**The Saints Come Marching Into Constitutional Federalism:**
**Southern Embrace of a National Evangelical Morality, 1880-1918."**

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## Introduction

Why would anyone constitutionally limit the legislative jurisdiction of the national government in order to protect subnational governments' power? And how is such a limit practically possible? These two questions together present a dilemma. The familiar explanation for why anyone would ever constitutionally protect subnational power also seems to be a reason for why such protection will likely be either impossible or unnecessary.

The obvious reason to protect subnational power is one's prediction that one's own subnational government is more likely than the national government to favor policies that one also favors, because the former is more likely than the latter to be controlled by voters who share one's own ideology or preferences. But such a prediction suggests that constitutional protections for subnational power will be either unnecessary or impossible. If everyone else in the nation also predicts that their subnational government will favor their own views more than the national government, then constitutional limits on national power seem gratuitous. Voters will simply elect do-nothing Congresses that will defer to the subnational decisions that their constituents prefer. By contrast, if other voters have strong inclinations to nationalize policies, then any constitutional limit on a Congress elected by such a constituency might seem to be futile.

The paradox of constitutionally protected subnational power might be exacerbated by the abstract and procedural character of such jurisdictional issues. People care immediately about how they are governed – the coercion that they might suffer or can impose – and only derivatively and abstractly about the identity of the particular government that produces such coercion. If one has the votes to nationalize one's preferred system of private rights, then why would one care to preserve subnational power that one does not need? By contrast, if one lacks the votes to impose one's view of rights on the nation, then how will one be able to impose one's view of subnational power on the nation? Abstract theories of states' rights seem intuitively less likely to motivate a passionate coalition of allies to march under a common banner than robust theories of private rights.

This article describes the rise and fall of a coalition within the Nineteenth Century Democratic Party that was united solely and passionately around a particular theory of subnational power. The members of this coalition were united in their adherence to this theory by a common fear of a group I shall call "the Saints," a shorthand for evangelical protestant reformers pressing reforms ranging from temperance to abolition of slavery through fervent petitioning campaigns and revival-style conventions. A broad array of groups – Southerners, freethinkers, Irish Catholics, and German Lutherans – resented Yankee protestant interference with what they regarded as the "private" sphere."

These groups, however, confronted the dilemma of identity pluralism in trying to unite around a single concept of "the private." On one hand, each group would ideally like the central government to enforce their preferred concept of "the private" against all other groups; On the other hand, they feared that other groups would use such national power to undermine their own conception of the household's proper scope. Lacking any unified concept of the proper scope of "the private," the groups could unite only on a general anti-Yankee platform to resist any nationalization of norms governing household matters. The result was the Democratic Party's gradually adopting of a form of federalism in which religiously sensitive issues vaguely relating to the home were reserved for subnational governments.

The coalition, however, was only as strong as their common allegiance to an anti-saintly agenda. When evangelicalism spread to the South, southerners abandoned the coalition for a new alliance with their saintly counterparts in New England and the West. The result was the collapse of a constitutional theory of federalism that had stood for a half-century, replaced by a new "Progressive" theory of federalism rooted in a new coalition and championed by the followers of Teddy Roosevelt and Woodrow Wilson. The saintly version of federalism favored decentralization not so much to preserve the autonomy of the household as to reform the home through the internalization of national norms of piety and purity. Decentralized public participation was a fundamental aspect of this new vision of federalism, but the object of such participation was not to fight off the cultural imperialism of overweening Yankees but to nationalize new values of temperance, universal public education, cultural unity, and domesticity.

**I. Saintly republicans: Public participation as cure for private sin**

As Jonathan Scott has observed, it is easy to over-emphasize the influence of Renaissance ideas on English republican writers, ignoring the equally important contribution of Christian and

Neo-Stoic principles.[1] English republicans were not academics trying to revive Roman or Italian ideas for the sake of obsessive classicism: They were defenders of a Puritan revolution against an established church and a monarch suspected of Catholic sympathies. Calvinist ideas, therefore, played an important role in their conception of the republic with which they replaced the Stuart monarchy. Chief among these Calvinist ideas was the commitment to individual self-discipline through the communal internalization of moral norms. Puritan commonwealthmen defended the idea of widespread public participation in local government not simply as a way of controlling wayward government but also disciplining wayward citizens. Calvin himself insisted on this idea of individual internalization of social norms when he demanded that the burghers of Geneva take their famous oath with upraised arms to uphold Calvinist-Christian ideals in the public square, an insistence on individuals' bonding with communal norms that looks suspiciously like the ideal of the General Will celebrated by that other Genevan, Jean-Jacques Rousseau. [2] The citizen who did not serve as a constable, selectman, or juror was corrupted by his sloth: In John Milton's contemptuous phrase, he was the "softest, basest, vitiousest, servilest, easiest to be kept under; and not only in fleece, [b]ut in minde also sheepishest."[3]

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[1] Jonathan Scott, *England's Troubles* at 230-32.

[2] For a comparison of Calvin's and Rousseau's ideas of social unity, see Pamela Mason, *The Communion of Citizens: Calvinist Themes in Rousseau's Theory of the State*, 26 Polity 25, 40-41 (1993).

[3] John Milton set forth this ideal of widspread public participation in *Readie and Easie Way to Establish a Commonwealth* at 100-101 (1660), a pamphlet defending the commonwealth on the eve of its dissolution and reinstatement of the Stuart monarchy:

> [N]othing can be more essential to the freedom of a people, then to have the administration of justice and all public ornaments in thir own election and within th[e]ir own bounds, without long travelling or depending on remote places to obtain th[e]ir right or any civil accomplishment; so it be not supreme, but subordinate to the general power and union of the whole Republic. In which happy firmness as in the particular above mention[e]d, we shall also far exce[ed] the United Provinces, by having, not as they (to the retarding and distracting oft times of th[e]ir counsels or urgentest occasions) many Sovranties united in one Commonwealth, but many Commonwealths under one united and entrusted Sovrantie. And when we have our forces by sea and land, either of a faithful Armie or a setl'd Militia, in our own hands to the firm establishing of a free Commonwealth, publick accounts under our own inspection, general laws and taxes with thir causes in our own domestic suffrages, judicial laws, offices and ornaments at home in our own ordering and administration, all distinction of lords and commoners, that may any way divide or sever the publick interest, remov'd, what can a perpetual senat[e] have then wherin to grow corrupt, wherin to

That Puritan republican ideal of public participation for the sake of the participant's personal self-discipline crossed the Atlantic to New England, most notoriously under the Massachusetts Charter of 1692 by which William and Mary bestowed on the colony the power to legislate in any way to repugnant to English law. The Massachusetts general court used this power to create the "standing order" of 1693 requiring every town to retain a "learned, able, and orthodox minister," support a schoolmaster, and govern itself through a myriad of offices – bailiff, fence reeve, etc – rotated among the townspeople. The Congregationalist elite celebrated the self-governing character of these town-based establishments, as assuring that "the Laiety continued to have a share in the Government of the Church, as Members of a voluntary Society, ... interested in its Concerns,"[4] distinguishing this decentralized regime from the Church of England or other "National Establishment"[5] on the ground that their town-based churches rejected "the Authority of Councils or Synods for their direction and Government,"[6] thereby protecting "the Right of private Judgment" of "particular Churches ... to be governed within itself and by its own Laws." The congregationalist organization of Massachusetts' town-based establishments led other more politically centralized reformed churches in Scotland and Holland to question the New Englanders' orthodoxy, but the point of Massachusetts' town-based establishments was not to encourage heterorthodox opinion.[7] Although towns were subject to centralized supervision in their choice of minister to insure orthodoxy and ability,[8] the laity also exercised a high level of control over their ministers and engaged in sometimes rowdy debate

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encroach upon us or usurp; or if they do, wher[e]in to be formidable?

[4] Samuel Mather, *Apology for the Liberties of the Churches* at vii (1738)

[5] *Id.* at 9, 7.

[6] *Id.* at 4.

[7] Richard Ross, *Puritan Godly Discipline in Comparative Perspective: Legal Pluralism and the Sources of Intensity*, ___ Am Hist Rev 975, 994-95 (October 2008).

[8] McLoughlin, at I:124-26.

over church affairs. [9] The political governance of Massachusetts matched its religious order: The colony possessed a substantially decentralized political system with minimal colony-wide legislation, resting on local juries' enforcement of town-based customs and a requirement that town residents fill a myriad of burdensome local offices. [10] This system of government rested on pervasive duties of political participation, but the point was not to celebrate diversity of belief but to inculcate consensus about morality.[11] The saintly theory of society was dominant in New England, spreading westward across a "Yankee diaspora" from upstate New York through the Western Reserve into the Great Lakes Midwest. At the core of the saintly idea was the Calvinist commitment to individual self-discipline through the communal internalization of moral norms. From the English civil war through the Social Gospel of the 1890s, Puritan reformers in England and North America defended the idea that widespread public participation was not simply a way of controlling wayward government but also disciplining wayward citizens. By purifying society of sin through collective exhortations and resolutions, citizens would also cure themselves of sinfulness. Politics, therefore, was not a matter of individual self-interest but rather of disinterested pursuit of moral improvement. This saintly attitude towards collective action implied what Daniel Elazar has called a "moralistic" theory of government: Saints believed that the state had both the power and duty to inculcate moral norms of personal purity through widespread public participation. Pietist protestants accordingly invented the practice of *disinterested* petitioning of legislatures for the advancement of moral causes – banning slavery in Washington, D.C. or banning mail delivery on the Sabbath -- rather than for obtaining pork advantageous for particular communities like bridges or courthouses.

[9] James F. Cooper, Jr., Tenacious of Their Liberties: The Congregationalists in Colonial Massachusetts (1999).
[10] William E. Nelson, The Americanization of the Common Law 21, 28-29 (2nd ed. 1994).
[11] *Id.* at 3-4. Almost forty years ago, Michael Zuckerman went so far as to argue that New England colonial towns were societies "dedicated to concord and devoid of legitimate difference, dissent, and conflict ... [a] democracy without democrats." Peaceable Kingdoms: New England Towns in the 18th Century 185-88 (1970).

