"The Production of Authority: Regulating the Market in the Age of Jefferson"

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Dear participants in the PEAES/McNeil seminar,

Thank you so much for taking the time to read my work—I very much appreciate it, and look forward to hearing your criticisms and suggestions. Let me give you a brief description of what you are about to read. This is a very rough first stab at turning a dissertation chapter on Jefferson's Embargo into a free-standing article. The dissertation, which has just been completed, is a legal and political history of federal customhouses from 1787 to 1815. The central claims of the dissertation are that customs officials fashioned a politics of accommodation to reconcile competing private, commercial and public, political-economic demands, and that this politics of accommodation defined the political legitimacy of the American nation-state in global commerce and politics during the age of the Napoleonic Wars.

As you will see, I am still thinking along these lines. But I'd like to push beyond them, if possible. As it stands, I know that I am trying to do too much in a small space, rather than focusing on one element or another in particular. So I would greatly appreciate any input on which aspects of the essay you think should be emphasized, and which should be treated separately (or, gulp, discarded entirely). I am also struggling to figure out where I should be introducing connections between the early republican and colonial experience of customs taxation. It would also be helpful to see where people think I can fit an explanation of the use of common law suits to 'check' customs officials against executing the embargo. Again, any ideas on this would be greatly appreciated.

Thank you again for your time, and I look forward to seeing you soon.

Sincerely,
Gautham

The arrival of the mails on December 31, 1807 caused quite a stir on the Newburyport, Massachusetts waterfront. At the customhouse, Collector of Customs Ralph Cross had received a copy of the newly enacted Embargo Act of 1807, which aimed to punish British depredations on American commerce, such as impressment and privateering. Enforcing this law meant that Cross, and the several dozen collectors of customs throughout the land, were directed to prevent the departure of "any ship or vessel bound to" a "foreign port or place."[1]

Collectors of Customs were typically men of significant social standing, and Cross was no different. During the American Revolution he had been a shipwright of great repute. His fortunes later swelled from the lucrative West Indies trades. Commerce had made Ralph Cross "among the most active and influential citizens in Newburyport," and he owed his official post in the Newburyport Customhouse to the very fact that "few citizens had better opportunities of conciliating public confidence." But the Embargo Act placed men like Collector Cross, who had made fortunes in the Atlantic market, in a difficult position. The act compelled Ralph Cross to put aside allegiances to his mercantile brethren in Newburyport. Indeed, he was now asked to use his authority to police the market—to sever the nation's ties to the world of commerce.[2]

Cross did his best to shield his old merchant friends in Newburyport from the onset of the Embargo. For three days before receipt of the law, Cross had warned local merchants of impending doom, likely imploring them to get their vessels away, and their

[1] *Newburyport Herald*, January 1, 1808, 3. 2 *Statutes at Large* 451 at 452 (1807).
[2] Caleb Cushing, *The History and Present State of the Town of Newburyport* (Newburyport, Mass.: E.W. Allen, 1826), 96, and generally 96-99. Cross' considerable mercantile dealings can be glimpsed in the records of the Mercantile House, a northern Massachusetts trading firm. See, Records of the Mercantile House, 1792-1804, MS 285, W.E.B. DuBois Library, University of Massachusetts Amherst. See also, New England Historic Genealogical Society, *New England Historical and Genealogical Register* (New York: Heritage Books, 1994), 15:128.

affairs in order. But on January 1, 1808, Cross began the difficult task of conscientiously enforcing the Embargo, a decision for which he would suffer greatly. Immediately, he stood accused of exerting "a high hand towards all our merchants," and of arraying a "standing army" of "his troops" against the commercial interests of Newburyport. Ostracized from his community, the Collector of Newburyport now faced an onslaught of lawsuits. Throughout town Cross was blamed for visiting upon Newburyport's "wharves…the stillness of the grave." Cross was also the victim of more than mere verbal barbs. In August, 1808, "a large armed mob" overtook the Newburyport Customhouse and turned Cross out to the street.[3]

Why, exactly, did Ralph Cross merit such harsh treatment? For the merchants of Newburyport, Cross' crime was not simply executing an unpopular law. Rather, it was that during the Embargo, an official like Cross—an official drawn from the merchants' own ilk—seemed to lay claim to a disturbing new type of political authority. Under the Embargo Acts, "new Custom House Regulations" would be based upon "Presidential Orders." "A custom house officer comes and takes away my vessel," explained an angry Newburyport merchant. "I call on him for his authority—he says the embargo laws—we examine them, but it is not there." Collector Cross responded that a Treasury Department "circular, explanatory of the *spirit* of said laws," guided his actions. What was so objectionable, wrote a Virginia correspondent, was that the President "undertakes to direct the collector in the exercise of his direction." The President, that is, determined the principles "upon which the collector *must form his opinion*, and instructions to this effect

[3] John James Currier, *History of Newburyport, Mass.* (Newburyport, Mass.: By the Author, 1906), 649. *Newburyport Herald*, January 15, 1808, 2. *Salem Gazette*, September 9, 1808. Albert Gallatin to Thomas Jefferson, August 17, 1808, Reel 42, Jefferson Papers, Manuscript Reading Room, Library of Congress [hereafter, Jefferson Papers].

are issued" to the customhouses. "Under *these instructions*, and not according *to his own opinion* the collector" would act. In executing the Embargo Acts according to the will of the President, Ralph Cross had forfeited his capacity to govern according to "his own opinion" and principles.[4]

As the principles "upon which the collector must form his own opinion" slipped away from the familiar setting of the Newburyport waterfront, and began to accumulate in the halls of power in Washington, D.C., the merchants of Newburyport themselves seemed to lose power. Prior to the Embargo, local considerations, rather than the will of the President, influenced how men like Cross administered and executed customs laws. In those days, the merchants seemed to have a say in how officials went about executing their office. After all, Ralph Cross, like most customs officials, had been selected for office from the ranks of the local merchant community. His tenure at the customhouse had been marked by a sense of "moderation," or a mode of conscientiously and carefully balancing the letter of the law against the needs and concerns of Cross' mercantile ilk. But the Embargo seemed to change all that was familiar at the customhouse. The very least that the merchants hoped for, contended another Newburyport critic of the Embargo, was that the "officers of the customs" would revert to the spirit of "moderation" that had once governed customhouse policy, in contrast to the "strained interpretations," and the doctrinal "additions" of the Jefferson administration.[5]

The same, sad fate awaited customs officials throughout the country. A strict allegiance to the letter of the Embargo Acts meant forfeiting local discretion, and would

[4] Thomas Perkins and John Perkins to Russell & Cutter, *Boston Gazette*, August 8, 1808, reprinted in *Newburyport Herald*, August 9, 1808. Letter of "Mercator," [pseud.], *ibid.*, August 16, 1808, 2. Letter of "Tullius," [pseud.], *ibid*., September 30, 1808, 2.
[5] Letter of "Hampden," [pseud.], *Newburyport Herald*, September 16, 1808, 1.

undoubtedly incur local wrath. But officials also faced incredible pressure from the opposite direction, as the Jefferson administration used every political tool in its arsenal to make effective the Embargo. Officers could be denounced in the party press, or, worse yet, dismissed from their posts. For Jefferson, such extreme measures seemed to fit the high stakes of the Embargo. If the scheme was to work, to truly teach Great Britain a lesson, the prohibition on commerce had to be absolute. This meant that customs officials' sole task was to "suppress this commerce, altogether." In such a calculus of enforcement, what room was there for customs officials to draw upon the 'moderation' of years past?[6]

In truth, there was little: customs officials could either enforce the prohibition of commerce or undermine it. Cross made his fateful choice. But his colleagues throughout the country generally made the opposite decision, Against the legal force of the Embargo, these officials clung to their local, discretionary authority, and stymied the administration's attempt at reconstituting the legal and political foundations of customs policy and practice during the Embargo. Due in large part to this systematic subversion, Jefferson's Embargo was pronounced a dead letter by the summer of 1808. The law was unenforceable, not only because it cut against the grain of public opinion, but also because the offices and officeholders responsible for implementing the law chose not to enforce it. These officials understood that, even two decades removed from the ratification of the United States constitution, national political authority remained incredibly contingent. In their own situation within the customhouse, the ability to

[6] Argument of Joseph Story in *United States v. The William* (1808), reprinted in Francis Blake, *An Examination of the Constitutionality of the Embargo Laws…* (Worcester, Mass.: Goulding and Snow, 1808), 25, 12.

govern and regulate ultimately rested on the consent of the governed and the regulated—the merchants.

This essay explores the struggle over the location of political authority during the Embargo. This struggle, which unfolded in and around the customhouse, revealed how commerce and commercial interests defined the capabilities and limits of national sovereignty in the early republican United States. As the Jefferson administration attempted to use federal customhouses to police the market, they confronted, and ultimately succumbed to, an established mode of customhouse politics—a shadowy realm of governance in which commercial interests exerted an informal, but nonetheless powerful influence over the scope and scale of customs regulation and administration. The essay begins by uncovering the Jeffersonians initial confrontation with the customhouses, before and during the earliest days of the Embargo. How this distinct brand of customs politics and practices came about is the subject of the second section, which turns back to the days of federalist rule. The third section examines how the Jeffersonians attempted in vain to replace the local, commercially influenced mode of customs administration with a new vision of centralized, national coercive authority.

