing the freedoms

of Africans Americans (as the former “slave race” in America) and any other racial group that might hypothetically become similarly enslaved.\textsuperscript{534}

With respect to the weakening of the Tenth Amendment and revisionist interpretations of wide-ranging Executive Power in Article II, such constitutional abuses have incrementally developed through the course of United States history. From the start of the federal government under the Constitution, the nationalist oriented President and Congress began expanding the powers of the federal government via grabbing reserved powers from the States (e.g., their enactment of Secretary Hamilton’s plan to incorporate a National Bank). Even with Jeffersonian Republican Revolution in 1800, such federal aggrandizement continued through the machinations of the Marshall Court (e.g., nationalist interpretations of the Commerce Clause, Necessary and Proper Clause, Supremacy Clause, and of supposed Judicial supremacy over State courts through a nationalist interpretation of Article III, Section 2.). The capacity of the States to resist such encroachments was brutally crushed by President Lincoln, and the States were (in turn) defenseless against the twentieth century federal government expansion under the influence of Progressivism. The State governments were bribed into compliance by LBJ’s creative use of grant-aid, and the increasing federal intrusion on States’ reserved powers continues into present (albeit, it is occasionally stalled, but never reversed, by a Conservative minded Court).

Similarly, the constitutionally suspect expansion of Presidential powers has developed over the course of United States history; albeit, its most dramatic growth has occurred within the last hundred years. In “The Problem of the Imperial Presidency”, George Carey discusses key developments of the “decline of Congress and the growth of executive powers.” He includes the following: (1) the “emergence of competing political parties during the early years of the republic”; (2) “the election in 1828 of Andrew Jackson to the presidency…”, which “allowed him to plausibly maintain that he represented the people as fully as Congress…” due to how he “secure[d] his party’s nomination through popular channels” and, then, “secured victory in the general election with an overwhelming popular majority…”; and (3) Woodrow

\textsuperscript{534} \textit{Slaughter-House Cases}, 16 Wall. (83 U.S.) 36; readers can review case in Sullivan and Gunther, \textit{Constitutional Law}, 450.
Wilson developing and even moving beyond “Jackson’s claims” by “asserting that the president was the only authentic national voice; that the nation as a whole possessed ‘no other political spokesman.’” ...[viewing] the president as ‘the unifying force in our complex system, the leader both of his party and nation.’” 535 Carey also discusses the dramatic changes occurring in the early years of the twenty-first century during the Presidency of George W. Bush. These include the Bush Administration’s employment of a “‘unitary executive theory’”, which maintains that “presidents can lay claim to a large and indefinite domain of exclusive authority derived from their constitutional obligation in Article II to insure that the ‘laws be faithfully executed.’” 536 Based on this theory, for example, the Bush Administration has ignored Congressional subpoenas requiring administration and cabinet officials to reveal conversations that they have had with one another. Here the Administration’s argument has been that the nature of a “unitary executive” extends executive privilege to administration officials in the same way that it does to the President when he or she has conversations with advisors. Moreover, the President has issued unprecedented numbers (far in excess of any previous President) of “‘presidential signing statements’”, which “mark out those of provisions of the laws regarded as intrusions or potential intrusions of his executive authority.” 537 Such statements are signed and attached to a legislative bill that the President chooses to sign, rather than veto. In doing so, the Bush Administration has maintained that President can choose to enforce the new statute to the extent that he deems it (and its enforcement) constitutional, and the signing statements often note the areas that the President already deems to be unconstitutional. For more on the Bush Administration’s constitutionally suspect moves to expand the authority of the Executive, see additional facet’s of George Carey’s “The Problem of the Imperial Presidency”, his “The Irony of Conservative Success” in Charles W. Dunn’s The Future of Conservatism: Conflict and Consensus in the

536 Ibid., 446.
537 Ibid., 446.

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Appendix D

Robert George may be tempted to disagree with this assertion. He seems to view his moral theory as a public philosophy that can be corroborated via the proper use of common human reason and doesn’t require sectarian religious assumptions/insights for its justification. In this appendix, I argue that Robert George is incorrect about this.