In particular, the saints' political agenda revolved around the protection of the home from the sinfulness of the household's male members. The personal, in this sense, was emphatically the political, because sinful private institutions – the tavern, the brothel, mail delivery of newspapers on Sunday, etc -- endangered the welfare of women and children at home. Starting from the Second Great Awakening in the early 19th century, Yankee evangelical reformers in different Protestant denominations organized themselves as a "Benevolent Empire" and pressed for both public policies and individual pledges to stop the drinking of alcoholic beverages, the desecration of the Sabbath, dueling, prostitution, gambling, and profanity.[12] The common denominator of these various reforms was protection of the private household from male sinfulness. Drunkards reeling home from the local tavern endangered their families with violence and unemployment; The mail coach's horn announcing the arrival of newspapers at the post office on the Sabbath tempted men away from the dutiful trek to the family pew. The anti-slavery movement was intimately tied to this Pietist effort to prevent male sinfulness from corrupting the home. To Yankee reformers, the owning of slaves was just another instance of sinful patriarchy: Like drunkards, duelers, and other swearing, gambling impious males, slaveowners tyrannically wasted the substance and wreaked violence on the maternal household.

Unsurprisingly, the political parties most closely associated with the Benevolent Empire of Protestant reform were also most welcoming to the political participation of women. The Whigs not only were willing to use state governments in limited ways to enforce proper family behavior but were also willing to involve women as active participants in conventions, petition campaigns, and parades.[13] The Republicans continued this tradition of feminine involvement in

[12] On the idea of a "benevolent empire" of interdenominational Protestant reformers, see Ronald G. Walters, American Reformers, 1815-1860, at 33-35 (2nd ed. 1997).
[13]Rebecca Edwards, Angels in the Machinery: Gender in American Party Politics from the Civil War to the Progressive Era 17-18 (1997).

politics, often holding meetings in churches where women were dominant presences and advertising the maternal family as the ideal that the Slave Power licentiously corrupted through male omnipotence. Republicans also drew on stereotypes of Irish Democrats as drunk, rowdy, and violent – "the nasty, drunken, brawling Democrat" in the words of one Republican.[14] Southern behavior in caning Charles Sumner on the Senate floor or murdering Republican congressmen in duels reinforced the Republicans' rhetoric that the entire Southern code of manly honor was just another variety of male license to drink and fight, no different than the culture of Irish "roughs" spoiling for a brawl in a saloon or rioting in New York City. Republican candidates, by contrast, were portrayed as good family men married to teetotalling and pious wives like "Lemonade Lucy" Hayes.[15]

That the Whigs and Republicans called for national action to reform moral did not mean that they discouraged decentralized political participation. To the contrary, the politics of the maternal family encouraged decentralized petition campaigns to end slavery in Washington, D.C. or mail delivery on the Sabbath and, after the Civil War, local crusades (including sit-ins) to shut down saloons.[16] The congregation-based organization of Protestant churches encouraged this tradition of local moralistic participation: The Anti-Saloon League, for instance, was the preeminent lobbying organization of Protestant reform from the 1890s, and it campaigned for "local option" laws to ban alcohol in individual local jurisdictions precisely because such laws created venues by which the religious zeal of members could be kindled through local action.[17] Likewise, Social Gospel reformers like Frederic Howe and Delos Wilcox campaigned for

[14] *Id*. at 31.
[15] *Id*. at 34.
[16] Barbara Leslie Epstein, The Politics of Domesticity 89-146 (1981) (on the Women's Crusade to shut down saloons in Ohio in 1873-74).
[17] Szymanski on the Anti-Saloon League. As one ASL pamphlet urged, the "local option" policy "presents the saloon to the voters for their judgment upon it again and again…. The voter cannot escape the responsibility for a decision for or against the saloon. Public opinion is kept keen on the subject." *See* Joseph Coker *Liquor in the Land of the Lost Cause* at 63.

municipal home rule not for the sake of governmental efficiency but for the sake of inspiring citizens to become more deeply involved in political life: The "real test of municipal ownership," declared Howe, was not efficiency but rather its "value to our civic life," because "a city with big interests will invite big men to serve it.."[18] Richard Ely, the evangelically inclined economist and Social Gospeler, argued for the decentralization of Switzerland to inspire citizens to civic action by the hope of local public benefits.[19]

The point of saintly decentralization, however, was not to protect the right of a local community to autonomous self-government but rather to enlist the local community to become personally engaged in enforcing universal norms. The end result should be national enforcement of the principle that the localities strive to impose. "Think globally, act locally" captures the saintly mindset towards decentralization.

## II. The Impossibility of Unifying the Gentry Against the Benevolent Empire With National Rights

The Democrats' opposition to this saintly republican campaign centered on resentment of disparate cultural groups to the Yankees' invasion of the household's private sphere. One could loosely united these group under the term "gentry," because they were self-consciously unified around protection of small property holdings – their household business or home. As Paul Formisano observed, anti-evangelical groups were united by little more than dislike of Yankee meddling in other people's business: "We have Anti-Masonry, Anti-Rum, Anti-Gin, Anti-Brandy, and Anti-mind-their-own business people enough in this small town," complained one

[18]Frederic C. Howe, *The Case for Municipal Ownership*, 2 Proceedings of Am. Pol. Sci. Ass'n 89, 96, 103 (1905). For a general discussion of how city power will enlist citizens to public action, see Frederic C. Howe, *The City as a Socializing Agency: The Physical Basis of the City*, 17 Am. J. of Soc. 590 (1912).

[19] *See* Richard T. Ely, *Socialism: An Examination* at 31-32 ("all socialists are working for decentralization of government…."). Ely also praises the referendum and initiative as devices to bypass partisan democracy and "teach men to discuss measures more and men less" thereby discouraging "merely personal politics." *Id.* at 346. On the general tendency of Progressive advocates of municipal "home rule" to defend decentralization as a way of enlisting citizens into focusing on public affairs, see Mattson;

opponent of temperance.[20] These critics did not distinguish between Yankee "meddling" for egalitarian or merely moralistic causes: Both temperance and abolition could be branded as more efforts by Yankee busybodies to disturb the civil peace. As one German Republican later recalled, Democrats denounced Republicans as "long-faced, white-livered, hypocritical Yankees, who sold wooden nutmegs and cheated honest farmers with lightening rods and Yankee clocks," "would not allow a man to cook meals on the Sabbath, or kiss his wife or take a walk for pleasure," and "[who] were rank abolitionists" intent on "break[ing] up the union."[21]

Thus, simply by rejecting the "aggressive didacticism" of the overweening Yankees,[22] slave-owning Southerners could form a common cause with backswoodsmen who wanted to hunt on Sunday, Irish Catholics who wanted to send their children to parochial school, and German Lutherans who liked their beer. Such a disparate coalition could theoretically be united by a common *laissez-faire* agenda on religion and "morals legislation." As a practical matter, however, it was not possible to define any single consensus baseline of "the private" on which such a disparate coalition of anti-evangelicals could agree. Catholics insisted that the state should keep protestant religion out of schools and saloons, while Southerners would denounce Yankee meddling with slavery. Catholics, however, had deeply mixed feelings about slavery, while Southern Protestants were not enamoured of Catholic education.[23] One person's privacy was another's coercion.

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[20]Formisano, *The Birth of Mass Political Parties* at 161

[21] Gustave Koerner, 2 Memoirs, 1809-1896, at 20-27. For another similar attack on Yankee reformers uniting criticism of their moral agenda with their anti-slavery program, see Walter March [Orlando Bolivar Wilcox], *Shoepac Recollections: A Way Side Glimpse of American Life* (New York 1856), quoted in Paul Formisano, The Birth of Mass Political Parties: Michigan, 1827-1861, at 176 (1971)( "[Prior to the arrival of the New Englanders], [o]ur community was not yet divided on the question of Bibles in the schools, or wine on the side-boards. Slavery was little talked of, and as far as disunion – the mere word was considered by the veriest Kanuck as a profanation of the human language").

[22] Daniel Walker Howe, The Political Culture of the American Whigs 33 (1979).

[23] On antebellum Catholic attitudes toward slavery, see John T. McGreevy, Catholicism and American Freedom: A History 51-56 (2003)(noting range of Catholic opinion, from outright condemnation of liberal Catholics to relative indifference of ultramontane Catholics).

The occasional efforts of Democrats to define national libertarian rights against Yankee reformers collapsed in the face of their own contradictions. For instance, the Senator Richard Johnson's Senate Committee Report rejecting suspension of Sunday mail delivery argued that such suspension would deny religious equality to those for whom Saturday was a holy day.[24] The House report added that requiring evangelical contractors to work on Sunday against their religious convictions was no interference with religious liberty, because those contractors could always resign from federal service rather than deliver the mails.[25] The evangelicals retorted that, if there is no conscientious right to be exempt from non-discriminatory employment duties, then Saturday employment would not violate anyone's freedom of conscience, [26] while the Sunday suspension would provide a day of rest on the day most accommodating for the vast majority of postal employees. Similar difficulties plagued any resolution of whether public aid to religious schools would constitute an impermissible violation of taxpayers' freedom of conscience. On one hand, Catholic parents paid taxes for educational services of which they could not conscientiously avail themselves; On the other, non-Catholic taxpayers objected to bearing any share of the cost of Catholic religious education. Between the two, there was a reasonable disagreement about the scope of "the private" that was left unsettled by any clear constitutional rule.

[24]"While the mail is transported on Saturday, the Jew and the Sabbatarian may abstain from any agency in carrying it, from conscientious scruples. While it is transported on the first day of the week, another class may abstain, from the same religious scruples.. The obligation of the government is the same to both of these classes; and the committee can discover no principle on which the claims of one shoiuld be more respected than those of the other, unless it should be admitted that the consciences of the minority are less sacred than those of the majority." Senate Report N. 74 on the Sunday Mails, 20th Cong., 2d Sess., at 211 (January 19th, 1829).

[25]"Do the petitioners allege that they cannot conscientiously participate in the profits of the mail contracts and post offices, because the mail is carried on Sunday? If this be their motive, then it is worldly gain that stimulates to action and not virtue or religion." Report No. 87 on Sunday Mails, 21st Congress, 1st sess., at p. 230.