In studying the legal function of government customhouses in the context of the political economic and geopolitical tumult of Jefferson's Embargo, and more broadly, during the age of the Napoleonic Wars, this essay offers a new perspective on the construction of political authority in the early American republic.[7] While many recent

[7] The literature is simply too formidable to list in any detail here. See, e.g., James T. Kloppenberg, *The Virtues of Liberalism* (New York: Oxford University Press, 1998); Stanley Elkins and Eric McKitrick, *The Age of Federalism* (New York: Oxford University Press, 1993); Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia: University of Pennsylvania Press, 1983); Joyce O. Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s* (New York: New York University Press, 1983); Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969); Bernard Bailyn, *The*

works have discovered the presence of "the state" in the early national United States, few account for the mutually constitutive, but nonetheless fragile relationship between commerce and national politics.[8] Where scholars have identified the significance of this relationship, they have done so by apprehending the *idea* of commerce, rather than by interrogating the material ramifications of commercial relations on politics and governance.[9] In this light, the study of Jefferson's Embargo—perhaps the most radical market regulation in United States history—has typically been reduced to a case study within influential histories of Jeffersonian ideology.[10] This essay takes a different

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Ideological Origins of the American Revolution (Cambridge: Harvard University Press, 1967); Leonard D. White, *The Federalists: A Study in Administrative History* (New York: Macmillan, 1946); White, *The Jeffersonians: A Study in Administrative History* (New York: Macmillan, 1948).

[8] See, Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (New York: Oxford University Press, 2004); Mark R. Wilson, "Law and the American State, from the Revolution to the Civil War: Institutional Growth and Structural Change," in Michael Grossberg and Christopher Tomlins, ed., *Cambridge History of Law in America, Volume II: The Long Nineteenth Century, 1789-1920* (Cambridge: Cambridge University Press, 2008), 1-35. Richard R. John, ed., *Ruling Passions: Political Economy in Nineteenth-Century America* (University Park, Penn.: Pennsylvania State University Press, 2006); Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge: Harvard University Press, 1995); Richard R. John, "Government Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787-1835," *Studies in American Political Development*, vol. 11 (1997), 347-380; John Lauritz Larson, *Internal Improvement: National Public Works and the promise of Popular Government in the Early United States* (Chapel Hill: University of North Carolina Press, 2001); Jeffrey R. Pasley, *'The Tyranny of Printers': Newspaper Politics in the Early American Republic* (Charlottesville: University Press of Virginia, 2001).

[9] J.G.A. Pocock's remarkable studies are the clearest example of this, e.g., *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (New York: Cambridge University Press, 1985), and *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975). Scholarship that frames early republican history around the themes of the Hamilton-Jefferson conflicts can be understood similarly. For the most recent enunciation of this, see Sean Wilentz, *The Rise of American Democracy: From Jefferson to Lincoln* (New York: W.W. Norton & Co., 2005).

[10] The finest work on the embargo has been done by Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (New York: W.W. Norton & Company, 1982), Douglas Lamar Jones, "'The Caprice of Juries': The Enforcement of the Jeffersonian Embargo in Massachusetts," *American Journal of Legal History*, vol. 24, no. 4 (October, 1980), 307-330, and Richard James Mannix, "The Embargo: Its Administration, Impact, and Enforcement," Ph.D. Dissertation, New York University, 1979. See also, Lance E. Davis and Stanley Engerman, *Naval Blockades in Peace and War: An Economic History Since 1750* (New York: Cambridge University Press, 2006), 77-108; Burton Spivak, *Jefferson's English Crisis: Commerce, Embargo, and the Republican Revolution* (Charlottesville: University Press of Virginia, 1979); Noble E. Cunningham, Jr., *Jeffersonian Republicans in Power; Party Operations, 1801-1809* (Chapel Hill: University of North Carolina Press, 1963); Louis Martin Sears, *Jefferson and the Embargo* (Durham: Duke University Press, 1927)

approach. It focuses attention on legal and political practices within the customhouse, a liminal space of officialdom at the littoral, pervious boundary between commerce and national politics.[11] It understands these practices as more than arrests, seizures, and prosecutions, but rather as both exertions of official power and personal influence; as formal directives and informal authority.[12] Thus, this piece sheds new light on the function of political authority, legal legitimacy, and political institutions in the waning years of the Age of Revolution. Even as political vicissitudes augured a revolution in governance, the commercial underpinnings of early republican officialdom remained intact, and continued to mark the limits of the young nation-state.

The crisis that occasioned the Embargo emerged from the inextricably linked bailiwicks of global commerce and militarism during the height of the Napoleonic Wars. The contest for global domination placed a great strain on the French and British navies and merchant marine, especially as regarded trade between the metropoles and their West Indian colonies. American merchants were only too pleased to pick up the slack, and

[11] For histories of customs administration, see Frederick Arthur Baldwin Dalzell, "Taxation Without Representation: Federal Revenue in the Early Republic," Ph.D. Dissertation, Harvard University, 1993; Dalzell, "Prudence and the Golden Egg: Establishing the Federal Government in Providence, Rhode Island," *New England Quarterly*, vol. 65, no. 3 (September, 1992), 355-388; Joshua M. Smith, *Borderland Smuggling: Patriots, Loyalists and Illicit Trade in the Northeast, 1783-1820* (Gainesville, Fla.: University of Florida Press, 2006); Joshua Mitchell Smith, "The Rogues of 'Quoddy: Smuggling in the Maine-New Brunswick Borderlands, 1783-1820," Ph.D. Dissertation, University of Maine, 2003; Carl E. Prince and Mollie Keller, *The U.S. Customs Service: A Bicentennial History* (Washington, D.C.: Department of the Treasury, U.S. Customs Service, 1989); Prince, *The Federalists and the Origins of the U.S. Civil Service* (New York: New York University Press, 1977); R. Elberton Smith, *Customs Valuation in the United States: A Study in Tariff Administration* (Chicago: University of Chicago Press, 1947); Laurence F. Schmeckebeier, *The Customs Service: Its History, Activities and Organization* (Baltimore: Johns Hopkins University Press, 1924).

[12] On this expansive understanding of law and authority, see Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* (1985), 899-935 esp. 915-916; Laura F. Edwards, "Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth-Century U.S. South," *American Historical Review*, vol. 112, no. 2 (April, 2007), 365-393; Lauren A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (New York: Cambridge University Press, 2002); Amy Chazkel, "Beyond Law and Order: The Origins of the *Jogo do Bicho* in Republican Rio de Janeiro," *Journal of Latin American Studies*, vol. 39, no. 3 (June, 2007), 535-565.

gradually monopolized the shipping lanes between the West Indies and European markets.[13] But with the promise of lucre came immense risk. The United States was technically neutral in the Napoleonic Wars, but the warring belligerents often refused to acknowledge this neutrality when it suited their strategic interests. "The English take all vessels bound to Spanish or French ports and the Spanish or French take all vessels bound to or from an English Port," recounted one merchant. Through such measures as blockades, privateering, impressment, and piracy, the warring powers each sought to ensure that American colonial goods reached their markets, while depriving the enemy of the same trade. Shortly before the Embargo, the Jefferson administration turned to market regulations, and to the customhouses in particular, to cope with the political fallout from American neutral commerce during the Napoleonic Wars.[14]

The first instance concerned American trade with the black revolutionaries of Haiti. Although American merchants had been doing a brisk business in Saint-Domingue and then Haiti since the 1780s, this trade came to appear problematic in 1801, in the aftermath of the American Quasi War with France. The French refused to formally recognize Haiti. Rather, Napoleon and his envoys claimed it to be a colony in a state of insurrection—an insurrection that owed its sustenance to American commerce.

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[13] See, Michelle Craig McDonald, "The Chance of the Moment: Coffee and the New West Indies Commodities Trade," *William and Mary Quarterly*, 3d Series, vol. 62, no. 3 (Jul., 2005), 441-472; Claudia D. Goldin and Frank D. Lewis, "The Role of Exports in American Economic Growth during the Napoleonic Wars, 1793 to 1807," *Explorations in Economic History*, vol. 17, no. 1 (Spring, 1980), 6-25. Generally on the role of overseas trade in the early national American economy see Douglass C. North, *The Economic Growth of the United States, 1790-1860* (Englewood Cliffs, N.J.: Prentice-Hall, 1961); Curtis P. Nettels, *The Emergence of a National Economy, 1775-1815* (New York: Harper & Row, 1962), 233-236; Gerald Gunderson, *A New Economic History of America* (New York: McGraw-Hill, 1976); Gerald C. Bjork, "The Weaning of the American Economy: Independence, Market Changes, and Economic Development," *Journal of Economic History*, vol. 24, no. 4 (Dec., 1964), 541-560.

[14] John Odiorne to James Locke, March 19, 1807, Folder 5, Box 1, Shipping Papers Collection, New Hampshire Historical Society. On the effects of war on the Atlantic market, see Eliga H. Gould, "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772," *William and Mary Quarterly*, third series, vol. 60, no. 3 (Jul., 2003), 487-88.