Robert George’s employment of the New Natural Law theory ultimately requires various sectarian theological/philosophical assumptions, even though he wants to deny and avoid this reality. This can be seen in George’s writing on complicated moral issues. On the issue of abortion, for example, the intelligibility of George’s argument seems to rely on Catholic moral views, which are based on certain Catholic theological/philosophical assumptions. Let me emphasize that the problem here is not with Catholic Doctrine; it may be a very reliable and God-given source of human truth. Instead, the problem here is with George. He claims to be developing a secular argument, which does not require controversial religious and metaphysical assumptions; however, his argument must ultimately rely on Catholic metaphysics and theology for its intelligibility.

In The Clash of Orthodoxies, George’s argument for the immorality of abortion draws heavily on the insight that a human life begins at conception (i.e., the sperm and egg fusion that produces an embryo) because this is when (as “Modern Science shows”) “a single, unitary human organism” comes into existence. Such embryos are “capable of directing from within their own integral organic functioning and development into and through the fetal, infant, child, adolescent stages of life, and ultimately into adulthood as, in each case, determinate, enduring whole human beings.” Based on this the logical implications of his argument seem clear. Embryos are actualized human beings. Human life is a basic good that provides basic reasons for acting to respect and protect this good. The first principle of morality mandates the following: “In voluntarily acting for human goods and avoiding what is opposed to them, *

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539 Robert George, “Public Reason and Political Disagreement: Abortion and Homosexuality”, 201-205.
541 Ibid., 319.
one ought to choose and otherwise will those and only those possibilities whose willingness is compatible
with a will toward integral human fulfillment.”\textsuperscript{542} Since this principle is “too abstract, too general to guide
morally significant choice…”, it “must be specified…”. Such further specifications are developed via
“considering… the various ways in which feelings can fetter reason and deflect the acting person from fully
reasonable choosing.”\textsuperscript{543} The resulting “specifications are” what Finnis calls the “‘requirements of practical
reasoning’…”. George obviously believes that these include or logically imply the moral norms that resolve
the hypothetical example, which he discusses in \textit{Making Men Moral}, of a scientist deliberating about
whether to destroy the life of another human in order to discover the cure to a fatal disease that will destroy
many lives if the cure is not discovered: “Here, however, moral norms enjoining us to treat every human
being fairly and every human life as an end rather than as a mere means clearly exclude the option of
carrying out the experiments.”\textsuperscript{544} Such a norm or dictate of practical reason also seems relevant to George’s
argument concerning abortion. One should never treat the life of an unborn human being as a mere means
to realizing human goods for oneself or others (e.g., destroying the life of the unborn for the sake of
preserving interpersonal harmony in one’s family, maintaining one’s pursuit of work and play, etc.).
Furthermore, the “so-called Pauline Principle which forbids the doing of evil that good may come…”
implies that one should never intentionally act to destroy the good of human life, even if so doing would
result in advancing other basic human goods (e.g., work, play, etc.). So, one should not act to harm the
basic human good of life of unborn human beings, even for the sake of advancing other basic goods like
work, play, etc. Based on such considerations, it seems that practical reason proscribes acting to abort and
destroy the lives of embryos.

George’s above argument presumes that human life is a basic human good, which is intrinsically
valuable, and he assumes that unborn embryos’ identification as human beings renders their lives to be
instantiations of the intrinsically valuable basic good of human life. With these assumptions, he can prove
the moral problem of aborting unborn embryos via the type of argumentation elucidated above.

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\textsuperscript{542} George, \textit{Making Men Moral}, 16.
\textsuperscript{543} Ibid., 17.
\textsuperscript{544} Ibid., 11.
Such an argument seems acceptable, but one must be honest about how it actually requires acceptance of and reflection on controversial Catholic metaphysical and theological assumptions. Like all basic goods, the basic good of life is grasped through a non-inferential act of understanding; it is not logically derived from theoretical/empirical knowledge, human experience, or any other possible premise. Nevertheless, like all basic goods, the basic good of human life requires certain exposure to relevant theoretical/empirical knowledge and experience in order for this good to be non-inferentially grasped. Here such background knowledge and experience functions to prime one’s practical reasoning to ascertain and non-inferentially grasp the basic goods. Unfortunately, some New Natural Law theorists may have an unrealistic hope that the requisite background theoretical knowledge and experience will be non-controversial enough for the New Natural Law theory to still function as a public philosophy. In other words, they may hope that the requisite background knowledge and experience does not include controversial metaphysical and religious truths that many naturalists, agnostic/atheistic humanists, and even many Christian and non-Christian theists will not accept. Unfortunately, this does not appear to be the case with respect to ascertaining the intrinsic value of many modes of human life.