[26] "[H]e who conscientiously believes that he is bound to observe the seventh day of the week in a religious manner can have no just reason to complain, because the government takes nothing from him in permitting all classes of citizens to observe the first day of the week as a day of religious rest." *Id.* at 231 (Dissenting views of Mr. McCreery)

## III. Controlling the Benevolent Empire with Federalism: The Cases of Slavery, the Common Schools, and "Sumptuary Laws"

Absent any consensus on the scope of the private, the anti-Yankee coalition gradually settled on sorting federalism as the preferred method of cabining the Benevolent Empire. Following a script written by John C. Calhoun, Democrats most explicitly and articulately adopted federalism as a constitutional device by which to avoid cultural conflicts over slavery. During the 1840s and 1850s, however, Democrats also used statutory decentralization to settle religious fights over the governance of public schools. By the end of the Civil War, constitutional decentralization of education had become a way for the Democratic Party to defeat the Blaine Amendment, thereby preventing nationalization of the Yankee theory of common schools without also branding itself as a Catholic Party committed to public funding for parochial education.

### A. *Slavery and Constitutional Decentralization*

The Democratic Party's most familiar version of sorting federalism dealt with the problem of slavery. In the purest theoretical form set forth by John C. Calhoun,[27] this theory of federalism used federalism to protect subgroups within a single nation having a distinct political identity. Calhoun did not deny Madison's insight that subgroups within a large and heterogeneous republic ordinarily could not assemble a permanent minimum winning coalition.[28] If a subgroup was united by characteristics that combined common sentiment and self-interest into a single region, however, then it could prove resistant to the normal process of shifting

[27] Calhoun offered his theory of federalism in numerous venues – most elaborately in his *Disquisition on Government* and *Discourse on the Constitution and Government of the United States*, both of which were published shortly after his death. The essential idea of concurrent majorities each of which could veto national legislation was also defended in his 1832 *South Carolina Exposition and Protest* as, in much abbreviated form, in his final speech to the Senate against the Compromise of 1850 on March 4th, 1850.

[28] "To form combinations in order to get the control of the government, in a country of such vast extent — and consisting of so many States, having so great a variety of interests, must necessarily be a slow process, and require much time, before they can be firmly united, and settle down into two organized and compact parties." *Discourses* at 50.

political alliances that prevents a single group from permanently remaining in a majority coalition in a pluralistic society. Such characteristics include "[s]imilarity of origin, language, institutions, political principles, customs, pursuits, interests, color, and contiguity of situations." For Calhoun, however, "[geographic] contiguity" trumps them all as a source of cohesive and stable identity: "[N]othing tends more powerfully to weaken the social or sympathetic feelings, than remoteness" and because "contiguity of situation usually involves a similarity of interests." Although the bonds that tie such a group together as a party are sentimental, the goal of such tightly united subgroups is not ideological but rather material: – "an amount of honors and emoluments, sufficient to excite profoundly the ambition of the aspiring and the cupidity of the avaricious."[29] Partisan division, for Calhoun served the same function as Carl Schmitt's *Freund-Feind* distinction.[30] It was a device to mobilize voters against perceived outsiders and thereby reap the material rewards of governmental domination.

Given the inevitability of conflicts among such subgroups, Calhoun argued that their cooperation was possible only if each could make a credible commitment not to exercise national power to the disadvantage of the other. Mere good will or constitutional promises did not suffice: As Calhoun noted in his speech opposing the Compromise of 1850, utmost and earnest efforts by the Whigs and Democrats had been unable to keep slavery off of Congress' agenda after the destruction of "the equilibrium between the two sections in the government as it stood when the Constitution was ratified": Rapid population growth in the North had left the South with insufficient votes to veto northern proposals, clearing the way for political opportunists to excite sectional controversy. To prevent such agitation, Calhoun called for sectional vetoes to insure that each group with a distinct political identity could make a credible commitment not to

[29] *Disquisition* at 8.
[30] Carl Schmitt, The Concept of the Political 26-37 (1932)(George Schwab trans. 1996)

disturb the balance of power through national laws exceeding the scope of the constitutional bargain. Because the set of laws that could injure the interests of a single section could not be defined in terms of any precise subject-matter, these vetoes had to extend to all national legislation rather than some subset of proposals especially close to issues over which the subgroups disagree.

Whatever its merits as predictive social science, Calhoun's theory brilliantly served Calhoun's and, more generally, the Southern political elites' rhetorical needs. Against Andrew Jackson's accusation that he was rejecting the republican basis of American government, Calhoun could respond that he was protecting its majoritarian basis through concurrent majorities. Why, after all, did the relevant majority have to be counted at the national level? Against the Abolitionists' claims of moral superiority, Calhoun could wield the tough, unsentimental language of the political realist in which all public postures were just masks for private interests – a stance that was a favorite trope of Southerners during the 1850s who were infuriated by incessant Yankee moralizing at their expense. Against the claim that sectional vetoes would lead to endless gridlock at the national level, Calhoun argued that the existence of the vetoes would eliminate the need for their exercise: Because (by hypothesis) the rival subgroups would be motivated by the prospect of material gain, vetoes that made it impossible to obtain material advantage through sectional coalitions would deter politicians from seeking legislation that would inspire any veto. The *ex ante* effect of the veto on the parties' incentives, in other words, would make the actual use of the veto unnecessary.

Sorting of populations by ideology, however, was essential to the theory's operation, because each section had to elect national representatives single-mindedly devoted to resisting rival sections' efforts at dominance. Partisan loyalties that cut across section identity – dividing the South between, for instance, pro- and anti-corporate representatives – would weaken the

section in struggles with its rivals. Calhoun, therefore, worked assiduously to unite Southerners around a sectional agenda through the deliberate provocation of Northerners.[31]

Calhoun's idea of sectional vetoes was the most theoretically developed of the antebellum arguments for resolving the controversy over slavery through constitutional entrenchment of a decentralization. Since 1847, however, northern Democrats had offered an analogous theory of "popular sovereignty" as a device for settling the status of slavery in federal territories. The critical difference between Calhoun's theory and popular sovereignty was that the latter did not give any section of the nation a veto over all national laws. Instead, popular sovereignty defined a set of topics as "local" in character and devolved exclusive power over these topics to subnational governments. Thus, unlike Calhoun's theory, popular sovereignty depended on some entity, whether Court, Congress, or President, to enforce some defined limit on the topics that Congress could address. In this endeavor, the text of the actual Constitution would provide no guidance, as that document did not carve slavery-related topics out of Congress' jurisdiction. Instead, all of Congress' powers would be read with a slavery-excluding gloss rooted in a general commitment to local self-government. This commitment could take the form of a prudential limit on Congress' powers, as in Lewis Cass' original letter outlining the principle,[32] or it could take the form of a "higher law" limit on Congress' powers implied by the due process clause of the Fifth Amendment, as with Representative Dickinson's resolution asserting that Congress' Article IV power over the territories was implicitly limited by a requirement that territories enjoy some power of self-government over "all questions concerning

[31] *See generally* David Potter, The Impending Crisis at 83-86. As Secretary of State, for instance, Calhoun leaked communications to Richard Pakenham, the British minister in Washington, D.C., that openly trumpeting the advantage to slave-holding states from annexation of Texas. *See* Joel H. Silbey, Storm Over Texas: The Annexation Controversy and the Road to the Civil War 41-44 (2005).

[32] Leave it to the people who will be affected by this question," Cass urged, "to adjust it on their own responsibility and in their own manner, and we shall render another tribute to the principles of our own government, and furnish another guarantee of its permanence and prosperity." Lewis Cass to A.O.P. Nicholson, December 1847, quoted in Robert Walter Johannsen, Stephen A. Douglas 227 (1997).

the domestic policy."[33] As Dickinson's comments in defense of the resolution indicated, the resolution was simultaneously rooted in the principle of local democracy[34] and the principle of identity pluralism.[35] In his Illinois senatorial debates against Lincoln, Stephen Douglas urged the strong constitutional form of the "popular sovereignty" theory and was famously disappointed by the U.S. Supreme Court's apparent rejection of the idea in *Dred Scott v. Sandford*.

In sum, both Southern and Western wings of the Democratic Party urged some form of subnational government as a way to cabin anti-slavery sentiment. The former relied primarily on a sorting rationale, arguing that national civil peace could be maintained only with sectional balance in the national legislature. The latter relied on the core idea of democratizing federalism as well, urging that agency costs would be reduced if westerners could choose their own policies rather than have policies imposed on them from the center. Whether these sorting and democratizing ideals could plausibly be combined into a single theory of constitutional

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[33] "*Resolved*, That, in organizing a Territorial Government for territory belonging to the United States, the principles of self-government upon which our federative system rests will be best promoted, *the true spirit and meaning of the Constitution will be observed*, and the Confederacy strengthened, by leaving all questions concerning the domestic policy therein to the Legislatures chosen by the people thereof." Remarks of Dickinson, Cong. Globe, 30th Cong., 1st sess., at 21 (December 14th, 1847) (emphasis added).

[34] Dickinson's speech echoed Abolitionist rhetoric favoring "higher law,"invoking the collective self-government, a principle that, according to Dickinson, was

> "older and stronger than written laws and paper constitutions – principles which lie at the foundation of free institutions, and from which laws and constitutions emanate – inculcating the doctrine that the inherent, original power of self-government was derived by Man from the sovereign of the universe.... The republican theory teaches that sovereignty resides with the People of a State, and not with its political organization; and the Declaration of Independence recognizes the right of the People to alter or abolish and reconstruct their government. If sovereignty resides with the people and not with the organization, it rests as well with the people of the Territory, in all that concerns their internal condition, as with the people of an organized State. And if it is the right of the people, by virtue of their innate sovereignty, to "alter or abolish" and reconstruct their government, it is the right of the inhabitants of the territories, by virtue of the same inborn attribute, in all that pertains to their domestic concerns, to fashion one suited to their condition....