Accordingly, in February, 1802, the French placed an embargo on all ports controlled by the revolutionaries.[15] Rather than abiding by the French regulations, American merchants in New York, Philadelphia, Baltimore, and Charleston began arming their vessels in order to fight their way through the French embargo, and into the Haitian market.[16]

By the end of Jefferson's first term, this armed Haiti trade had become a serious political liability. In 1806, at Jefferson's behest, Congress enacted legislation that prohibited American merchants from trading with Haiti. The law was simple: the customhouses were not to issue a clearance to any vessel bound for Haiti. But at the customhouses, the law was interpreted so narrowly as to rob it of any effect. Customs officials did not, it was true, clear any vessel for ports in Haiti. Rather, from Charleston to New York, officials cleared hundreds of vessels bound for the generic destination of "the West Indies," with full knowledge that the vessels would wind up in Haitian ports.[17]

The customhouses acquitted themselves similarly in enforcing the short-lived Non Importation Act of 1806. Like the Embargo that was to follow, the Non Importation Act law aimed to punish Great Britain for the widespread impressment of sailors thought to

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[15] On the scale of American trade with Saint-Domingue and Haiti in these years, see McDonald, "The Chance of the Moment," 459-60; Laurent DuBois, *Avengers of the New World: The Story of the Haitian Revolution* (Cambridge: Harvard University Press, 2004), 33; C.L.R. James, *The Black Jacobins: Toussaint L'Ouverture and the San Domingo Revolution* (1963; New York: Vintage Books, 1989), 245; John H. Coatsworth, "American Trade with European Colonies in the Caribbean and South America, 1790-1812," *William and Mary Quarterly*, 3rd ser., vol. 24 (Apr., 1967), 245-247. For the complicated diplomatic relations over the Haiti trade, see Rayford W. Logan, *Diplomatic Relations of the United States with Haiti, 1776-1891* (Chapel Hill: University of North Carolina Press, 1941), 6-7; Donald R. Hickey, "America's Response to the Slave Revolt in Haiti, 1791-1806," *Journal of the Early Republic*, vol. 2, no. 4 (Winter, 1982), 365.

[16] Anthony Merry to James Madison, August 31, 1804; Logan, *The Diplomatic Relations of the United States with Haiti*, 157. Gallatin to Jefferson, June 7, 1804, in Henry Adams, ed., *Writings of Albert Gallatin* (Philadelphia: J.B. Lippincott & Co., 1879), 1:194.

[17] William Plumer, *William Plumer's Memorandum of Proceedings in the United States Senate, 1803-1807*, ed. Everett S. Brown (New York: DaCapo Press, 1969), 387 [January 21, 1806]. See also, David Gelston to Albert Gallatin, January 23, 1807, Box 5, Folder 5, Gelston Papers; David Gelston to Nathaniel Sanford, January 20, 1807; June 20, 1807, Box 15, Folder 6, Gelston Papers, G.W. Blunt Library, Mystic Seaport.

be United States citizens. Equally galling were recent British admiralty decisions that refused to acknowledge the neutrality—and thus legal legitimacy—of American trade with France.[18] The Non Importation Act barred imports of British manufactures of which leather, silk, hemp, flax, tin, or brass were the components "of chief value;" all luxury wool and hosiery; glass, silver, paper, nails and spikes, hats, "clothing ready made," "millinery of all kinds," playing cards, beer, and "pictures and prints." Any of these items, if imported "contrary to the true intent and meaning" of the law, were forfeited upon discovery.[19]

Most of the seizures that customs officials performed under the Non Importation Act occurred in the first of the law's five-week existence. As Herbert Heaton illustrates, a New York official "seized a ship and 150 casks of nails on the very first day, and soon added a box of linen and casks of porter to his collection." A zealous Baltimore official sequestered "two pairs of British shoes *and* the ship in which they arrived." Only in Philadelphia did the customhouse continue to prosecute violators, much to the chagrin of District Judge Richard Peters, who now seethed at a docket "filled with Petitioners to me, to state Cases for the Remission of Forfeitures." But with a judicial wink and nudge, Peters counseled the offending merchants "to have patience," hinting that they would

[18] "Sentence of the Vice-Admiralty Court of Nassau, New Providence, in the Case of the Brig Essex, Joseph Orne Master," (1799) reprinted in Bradford Perkins, "Sir William Scott and the Essex," *William and Mary Quarterly*, 3rd ser., vol. 13, no. 2 (April, 1956), 177-78. *The William*, 5 C. Rob. 385 at 395, 165 Eng. Rep. 817 at 821 (1806). See also, Charles Burke Elliott, "The Doctrine of Continuous Voyages," *American Journal of International Law*, vol. 1, no. 1 (Jan.-Apr., 1907), 61-74; Lester H. Woolsey, "Early Cases on the Doctrine of Continuous Voyages," *American Journal of International Law*, vol. 3, no. 4 (1910), 823; Herbert Whittaker Briggs, *The Doctrine of Continuous Voyage* (Baltimore: Johns Hopkins University Press, 1926), 11-30.

[19] 2 *Statutes At Large* 379 at 379-381 (1806).

soon be off the hook. Indeed, two weeks after Peters' did so, Congress suspended the Non Importation Act, and violators were granted what amounted to blanket amnesty.[20]

Most customs officials had ignored the Non Importation Act because the law, as written, was so stringent that it could not help but fill up courtrooms, as had occurred in Philadelphia. Even officials sympathetic to Jefferson's goal of punishing Great Britain found the law unenforceable. David Gelston, Collector of the New York customhouse found the law so general and vague that he requested an advisory opinion from the District Attorney of the Southern District of New York, Nathan Sanford. Sanford urged Gelston to use extreme caution in handling the "obscure and ambiguous" law. He also urged Gelston to construct the law "distributively," which he believed to be the opposite of constructing the law literally. In other words, Gelston should feel authorized to seize imports of large volumes of prohibited goods, such as silver. But the customhouse was advised that "silver watches," or other productions of silver, were "not prohibited." This discretion, concluded Sanford, was "the best examination I have yet been able to give" to the Non Importation Act.[21]

Just a year before Congress enacted the Embargo, then, the customhouses had proven to be of questionable utility in regulating the market. Prohibiting commerce was so problematic because the customhouses enjoyed great latitude to interpret federal statutes as they saw fit. And at the customhouse, it seemed customary to construct statutes in such a manner as to least encumber the merchants whose commerce the law had aimed to restrict in the first place. In this sense, it becomes possible to identify the

[20] Herbert Heaton, "Non-Importation, 1806-1812," *Journal of Economic History*, vol. 1, no. 2 (Nov., 1941), 180. Richard Peters to Timothy Pickering, December 8, 1806, Box 1, Folder 3, Timothy Pickering Papers Transcript, Massachusetts Historical Society.

[21] Sanford to Gelston, November 28, 1806, Box 12, Folder 2, Gelston Papers. These types of distinctions became the subject of a memo by Albert Gallatin, December 5, 1807, *ASP-C&N* 1: 699.

outlines of a pattern of officeholders' instrumentalism—officeholders' practices of enforcement and rulemaking which served to further the commonweal. This administrative instrumentalism, not unlike the judicial instrumentalism that had already begun to define transactional and regulatory law, possessed a clear, commercial bent. But unlike common law judges, customs officials' practices of interpreting and implementing laws to fit local circumstance undercut the legislative intent behind public laws.[22]

But Jefferson had reason to believe that the Embargo would operate differently. In 1807, the public outcry for action against Great Britain was far louder than public concern about Haiti or Great Britain in years past. Events of 1807, especially the so-called '*Chesapeake* Affair' also imparted the outcry with a sense of nationalism that had not previously existed. Jefferson, in fact, believed that the outpouring of nationalism in 1807 had shifted the public mood in favor of decisive regulatory action. The "ardor displayed by our countrymen on the late British outrage" against American interests, believed Jefferson, would be sufficient to sustain a new prohibition on British goods. As one republican merchant explained, "The haughtiness of Great Britain will strike to the feelings of every true American & arouse the spirit of 76" in 1807. Undoubtedly, Jefferson and his allies recalled that during the American Revolution, colonists possessed

[22] See, William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996); Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977); William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge: Harvard University Press, 1975); James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956).

of this "spirit of 76" used voluntary associations to twice prevent British imports from reaching (or passing through) American markets.[23]

Recent history also furnished Jeffersonians with ideological reasons to support an embargo policy. In 1779, Jefferson's fellow Virginian Meriwether Smith noted that "Nothing can be more advantageous to the country," than methods to "increase the Quantity of Provisions" throughout the land without recourse to foreign commerce. In 1807, a rising tide of Jeffersonian republicans again suggested that commerce itself was to blame for the United States' intractable geopolitical crises. In this logic, an embargo offered the possibility of a clean break with Europe, and a path to recovering the national virtue that lay in domestic economic self-sufficiency.[24]

Over the course of 1807, these political and ideological developments pushed Jefferson and his allies to believe that a popular understanding of the national good would overcome Americans' finely honed, and time-tested acquisitive impulses to participate in the marketplace. As Jefferson explained to Gideon Granger a few weeks after the Embargo took effect, "As to the sacrifices of the farmers & citizen-merchants, I am sure they will be cheerfully met."[25] The Embargo would surely damage the individuals' private interests. But the stakes of the Embargo seemed so great, and the public mood so advantageous, that Jefferson believed it possible to use the power of the state to effectively shutter the marketplace.

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[23] Thomas Jefferson to John Page, July 17, 1807, in *The Works of Thomas Jefferson in Twelve Volumes*, ed. Paul L. Ford (New York: G.P. Putnam's Sons, 1904-5), 10:470. On the non-importation movement, see Arthur M. Schlesinger, *The Colonial Merchants and the American Revolution, 1763-1776* (New York: Columbia University Press, 1918).

