Dear readers,

Thank you for inviting me to share the first chapter of a book project on the history of federal conspiracy laws. Because this is a chapter in a history book, there is no road mapping etc. typical of a law review article, and the sub-arguments are spooled out as the narrative unfolds. I thank you in advance for your forbearance. I'm also grateful for your feedback and suggestions, especially since there is much time for course correction.

Sarah Seo

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"Kindred to Treason": Conspiracy Laws in the United States

Situated midway between the Great Lakes and the Atlantic Ocean, north of Albany and south of Montreal, a body of freshwater has long served as a border lake. The Wabanaki Nation called it "lake in between"; the Iroquois referred to it as the "lake that is the gate of the country."[3] In 1609, the Frenchman Samuel de Champlain entered the lake from one of its many tributaries and admired the "many fine trees … with many vines finer than any I have seen in any other place," as well as "some very high mountains,"[4] where, he was told, there "were beautiful valleys … with plains productive in grain, such as I had eaten in this country, together with many kinds of fruit without limit."[5] In short order, European settlers claimed the land and the lake and the rivers that flowed into the lake from the indigenous peoples, as well as the abundance that the land and the waters produced. By the late eighteenth century, the English had partitioned Lake Champlain's water basin into the states of New York and Vermont and what is now Canada.

For those who lived in these borderlands, lines drawn on official maps did not restrain trade. But boundaries did influence the routes taken and the prices fetched, especially in periods of global conflict. For Vermonters, Norway pines were a lucrative export to Canada and beyond. The winter season was the time for felling, clearing, chopping, rolling, burning, and carting. Logs were gathered and tied together to form acre-sized rafts that required many men to maneuver in the springtime when the lake thawed. It was a backbreaking business made more profitable by the other commodities that the rafts could haul on their way to market.[6]

This thriving commerce was threatened in March 1808, when the U.S. Congress supplemented the Embargo Act that was hastily enacted after the British *Leopard* attacked the American *Chesapeake* the previous year. In addition to barring exports transported on ships, the new "Land Embargo" would now prohibit export "in any manner whatever any goods, wares, or merchandise."[7] Those in the Lake Champlain region, who were confident that the 1807 "O-grab-me" ("embargo" spelled backwards) didn't apply to the overland trade with Canada, were up in

[3] Gary G. Shattuck, *Insurrection, Corruption and Murder in Early Vermont: Life on the Wild Northern Frontier* (Charleston, South Carolina: The History Press, 2014), 27; Peter S. Palmer, *History of Lake Champlain: From Its First Exploration by the French in 1609, to the Close of the Year 1814* (Albany, New York: 1866), 12.

[4] These would be the Adirondacks of New York and the Green Mountains of Vermont. Palmer, 10.

[5] Samuel de Champlain, *Voyages of Samuel de Champlain* (Boston: Prince Society, 1878), 2:215-217. For a detailed geographic description, see Palmer's introduction in *History of Lake Champlain*.

[6] Shattuck, *Insurrection*, 36-38.

[7] Embargo Act, 2 Stat. 451 (December 1807); Supplementary Embargo Act, 2 Stat. 475 (March 12, 1808); see Peter Andreas, "Contraband and Embargo Busting in the New Nation," chap. 4 in *Smuggler Nation: How Illicit Trade Made America* (New York: Oxford University Press, 2013); Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Oxford University Press, 2009): 653; H. N. Muller, "Smuggling into Canada: How the Champlain Valley Defied Jefferson's Embargo," *Vermont History* 38, no. 1 (Winter 1970): 6, https://vermonthistory.org/journal/misc/SmugglingIntoCanada.pdf. On the embargo in Maine, see Joshua M. Smith, "The Rascals of Passamaquoddy," chap. 4 in *Borderland Smuggling: Patriots, Loyalists, and Illicit Trade in the Northeast, 1783-1820* (Gainesville: University Press of Florida, 2019).

arms. Four-hundred-thousand dollars' worth of lumber, already processed and awaiting the spring season, had suddenly become contraband.[8]