Remarks of Dickinson, Cong. Globe. App., 30th Cong., 1st sess. at 88.

[35] Dickinson urged in favor of his principle that it was a compromise between two extremes, noting that " the opinions advanced by me will not suit the views of the extreme North, or anti-slavery men, as they are called, nor of the extreme South, or pro-slavery men, as they are termed." *Id.* at 644 May 17th, 1848.

federalism is the subject of Part III(A) below. For now, it is important only to understand how such a use of constitutionally entrenched decentralization was suggested by the antebellum period's sociological context – namely, the need for a Western and Southern coalition to resist the nationalization of the anti-slavery principles of New England.

**B. *Decentralization of education from the MacLay Act to the Blaine Amendment***

By contrast with slavery, the Democratic Party's decentralization of cultural conflict in educational policy initially took statutory rather than constitutional form. Democrats simply needed some way to resist pietist policies without painting themselves in the eyes of voters as the "Catholic Party." As these decentralizing devices became entrenched political practices at the state level, however, the Democratic Party invoked norms of federalism to prevent subnational accommodations from being overruled by a national Yankee majority.

Both Whigs and Democrats attempted to recruit nativists and immigrants. The difficulty of appealing to both groups, however, increased with the explosion of nativist fears accompanying the flood of Irish Catholic immigration to the United States during the 1830s and 1840s.[36] These conflicts between nativists and Irish Catholics took legal form in the fight over the public schools. Newly assertive Catholic bishops like "Dagger" John Hughes of New York or Peter Lefevre of Detroit[37] insisted either that anti-Catholic practices (for instance, the refusal to hire Catholic teachers, the requirement that students reading from the King James Bible without authoritative commentary, the anti-Catholic statements in history texts) be eliminated from state-funded schools or that Catholic schools receive a proportionate share of the public monies for education. Protestant nativists responded that public money ought not to be spent on "sectarian" religious education and that exclusion of "non-sectarian" readings from the King

[36]On demographic changes and the cultural tensions that they created, included a spate of anti-Catholic riots during the mid-1830s, Steven Mintz, Moralists and Modernizers: America's pre-Civil War Reformers 6-7 (1995);
[37]On Lefevre's efforts to obtain support for Catholic schools, see Paul Formisano,

James version of the Bible would permit Catholics to censor the curriculum of the public schools. In short, both sides claimed rights to control public resources in the name of neutrality.

Between these two factions, both major political parties attempts to find a compromise that would not sacrifice the support of major voting blocs. In a bid for Catholic support, Governor Seward of New York, a Whig, offered to replace New York City's system of private schools run by a charitable society with a system of ward-based public schools to be governed by a board elected by voters within the ward. Seward, however, could not bring his Whigs along to endorse his proposed decentralization measure. In response, Democrats led by William MacLay, the state assemblyman who chaired the Schools Committee then took up the cause of New York City's Catholics, urging ward control over local educational policy in the name of the Democrat's anti-monopoly ideology. Despite deep misgivings from Democrats and opposition from Whigs, the MacLay Act passed after being amended to ban "sectarian" instruction in school.[38]

The experience in New York was typical of partisan fights over public schools in other states: Democrats (with important exceptions) typically managed to accommodate Catholic demands for equality not by taking a substantive position on Bible readings, teacher hirings, or other controversial questions but rather by urging decentralization of educational disputes to the local or sublocal level.[39] Decentralization was never total: The state reserved general administrative oversight and, as in New York, there were usually substantive prohibitions on "sectarian" education. Yet even with those limitations, districts retained substantial authority over curriculum, the after-hours religious use of schoolhouses, the public leasing of religious school buildings, and the hiring of teachers. Moreover, administrative oversight existed only

[38] For the fight over the MacLay Act, see Diane Ravitch, the Great School Wars, New York City, 1805-1973: A History of the Public Schools as Battlefield of Social Change 67-76 (1974).
[39] Carl F. Kaestle, Pillars of the Republic: Common Schools and American Society, 1780-1860, at 154 (1983).

where parents filed appeals to the state authorities: Districting policy that created homogenous school districts produced local voting patterns that legitimated district decisions, deterring appeals.[40]

Local control of educational policy, in short, could blunt pietist efforts to monopolize the hiring of teachers and the setting of educational policy. It was in light of this experience that the Democrats opposed constitutional amendments proposed by President Ulysses Grant and Republican Representative James Blaine of Maine in 1875, barring public aid to religious schools or societies.[41] In opposing the amendment in the House, Democrats emphasized a tradition of reserving control over education for state power, a position that they elevated to a constitutional principle in their platform of 1876.[42] Although the proposed amendment passed the House, it was narrowly defeated in the Senate after the failure of several efforts to strengthen its perhaps deliberately ambiguous language.[43] In opposition, Democrats repeatedly urged a constitutional principle that education ought to remain a subnational concern and that states did not want "New England and other states to dictate what her schools shall be or what her taxes

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[40] *See* Benjamin Justice, The War that Wasn't: Religious Conflict and Compromise in the Common Schools of New York State, 1865-1900, at 69-87 103 (2005).

[41] President Grant proposed an amendment in his annual message to Congress on December 7, 1875 "prohibiting the granting of any school funds or taxes, or any part thereof, either by the legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination, or in aid or for the benefit of any other object of any nature or kind whatever." Steven K. Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38, 41 (1992). Blaine's amendment re-worded Grant's proposal to provide that "no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations." 4 Cong. Rec. 205 (1875).

[42] Democratic Party Platform of 1876, June 22, 1876, provided that

> "Reform is necessary and can never be effected but by making it the controlling issue of the election and lifting it above the two issues with which the office-holding classes and the party in power seek to smother it:— First—The false issue with which they would enkindle sectarian strife in respect to the public schools, of which the establishment and support belong exclusively to the several States, and which the Democratic party has cherished from their foundation, and is resolved to maintain without partiality or preference for any class, sect or creed, and without contributions from the treasury to any."

[43] Because the amendment passed by the House barred only the use of money "raised by taxation for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto," the question was left open whether it applied to general revenues raised for general purposes. Efforts to close the loophole floundered in the Senate. *See* 4 Cong. Rec. 5245-46 (Aug. 7th 1876).

shall be and least of all what her religion shall be."[44]

In short, the Democrats attacked the educational agenda of the Republicans not so much for its anti-Catholicism as its Yankee imperialism, using federalism as a device whereby to cabin New England norms without embracing Catholic values. Such a theory assumed substantial heterogeneity among the states concerning religious preferences for education: In states where non-Yankee immigrants formed a powerful presence, there were incentives on the part of both political parties to defuse the controversy by devolving its resolution to the local or sublocal level.

### C. *Prohibiting congressional power over "sumptuary laws" regulating male recreation*

The Gentry goal of protecting ideal of protecting the patriarchal household from Yankee intrusion implied not only exclusion of federal interference with slavery and education but, more generally, a general suspicion of any federal "morals" legislation. If the Saints sought to protect the maternally led household from the sinfulness of men, then the gentry sought to protect male prerogatives to drink, smoke, gamble, and otherwise seek recreation outside the home. Democrats seeking to capture the votes of gentry constituencies emphasized their own rough manliness, contrasting it with the effeminacy of Republican and Whig reformers. The Saintly Whigs and Republicans celebrated the institution of the Revival meeting, secularized as a party convention; By contrast, the gentry-oriented Democrats celebrated the institution of the militia, expressed in electoral terms as the torchlight parade. The Whigs and Republicans pressed petition drives organized by church congregations, while the Democrats pressed thousands of local elections run by party lodges often associated with male enclaves like saloons. The tone of gentry rhetoric was anti-reformist – adopting the voice of what Richard Jensen has termed a

[44] *See* remarks of Senator Stevenson, 4 Cong. Rec. 5589.

"counter-crusade" – a quasi-military effort to rally the troops against "reckless fanatics… radicals who threaten to upset the tranquility of society by foolish panaceas and dangerous laws" such as temperance reform or public school reforms to "Americanize" immigrants.[45] As with an army, organization and loyalty rather than deep thought, was the mark of a successful political actor. It is not a surprise, therefore, that the term for a good party member – a "regular" -- was the same for being a soldier.

Such suspicion of meddling reformers was expressed in doctrinal terms as a strong doctrine of unconstitutional conditions to limit federal power over household matters. Even when an express grant of power looked on its face as if it were an unconditional grant to tax or regulate, such powers had to be construed to contain an implied limit against their being used for "moral" purposes especially threatening to household autonomy.

The doctrine is nicely illustrated by the 1872 debates in Forty-Second Congress over assigning a petition for temperance reform to an appropriate committee. The petitioners sought to prohibit the manufacture and sale of alcoholic beverages wherever Congress had exclusive authority – in the federal territories, international commerce, and Washington D.C. On its face, the proposal fell squarely within the jurisdiction of several Senate committees, including Finance (as the federal government raised a huge share of its revenue from excise taxes on alcoholic beverages), the Commerce Committee, or the Committee on Washington D.C. or the Federal Territories. But no committee chair would touch the issue, because, as John Sherman of Ohio (chair of the Finance Committee) explained, "the manifest purpose of this bill is to promote temperance, good order, sobriety" – all culturally sensitive matters of "morals" with which the properly constrained federal government had nothing to do. To Sherman's suggestion that the

[45] Richard Jensen, the Winning of the Midwest: Social and Political Conflict, 1888-1896, at 147 (1971)(describing the politics of Midwestern Democrats in appealing to German an Scandinavian Lutherans to resist reformers' efforts to require the teaching of English as a predominant language in all schools during the late 1880s).

bill be referred to the Judiciary Committee, Senator Pomeroy sarcastically asked, "[d]oes the Senator think that is a committee on morals?" [46] Every Senator acknowledged that "the United States cannot undertake to regulate the use of beverages in the States," and so even George Edmunds, the pro-temperance Vermont chair of the Judiciary Committee, conceded that "the Senate perfectly well knows that [the proposal] is totally out of the scope of the United States to do anything of that character."[47] But, because the bill's purpose was manifestly to exert the maximum deterrent pressure possible on the use of intoxicating beverages, the law was damned in its spirit even though it conformed to the letter of the enumeration.