As previously discussed in the first chapter, background priming of the practical intellect for non-inferentially grasping the intrinsic value of early modes of human life (e.g., embryos and fetuses) seems to require exposure and acceptance of various controversial metaphysical and theological assumptions, and many of these are posited and found in Roman Catholic and Eastern Orthodox philosophy/theology. People seem to require sufficient reflection on the unique nature of man in order to ascertain that the life of a human being, like themselves, has intrinsic value (i.e., valued for its own sake, without appeal to or inference from a higher reason). Here various qualities of the human personhood seem important. Man has certain cognitive, emotional, and spiritual capacities and components that distinguish him from the other animals and organic life and make him similar to God and the Angels. Moreover, human personhood also includes a bodily quality/component; the spiritual qualities/components are uniquely fused to the bodily
components and qualities. Through recognizing such insights, one becomes able to ascertain that such a human life (with these unique human capacities and components—bodily, spiritual, cognitive, and emotional) is intrinsically valuable. This basic evaluative judgment is not deduced from the theoretical/speculative knowledge (e.g., empirical, metaphysical, and religious truths) about man’s nature; however, reflection on such truths helps to prime one’s practical reason to make this non-inferential act of understanding.

Early modes of human life—i.e., post-conception stages of life—lack actualization of some qualities and components of human personhood (e.g., the cognitive and emotional), but they have actualized the bodily and spiritual components of post-conception primes the practical intellect to non-inferentially grasp how such life is intrinsically valuable.

Inaccessibility to this and other similar practical insight (e.g., the intrinsic value of human life as a entailing personhood that includes both body and spirit in union) arises from the fact that many people in contemporary western culture refuse to accept the metaphysical and religious truths/assumptions, which constitute such requisite theoretical/speculative knowledge. Most naturalists and atheistic/agnostic secular humanists, for example, probably would not accept the premise that human beings have an immaterial spiritual capacity and component within their nature. Furthermore, even among Christian theists, there are serious differences about (1) the immaterial spiritual capacity and component of human nature and (2) if and to the degree it exists, when it is actualized within a human life. Many Catholics and Orthodox Christians are willing to accept the thesis that humans are given an immortal soul sometime between conception and birth; whereas, many Protestants view this to be mere extra-Biblical theological speculation.

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545 Here human personhood entails the inseparable union of body—physical—and soul—spiritual. As discussed by John F. Crosby in his article, “Human Person”: “We human persons are not purely spiritual, like Divine Persons and even the angelic persons; we are incarnate persons, and ours is an embodied personhood.” This, however, entails defining personhood in a manner that relies on Catholic theoretical knowledge about human nature and eternal reality. See John F. Crosby, “Human Person”, 309.

546 The Roman Catholic Church presumes the possibility of “ensoulment” with respect to questions about how to treat the post-conception life of embryos and fetuses. Recognition of this impressive actualization of both body and the immortal (and immaterial) spirit (as well as their inseparable unity).
that cannot be relied on and made relevant to evaluating the life of post-conception and pre-birth modes of
human life (e.g., embryos and fetuses).\footnote{See this dissertation’s discussion of Robert Wennberg’s analysis of abortion (e.g., Chapter Seven).} Since embryos and fetuses clearly lack the emotional and
cognitive components and capacities of human personhood, their possession of bodily and spiritual
components and capacities becomes vital for evaluating their intrinsic value. The lack of openness that
many Protestants have to the “Tradition” component of Catholic and Orthodox theology (e.g., belief in
“ensoulment”) make it difficult for them to ascertain the intrinsic and equal value of embryos and fetuses;
albeit, conservative Protestants’ socialization in and identification with traditional Christianity often
renders them stalwart defenders of such new human life, even though their view of theological authority
severely hinders their moral theology on this topic.