A few months later, a Vermont lumber trader by the name of Van Dusen shipped a raft about two acres in size and valued at $25,000.[9] Enroute to the Canadian market, near the Isle of Mott in Lake Champlain, a deputy customs official seized the raft.[10] Van Dusen hired a man to take back the raft, promising $800 upon successful delivery to Canada. The hired man assembled a crew of about sixty, including one named Frederick Hoxie and his two sons, who armed themselves with muskets, clubs, and spike poles.[11] Reclaiming the raft was not too difficult, as the sentinel had wandered from his post. But about an hour later, the group encountered federal troops shooting at them from the shore. The men fired back. No one was injured in the skirmish, and the smugglers were able to make their way to Canada. They returned to Vermont and received their bounty.

Once back at home, Hoxie faced a criminal indictment. Curiously, the charge was not for violating the embargo. Instead, he was accused of treason for levying war against the United States. His case appears briefly in Willard Hurst's compendium *The Law of Treason in the United States*, which was first published as a series in the *Harvard Law Review* in 1945.[12] Hurst mentioned *Hoxie* to illustrate how "the scope of treason by levying war was narrowed" through "a strict definition of the intent element."[13] As Circuit Justice Brockholst Livingston had instructed the jury, "the forcible rescuing of a raft from the custody of a military guard" for "the sole purpose of private gain" was wholly different from doing so with the intent to make war against one's own country.[14] Given this instruction, the jury acquitted Hoxie, after which the court dismissed the treason charges against his sons.[15]

United States v. Hoxie is also included in another compendium, *Digest of Decisions of the United States Circuit and District Courts, from 1789 to 1880*, published by West in 1898. The case is listed in the section on conspiracy, which is, again, curious.[16] Conspiracy—that is, an agreement to commit an unlawful act—wasn't a federal crime until over fifty years after Hoxie was tried.[17] Also curious is that West's *Digest* placed the *Hoxie* case under the subsection "treasonable conspiracies." Just two

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[8] Shattuck, *Insurrection*, 95.

[9] Shattuck, 125.

[10] The island was named after Sieur la Mothe, a French officer who built a fort on the north end of the island in 1665. Palmer, *History of Lake Champlain*, 7.

[11] *United States v. Hoxie*, 26 Fed. Cas. 397 (C. C. D. Vt. 1808) (No. 15,407); Shattuck, 116, 118, 124, 257.

[12] The U.S. Department of Justice asked Professor Hurst for a historical analysis of treason ahead of its argument in *Cramer v. United States*, 325 U.S. 1 (1945). Hurst published his findings in the *Harvard Law Review* in three installments, which he subsequently published as a book. J. Taylor McConkie, U.S. Department of Justice, Civil Division, "State Treason: The History and Validity of Treason Against Individual States," *Kentucky Law Journal* 101, no. 2, 284, n.19 (2013).

[13] J. Willard Hurst, *The Law of Treason in the United States* (Westport: Greenwood Publishing Corp., 1945, 1971), 195.

[14] *Hoxie*, 26 F. Cas. at 399.

[15] Shattuck, 259-260.

[16] *Digest of Decisions of the United States Circuit and District Courts, from 1789 to 1880* (Eagan: West Publishing Co., 1898), 702.

[17] See An Act to define and punish certain Conspiracies, 12 Stat. 284 (July 31, 1861). Before then, Congress had passed few, very specific conspiracy provisions, such as Section 12 of the 1790 Crimes Act, which prohibited individuals from joining a "confederacy to become pirates." 1 Stat. 115 (1790).

months before Hoxie's escapade, Congress had debated and declined to enact a treasonous conspiracy law.[18]

This chapter takes on the many puzzles of *Hoxie*: why the government brought treason charges, why the case later served to elucidate conspiracy doctrine, and how the offenses of treason and conspiracy were related. And by contextualizing these questions with the histories of critical but deeply contested policies from the Revolutionary period to Reconstruction, this chapter will examine why the federal government in the 1860s finally enacted general conspiracy laws—"general" in that they punished agreements to violate *any* federal law—and why it took so long, at least compared with England, which had criminalized conspiracies since the thirteenth century.[19]