Democrats routinely attacked "regulatory taxes" designed to deter smoking or drinking, terming such measures "sumptuary laws" designed to privilege evangelical values over patriarchal prerogatives. Representative Duke, a North Carolina Democrat, for instance, denounced a "special tax" imposed on tobacco leaf as unfair "class legislation" because it treated some farmers more unfavorably than others. But this departure from the principle that taxation should be apportioned by ability to pay was especially egregious because it looked like what Democrats termed "sumptuary laws" – that is, laws designed to stigmatize certain behavior as immoral. "[H]as the Congress of the United States any authority to pass sumptuary laws?" Duke queried: "I do not think that the Congress of the United States can resolve itself into 'a Brick Lane branch of the Grand Junction Ebenezer Temperance Society' and enforce its views upon the people by law…. I sympathize with the anti-smoking and anti-chewing society; but when they ask Congress to legislate on these subjects I must respectfully refer them to their state legislatures, where the power to do so properly belongs."[48] No such textual limit applied to the taxing power, of course, but Duke inferred one from the entire point of the federal system – to

[46] Cong. Globe, 42nd Cong., 3rd sess., 93 (December 10th, 1872)
[47] *Id.* at 95
[48] Cong. Globe, 42nd Cong., 2nd sess. 3014 (May 2nd, 1872).

limit federal power over morals. Taxes, therefore, had to have a neutral revenue purpose, according to standard Democratic ideology.

On the basis of this ideology, Southerners in 1886 rallied against a proposed tax on oleomargarine colored to look like butter: As a regulatory tax without a revenue purpose, the measure was immediately suspect.[49] This constitutional ideology that taxes had to have a primarily revenue-based purpose had never been ratified by the Court. Indeed, in the context of taxation, the Court seemed specifically to reject it in *Fenno v. Veazie Bank* and, more generally, to reject the idea of limiting Congress' express powers by inquiring into the purpose for which they were used.[50] But the theory of federalism underlying the ideology was not intended to be enforced by courts: It was enforced by a "federalism coalition" that, before the Civil War largely controlled the Presidency and, after 1874, could generally control at least one House of Congress through either the Democratic Party or some coalition of Democrats and anti-Yankee Republicans.

Likewise, Southern Democrats denounced efforts to strengthen bans on polygamy in Utah Territory during the 1870s[51]: The territorial power, to be sure, contained no textual limitation, but some such there had to be, if the politics of cultural segmentation were to be preserved. In fighting off these proposals, the Democrats acted for no immediate self-interest: Their constituents had no desire to promote plural marriage. But their alliance with Catholics for preservation of subnational power over "domestic institutions" required loyalty to a principle more general than simply preservation of white supremacy.

The defensive theory of federalism, in short, went hand in hand with a defensive theory

[49] "If we have the power to do this… where is this thing to stop? …. Have we not in that case the right to go into state lines and supervise the domestic relations of the people of the states in such matters [as the healthiness of canned food]?" 17 Cong. Rec. 5165 (June 2nd, 1886)(remarks of Representative Hale)

[50] *See* Caleb Nelson on the history of judicial rejections of inquiry into legislative purpose.

[51] Gaines Foster, Moral Reconstruction: Christian Lobbyists and the Federal Legislation of Morality, 1865-1920, at 55 (2002).

of democracy more generally. Between 1886 and 1918, however, both were to collapse, with the transformation of party politics wrought by the spread of evangelical religion in the South and the realignment of Southerners towards a new national politics of progressive reform.

## IV. The Saints Come Marching In: The Third Great Awakening and the End of Federalism

Starting roughly in 1880, the South embraced the cause of evangelical reform. Although the immediate focus of Southern evangelical reformers was the prohibition of alcoholic beverages and lotteries, the larger effect was to reconcile Southerners with the Yankee reformers against which the Democratic Party had always been arrayed. The Yankees facilitated this coalition by giving up on protection of the freedmen and tacitly accepting white supremacy in the South by respecting federalism over election law and private violence. The result was a brand of nationalism that the South could embrace -- a new national coalition of progressive reformers, North and South, dedicated to the goals of moral purity, social order, and domesticity and at least tolerant of racial segregation and white supremacy.

### A. *The spread of evangelical reform culture to the South, 1880-1890*

Because of their close association with abolitionism, evangelical reforms that spread across the Northeast and Midwest during and after the Second Great Awakening had not penetrated the South prior to or during the Civil War. In response to their Northern counterparts' refusal to ordain slaveholders or to demand loyalty to the Union, the Methodists, Baptists, and Presbyterians of the South formed separate Southern organizations that all emphasized "the spirituality of the church" and the corollary that the church ought not to meddle in political affairs.[52] By the 1870s, the church's devotion solely to personal salvation rather than social reform was deeply rooted in the identity of Southern Protestantism. Although this

[52] *See* Paul Harvey, Freedom's Coming: Religious Culture and the Shaping of the South from the Civil War through the Civil Rights Era 24 (2005).

conception of the Church's social role began to shift in the 1880s, it was still the case that ministers' advocating legal reforms could earn disapproval: In 1887, for instance, Jefferson Davis, the aging ex-President of the Confederacy, branded a Methodist bishop as a "political parson" for meddling inappropriately in politics by urging the ratification of a state law prohibiting the sale or manufacture of alcoholic beverages.[53]

By the early 1880s, however, a new brand of evangelism was spreading throughout the South, driven by the same urbanization and fear of disorder that influenced Northern evangelical reform.[54] (Some Southern ministers specifically linked the move towards social advocacy to the need to combat cultural heterogeneity in cities[55]). By the 1890s, ministers were specifically organizing petition drives and urging their congregations to vote for church-favored measures like the prohibition of lotteries and alcoholic beverages. State legislatures responded by enacting laws limiting the traditional male recreational activities – for instance, drinking, hunting, gambling., swearing, prize-fighting, and Sunday sports – that, before the Civil War, had been informally permitted in towns although forbidden by the code of domesticity that governed the home.[56]

Against this evangelical drive for reform, Southern congresspersons faced electoral pressures to modify or abandon their traditional suspicion of federal regulation of morality. The first cracks in Southern unity appeared in 1881, when a substantial number of Southern congresspersons vote for Vermont Senator George Edmunds' bill banning "unlawful cohabitation" in federal territories. By 1888, J. Randolph Tucker, the "states' rights" chair of the

[53] Joseph Coker, *Liquor in the Land of the Lost Cause* at 80-82.
[54] Blaine A. Brownell, *The Urban South Comes of Age, 1900-1940*, in The City in Southern History: The Growth of Urban Civilization in the South 123-58 (Brownell & David R. Goldfield eds. 1977).
[55] Washington Bryan Crumpton, an Alabama Baptist and leader of the Southern temperance movement, for instance, blamed excessive drinking on Jewish merchants' selling alcohol, while Benjamin Franklin Riley, another Baptist leader, argued that Blacks could be uplifted only by banning alcohol to which they were allegedly addicted. *See* Joseph Coker, *Liquor in the Land of the Lost Cause* at 46-48.
[56] *See* Ted Ownby, Subduing Satan: Religion, Recreation, and Manhood in the Rural South, 1865-1920, at 167-80

House Judiciary Committee, actually co-sponsored an anti-Mormon measure stripping the Church of the Latter-Day Saints of control over church property.[57] Although some diehard Southern advocates of limited federal power spoke against the bill, it received a large majority of Southern members' votes.

Neither a ban on polygamy nor the expansion of Congress' territorial power, however, posed a direct threat to the federalism coalition of anti-Yankee cultural groups, north and south. The Southerners' northern allies, non-Yankee immigrant groups and especially the Irish Catholics, had no stake in permitting the former or contracting the latter. The Southerners, therefore, could safely trim their sails on federalism in this narrow context to avoid being branded the party of polygamists.

Opposition to Prohibition, not polygamy, was the core issue defining the Immigrant-Southern coalition. Between 1888 and 1890, Midwestern Democrats had made important inroads on Republican strongholds in Iowa, Illinois, and Wisconsin by opposing state laws pressed by moralistic Republicans outlawing alcohol or requiring English as the predominant language of instruction in all schools. Business-oriented Republicans deplored this alienation of Germans, Scandinavian, and Irish Catholic voters, but they could not easily control their pietistic Yankee allies.[58] The Democratic Party, therefore, had a golden opportunity to sustain the old "federalism coalition" on the strength of its hostility to Republican "paternalism" in tariff policy, civil rights, and national "sumptuary laws" dealing with drink, education, Sunday "blur laws," and language.[59] But the spread of evangelical support for national morals legislation in the

[57] Gaines M. Foster, Moral Reconstruction: Christian Lobbyists and Federal Legislation of Morality, 1865-1920, at 59-64 (2002).
[58] *See* Richard Jensen, *The Winning of the Midwest* at 89-121 (discussing prohibition in Iowa), 123-33 (on school laws in Wisconsin), 148-52 (on Illinois school language law).
[59] The Midwestern Democrats portrayed various Republican policies ranging from the tariff and Speaker Thomas Reed's centralizing rules in the House of Representatives to cultural measures dealing with drink, civil rights, and schools as all reflecting "the settled republican policy of paternalism." Jensen at 133.

South directly threatened this coalition by threatening to peel off Southerners to an alliance with New England pietists.

The first test of the federalism coalition occurred during the debates over the 1890 Wilson Act, a measure intended to overrule the Court's *Bowman* decision barring states from prohibiting the sale of alcoholic beverages in their "original packages." By authorizing state action that the Court had forbidden, the Wilson Act could be defended as a "states' rights" measure. Congress, however, had refused to enact a broader version of the Act that would have overruled the "original package" doctrine altogether (and thereby win support from Midwestern dairy farming states that wanted to outlaw the importation of oleomargarine). By authorizing only state regulation of liquor, the Wilson Act resembled a Prohibition measure – precisely the sort of federal "sumptuary law" that traditional Democratic ideology condemned. The ambiguity sufficed to divide "wet" and "dry" Democrats: Ten Democrats from liquor-producing states – Tennessee, Indiana, and Missouri -- voted against the measure, while Southern "dries" enthusiastically embraced it.[60] By 1890, the southern spread of evangelical reform had divided Southerners between "wets" and "dries," suggesting a potential crack in the old federalism coalition.