George is apparently sensitive to the “dangerous” (if one’s goal is to develop a public philosophy)
proximity of the anti-abortion argument to controversial metaphysical and religious assumptions, for he
tries to explicitly deny that his view is connected to Catholic discussion of “‘ensoulment’”:

> Then there is the claim that the argument for the human status of the early embryo depends on controversial religious premises about ‘ensoulment.’ It does not. The question is not about embryos’ eternal destiny. That is a religious matter. (One on which the Catholic Church, by the way, has no official position). The question is whether embryos are or are not whole, living members of the species Homo sapiens; whether they are or are not distinct, self-integrating organisms with the capacity for active self-development and maturation as human beings; whether the organism that is now you or me is or is not the same organism-the same being- that at an earlier point in its biography was an embryo, a fetus, an infant, a child, and an adolescent.\footnote{George, The Clash of Orthodoxies, 320-321.}

> Here George risks muddling the Catholic Church’s view on the relevance of “‘ensoulment’” for the abortion debate. As we previously discussed, the Church teaches that the possibility that God gives souls to embryos at conception mandates very carefulness about protecting and honoring embryonic life. A plain reading of George’s writing, however, might suggest he believes that the Church’s “no official position” on “‘ensoulment’” means that the Church does not teach about a relevant connection between “‘ensoulment’” and abortion. This is not the case.
Our questions about George’s anti-abortion position becomes even greater when we consider his attacks against the pro-abortion view that embryos do not have rights to life because they are not actualized persons. George’s attack is as follows:

This will not do. You and I are essentially human, physical organisms. In other words, we do not ‘have’ organisms that we (considered as conscious and desiring agents) possess and use; rather, we are rational-animal organisms. Therefore we—that is, the persons we are—come to be precisely as and when the animal-organisms we are come to be. One does not become a person only sometime after one comes to be. The human person is a bodily entity—not a mere consciousness inhabiting and using a body—so all human beings, including embryonic human beings, retarded human beings, and frail, demented, and dying human beings, are ‘persons’ whose rights deserve respect and protection.

Basically, he asserts that human personhood begins at conception because this is the beginning of a human being, and a human being is essentially “a bodily entity.” Human personhood equals a human physical organism at any stage of its development. His argument seems questionable. He seems to start with a loaded term, human person, which is associated with bodily, spiritual, cognitive, emotional, and willful qualities that render humans similar (in some respects) to God and the Angels, and that is commonly recognized as being intrinsically valuable. He, then, gives this term, “human person”, a different connotation (i.e., a human bodily organism at any stage of development, regardless of actualized consciousness and actualized rational, emotional, and willful capacities) that still relies on the dignity and value associated with the richer connotation of human personhood.

One might try to save George from this problem by arguing that he probably does not believe that human personhood is tantamount to a “bodily entity” alone. Instead, George might actually believe in a significant part of the richer connotation of personhood: the human organism’s being, which entails the inseparable union of body (physical) and soul (spiritual). As discussed by John F. Crosby in his article, “Human Person,” in Robert Shaw’s edited volume, Our Sunday Visitor’s Encyclopedia of Catholic Doctrine: “We human persons are not purely spiritual, like Divine Persons and even the angelic persons; we are incarnate persons, and ours is an embodied personhood.” There are actually facets of George’s writing that reveal such a view of the human person as a union of the body and spirit. In his essay,

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549 George, The Clash of Orthodoxies, 322-323.
“Marriage and the Liberal Imagination”, for example, we see the following: “The body is not rightly treated as a machine for having experiences; it is, rather, a part of the personal reality of the human being whose every act (including spiritual acts) is also a bodily act, and whose body, as an intrinsic (and not merely instrumental) part of the person, participates in the his or her fulfillment.”551 This, however, defines personhood in a manner that both (1) relies on the controversial metaphysical assumptions about an immaterial spiritual quality and component of the human person and (2) is very similar to the Catholic metaphysical assumption about the inseparable unity between body and spirit in the human person. Thus, it appears that George, himself, is not above relying on Catholic theoretical knowledge about human nature and eternal reality, and this is what George wants to avoid.