[24] Meriwether Smith to John Page, February 21, 1779, Papers of Meriwether Smith, Manuscript Reading Room, Library of Congress. The link between embargo politics and republican ideology is explained in detail by McCoy, *Elusive Republic*, 216-220. 1 *Statutes At Large* 372 (1794).

[25] Thomas Jefferson to Gideon Granger, January 22, 1808, Reel 40, Jefferson Papers, [emphasis added].

These political and legal calculations were accepted even by critics of a possible embargo policy, such as Albert Gallatin, who instead articulated doctrinal and political-economic concerns. Gallatin believed that there was no precedent for the federal government to institute an embargo over so vast an expanse as the entire United States. To be sure, in 1794 Congress gave the President the power to lay an embargo when Congress was out of session. But in this case, Congress was in session. "Supposing that the power to lay embargoes should be considered as improper to be vested in the President during the session," asked Gallatin, "how would this plan answer?" The solution to this dilemma was that Congress would enact embargo legislation, which the Jefferson administration would merely execute.[26] There was also a serious, political-economic drawback to an embargo: a complete prohibition on commerce would halt imports of foreign goods and, in the process, bring the collection of customs duties to a complete halt. Throughout the early republic, customs revenue was the single largest source of government funds—$229 million out of $264 million in total revenue, or 86%. "Our revenue will be cut up," warned Gallatin, and "we must necessarily borrow" to fill the void. But this, too, was not a prohibitive concern. The robust revenue system had accumulated a surplus, which, even with an embargo, would ensure the country's fiscal solvency for at least an entire year.[27]

By December, 1807, with political winds seemingly behind its sails, the embargo policy had become inevitable. As passed by Congress, the Embargo Act of 1807

[26] Gallatin to Jefferson, December 2, 1807, Reel 40, Jefferson Papers.
[27] Gallatin to Joseph Nicholson, *Writings of Gallatin*, 1:339. Mannix, "The Embargo: Its Administration, Impact, and Enforcement," 41-49. Figures are drawn from, John Joseph Wallis, "Federal government revenue, by source: 1789–1939." Table Ea588-593 in *Historical Statistics of the United States, Earliest Times to the Present: Millennial Edition*, ed. Susan B. Carter et al. (New York: Cambridge University Press, 2006). http://dx.doi.org/10.1017/ISBN-9780511132971.Ea584-67810.1017/ISBN-9780511132971.Ea584-678; Internet; accessed April 11, 2007.

consisted of only two brief sections. The first section established that "an embargo be…laid on all ships and vessels in the ports and places within…the United States." It also ordered customs officials to withhold "clearances," or permissions to depart a port, from any vessel en route to a "foreign port or place." Finally, Congress granted the President broad authority to administer the Embargo. The Act "authorized" Jefferson "to give instructions to the officers of the revenue…as shall appear best adapted for carrying the same into full effect." This clause directly confronted Gallatin's concerns over executive power: the legal authority behind the Embargo would be Congress, rather than the executive.[28]

Even despite the Embargo Act's brevity, its details were noteworthy, for the idea of the national executive issuing "instructions" to customs officials in order to put the embargo into "full effect" was a relatively new bit of legal and administrative language. In colonial times, Governors' proclaimed embargoes in part by "commanding" or "requiring" customs officials to prevent vessels from departing. Connecticut Governor Jonathan Trumbull, who sided with the colonists during the Revolution, had "required," "empowered," and "enjoined" his officers to enforce periodic embargoes.[29] But the concept that the executive branch would how precisely a market regulation such as an embargo would be instituted, was a different matter altogether. As was clearly the case with the Haiti embargo and Non Importation Act, early federal legislation only faintly constructed lines of authority between the executive branch and field offices such as the customhouse. For instance, the portfolio of the Secretary of the Treasury was to

[28] 2 *Statutes At Large* 451 at 452 (1807).
[29] Spencer Phips, Proclamation [1757 Jan. 11] (Boston: J. Draper, 1756). Jonathan Trumbull, *Proclamation* [18 May 1772] (Connecticut: s.n., 1772). Jonathan Trumbull, *Proclamation* [19 Oct 1775] (Connecticut: s.n., 1775).

"superintend the collection of the revenue;" customs officials were to govern their paperwork as per the form prescribed by "the proper department."[30] Through executive "instructions," the Embargo legislation thus sought to tighten the administrative connection between the executive and the customhouses by delineating a direct, hierarchical relationship between the President and officers of the customs.[31]

In the nationalist climate surrounding the creation and passage of the Embargo Act of 1807, it thus appeared possible to curb customs officials' discretionary powers, and their penchant for instrumentalist decision-making, by means of executive "instructions." These "instructions" took the form of "circulars" from the Secretary of the Treasury to each of the collectors of customs. The first such circular was dated December 31, 1807, and reached most customhouses a few weeks later. "You are instructed by the President during the continuance of the Embargo," wrote Gallatin, to prevent vessels formerly involved in international commerce from falsely gaining papers to participate in "coastwise" or domestic shipping. Collectors of customs were also to detain any vessel, even with legitimate coastwise papers, suspected of secretly plying trade with foreign ports. Concluded Gallatin, "Force may be used to detain vessels."[32]

As the presidential instructions made their way through the postal system, the intended, clear lines of authority between the federal executive and the customhouses

[30] 1 *Statutes At* Large 65 at 66 (1789). 1 *Statutes At Large* 145 at 155 (1790). Legal scholar Jerry Mashaw has recently argued the opposite—that these clauses in early federal statutes established field offices as subordinate to "higher-level administrators." Mashaw, however, seeks to discover the historical origins of an "internal law of administration," which established that "high-level officials have effective control over the bureaucracies that they manage." Arguably, this framing forces Mashaw to fit the more fragmented lines of administrative authority in the early republic within a continuum of administrative legal development, culminating in the administrative and neo-liberal states of modernity. See, Jerry L. Mashaw, "Recovering American Administrative Law: The Federalist Foundations," *Yale Law Journal*, vol. 115 (2006), 1261, 1307.

[31] The 1794 embargo statute provided a foundation by authorizing the President to give "orders…to carry the same into full effect." 1 *Statutes At Large* 372 (1794).

[32] Albert Gallatin, Circular to Collectors of Customs, December 31, 1807, reprinted in Mannix, "The Embargo: Its Administration, Impact, and Enforcement," 100.

already showed significant strains. This was made abundantly clear by dispatches from New Orleans. The Collector of the Port, William Brown, was rather notoriously allied with a polyglot riff-raff of smugglers, pirates, privateers, and bootleggers. From the customhouse in the French Quarter, he was "willing to assist" in commercial schemes that were "illegal acts," such as slave smuggling, 'false' or 'collusive captures,' and the like.[33] As the Embargo loomed, Brown informed local merchants that he would not begin enforcing the Embargo Act until a copy of the law physically arrived from Washington, D.C. Brown's actions met the approbation of local merchants, as commercial interests believed it a standard convention of customhouse practice, "that though a statute takes effect upon its passage, yet a reasonable time must be allowed for its promulgation, so that the citizens may have notice." As the merchants of New Orleans took such notice, Brown cleared over forty vessels in clear violation of the Embargo Act.[34]

Worse yet, even after Collector Brown received his official copy of the Embargo Act, he continued to allow vessels to depart the Port of New Orleans. When confronted by Gallatin, Brown based his actions on his reading of the law. He criticized as vague both the text of the Embargo Act as well as the instructions in Gallatin's circular. He also claimed that based on these legal authorities, the office of the collector of customs

[33] Brown's notoriety would only grow as he became known, not only as a friend to smugglers, but as a remarkable scoundrel. In 1810, Brown disappeared from the New Orleans customhouse with tens of thousands of dollars of customs duties. Marietta Marie LeBreton, "A History of the Territory of Orleans, 1803-1812," Ph.D. Dissertation, Louisiana State University, 1969, 257. On the open black market, see John G. Clark, *New Orleans, 1718-1812: An Economic History* (Baton Rouge: Louisiana State University Press, 1970), 316; William C. Davis, *The Pirates Laffite: The Treacherous World of the Corsairs of the Gulf* (New York: Harcourt, Inc., 2005), 18-24.

[34] Albert Gallatin to Thomas Jefferson, February 29, 1808, Reel 40, Jefferson Papers. Marietta Marie LeBreton, "A History of the Territory of Orleans, 1803-1812," Ph.D. Dissertation, Louisiana State University, 1969, 247. In *The Ann*, 1 F. Cas. 926 at 927 (1812), Joseph Story ruled that this convention had no foundation in the common law.