**B. *The Reconciliation of the North with Southern White Supremacy***

The crack, however, could not become an open breach so long as Southerners needed Catholic support to fight off northern reformers' efforts to protect the freedmen: Safeguarding white supremacy would trump Southern "dries'" support for national liquor laws and other morals legislation. Indeed, while the Wilson Act was being debated, an federal elections law designed to protect Black voters from disenfranchisement was pending. Sponsored by

[60] *See* Richard F. Hamm, Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920, at 80-84 (1995).

Masschusetts' Henry Cabot Lodge and George Frisbie Hoar, the bill was New England's last major effort to preserve the Republican Party's egalitarian heritage. The bill was derided by Southerners as coercive sectional legislation – a 'force act" -- for which federal regulation of liquor could serve as a precedent.[61] The Catholic-Southern federalism coalition, in short, was alive and well so long as northern reformers threatened a uniform agenda of national "morals" legislation that simultaneously threatened Southern white supremacy and Catholic cultural autonomy.

The Republican Party's rejection of Lodge's and Hoar's election bill eliminated this justification for the Immigrant-Southern federalism coalition. The Republicans had the votes, but not the stomach or unity, to pass the measure: Pro-business Republicans wanted to give priority to the tariff issue, and they needed Democratic votes to make up for lost pro-silver western Republicans dissatisfied with the Sherman Silver Purchase Act.[62] Beyond this immediate difficulty of maintaining pietist-business unity, there was the deeper problem of unifying New England Protestant reformers themselves. Northern intellectual support for Black disenfranchisement was nothing new in the 1890s, but it had previously been concentrated among secular urban professional elites like E.L. Godkin, Charles Francis Adams, and Carl Schurz (the last of whom had actively campaigned for such disenfranchisement in 1872).[63] But the 1880s saw a new defection from the old Republican coalition for civil rights of black Southerners: Yankee *religious* reformers' fear of immigrants also led them to back away from

[61] Hamm, at 84.
[62] Richard Welch, *The Federal Elections Bill of 1890: Postscripts and Prelude*, 52 J. Am. Hist. 511, 517-21 (1965). On the general hostility of the mid-Atlantic "national bourgeoisie" towards civil rights law, see Sven Beckert, The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850-1896 (2001)
[63] *See* David Blight, Race and Reunion: the Civil War in American Memory 123-28 (2001) (on liberal republicans' call for rule by a natural aristocracy and Southern support for northern liberals like Carl Schurz); Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877, at 496-99. Charles Francis Adams expressed this elite project of disenfranchisement as a struggle against a "Celtic proletariat" in the North and an "African Proletariat on the shores of the Gulf." *See* McGerr, at 46.

support of black civil rights.[64] Blacks in the South looked increasingly like immigrants from Southern and Eastern Europe in the North – a strange and unassimilable ethnic underclass that should be controlled by Protestant elites.[65]

With the defection of pietist reformers from the cause of black equality, that cause was well and truly doomed. By 1890, even former abolitionists like Thomas Wentworth Higginson, a Unitarian supporter of John Brown and commander of a Black regiment during the Civil War, joined the call against "sectional" legislation.[66] Southerners egged on New England reformers to embrace the common cause of cultural control by a white Protestant elite, north and south: In a dramatic 1889 speech to the Boston Merchant's Association shortly before his death, Henry W. Grady, the advocate of a "New South" and publisher of the *Atlanta Constitution* urged an enthusiastic Boston audience to allow white Southerners to control a "vast, ignorant, and purchasable vote – clannish, credulous, impulsive, and passionate – tempting every act of the demagogue, but insensible to the appeal of the statesman."[67]

Grady's speech was an invitation to New Englanders to join the South in a unified national campaign for white and Protestant social control of an unreliably polyglot population. With the usual caveats that the term is contested and perhaps even empty,[68] one might reasonably describe this campaign as a "progressive" effort at social control. There is little dispute that anxiety about social control of an urbanized population formed an important motivation for reforms associated with politicians and publicists commonly described as

[64] A key text reflecting this Protestant clerical fear of immigration includes Josiah Strong's *Our Country: Its possible Future and Its Present Crisis* ch. 4 (1885) (addressing the "peril" of immigration)

[65] *See* Nina Silber, The Romance of Reunion: Northerners and the South, 1865-1900, at 124-29 (1993)(noting how minstrel shows and other displays of Southern blacks portrayed them as a "strange and foreign population" akin to immigrant groups); Stanley Hirshon, Farewell to the Bloody Shirt: Northern Republicans and the Southern Negro, 1877-1893 (1962).

[66] Mark Schneider, Boston Confronts Jim Crow, 1890-1920, at 46-47 (1997).

[67] *See* Joel Chandler Harris, Life of Henry W. Grady, Including His Writings and Speeches 180, 190 (1890)

[68] For an argument that the term lacks any core meaning, see generally Stephen J. Diner, A Very Different Age: Americans of the Progressive Era (1998); Peter G. Filene, *An Obituary for 'The Progressive Movement,'* 22 Am. Q. 20 (1970).

"progressive," both North and South.[69]

Southerners increasingly shared this anxiety with growing urbanization[70] and addressed it through mechanisms familiar to Northern protestant reformers – disenfranchisement of ethnic minorities and miscellaneous "morals" laws to compel conformity of urban behavior with norms of domesticity. The stereotypical Southerner was no longer the dueling, hard-drinking plantation owner who demanded totally autonomous control over his household of women and slaves. Instead, the new Southern ideal was a teetotaling family man, a Good Soldier who conformed to collective national norms of duty and domesticity. Enthusiastic Southern participation in the Spanish-American War solidified the reputation of the South as patriotically devoted to national culture; Northerners reciprocated by burying Confederate dead at Arlington National Cemetery, returning captured Confederate battle standards to a Confederate Museum in Richmond, Virginia, and celebrating the heroism of Confederates like Robert E. Lee.[71]

Moreover, Yankee moralists in the 1890s were more willing to make concessions to Southern sensibilities about limiting reform to specific moral issues that were less controversial in the South.[72] The success of new morals campaigns of the 1890s gradually rendered the South dry, county by county, and banned lotteries from every Southern state.

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[69] *See* Paul S. Boyer, Urban Masses and Moral Order in America, 1820-1920 (1978); Richard McCormick, *Progressivism: A Contemporary Reassessment*, in Richard McCormick, The Party Period and Public Policy: American Politics from the Age of Jackson to the Progressive Era 263, 270, 282-83.

[70] David Blight, *Race and Reunion* at 354.

[71] Gaines M. Foster, Ghosts of the Confederacy: Defeat, the Lost Cause, and the Emergence of the New South, 1865-1913, at 145-59 (1987).

[72] For instance, the Woman's Christian Temperance Union (WCTU) had made only weak inroads in the South in part because Frances Willard, its leader, pressed the organization to endorse reforms more controversial in the South than temperance, such as women's suffrage. Ann-Marie E. Szymanski, Pathways to Prohibition: Radicals, Moderates, and Social Movement Outcomes 43-45 (2003). In 1894, Howard Hyde Russell, a Presbyterian minister in Ohio, formed the Anti-Saloon League (ASL) with a much narrower mandate, focusing exclusively on the regulation and ultimate prohibition of alcoholic beverages through whatever measures – local option, high license fees, or total bans – would prove electorally successful in the particular jurisdiction where the ASL operated. ASL campaigns against alcohol were both intensely centralized and intensely participatory, relying on networks of churches to distribute centrally generated information about how to vote on particular candidates. In particular, the ASL relied heavily on "local option" legislation to fan rank-and-file members' enthusiasm for the cause with direct political participation. *Id.* at 58.

The South, in short, had gone saintly: The old Yankee agenda of "morals" legislation was no longer a threat to Southern values, because Southerners, for the most part, enthusiastically embraced that legislation. The old federalism of the Immigrant-Southern coalition, therefore, no longer generated great benefits for the South. This is not to say that Southerners no longer cared about federalism: In particular, the South was united on the need for constitutional barriers to federal laws interfering with Southern electoral restrictions and private violence, both of which were essential parts of the Redemption campaign to insure white supremacy in Southern states. But the old theory of federalism that depended on an alliance with Catholics and other non-Yankee groups based on the safeguarding of family affairs from central control no longer had much appeal in the South. Thus, there was no reason for Southerners to insist on the exclusion of the federal government from the areas of family law, educational policy, and matters of cultural sensitivity like alcohol. Accordingly, constitutional doctrine, both within the courts and Congress, began to change in response to new sociological conditions.

**C.** ***The new Progressive theory of federalism, 1890-1924***

The new theory of federalism favored by Southerners and accepted by Northern progressives had two components. First, Southern politicians and lawyers insisted on a strict enforcement of the "state action" limit on the Fourteenth and Fifteenth Amendments, defeating anti-lynching laws both in Congress and the U.S. Supreme Court by relying on this limit. Second, the South gradually accepted a broad construction of the commerce and taxing powers, allowing national prohibition of interstate movement of goods and people and national taxation of activities even when the purpose of these laws was frankly to carry out national moral policy. The new theory of federalism culminated in the South's enthusiastic support for national prohibition of alcoholic beverages, support that finally destroyed the Immigrant-Southern alliance on which 19th century federalism had been built.