The evident need to punish unlawful agreements goes to the heart of what criminal law is and what it is for.[20] Criminal law, with its focus on culpability, is generally understood as a necessary condition of ordered society, keeping us from a state of nature. But it has also been necessary for the *state*; specifically, conspiracy laws have been necessary for the *American* state.[21] The case of *United States* against *Hoxie* was tried at a time when the fledgling new nation lacked effective enforcement mechanisms to carry out national goals. The problem was existential; the American Civil War made clear, if the War of 1812 after the embargo's demise didn't already, that noncompliance could threaten government itself, even if it didn't amount to treason. Building the state was one way of solving the enforcement problem, but it was significantly constrained in a federal system that was politically and philosophically wedded to limited government. Criminal law offered an alternative. Albeit unintentionally, the *Digest* pointed to the state-building role of conspiracy laws, from protecting government functions to preventing rebellions—all without a bureaucracy that seemed too big.

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The British impressment of Americans on the high seas during its ongoing hostilities with France threatened the independence and honor of the young nation. President Jefferson believed that economic sanctions, not war, could compel European powers, especially the British, to respect American neutrality and to leave its sailors alone.[22] After the British attack on *USS Chesapeake*, the wave of patriotic outrage, plus faith in republican virtue and self-sacrifice, led Jefferson to have confidence that the people would forgo trade, at least temporarily. Put differently, American foreign policy depended on voluntary compliance with commercial restrictions, for the U.S. Customs

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[18] 18 Annals of Cong. 2279 (1808).

[19] Frank P. Blair, "The Judge-Made Law of Conspiracy," *American Law Review* 37, no. 1 (1903): 35.

[20] According to Sandra Mayson, the nature of criminal law is "an overlooked first step" in debates on criminal legal reform. Sandra G. Mayson, "The Concept of Criminal Law," *Criminal Law and Philosophy* 14, no. 3 (2020): 447, 448 ("one cannot deliberate about what to criminalize without determining what the criminal law is *for*; and one cannot deliberate about what the criminal law is for without determining what it *is*.").

[21] Many scholars have examined the American state through its agencies, policies, and bureaucrats. By contrast, I focus on the relationship between the state and criminal *law*. In this way, it is similar to William Novak's methodology in *The People's Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996), which looked to the common law to find the state in the early nineteenth century. See also Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982) (arguing that courts, in addition to parties, were important institutions in the early American state).

[22] Wood, *Empire of Liberty*, 626-633, 641-651; Gautham Rao, *National Duties: Custom Houses and the Making of the American State* (Chicago: University of Chicago Press, 2016), 132-133; George C. Herring, *From Colony to Superpower: U.S. Foreign Relations Since 1776* (New York: Oxford University Press, 2008), 119-120; Muller, "Smuggling into Canada," 5-6.

Service did not have enough manpower—personnel numbered just a little over a thousand for the entire Atlantic coast.[23]

President Jefferson, however, had overestimated how much support there would be for the embargo laws.[24] The embargo was a widespread failure, for he never considered how to enforce a decree that seemed, to many, to require a great deal of personal self-sacrifice.[25] The Vermont borderlands relied heavily on agricultural exchange "for many of the conveniences, and even necessaries of life," as residents of St. Albans, Vermont, explained to Jefferson in an appeal to end the embargo.[26] Other towns all along the Champlain Valley drafted similar letters demanding that trade restrictions be lifted.[27] Merchants throughout the country were furious and tried to sabotage the embargo before it even took effect.[28] The main consequence of the embargoes may have been to cut off a significant source of the federal government's revenue, for smuggling was rampant.[29] Canadians reported that trade was "proceed[ing] as usual from the ports on the Lake to Montreal."[30] According to a local historian, commodities trading from the Champlain Valley to Canada increased 70 percent from 1807 to 1808.[31] Flagrant violations of the embargo augured violence. An informant enlightened the Canadian governor that "the clamour [sic] against the Government and the measure particularly is such that you may expect to hear of an engagement between the officers of Government and the sovereign people on the first effort to stop the introduction of that vast quantity of timber and produce which is prepared for the Montreal market."[32]

Anticipating a violent clash, Vermont's Collector of Customs asked Treasury Secretary Albert Gallatin for "an adequate force" to enforce the new law.[33] Gallatin, in an admission of defeat, wrote Jefferson that "the stoppage of intercourse [was] so unpopular" that revenue agents were "afraid to act," an observation that surely called to his mind recent history, when threats to government officials posed threats to government itself.[34] During the American Revolution, colonial

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[23] 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), 71, 79.