"lacked the power to enforce the law." Instead, Brown offered an alternative construction of the Embargo Act—one that he had obtained from a meeting of New Orleans merchants. Since in 1808, "Louisiana was a territory and not a state," the merchants had argued, "it required a special act of Congress to extend the Embargo law to that jurisdiction." When it came to enforcement, according to one student of the Embargo, this influential legal interpretation "rendered William Brown powerless."[35]

Other customhouses also flouted the letter of the Embargo Act. In the small port of Burlington, Vermont, Collector Jabez Penniman was amenable to allowing goods to pass through to British markets in Canada without "the trouble of inspecting them," so long as merchants contacted him in advance. In Boston, a request for "an indulgence" by the importer of European cloths and linens was enough to allow importations. And in Baltimore, officials ignored the clause of Gallatin's circular, which explicitly restricted officers from allowing vessels formerly involved in foreign trade to obtain domestic shipping licenses. With these licenses, or registers, vessels fully intending to make illegal voyages to foreign ports, gained perfectly legal paperwork clearing them for nearby, domestic ports. Vessels bound for Canada, for instance, obtained clearances for Passamaquoddy, Maine; those en route from the mid-Atlantic to the West Indies listed New Orleans as their destination; transatlantic voyages often claimed that their legal destination was Nantucket or Martha's Vineyard. Concluded Jefferson, "There is no

[35] Mannix, "The Embargo: Its Administration, Impact, and Enforcement," 95. A survey of customhouse documents from the Port of Edenton, North Carolina, reveals that customs officials were clearing vessels for foreign ports through the summer of 1808. Edenton-Customhouse Journal, 1805-1826, vol. 2, Entry 1309, RG 36, National Archives and Records Administration, Morrow, Ga.

source from whence our commerce derives so much vexation…as from forged papers & fraudulent voyages."[36]

Even in the first weeks of the Embargo, then, it was apparent that the Jefferson administration's attempt at using "instructions" to curtail local administrative instrumentalism was insufficient. Rather than merely implementing a statute that demanded a total prohibition on commerce, customs officials found methods, often creative ones, for allowing vessels to leave port, for goods to enter and leave the United States. Their tactics, it turns out, were part of a well-established system of bending the letter of the law to accommodate the exigencies of commerce.

Such deep connections between commerce and governance were certainly not distinct to the early republican United States. Generally speaking, early modernity often contemplated where the market ceased and the state began—to decide what was saleable and what was not, and to decide what aspects of society required protection from market logic.[37] In the United States, though, the intrusion of commercial interests into the political machinery of the customhouse was not inevitable. Rather, the process can be traced back at least as far back as the chaotic days in which the postcolonies of the United

[36] T.W. Storrow to Jabez Penniman, April 9, 1808, Box 1, Folder 85, Haswell Papers, University of Vermont Libraries. Benjamin Lincoln to Gabriel Duval, February 29, 1808, Boston Customs Correspondence, RG36, National Archives and Records Administration, Waltham, Mass. Jefferson to Gallatin, February 28, 1808, Reel 40, Jefferson Papers.

[37] See, for instance, Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (1944; Boston: Beacon Press, 2001); E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975); Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (1930; New York: Routledge, 1999); Robert Brenner, *Merchants and Revolution: Commercial Change, Political Conflict, and London's Overseas Traders, 1550-1650* (New York: Verso, 2003). Notably, British customhouses also displayed similar administrative characteristics in these years as well. See *The Sinews of Power: War, Money and the English State, 1688-1783* (Cambridge: Harvard University Press, 1988); Gavin Daly, "English Smugglers, the Channel, and the Napoleonic Wars, 1800-1814," *Journal of British Studies*, vol. 46, no. 1 (Jan., 2007), 30-46.

States transitioned to republican government under the new Constitution. In these times, a significant struggle between the Treasury Department and the customhouses unfolded around the precise problems of discretionary power and instrumentalist proclivities.

By 1787 it was widely agreed upon that the new nation required a network of customhouses. The most essential functions of state—e.g., compensating soldiers, prosecuting wars against Indians, and paying debts—required money. In the wake of the failed Articles of Confederation, the United States sought a consistent, reliable source of revenue with which to defray the cost of its own political existence. During the 1780s, it became clear that the best way to produce this revenue was through customhouses collecting tariff duties on imports.[38] Unlike property taxes, which would likely have alienated slaveholders, import duties confined the act of taxation to a single space, the customhouse, which was visited only by the regulators and the regulated, or officeholders and the merchant class. In this sense, the customhouse and the collection of tariff duties offered a remarkably unobtrusive manner in which to construct a nation-state. So long as American merchants bought and sold things in the global marketplace, the nation-state staked a claim to its customs duties. Meanwhile, for farmers, mechanics, and others, the act of federal taxation had receded from the public square, visible only in the price of the commodities they purchased.[39]

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[38] Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007), 96-107, 179-225. Discussions of an impost during the 1780s can be found in: Alexander Hamilton to James Duane, September 3, 1780, *The Works of Alexander Hamilton*, ed. Henry Cabot Lodge (New York: G.P. Putnam's Sons, 1904), 1:213-219; Robert Morris to John Jay, June 5, 1781; May 12, 1783, Papers of John Jay, Butler Library, Columbia University. Article I, Section 8, of the Untied States Constitution gave Congress the authority to collect taxes and duties.

[39] Alexander Hamilton, "Number XXXV," in Alexander Hamilton, John Jay, and James Madison, *The Federalist*, ed. Isaac Kramnick (1787; New York: Penguin Books, 1987), 231-2. Robin L. Einhorn, *American Slavery, American Taxation* (Chicago: University of Chicago Press, 2007), 133. See also, Edling, *A Revolution in Favor of Government*, 204.

But customs laws on the books were one thing.[40] Putting them into practice was wholly another. That difficult task fell to the capable hands of the first Secretary of the Treasury, Alexander Hamilton. Upon taking the helm of the Treasury, Hamilton placed great emphasis on appointing personnel capable of performing the delicate work of extracting tax revenue from merchant capital. As far back as the Constitutional Convention, Hamilton had argued that federal tax collectors must be drawn from the communities they would be dispatched to tax—they must be "proper characters from home." This was because the further one moved from the nation's capital, the more "feeble" became "the execution of laws." But "proper characters," capable of creating "the sentiment of obedience" and capturing local "opinion" could remedy this problem.[41]

There were several traits that made a person a "proper character" for appointment to the customhouse. Official continuity was a major determinant: where states had maintained their own impost officers during the 1780s, Hamilton was happy to retain established figures in established customhouses, to continue the established routine of tax collection. This was true even when officials were noted *anti*federalists, such as John Lamb of New York, who had been one of Hamilton's chief antagonists in New York politics—and a key ally of George Clinton—throughout the 1780s.[42] Well known Revolutionary War veterans, especially those who were members of the Society of the

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[40] In the first substantive bill—technically the second actual piece of legislation, the first being an act to administer oaths—of the first Congress, lawmakers placed duties on imported commodities. Subsequent legislation created ports of entry, apportioned customhouses, and appointed customs officials to collect these duties. The Tariff Act of 1789 is, 1 *Statutes At Large* 29 (1789). The first act of the first Congress was an act to administer oaths. See also, 1 *Statutes At Large* 55 (1789), 1 *Statutes At Large* 145 (1790); 1 *Statutes at Large* 305 (1793); 1 *Statutes At Large* 336 (1793); 1 *Statutes At Large* 627 (1799).

[41] *Farrand's Records*, 1:305.

[42] On Lamb's checkered career, and his relationship with Hamilton, see Isaac Q. Leake, *Memoir of the Life and Times of General John Lamb…* (Albany: Joel Munsell, 1857), 297-298, 304, 315-6.

Cincinnati, were another source of customs personnel. But this was not simply patronage. Generals Jedediah Huntington in New London, Benjamin Lincoln in Boston, Otho Holland Williams in Baltimore, and Captains Sharp Delaney in Philadelphia and Isaac Holmes in Charleston were living reminders for Americans that "the events of the American Revolution are so nearly connected with our own times." The mere presence of leading military figures within the major customhouses was intended to be a "portal" to the American story of "the past century," if not to the political authority of General, and now President George Washington.[43]

Beyond official and military experience, almost every one of the first generation of American customs officials shared one final characteristic: they were men of the market. Most had been merchants before or after the war, while others learned the ways of commerce from the bench or bar. These men knew the lay of the commercial landscape, and held close social ties to the merchants themselves. For instance, Henry Packer Dering, appointed Collector at Sag Harbor, had been involved in the St. Domingo trade during the 1780s. As Collector of Customs, he maintained his mercantile contacts by brokering deals and disseminating market intelligence for the benefit of his associates. As a result, "the Dering house became the center of social, political, and commercial activities" in Sag Harbor. For the Henry Packer Derings of the early United States, then, experience in commerce furnished social authority that eased the transition to

[43] The cultural understanding of Revolutionary War service is discussed by Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* (New Haven: Yale University Press, 2001), 254-255. Osmond Tiffany, *A Sketch of the Life and Services of Gen. Otho Holland Williams, Read Before the Maryland Historical Society…* (Baltimore: John Murphy & Co., 1851), 3. Gaillard Hunt suggests that Revolutionary War soldiers felt an entitlement to federal office as compensation for their service. Hunt, "Office-Seeking during Washington's Administration," *American Historical Review*, vol. 1, no. 2 (Jan., 1896), 282-283.

officialdom. Likewise, from the view of the Treasury Department, this social authority would grease the machinery of taxation.[44]

The merchant elite was thus a significant component of a "regime of notables" that Alexander Hamilton assembled to operate the United States customhouses. Hamilton hoped to appropriate preexisting local power relations for the ends of the new federal government. That is, officeholders would leverage their commercial connections to facilitate tax collection.[45] But relying on this manner of personal authority to do the work of the state created a crucial space for commercial interests to gain a powerful position in the construction of social authority. That position was evident even in the first days of the new republic, as customs officials began carving out for themselves a discretionary authority, with which to accommodate local merchant populations.