**1.** ***The "State Action" limit as foundation of Southern federalism*** -- By the early 1900s, there was a constitutional consensus in Congress that the "state action" limit on the Fourteenth Amendment barred federal anti-lynching laws. This consensus was most dramatically illustrated by Senator George Frisbie Hoar's recommendation in 1902 that Congress not enact an anti-lynching law drafted by Albert Pillsbury, the former Attorney general of Massachusetts. Hoar reported to the Senate that the judiciary Committee (of which he was the chair) unanimously regarded the bill as outside of Congress' power to enact: By authorizing federal court jurisdiction over private violence in default of protection by state officials, the bill had not with sufficient directness addressed state action.[73] As Pillsbury noted in defense of his bill, the measure contained direct restrictions on racist state inaction: States' officers who failed reasonably to prevent a lynching or bring lynchers to justice were, for instance, guilty of a federal offense.[74] It was hardly self-evident that the 14th Amendment did not authorize a federal judicial remedy for private violence where specific and culpable official inaction had been identified. That Senator Hoar, the preeminent champion of black civil rights, could not report such an interpretation out of committee for a floor debate, therefore, suggests the degree to which a broad reading of the Fourteenth Amendment was foreclosed by the legal consensus in the North as well as the South. This narrow view of federal remedial powers to combat Southern governments' inaction in the face of private violence was later affirmed in 1905 by the United States Supreme Court over a dissent by Justices Harlan and Day.[75]

The obstacles to a successful defense of federal power were not, however, merely doctrinal. There simply was no sufficiently influential reform movement in the North interested

[73] Adam Burns, *Without Due Process: Albert E. Pillsbury and the Hoar Anti-Lynching Bill*, 11 Am. Nineteenth Century Hist. 233, 241(2010).
[74] Albert E. Pillsbury, *A Brief Inquiry into a Federal Remedy for Lynching*, 15 Harv. L. Rev. 707 (1902).
[75] Hodges v. United States, 203 U.S. 1 (1905).

in challenging Southern violence. Indeed, northern Protestant reformers and the northern press sometimes accepted the Southern account of lynching as an extra-legal method for addressing an allegedly genuine problem of black rape of white women.[76] It is hardly surprising that Southern racism should find resonance among Northern reformers: Both Northern and Southern progressives were dedicated to preserving feminine domesticity from the male violence that urban disorder allegedly fostered. Lynching, in this sense, was the Southern version of social order through collective coercion that Northerners sought through gentler means. Thus, respected Southern progressive leaders who cooperated with Northern reformers on issues like child labor could praise race riots as a useful curb on black urban unruliness without fearing ostracism in the North.[77]

**2.** ***Southern acquiescence to expansive taxing and commerce powers*****--** Alongside the narrow construction of the Fourteenth Amendment, however, Southern leaders increasingly accepted a broad reading of the taxing and commerce powers. These positions have led some commentators to accuse Southerners of opportunistic hypocrisy.[78] But the nationalism and resistance to national laws were arguably both part of a single progressive impulse for collective social control. Between 1890 and 1918, Southerners increasingly accepted national measures enforcing norms of domesticity – prohibitions on lotteries, impure food, films of prize fights, prostitution, child labor, and ultimately consumption of alcoholic beverages – as part of an

[76] Frances Willard, the head of the Woman's Christian Temperance Union, for instance, chastised Ida C. Wells for impugning the honor of Southern women by arguing that alleged black rapes of white women were consensual. *See* Ida C. Wells, the Red Record ch. 8 (1895). An anonymous New York Times review of James E. Cutler, *Lynch Law* (1905) praised the book's "fairness" and "appreciation of the historical facts" but cautioned that any remedy for lynching had to address the "basis in rality" for "racial prejudice" – namely, the "crime of rape by negroes" that had been "growing in frequency."

[77] Alexander McKelway, for instance, praised the Atlanta race riot of 1906 as a salutary curb on Black "bumptiousness." As the director of the Washington office of the National Committee on Child Labor who managed the national campaign to end child labor in Congress, McKelway was a national progressive leader with close relations to northern progressives like Owen Lovejoy and Julia Lathrop, head of the federal Children's Bureau. *See* Stephen B. Wood, Constitutional Politics in the Progressive Era: Child Labor and the Law 31 (1968).

[78] *See, e.g.*, Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 Yale J.L. & Feminism 31 (1996).

impartial national reform that, being "non-sectional," was consistent with the new progressive theory of federalism. Anti-lynching law, by contrast, was "sectional" in that it deprived the South of its peculiar mechanism for enforcing those same national norms. Confident that Northern reformers would accept this dichotomy, Southerners dropped their guard against national "morals" legislation.

The initial step in this direction occurred with Southern support for a national ban on sending lottery tickets through the mails or interstate commerce. Initial efforts to enact such a ban faltered during the 1870s and 1880s as a result of Southern resistance, as Southern members argued that giving the Postmaster of the United States power to keep lottery ads out of newspapers would "coerce the States to adopt the standard of Congressional morality."[79] But Southern resistance softened notably in response to a campaign of Southern religious leaders joined with the Farmer's Alliance that attacked the Louisiana Lottery Company as a corrupting influence on state politics and an immoral influence on private behavior.[80] In 1895, the ban on sending lottery tickets through the mails was supplemented by a ban on sending the tickets through interstate commerce – an effort to close a loophole exploited by the Honduras Lottery Company (the name of the Louisiana Lottery Company after it moved offshore), which delivered tickets to customers through private banks and carriers. This expansive regulation of morality was unprecedented: Unlike the Wilson Act, the measure banned items regardless of whether they were legal in the state of destination or origination, and, unlike earlier anti-lottery laws, the 1895 Act extended to purely private transactions rather than activities that made use of the federal mails. Yet the measure passed without significant Southern opposition and, indeed,

[79] Congress enacted a ban on sending lottery tickets through the mails in 1876 over objections of some Southerners that such a measure illegitimately nationalized morality policy. John S. Ezell, *Fortune's Merry Wheel: The Lottery in America* 239 (1960). But Southerners blocked efforts to strengthen the ban by, for instance, barring newspapers carrying lottery advertisements from the mails. Gaines Foster, *Moral Reconstruction* at 121-22.
[80] Foster, *Moral Reconstruction* at 123-25.

enjoyed substantial Southern support.[81]

The Court's 1903 decision in *Champion v. Ames* upholding the 1895 Anti-Lottery Act is conventionally regarded as opening the way for a Progressive expansion of national power. As with Congress, the Southerners on the Court (Edward White and John Marshall Harlan) joined the *Champion* majority in accepting the broad reading of Congress' commerce power. Unlike Congress, the Court was closely divided over this expansion. Chief Justice Fuller's four-vote dissent implicitly set forth the old gentry-protecting theory of federalism, insisting that federal laws banning goods from interstate commerce have "an essentially commercial purpose."[82] Elaborated in terms of 19th century federalism's preoccupations, Fuller's theory demanded some purpose unrelated to morals reforms pressed by Pietist reformers intent on safeguarding domesticity from sinful masculine behavior: Keeping diseased cattle out of the channels of commerce would be acceptable, while keeping out influences deemed immoral by Congress would not.

But this anti-Yankee theory of federalism had lost its constituency. Justice Harlan, himself partial to the moralistic Whig tradition,[83] could count on his fellow Southerner, Edward White, to join with New England nationalists like Oliver Wendell Holmes to back New England norms of morality, because this nationalization of morality was no longer sectionally divisive. The four dissenters were speaking the language of a bygone period.

The same pattern held with the expansion of the taxing power. An illustrative congressional debate took place with regard to a 1902 bill subjecting colored oleomargarine to a tax of ten cents per pound. The supporters of the tax (primarily from Midwestern and eastern

[81] Herbert Margulies, *Pioneering the Federal Police Power:* Champion v. Ames *and the Anti-Lottery Act of 1895*, 4 J. Southern L. Hist. 45, 51 (1995).
[82] *Champion v Ames*, 188 U.S. 321, 364-74 (1903)(Fuller, C.J., dissenting).
[83] Loren Beth, John Marshall Harlan: The Last Whig Justice 203 (1992).

dairy-producing states like Wisconsin and Vermont) defended the tax as a way to eliminate the allegedly fraudulent commercial practice of coloring oleomargarine to look like butter. The opponents of the tax (primarily from western and southern states where cottonseed oil and animal fat used in oleomargarine was produced) attacked the measure as a "subterfuge" to regulate intrastate manufacturing under the guise of a revenue-producing tax. The opponents urged the old gentry position that federal taxes had to have a genuine revenue-raising purpose and could not be used primarily for the purpose of prohibiting some activity or item. This constitutional theory was not urged as a limit that any court would enforce: Senator Bailey, a Democrat from Texas, conceded that no court would inquire into congressional motive but argued that the Senators themselves knew their own motives and ought not to vote for a measure that was obviously not really intended to raise revenue.[84] Similar constitutional arguments were offered by Senator Money from Mississippi.[85]

The arguments, however, had no purchase on the majority, not because the arguments were doctrinally incorrect but because there was no real sense of threat in Congress from a broad construction of federal taxing power. One Senator gently mocked Senator Money's argument against a broad taxing power, comparing it to the old antebellum Democratic arguments against a federal power to fund internal improvements – an argument that "will in due time be relegated to the limbo of forgotten things."[86] Even the Southerners launched no vigorous filibuster to stop the tax, although they had successfully blocked similar measures since 1886.[87]

Quite simply, there no longer was a passionate constituency in favor of a narrow federal

[84]In Senator Bailey's words, "But while the courts cannot look into our hearts and minds and determine the motive which controlled our votes, the rule is different with the Senator himself. He knows the motive which controls him, and he ought not to be controlled by one which he dares not avow before the world." Cong Rec. 3556 (April 2nd, 1902).
[85] *Id.* at 3503 (April 1st, 1902).
[86]*Id.* at 3504.
[87] Thomas A. Bailey, *Congressional Opposition to Pure Food Legislation, 1879-1906,* 36 Am. J. of Soc. 52 (1930).

taxing power. The Southerners of the 19th century feared that any broad taxing power might be used by a Yankee-controlled Congress to attack the anti-Yankee cultural enclaves of immigrants and Southerners – for instance, to tax out of existence alcoholic beverages or tobacco. But the Southerners of the early twentieth century no longer jealously struggled against New England morality: They embraced it. The only issue at stake in 1902 was whether cottonseed oil makers might suffer an economic disadvantage as against dairy farmers – hardly an issue of apocalyptic constitutional significance. The tax was duly passed and was upheld by the Court in *McCray v. United States*.