[24] Jefferson appears to have become pessimistic by April 1808. See Levi Lincoln to Jefferson, April 1, 1808 ("I fear you think the opposition to the embargo in this quarter much greater than it is.").

[25] Jefferson to Gallatin, August 11, 1808, Founders Online ("This embargo law is certainly the most embarrassing one we have ever had to execute. I did not expect a crop of so sudden & Rank growth of fraud & open opposition by force could have grown up in the US."). See Rao, *National Duties*, 156; Herring, *From Colony to Superpower*, 120.

[26] Inhabitants of St. Albans to Jefferson, May 21, 1808, Founders Online; see also Joshua Smith, "Patterns of Northern New England Smuggling, 1783-1820," in *The Early Republic and the Sea: Essays on the Naval and Maritime History of the Early United States*, ed. William S. Dudley and Michael J. Crawford (Sterling, VA: Potomac Books, 2001), 44 (on the economic circumstances of timber smugglers during the embargo).

[27] Muller, 7-9.

[28] Rao, 139, 141.

[29] See Rao, 139.

[30] *Connecticut Courant*, May 25, 1808, quoted in Muller, "Smuggling into Canada," 11.

[31] Muller, 17; see also Smith, "Patterns of Northern New England Smuggling," 40.

[32] John Henry to Herman Witsius Ryland, 1808, quoted in E. A. Cruikshank, *The Political Adventures of John Henry: The Record of An International Imbroglio* (Toronto: MacMillan Co., 1936), 18. The Canadian governor, John Craig, had relied on John Henry for information on whether the New England states would be open to seceding from the Union and reunite with England. Palmer, *History of Lake Champlain*, 179.

[33] Muller, "Smuggling into Canada," 7.

[34] Gallatin to Thomas Jefferson, May 28, 1808, in *The Writings of Albert Gallatin*, ed. Henry Adams (Philadelphia: J. B. Lippincott & Co., 1879), 1:393. For a contemporary analogue, see Sue Halpern, "Threats Against Election Officials Are a Threat to Democracy," *New Yorker*, June 29, 2021.

mobs had attacked customs officials in protest against British taxes. Parliament's mismanagement of the outcry had led to the ultimate rebellion: secession.

After Jefferson heard about the uproar in Vermont, he issued a proclamation decrying "sundry persons … combining and confederating together on Lake Champlain … for the purposes of forming insurrections against the authority of the laws of the United States."[35] He conceded that the protests "may not be an insurrection in the popular sense of the word" but nonetheless insisted that forcible opposition to federal law fell "fully within the legal definition of an insurrection."[36] Jefferson had to be legalistic about the matter because the Insurrection Act required the president to first order "insurgents" to "disperse and retire peaceably" before summoning regular troops and the militia.[37]

The proclamation backfired.[38] After Vermonters received the president's indictment, they indignantly penned a retort that they were "TRUE AND FAITHFUL CITIZENS."[39] They were shocked to learn that attempting to avoid the "ruin and wretchedness" of their families could amount to insurrection.[40] Believing that it was, in fact, the government that was infringing their "right of disposing of our property in time of peace, to whomever we please," they sought "redress of our grievances" as "guaranteed to us by our constitution."[41]

The executive's charge of insurrection and the people's counter-charge that they were comporting with true republicanism mirrored the dispute between Parliament and the colonists on the eve of the Revolution. From the perspective of imperial law, the mobs that attacked customs officials had engaged in unlawful rebellion.[42] But from the perspective of American colonists, according to historian John Phillip Reid, "they were far from being rebels and traitors" because they rioted and tarred-and-feathered the crown's agents for the purpose of protesting unconstitutional laws.[43] They justified their acts of violence as a last-resort measure to persuade Parliament to repeal

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[35] Thomas Jefferson, A Proclamation, April 19, 1808, in *A Compilation of the Messages and Papers of the Presidents*, ed. James D. Richardson (Washington, D.C.: Bureau of National Literature and Art, 1910), 1:438; see also James Madison to John Willard, April 19, 1808, Madison Papers, Founders Online ("From information transmitted by the Collector of the District of Vermont, it is apprehended that forceable attempts are about to be made in his District to frustrate the execution of the Embargo Laws. The President requires … that you render him by means of your posse all the aid which the occasion may require & the laws authorize.").