As early as October, 1789, Hamilton began receiving reports that collectors of customs had begun to deviate from the letter of federal statutes and Treasury circulars, in order to fit federal statutes to best meet local circumstances. When it came to customhouse bonds, or bonds that merchants took out on the promise to pay customs duties in the future, collectors offered discounted rates to local patrons. Overdue bonds were given extensions unauthorized by any formal law. "This," Hamilton objected, was not "the true construction of the Act." He knew that in the colonies and under state constitutions, "relaxations" of the law may have been commonplace. But "Strict

[44] On Dering's career as a merchant in Santo Domingo, see Entry of August 10, 1787, Diary of Henry Packer Dering, Henry Packer Dering Papers, New York Public Library. For mercantile activities while Collector of Customs, see Orange Webb to Henry Packer Dering, June 12, 1793; William Eldridge, Groton, to Dering, December 19, 1792, Correspondence, 1792-1795, *ibid*. National Society of the Colonial Dames of America, *Three Centuries of Custom Houses*, 110

[45] The concept of a "regime of notables" is borrowed from Martin Shefter, "Party Bureaucracy, and Political Change in the United States," in *Political Parties: Development and Decay*, ed. L. Maisel and Joseph Cooper (Beverly Hills: Sage Press, 1978), 211. See also, Hulsebosch, *Constituting Empire*, 235-236; and Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1983; New York: Verso Books, 1991), 161.

observance" of the bond policy was "essential not only to the order of the finances," but also to the basic ability to govern.[46]

For Hamilton, the threat posed by the collectors' assertion of discretionary power was distinctly fiscal: what if the customhouses took their power so far as to cease collection of customs duties? In this way, local legal innovation and lax enforcement *could* destroy the federal government's ability to collect revenue. Thus, from 1789 to mid-1792, Hamilton fiercely protested the customhouses' distribution of favors to the merchant community, and resisted officials' claims to discretionary authority. "For the sake of equality and uniformity," Hamilton urged dispatched a lengthy report to Congress, in search of a legislative solution that would reign in the wayward collectors of customs, and restore the letter of the law. The best way to do so, he argued, was to create a new breed of supervisory officials, to ensure that local customs officials stuck to the law as defined by Congress and the Treasury. "When it is considered," he explained, "how apt their [the collectors of customs] representations will be," he continued, "to receive *a tint from the personal interests of individuals, and the local interests of districts*, it must be perceived that there cannot always be sufficient reliance upon them." But the proposed new personnel would be based out of the Treasury Department and, for that reason, be free of the same "tint" of "interests or local predilections" that had overtaken the customhouses. Within the customhouses "a loose mode of thinking had

[46] Alexander Hamilton to Collectors of Customs, October 6, 1789, Container 1, Folder 1, Treasury Papers, Manuscript Reading Room, Library of Congress [hereafter, Treasury Papers]. Alexander Hamilton to Collectors of Customs, December 18, 1789, Box 1, Folder 1, *ibid*.

taken root," he added a few months later, as the merchants' "impulse of interest," had proven to be "an overmatch for the sense of obligation" to obey the laws.[47]

But by the early summer of 1792, Hamilton conceded. On issues of great contention, such as customs officials' method of calculating their own payments, Hamilton allowed local circumstance, rather than centralized uniformity, set the rules. Henceforth, he wrote, "each officer will then pursue that course which *appears to him* conformable to Law, to his own interest & safety, and to the good of the service." In this remarkable grant of discretionary authority to the Collectors, however, Hamilton also passed along some lawyerly tips. In general when statutes were "inaccurately drawn," or "are not free from ambiguity"—such as the Enrollment Act of 1789—Collectors should assume that "the intention of the Legislature" was "not to burthen the trade." Likewise, where different customhouses set varying rates of duty on goods, Hamilton believed it best to set the rate of duty according to what was "customary among the merchants in your district."[48]

Why, then, did Alexander Hamilton suddenly abandoned his struggle to maintain a uniform customs system? Why had he accepted that local, commercial influences would shape the texture of federal law within the customhouses? Hamilton never quite explained his switch in time. However, it likely had something to do with the fact that for all his dire warnings about the consequences of local variation and "loose thinking" on the health of the revenue system, the federal government found itself awash in new

[47] Hamilton to Collectors of Customs, April 1, 1790, Box 1, Folder 1, Treasury Papers. Hamilton, Operations of the Act Laying Duties on Imports, April 22, 1790, in *The Works of Alexander Hamilton*, 2:292-301, 305, 317, 317. Alexander Hamilton to the House of Representatives, December 13, 1790, Reel 4, Hamilton Papers.

[48] Alexander Hamilton to Collectors of Customs, July 22, 1792, Box 1, Folder 1, Treasury Papers [emphasis added]. Alexander Hamilton, Circular to Collectors of Customs, June 11, 1792, Box 1, Folder 1, Treasury Papers.

wealth. As the administrative contest between Hamilton and the Collectors had unfolded, the revenue system had functioned with remarkable efficiency. Collections totaled $2.98 million in 1791 and jumped to $3.44 million in 1792. Despite an expenditure of $740,000 in 1791—an increase of $100,000 from the previous year—the federal government recorded a million-dollar surplus. The means of government may not have corresponded to Hamilton's vision, but the ends certainly did. In fact, around the time when Hamilton ended his struggle with the collectors, he saw fit to ask for even greater customs duties with which to pay down the national debt.[49]

What had occurred was a basic compromise. So long as the merchants paid their duties at the customhouse, Hamilton would not dictate how, precisely, the customhouse should go about interacting with the merchants. From the view of the Treasury, the government's ability to secure a consistent, and powerful revenue outweighed the doctrinal tenets of federalism. In fact, just a year after Hamilton's switch in administrative philosophy he found himself counseling a Providence customs official to bend the law in favor of the leading merchants of Rhode Island.[50] Collector Jeremiah Olney was an exemplar of Hamilton's "regime of notables": a man of great independent wealth and a distinguished Revolutionary war record. Olney's local detractors in the merchant community had "no personal objection to the Collector," for "as a citizen he is a native of this Town & *otherwise connected* with some of your petitioners." But he stood accused of "vigorous and severe execution" of federal laws. All the merchants of Providence sought was that Olney adopt "the mode in which the like business is

[49] Schmeckebeier, *The Customs Service*, 165. Alexander Hamilton, Additional Revenue, 1792, March 17, 1792, *ASP-Fi* 1:159.

[50] This episode is recounted in great detail in Dalzell, "Taxation Without Representation," and Dalzell, "Providence and the Golden Egg."

conducted in other states," which offered "every accommodation to Commerce consistent with an exact, & punctual collection of the Revenue."[51] In other words, the merchants were fine to pay their customs duties, so long as the customhouse offered them "accommodation," as had occurred in other ports. Hamilton urged Olney to concede. "The good will of the Merchants is very important in many senses," wrote Hamilton, "and if it can be secured without any improper sacrifice or introducing a looseness of practice, it is desirable to do it."[52]

It was in this context of political economy and nationbuilding that Alexander Hamilton had gradually allowed commercial interests to so deeply influence the function of government customhouses. And it was this administrative dynamic that so vexed Thomas Jefferson as he attempted to implement the Embargo well over a decade later. Hamilton had, in effect, dispersed the location of political authority to the waterfront itself, and given commercial interests a powerful hand in shaping how that authority would operate on a daily level. It is not surprising that Hamilton's administrative career fit within a broader agenda that "encouraged consolidation, elite control of new investments, and subordination of small producers…to the new nation's commercial, financial, and speculative elites," as Andrew Shankman has written. But that Hamilton achieved this by decentralizing the very political authority that Jefferson later sought to aggregate, serves as another fascinating, if ironic, chapter in the story of the historic encounter between these two statesmen.[53]

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[51] Memorial of the Merchants of Providence, January 31, 1793, Reel 1, Box 1, Folder 10, Jeremiah Olney Papers, Rhode Island Historical Society.
[52] Alexander Hamilton to Jeremiah Olney, April 2, 1793, quoted in Dalzell, "Providence and the Golden Egg," 371-372.
[53] Andrew Shankman, "'A New Thing on Earth,'; Alexander Hamilton, Pro-Manufacturing Republicans, and the Democratization of American Political Economy," *Journal of the Early Republic*, vol. 23, no. 3 (Autumn, 2003), 326. Elkins and McKittrick, *Age of Federalism*, 116.

As soon as the Jefferson administration began to realize the depth of the problem at the customhouses in enforcing the Embargo, Jefferson and Gallatin searched for methods to further tighten the administrative relationship between the executive and the customhouses. This was to be achieved primarily by circumscribing customs officials discretionary authority over any matter of business connected to the Embargo.