That a broad taxing power was no longer perceived as a cultural threat by the South is nicely illustrated by the legislative history of the tax on phosphorus matches enacted in 1912. Phosphorus matches were linked to the disease of necrosis of the jaw among workers in match factories, and progressive reformers from the American Association of Labor Legislation called for a prohibitive tax to force manufacturers to produce matches from safer substances. There were Southerners who urged the traditional "Democratic doctrine … that the power to tax can be used only for the purpose of raising revenue for the Government, economically administered."[88] But the South was hardly unified on the position: Edward Saunders, a Democrat from Virginia, strongly endorsed the bill, and the measure in the Senate had the strong backing of Senator John Sharp Williams, a Mississippi Democrat.[89] AALL leaders assured members of Congress that voting for the measure would not establish any broad precedent for generally using the taxing power to regulate industry, apparently on the ground that the urgent need to stop "phossy jaw" justified the use of the power in this case, and, on this vague assurance, the Senate passed the bill

[88] Cong. Rec. 62d Cong., 2d sess., 48, part 4 (28 March 1912): 3967-68 (remarks of representative Charles Bartlett from Georgia).
[89] David A. Moss, Kindling a Flame under Federalism: Progressive Reformers, Corporate Elites, and the Phosphorus Match Campaign of 1909-1912, 68 Bus. Hist. Rev. 244, 269-70 (1994).

on a voice vote.

Southerners' equanimity in voting for regulatory taxes can best be explained by the new Southern confidence that the South no longer need strict limits on national power to control a Yankee cultural elite: With the election of Woodrow Wilson, a Southern President, the Southerners could rightly regard themselves as the new arbiters of national culture. Wilson's victory brought a Southerner to the White House for the first time since Andrew Johnson's presidency; half of Wilson's cabinet seats went to Southerners, including the critical position of Treasury Secretary (to McAdoo, his son-in-law); and Wilson demonstrated vigorous support for racial segregation in his regulation of the civil service.[90] Some of the national legislation supported by Southern Democrats was rooted in not very thinly veiled racist assumptions that (for instance) the Mann Act's prohibition of the transportation of women and girls across state lines for immoral purposes was necessary to prevent white women from being sexually exploited by black males.[91] The epitome of such an expansive view of the commerce power was the enactment of a federal law banning the interstate transportation of prize-fighting films – a measure specifically tailored to prevent circulation of films of Jack Johnson, the black boxer loathed in the South, defeating the various "great white hopes" in Cuba and the Phillipines.

But it is a mistake to assume that Southerners only supported national laws that could easily be linked to white supremacy: As members of a progressive coalition, Southerners could easily be enlisted to support national legislation tied to the general progressive goal of protecting women, children, and norms of domesticity from the marketplace.

[Paragraph needed on the 1906 Pure Food & Drug Act]

Likewise, the Owen-Keating Child Labor Act of 1913 blocked the interstate movement

[90] Kathleen L. Wolgemuth , *Woodrow Wilson and Federal Segregation*, 44 J. of Negro Hist. 158 (1959).
[91] On the assumption that "white slavery" rings were being run by Italian or Jewish criminal syndicates, see David Langum, Crossing Boundaries; Barbara Holden-Smith.

of goods manufactured with child labor: It constituted a major expansion of the federal commerce power to address states' inability to control the importing of cheap goods from other states. But the measure inspired no angry Southern resistance. Its floor manager was Representative Robinson of Arkansas, and it received a majority of the votes of the House delegations from eleven southern states. The only Southern opposition to the measure came from the representatives of four Southern states in which textile factories employing child labor were a major industry.[92]

In theory, these expansive theories of the taxing and commerce powers could be deployed against Jim Crow. In practice, by the time of Wilson's election, few Southerners worried about a new northern coalition for such a social reform, because racial segregation seemed consistent with the general progressive coalition for preserving protestant domesticity from alien culture. Indeed, Southerners began pressing for nationalization of white supremacy, proposing a constitutional amendment to ban interracial marriage in 1912[93] and a bill to ban interracial marriage in Washington, D.C. in 1913.[94] The former was likely sheer grandstanding, but the latter based the House on a voice vote only to die in the Senate. A second version of the bill passed the House in 1915 with overwhelming support not only from the South but also Northern Democrats.[95]

### 3. *Southern abandonment of the Immigrant-Southern coalition*

None of these progressive measures dealing with food and drugs, prostitution, or child labor directly attacked the Southerners' old coalition partners, those non-Yankee immigrant

[92] Stephen B. Wood, *Constitutional Politics in the Progressive Era* at 56.
[93] Cong. Rec. 62nd Cong., 3rd sess., 507 (December 11th, 1912).
[94] Cong. Rec., 62nd Cong., 3rd sess., 2929 (February 10th, 1913).
[95] Cong. Rec. 63rd Cong., 3rd sess., 1362-68 (Jan. 11th, 1915). 95 out of 102 Northern democrats supported the bill, along with one out of four Progressive Party representatives. *See* Jeffrey Jenkins, Justin Peck, & Vesla M. Weaver, *Between Reconstructions: Congressional Action on Civil Rights, 1891-1940*, 24 Stud. In Am. Pol. Dev. 57, 65 (2010).

groups in the North. But Southerners were plainly turning away from these groups in the early twentieth century, and, under the Administration of Woodrwo Wilson, the alienation became complete. Southerners initially resisted Massachusetts Senator Henry Cabot Lodge's proposals during the 1890s to restrict immigration with literacy tests: As late as 1903, they strongly opposed the Lodge literacy test out of a desire to attract cheap white labor to the South. By 1905, Southern members of Congress had shifted against immigrants and endorsed the Lodge bill, and, by 1912, overwhelming numbers of Southern members of Congress voted for the measure.[96]

The election of Woodrow Wilson in 1912 marks the critical shift in Southern Democrats' thinking about non-Anglo-Saxon constituencies. Wilson's disparaging remarks about "men of the meaner sort out of Hungary and Poland" and, more generally, his hostility to urban Democratic organizations had not endeared him to the Catholic and Irish Democratic constituencies.[97] Wilson nomination on the forty-sixth ballot at the Democrat's Baltimore convention critically depended on an alliance with William Jennings Bryan, enabling Wilson to defeat the Missourian Champ Clark who had the support of western progressive delegates.[98] Bryan was a "dry" who shared Wilson's distaste for Charles Murphy's New York organization, and Wilson's central political message was the redemption of politics from vaguely described "machines." The Wilsonian Democratic Party, therefore, contained a powerful anti-urban and anti-immigrant element that Wilson himself could not easily control [99]: His second veto of the literacy test for immigrants was overridden in 1917 with overwhelming support from Southern delegates. Southern Democrats also overwhelmingly supported prohibition of alcoholic

[96] *See* John Higham, Strangers in the Land: Patterns of American Nativism, 1860-1925 at 113, 165-75 (1972).
[97] Hans Vought, Division and Reunion: Woodrow Wilson, Immigration, and the Myth of American Unity, 13 J. of Am. Ethnic Hist. 24, 29-30 (1994).
[98] John Broesamle, *The Democrats from Bryan to Wilson*, in the Progressive Era 96-97 (Lewis Gould ed. 1972).
[99] David Burner, The Politics of Provincialism: The Democratic Party in Transition, 1918-1932, at 8-10 (1967).

beverages in 1918. By 1924, urban "wets" led by Governor Al Smith of New York and Western and Southern "dries" led by William Gibbs McAdoo were so savagely at each other's throats that the Democratic Party had ceased to function as a coalition-building entity: After 103 ballots, the Party nominated John W. Davis, a non-entity destined for sure defeat.[100]

The old urban-rural, Southern-immigrant coalition, in short, had been utterly shattered by "the damn fool Democrats" (in Arthur Krock's phrase).[101] But the death of this coalition was not merely the death of a political alignment but also a constitutional theory. The coalition had been rooted in a common gentry-based theory of subnational democracy under which different groups with no common interest except a shared enemy (Yankee) and a shared interest in household autonomy could band together to prevent national control of laws affecting the household. When the South abandoned this theory of household autonomy and instead favored a new saintly ideology, the coalition's theory of federalism was thrown to the wayside, first in legislation and, eventually, in Supreme Court doctrine.

**Conclusion**

Nineteenth century constitutional federalism depended on a constitutionally rooted alliance of ethnocultural minorities. When that alliance collapsed, the theory of federalism that it supported collapsed as well. It is tempting to infer from these facts the further idea that constitutional ideas were merely superstructure overlain above a political base of ethnocultural interest. Such an inference, however, would be mistaken. The alliance that sustained nineteenth century constitutional federalism could not be conjured up by magic: Its members were mutually suspicious and could have made common cause with their mutual opponents against each other. In particular, the alliance could not unite around a common notion of household liberty, because

[100] David Burner, *the Politics of Provincialism* at 120-25.
[101] Arthur Krock, "The Damn Fool Democrats," 4 American Mercury 257 (March 1925).

they lacked any such shared libertarian principle. Catholic priests, slave owners, and German saloon owners embraced some vague notion of household freedom in a general sort of way, but their particular conceptions of such freedom differed so widely from each other that Whigs and, later, Republicans could easily have compromised with some groups and thereby isolated others by compromising on specific issues of particular interest to each group.

Constitutional federalism gave these groups a common rallying cry, obviating the need for any to embrace the peculiar versions of household liberty endorsed by the others. In the name of federalism, Southerners could stand pat against the Blaine Amendment without being branded papists, while Catholics and Lutherans could opt for Southern control of schools and an end to Reconstruction without embracing white supremacy. The structure of federalism had, moreover, a sufficient textual presence (in the general idea of an enumeration of powers suggested by Article I, §8) and constitutional tradition that rallying around various notions of unconstitutional conditions with the taxing and territorial powers did not seem wholly unprincipled. Constitutional concepts of federalism, in short, helped sustain the coalition that, in turn, protected those concepts. Neither could be reduced to the other.

Neither, however, could survive without the other: the end of the coalition was the end of the constitutional concepts as well. The echoes of those concepts still bounce through the pages of the U.S. Reports and Congressional Record with vague allusions to the notion that family, education, and violent non-economic crime are peculiarly the province of the states. The Yankee threat that once made sense of these commitments, however, has vanished, and, with that threat, the rationale for the slogans that the threat sustained.