[36] Jefferson to Daniel D. Tompkins, August 15, 1808, Founders Online.

[37] Jefferson Proclamation, in Richardson, *Compilation of the Messages*, 439; see Insurrection Act, 2 Stat. 443 (1807); see also Stephen I. Vladeck, "Emergency Power and the Militia Acts (Note)," *Yale Law Journal* 114, no. 1 (2004): 164.

[38] Muller, "Smuggling into Canada," 8-9; see also Shattuck, *Insurrection*, 98, 100; Smith, *Borderland Smuggling*, 57 (on newspaper editors' questioning Jefferson's use of military force); Wood, *Empire of Liberty*, 656 ("The United States government was virtually at war with its own people.").

[39] Inhabitants of St. Albans to Jefferson, May 21, 1808, Founders Online.

[40] Inhabitants of St. Albans to Jefferson, May 21, 1808, Founders Online.

[41] "Copy of a Memorial, Addressed to the President of the United States, relative to the Embargo—By the Inhabitants of Castleton, Vermont," *Vermont Centinel*, July 15, 1808 (on file with author).

[42] John Phillip Reid, "In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution," *New York University Law Review* 49, no. 6 (1974): 1044.

[43] Reid, "Defensive Rage," 1053, 1063. According to Reid, the argument of constitutional necessity went as follows: "if all other means to obtain constitutional redress or reform fail, violence is justified as a last resort because there is no other alternative and therefore it is necessary." Ibid., 1063; see also Ibid., 1064.

laws that infringed colonial rights.[44] As important, Reid argued, all institutions of local government constituted under the British constitution, from juries to magistrates, condoned the mob's actions, which rendered their understanding of legality to be "law," albeit a contested one.[45]

Embargo protestors believed they were having the exact same fight. They revived revolutionary songs, compared President Jefferson unfavorably to King George, and even talked openly of secession.[46] While Jefferson characterized the Vermont protests as an insurrection that could undermine the new nation, Vermonters viewed their efforts to nullify or evade the laws as within their rights as American citizens.[47] And local institutions supported their views.[48] Despite Gallatin's direct orders to the federal prosecutor in Vermont "to institute prosecutions," hardly any enforcement actions were taken.[49] When a few Canadians were arrested and charged for smuggling rafts on Lake Champlain, the jury—a Democratic-Republican one at that—refused to return the indictments.[50] Even the state militia could not be trusted. Militiamen refused to shoot at violators and released the few prisoners they had taken.[51] Some, after serving their requisite three months, joined the smugglers.[52] Others went so far as to advocate murdering federal customs officers.[53] By the time of Hoxie's trial in October 1808, the governor had so little faith in the militia's loyalty that he relied on regular troops instead.[54]

Local allegiances explain why Hoxie believed that he would not encounter opposition when retaking the raft.[55] Even though he had talked big about taking troops as prisoners "if necessary" and "fighting his way through" the blockade, Hoxie likely did not expect to use force.[56] Though he did end up using force, he would have justified it as a necessary and legitimate challenge to the embargo laws. His lawyers were so confident in this position that they declined to put forth a

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[44] Reid, "Defensive Rage," 1964. See also John Phillip Reid, "The Irrelevance of the Declaration," in *Law in the American Revolution and the Revolution in the Law*, ed. Hendrik Hartog (New York University Press, 1981) (arguing that the Declaration was a legal document claiming a constitutional right).

[45] Reid, "Defensive Rage," 1089-1091.

[46] Herring, *From Colony to Superpower*, 120.