From January through May, 1808, Jefferson pushed three pieces of supplementary Embargo legislation through Congress, with an eye to closing "the more obvious loopholes" that had badly maimed the first Embargo Act. In the opening days of the Embargo, customs officials had allowed passage to vessels, in theory bound for domestic ports but quite obviously bound for international ports. With the Second Embargo Act of January 9, 1808, all vessels in the coastwise trade were required to post bond at the customhouse before receiving a clearance for their domestic destination. If there was anything to suggest the ship's malfeasance, the customhouse was to put the bond into collection. Similarly, customs officials had failed to question vessels bound from the mid-Atlantic to New Orleans (or other such lengthy trip) that took incredibly long periods of time to complete their voyage. The Third Embargo Act of March 12, 1808, made it a crime for a coastwise vessel remain at sea for over four months—after which the vessel's bonds would be prosecuted.[54]

But it was impossible to enumerate every permutation of customhouse subterfuge or mercantile evasion. In the Fourth Embargo Act of April 25, 1808, the Jefferson

[54] The Second Embargo Act is, 2 *Statutes At Large* 453 (1808). It also attached heavy fines, of up to $20,000 for violations of the law, and shifted prosecutions for violations to federal courts. The Third Embargo Act is, 2 *Statutes At Large* 473 (1808). To stem the tide of smuggling on the Canadian border, this law also enumerated overland violations of the Embargo. See Jones, "The Caprice of Juries," 311-12, for a helpful summary of these laws.

administration took a more nuanced approach to the problem. Section 11 of this law stated that, "Collectors of the customs be…authorized to detain any vessel *ostensibly* bound…to some other port of the United States, whenever in their opinions the intention is to violate or evade the…embargo, until the decision of the President…be had thereupon." In other words, the collectors of customs did not have to have evidence that merchant vessels had, or would, violate the Embargo. Rather, mere suspicion sufficed to delay a vessel's departure.[55]

But it remained wholly possible that customs officials would define a suspicious vessel so narrowly as to hinder the operation of the law—as they had done, for example, with the Non Importation Act of 1806. The Fourth Embargo Act called upon the collector to interpret a merchant's "intention" in making a voyage. What was to hinder customs officials from taking each and every merchant at his word as to the veracity of an adventure? Jefferson realized the likelihood of this occurrence. Thus, he drew upon his power to issue "instructions" to circumscribe customs officials discretionary latitude. In particular, Jefferson devised a metric by which to determine the "intention" of a merchant vessel seeking a clearance at the customhouse. In order for a merchant to ship goods to a port of entry, those goods must be "wanted there [at the port of destination] for consumption." If there was no market for the goods in the listed destination, it was to be considered "too suspicious to be permitted." Since customs officials were men of the market, the supply and demand "at particular places should be very notorious to the Coll [sic] & others to take suspicion of illicit intentions." As for difficult cases, in which the collectors were unable to use Jefferson's metric to any effect, the President believed the government deserved the benefit of the doubt. . "Consider me as voting for detention,"

[55] 2 *Statutes at Large* 499 at 501 (1808) [emphasis added].

he concluded, "being satisfied that individuals ought to yield their private concerns to this great public object."[56]

Jefferson had great hope for the Fourth Embargo Act, and especially for his new administrative test to determine the legitimacy of commercial activity. Congress "finally gave us the power of Detention as the Panacea, and I am clear we ought to use it freely, that we may by a fair experiment know the power of this great weapon, the embargo."[57] But just weeks after this optimistic exclamation, customs officials and the federal judiciary struck a fatal blow against Jefferson's new administrative foundation for the Embargo. In mid-May, 1808, Charleston merchant Adam Gilchrist prepared his vessel *Resource* to carry a shipment of rice and cotton to Baltimore. When Gilchrist appeared at the Charleston customhouse and requested a clearance, Collector Simon Theus "refused to grant it."[58] As he explained to the Charleston *Courier*, Collector Theus was looking for a fight—a fight that would end up before a court of law. Theus had in fact decided "to stop the movement of all vessels laden with provisions and destined coastwise," and Gilchrist's *Resource* was the first to be ensnared in his policy. To be sure, Theus did not actually believe Gilchrist was guilty of "any intention" to violate the Embargo. But he instead wanted to bring a test case before a federal judge because the Collector of the Port of Charleston refused to abide by the strictures placed on his office by the Jefferson administration. Theus was "unwilling on the one hand to injure individuals" guilty only

[56] Jefferson to Gallatin, May 6, 1808, Reel 41, Jefferson Papers. In a subsequent circular to the collectors of customs, Gallatin added that a vessel was to be considered suspicious if the value of the goods on board exceeded one-eighth of the value of the embargo bond posted at the customhouse. Mannix, "The Embargo: Its Administration, Impact, and Enforcement," 260-61.
[57] *Ibid*.
[58] Charleston *City Gazette*, May 14, 1808, 1; May 30, 1808, 3.

of seeking to make a living through commerce. But he also refused to abdicate his office entirely, so instead, "he submits the question to the court."[59]

When *Gilchrist v. Collector of Charleston* came before the Circuit Court of the United States sitting in Charleston, the specific legal issue in question was whether or not Collector Theus had cause to prevent granting a clearance to Gilchrist's *Resource*. As was customary in circuit cases, a United States Supreme Court member, Associate Justice William Johnson, decided the matter in tandem with the judge of the District Court, Thomas Bee. Johnson, a Republican and a close friend of Thomas Jefferson's produced an opinion that systematically dismantled the administration's attempt at shifting the political authority of customs administration away from local, commercial accommodation, and toward uniform national rules.

Johnson began by eviscerating the concept that executive "instructions" could constrain a collector of customs' discretionary authority in executing the Embargo. In Treasury circulars, opined Johnson, the Secretary speaks "only in the language of recommendation, not of command." According to the Embargo Acts, the legal act of issuing clearances "is left absolutely to the discretion of the collector." The Fourth Embargo Act also specifically left it to the collector to decide "cases which excite suspicion." Johnson then held that Congress' intent in these laws was thusly clear: "Congress might have vested this discretion in the president, the Secretary of the

[59] Mannix, "The Embargo: Its Administration, Impact, and Enforcement," 263. Simon Theus to the Charleston *Courier*, May 30, 1808, reprinted in *ibid*., 263. The procedural dimension of bringing this case was as follows. After being refused a clearance, Gilchrist "applied to the Circuit Court of the United States for a rule to be served on the Collector, requiring him to shew [sic] cause why he refused a clearance—The Collector made a return to the rule; a petition was then presented praying that a writ of Mandamus might issue, to command the Collector to grant the clearance." Charleston *City Gazette*, May 30, 1808, 3.

Treasury, or any other officer," but instead they "vested the right of granting or refusing in the collector."[60]

By invalidating the Jefferson administration's use of executive instructions to control the discretionary authority of customs officials, the *Gilchrist* decision essentially stymied the effect of the Fourth Embargo Act, robbing Jefferson of a power that he had referred to just weeks prior as a "panacea." A stunned Jefferson noted that the whole point of issuing the instructions had been to insure that "decisions by the Collector might also be as uniform as possible," and that a set of "general & equal rules throughout" would provide "some outlines for the government of the discretion of the Collectors." But *Gilchrist* obviated this possibility. Rather, "in the hands of an hundred collectors," "all sorts of characters, connections & principles" would govern discretion, and continue to undermine the Embargo. What Jefferson found especially problematic in this regard was that it was a collector of customs who had brought the walls tumbling down. By so clearly signaling his hostility to administration policy, and his sympathy with merchants such as Adam Gilchrist, Theus had shattered "that barrier which we had endeavored to erect against favoritism."[61]

Jefferson did not quite give up his struggle to enforce the Embargo, however, and he took the unorthodox step of dispatching Attorney General Caesar Rodney to rebuke a sitting Supreme Court justice, and delegitimize the *Gilchrist* opinion. Rodney argued that the federal judiciary had unlawfully interfered in an administrative matter between the executive and the customhouse. Since the court had issued mandamus requiring Theus to

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[60] *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355 at 356 (1808). In administrative law, scholars have interpreted this holding as an early example of Congress' power to delegate discretionary authority in an executive office. A. Michael Froomkin, "Note: In Defense of Administrative Agency Autonomy," *Yale Law Journal*, vol. 96 (1987), 798 n.19.

[61] Jefferson to Charles Pinckney, July 18, 1808, Reel 41, Jefferson Papers.

distribute a clearance to Gilchrist, Rodney saw "no clear limitation" on the future interference of the courts to compel "all the executive officers; all subordinate to the president at least," according to the dictates of the "treasury and contrary to…the executive." *Gilchrist* had thus not only detached the customhouses from their subordinate moorings in the executive branch by denying the President's ability to mandate how laws would be executed. It also, Rodney concluded, made the customhouses answerable to the judicial branch.[62]

In response, Johnson rejected Rodney's second conclusion about judicial overreaching, but affirmed the concept that the collectors of customs possessed the discretionary authority to execute their offices as they, and not the executive, saw fit to do. "the law of Congress" made it the Collector's duty to use "the dictates of his own judgment," or the "right of judging, which must ever be entirely personal." The discretion and "right of judging" inherent to the Collector meant that the Collector was not "a mere ministerial officer," who acted "'at command, under superior authority.'" Rather the collector's "functions are among the most important exercised by any officer of the United States, and call for the frequent exercise of his own will, judgment and discretion." The Collector and the Collector alone "must frame his conduct; and no instructions from the president or secretary of the treasury [sic]…can be pleaded by him in justification" of his official conduct. "The officer," he concluded, "is himself the paramount judge and arbiter of his own actions."[63]

The *Gilchrist* decision took the wind out of the sails of the Embargo. Robbed of its administrative rationale, the Embargo now rested in the hands of reluctant Collectors