551 George and Bradley, “Marriage In the Liberal Imagination”, 149.
Appendix E

The following is a brief examination of various assumptions by key Framers like Madison and Hamilton. Specifically, it examines such assumptions that seem questionable from today’s vantage point. First, such framers believed that judges would be noble characters who would adjudicate law according to strict and clear rules of legal method. Federalist # 78 demands that federal judges must review the constitutionality of legislation by employing “JUDGMENT” and not “WILL”. Publius here condemns the possibility of judges substituting their own “pleasure” for the “intentions” of the legislature; instead, judges must only “judge” whether the legislation is in accordance with the Constitution as the fundamental law of the system. Sadly, we now know that many federal judges have conveniently invented constitutional constructions that justify reading their own policy views into the Constitution. This has been most obvious in the many cases where “substantive due process” (e.g., judges overturning legislation and, hence, restricting state and/or federal powers via reading desired substance into the constitutional restrictions from the Fifth and Fourteenth Amendments to prevent federal and state legislatures from depriving life, liberty, and property unless this is done in accordance to the due process of law) has influenced the Court’s decision (e.g., Dred Scott v. Sanford, Lochner v. New York, Griswold v. Connecticut, Eisenstadt v. Baird, Roe v. Wade, Planned Parenthood of Southeast Pennsylvania v. Casey, and Lawrence v. Texas).

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552 For the sake of argument, it is assumed that the arguments of Madison and Hamilton in The Federalist represent constructions of the Constitution that Madison and Hamilton were committed to adhering to if and when the Constitution was ratified and the new government became operational. In short, this assumes (for the sake of argument) that Madison and Hamilton were not being disingenuous when writing their contributions to The Federalist.
553 Alexander Hamilton (as Publius), Federalist # 78, The Federalist, ed. Carey and McClellan, 265-266.
554 Ibid., 265-266.
555 An excellent discussion of “substantive due process” is found in McDowell, “The Perverse Paradox of Privacy”, 57-83.
Second and maybe more importantly, such framers (based on their limited and historically specific experience) viewed Congress as the main power in the system and probable usurper of liberty. Based on this assumption, they gave the supposed weaker branches, the Executive and Judiciary, a degree of independence and some possibility of either vetoing or reviewing the actions of Congress. Today, one can see how this assumption has been turned on its head during the course of more than two centuries of United States history. Now, the Executive and the Judiciary possess most of the real power within the federal government and the American system in general. Moreover, the oversight and veto powers that the Framers gave to these supposed “weaker” branches have been the very tools that they have employed to acquire their hegemony over the system.

Third, such framers believed that the States would be the dominant group within a system of shared sovereignty between the federal government and that States. Again, this is seen in various passages from Federalist # 46 about how the States could successfully check any schemes by the federal government to illegitimately aggrandize its power. Aside from Madison’s comments about States having the “advantage” over the federal government in possible power struggles and in the fact that members of the federal Congress will be inclined to advance their State’s common good, Madison also discusses the States’ role in resisting inappropriate increases of federal power. First, he suggests that the Federal government would have a very difficult time opposing “an act of a particular state” that was “unfriendly to the national government” but “generally popular in the state…”. Second (and even more importantly), Madison suggests that the States would have ample means and ability to resist “an unwarrantable measure of the federal government” that was “unpopular in particular states…”:

556 As already noted above, Publius clearly portrays the legislative department of government as most prone to encroach upon other bodies’ rightful powers. This is seen most explicitly in Federalist # 48: “The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.” See Madison (as Publius), Federalist #48, The Federalist, ed. Carey and McClellan, 256-257.

557 In Federalist # 78, for example, Publius discusses the judiciary as the “least dangerous to the political rights of constitution” and “the weakest of the three departments of power.” See Alexander Hamilton (as Publius), Federalist # 78, in The Federalist, ed. Carey and McClellan, 402.

558 Professor Carey has taught me this insight during our various discussions on the matter.

559 James Madison (as Publius), Federalist # 46, in The Federalist, ed. Carey and McClellan, 245-246.
Should an unwarrantable measure of the federal government be unpopular in particular states, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are power and at hand. The disquietude of the people; their repugnance, and perhaps refusal, to co-operate with the officers of the union; the frowns of the executive magistracy of the state; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any state, difficulties not to be despised; would form, in a large state, very serious impediments; and where the sentiments of several adjoining states happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.  

Furthermore, Madison (in the sequel) proceeds to envision how the States would quickly and feasibly collaborate with one another to resist problematic expansion of federal powers:

But ambitious encroachments of the federal government, on the authority of the state governments, would not excite the opposition of a single state, or of a few states only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combination, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case, as was made in the other.

To qualify this, Madison quickly reassures readers that such a hypothetical scenario (e.g., “ambitious encroachments of the federal government…”) is not a likely possibility. Nevertheless, Publius’ comments provide a basis for viewing the action by multiple States as mechanisms for checking and resisting trespasses by the federal government onto “the authority of the state governments…”

Unfortunately, the long-term trend of American history has proven Madison as Publius wrong in his assumption that the States would be the dominant power in settling federal versus State jurisdictional power disputes. Chapter Five briefly addressed this when describing the historical stages through which the federal government has unconstitutionally intruded upon the States’ powers, so there is no need to repeat them here.