[62] Caesar A. Rodney to Thomas Jefferson, July 15, 1808, reprinted in *Gilchrist v. Collector of Charleston* at 358-59.
[63] *Ibid.*, at 363, 364, 365.

of Customs, and gradually became a dead letter. Events in Baltimore illustrate the precipitous decline of meaningful enforcement of the law. Collector James McCulloh arrived at the Baltimore customhouse after his loyal, if brief republican record in the state senate attracted the attention of party elders. Although McCulloh was not himself a merchant—his family speculated in Kentucky lands—as Collector he quickly ingratiated himself to the Baltimore merchants.[64] On his first month on the job, McCulloh dismissed a particularly "zealous" customs officer on the grounds that the guilty party brought a "rude and harsh manner" to the docks. When "persons of other character and mild demeanor," such as the merchants and shipmasters who dealt with this officer lodged complaints, McCulloh believed it wise that the officer be "cautiously removed."[65]

Meanwhile, in the wake of the *Gilchrist* decision, McCulloh's Baltimore customhouse took but a cursory interest in enforcing the Embargo. An informant reported that, "the way in which it [the Embargo] is administered in the Port of Baltimore will not produce any effect." Due to McCulloh's "mode" of enforcement, local merchants were "violating it at their pleasure." When a outward-bound vessel appeared at the customhouse, "the visiting officer comes along side asks for your papers casts his eye over there and leaves you with permission to pass." It was a clear "license…to a violation of the Law," for goods bound to a local port, such as Tappahannock, could well have "a cargo on on board for the W. Indies." The point was that McCulloh and his men would never know. And it seemed that this was precisely how McCulloh wanted it.

[64] See correspondence in Box 3, Folder 1, McCulloh Family Papers, Maryland Historical Society.
[65] James H. McCulloh to Albert Gallatin, May 22, Reel 3, M178, Archives II.

Concluded a second informant, "the Collector of Baltimore is acting on different principles" in enforcing the Embargo, than "the letter and spirit of the law."[66]

But what was left for the Jefferson administration by way of recourse? *Gilchrist* had gutted the executive's ability to "govern the discretion" of customs officials by executive instructions. All that remained was, as Justice Johnson had labeled it, the language of recommendation, instead of compulsion. "Shall we write to McCulloch to be more strict," asked Gallatin of the President, "or shall we answer that the restrictions…not being legal but only recommendatory, each collector must exercise his discretion?" Jefferson opted for the former approach, but Gallatin warned the President not to expect much. Gallatin would "use my best endeavours in enforcing as far as possible, as far as my powers extend, an uniformity both as to ports and persons in the execution of the law." That same day, Gallatin informed McCulloh that the practices of the Baltimore customhouse contributed to "a want of uniformity in the manner of carrying the law into effect" throughout the country. A few days later, he suggested that McCulloh utilize a "greater degree of strictness."[67]

McCulloh's immediate response to Gallatin is unfortunately not extant. But some months later, McCulloh offered a telling explanation of what he believed to be the administrative order of the customhouse. He noted that it was a routine practice in Washington, D.C., to route routine questions about administrative minutia back to the customhouses. From this he extrapolated that most in the Treasury and beyond believed it standard to rely upon the "Collectors discretion." This basic practice, he explained,

[66] John Darby to Albert Gallatin, July 2, 1808; Larkin Smith to Albert Gallatin, August 28, 1808, Baltimore Customs Correspondence, Columbia University Library [hereafter, Baltimore Customs Correspondence].
[67] Gallatin to Jefferson, October 13, 1808, Reel 42, Jefferson Papers. Gallatin to McCulloh, October 14, 808, and October 24, 1808, Baltimore Customs Correspondence.

was crucial as a general "principle" rather "than any circumstance" of a particular case. As for how the collectors discretion itself functioned, McCulloh sounded a familiar theme. "A Collector," he reminded Gallatin, was "connected with those around him by common if not by special ties." In his case, McCulloh surely believed himself "connected" with those around the Baltimore customhouse—the merchant community—by such "special ties." To be sure, McCulloh understood that this meant that customs officials, in the execution of laws, were "liable to bias from confidence in acquaintances." After all, the he entertained "good will" with "those around him." But this was simply the way things worked in the customhouse, where the location of political authority remained firmly planted in the commercial intrigues of the waterfront, rather than in the halls of power in the nation's distant capital.[68]

"Would it not be well," asked Jefferson of Gallatin in late October, 1808, to craft a new Embargo law in which "the discretion of the Collector [was] expressly subjected to instructions from hence?" Although the Embargo had faltered through the summer and fall, Jefferson still hoped it was possible to salvage some measure of success. Over the next three months, the Jefferson administration worked with legal luminaries such as Representative—and soon to be Associate Justice—Joseph Story to craft the final piece of Embargo legislation, which came to be known as 'the Force Act.' The law took aim at the problem of the collectors' discretion: "the powers given to the collector…should be exercised in conformity with such instructions as the President may give…which instructions and general rules the collectors shall be bound to obey." Likewise, the Force Act stipulated that collectors' were to seize a vessel whenever they suspected "an

[68] McCulloh to Gallatin, January 3, 1809, Reel 3, M178, Archives II.

intention to violate the embargo, or whenever they shall have received instructions to that effect by the direction of the President." Finally, by legislating away as much local discretion as possible, the Jefferson had an answer for Simon Theus, James McCulloh, William Johnson, and the logic of the *Gilchrist* decision.[69]

But if the Embargo had proven anything, it was that the political authority within the customhouse, and the discretion that animated it, could withstand even the most hostile iterations of official statutes and formal precepts. Indeed, most Collectors of Customs simply ignored the existence Force Act. James McCulloh explicitly dismissed the provisions of the law as "obscure," "without sanction," and "likely to be of no use." Others decried that the law would be "impossible" to implement. As Richard Mannix suggests, "few collectors would hazard full implementation of the new law, and this time there were no reprimands…for failure to do so." Rather, Jefferson and Gallatin "quietly accepted" the growing disparity between the letter and the practice of the Embargo laws.[70]

One exception, however, was in Providence, where the old federalist Collector Jeremiah Olney attempted to use the Force Act to enforce the Embargo. Before passage of the Force Act, Olney had reported that he detected "no unfavourable dispositions or symptoms among the merchants." His diagnosis was quite different a month later. At first, the merchants of Providence "generally expressed their full disapprobation of its [the Force Act's] provisions." But soon the anger turned into violence. After Olney had seized a vessel for violating the Force Act, "a large body of men had in a riotous manner

[69] 2 *Statutes At Large* 506 at 509 (1809). R. Kent Newmeyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), 61.
[70] James McCulloh to Gallatin, January 3, 1809, reel 3, M178; John Steele to Albert Gallatin, January 18, 1809, quoted in Mannix, "The Embargo: Its Administration, Impact, and Enforcement," 273, and *ibid*., 273.

assembled at and about the wharf" with designs to rescue the seized vessel and "run off…to a foreign port." When the rioters overtook the customhouse, Olney appealed to Rhode Island Governor James Fenner for the aid of the militia to restore order. Fenner flatly refused. With no means of self-defense, Olney began to fear for his life. "A person of good standing in society" publicly exclaimed that "the life of a Collector…would not be safe if he attempted to enforce the Fatal Embargo Act."[71]

The Providence riot is a helpful caution against romanticizing the local grasp on customhouse politics and practices in the early republic. The subtle tactics of commercial accommodation that typified the daily existence of the customhouse subjected federal authority and coercion to the consent of the regulated. But at all times, hanging above these tactics was the very real possibility of political violence—political coercion from the bottom-up. The episode also suggests that one could not by fiat uproot the informal, unofficial social relations that shaped and defined the problems and possibilities of political authority within the customhouses.

To a nearby observer, Jeremiah Olney's trials raised a familiar and haunting memory. William Ellery, Collector of the Port of Newport, wrote that it would be impossible to enforce the final Embargo Act. For all "the powers vein them by your Laws," Ellery spoke of customs officials, "how brief" and fleeting "may be their authority" in practice. "The determined spirit of 1764" had again raised its head, and Ellery "recollected the days of the Stamp Act and occurrences of the Revolution."[72] Of course, the Republicans originally turned to the Embargo on the hopes that the "spirit of

[71] Jeremiah Olney to Albert Gallatin, December 13, 1808; January 19, 1809; and January 23, 1809, reel 23, M178, Archives II.
[72] William Ellery, Collector Newport, to Representative William Stedman, Washington, D.C., February 8, 1809. William Ellery Papers, Box 1, Folder 1805-1809, MSS 407, Rhode Island Historical Society.

76," not that of 1764, would fuel a sudden reversal in the source, and authority of political authority in national politics and political economy. The stakes of the Embargo had indeed been high, and in the summer of 1807, it seemed as if the profound rise of nationalist sentiment may well have allowed Jefferson to achieve his goal. But despite Jefferson and Gallatin's persistence and ingenuity, the United States proved unable to uphold and enforce its own law.

The Embargo failed because it was simply impossible for a state built so closely upon the commercial marketplace to attempt a ban on commerce itself. It was from commerce that the state derived its lifeblood and revenue. It was from the market that the state discovered its personnel. And it was in the name of commercial interests that these officers fabricated authority, distributed rules, and maintained order. In the United States, such a state was the cost of cultivating a commercial society. During the age of Jefferson, sovereignty and political legitimacy unfolded, and would continue to unfold, on a commercial stage.