Fourth and finally, such framers did not appropriately account for two unfortunate weaknesses of the modern character: (a) the tendency to determine law and policy in accordance with the whims and fads of current culture; and (b) the tendency to rationalize/fabricate new and contradictory justifications, which have the appearance of deep and immutable theoretical principles, for various whims and preferences of

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561 Ibid.
elites and/or mass culture. The first of the above factors, “(a)”, is frequently on display in the evolution of law and policy to placate mass sensibilities (e.g., campaign finance reform, the development of unsustainable entitlement programs, policies mandating radical equal opportunities among the sexes, allowing long-term and painful implications of federal government’s expansion for the sake of accomplishing short-term objectives and mass whims), which are (ironically) often generated and manipulated by forces within elite culture.

The second above factor, “(b)”, significantly helps explain the development and application of the natural rights theory associated with the Declaration of Independence. Various late mutations of this theory were employed to dispense with the Colonies’ positive legal obligations to the Parliament of Great Britain. This became the basis for viewing the colonies as separate sovereign peoples with only a very loose connection to British rule that was ultimately not binding due the “King’s” supposed mistreatment of the colonies. In more recent history, this rationalization tendency has seemingly contributed to the development of various theoretical justifications for foreign wars and interventions (e.g., Woodrow Wilson’s liberal idealism; George W. Bush’s liberal/neo-conservative idealism in foreign policy; etc.). It also partially explains academic writing to justify employing political/moral philosophical standards within Constitutional jurisprudence that have no inherent (or even implied) connection with the original understanding of the State-peoples who ratified the Constitution.\(^{562}\)

In being mindful of how the framers so misjudged the trajectory of the United States political system and the fact that views of the ratifying State-peoples, not the framers, actually constitutes the original understanding of the Constitution, the State-peoples who have suffered under federally imposed tyranny can now work to regain control of their compact through changing it in a manner that both reclaims and better protects their reserved powers from federal intrusions. For, it is and always has been their compact. Each of the State-peoples is still a legal sovereign entity within the federal union.

Through making the Federal Judiciary both more accountable to their Sovereigns, the State-
peoples, and less free to employ creative jurisprudence as a means of mandating their own selective policy
preferences, significant progress will be made in regaining and maintaining the States’ original reserve
powers. Starting with the Marshall Court, the Federal Judiciary has tended to allow the federal government
to unconstitutionally usurp State powers. Moreover, in the twentieth century, the federal judiciary has
single handedly stripped the States of many reserve powers through “Incorporation” and its extremely
“loose” interpretations of the Bill of Rights. Through giving the States the power (either directly or
indirectly) to select, retain, and remove federal judges (including Supreme Court Justices), the Federal
Judiciary will be motivated to reverse its “nationalist” trajectory and begin rediscovering the States’ many
“reserve” powers that the federal government has been able to ignore. Moreover, through returning both the
selection of Senators back to the States and the States’ tax-base, the federal government will become more
motivated to consider the interests of its sovereigns, the State-peoples, when enacting legislation.

Finally, if all of the above fails and a State-people views its status within the federal union to be
intolerable, it still has its sovereign right to secede from the union and discontinue participating in the
constitutional compact. Of course, although this right is still very real (for no authoritative act has altered or
eliminated it), a seceding State-people will likely face the wrath of the now very powerful Leviathan that
was first created in 1789, asserted itself over the States militarily from 1861-1865, increasingly grew during
the course of the twentieth century, and still grows larger today. A State-people’s attempt to defend itself
against the federal “beast” might be futile, but would still be a noble and constitutional endeavor.
Moreover, if secession once again became a viable option, the federal government might actually begin
exercising some humility and prudence in its domestic and foreign policy.


15. Berry, Wendell. “Unsettling of America”. In Berry, 35-46.


78. Laws and Orders Concluded by the Virginia Assembly, March 5, 1624. In Lutz, In Documents of Political Foundation Written by Colonial Americans, 67-72.


82. Lincoln, Abraham. Gettysburg Address. Quoted in Wills, 263.