[47] See Farah Peterson, "Constitutionalism in Unexpected Places," *Virginia Law Review* 106, no. 3 (May 2020) (arguing that mob action, with protestors often dressing in Indian costume, was understood to be an unwritten constitution right to express economic grievances against the government that existed before, during, and after the ratification of the U.S. Constitution).

[48] Prince and Keller, *U.S. Customs Service*, 75.

[49] Gallatin to Jefferson, May 28, 1808, in Adams, *Writings of Albert Gallatin*, 393; Shattuck, *Insurrection*, 106, 107. See Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (2012), 93, 101.

[50] Gallatin to Jefferson, July 29, 1808, in Adams, *Writings of Albert Gallatin*, 397. See also Smith, *Borderland Smuggling*, 29 (observing that even magistrates in Maine engaged in smuggling).

[51] Muller, "Smuggling into Canada," 9-10.

[52] Shattuck, *Insurrection*, 111.

[53] Shattuck, 25.

[54] Shattuck, 104.

[55] *Hoxie*, 26 F. Cas. at 396. To be sure, not all Vermonters opposed the embargo. See, e.g., "Incidents at Home," *The World*, June 13, 1808 (accusing the *St. Albans Adviser* for having "ridiculed the feeble arm of the officer of the customs, who has been constant in season and out of season in the faithful discharge of his duty" and criticizing that the *Adviser* had "never yet *advised* the people to support the laws of their country") (on file with author).

[56] *Hoxie*, 26 F. Cas. at 396.

defense.[57] Lawyers for another individual in the same smuggling enterprise likened the men to "the soldiers of Washington," invoking the spirit of 1776.[58]

At issue in *United States v. Hoxie* was the validity of the smugglers' constitutionalism, that is, the validity of their obstruction of validly enacted federal laws. Conversely, the issue for the Jefferson administration was its ability to enforce laws and policies essential to the stability and standing of the nation.

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Given the import of the embargoes, Attorney General Caesar Augustus Rodney recommended that Hoxie's indictment for smuggling, which was punishable, at most, with a fine of four-hundred dollars, be changed to treason, which could be punished with death.[59] The chance of getting caught and fined hadn't been enough to deter the likes of Hoxie. It certainly wasn't sufficient to discourage the money men whose fortunes were at stake. To them, a fine was a mere rebuke for sabotaging national foreign policy. So long as they hired others to do the deed, then they would never face more serious criminal charges of rioting or, if things got out of hand, murder. Moreover, both rioting and murder were state crimes, which meant that the federal government had to rely on state courts to enforce federal laws—hardly a reliable option with hostile local institutions. Accordingly, Attorney General Rodney wanted to make an example of Hoxie by bringing the only effective criminal charge available. Otherwise, he wrote to Jefferson, "a system of evasion will defeat & prevent the good effects, expected to flow" from the embargo.[60]

Jefferson, however, had misgivings. "If all these people are convicted," he wrote Gallatin, "there will be too many to be punished with death."[61] The embargo was unpopular enough, especially in Federalist territory.[62] To try opponents of the embargo for treason risked alienating the populace and losing the electorate.[63] Jefferson was in a tight spot. On the one hand, treason was the only effective criminal sanction to those determined to defy federal authority.[64] On the other,

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[57] Shattuck, *Insurrection*, 257.

[58] Amos Marsh, quoted in Shattuck, *Insurrection*, 234.

[59] Carl Cummings and Homer McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* (New York: Macmillan, 1937), 68; Hurst, *Treason*, 198; An Act to regulate the Collection of the Duties by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States, 1 Stat. 44 (July 31, 1789) ("[I]f any person shall forcibly resist, prevent, or impede any officer of the customs, or their deputies, or any person assisting them in the execution of their duty, such persons so offending shall for every offence be fined in a sum not exceeding four hundred dollars."). See also Shattuck, *Insurrection*, 248, 251.

[60] Augustus Rodney to Jefferson, April 22, 1808, Founders Online.

[61] Jefferson to Gallatin, September 9, 1808, Founders Online.

[62] See Andrew Wender Cohen, *Contraband: Smuggling and the Birth of the American Century* (New York: W. W. Norton & Co., 2015), 28 ("border inhabitants were primarily Federalists who viewed Jefferson as a tyrant and his embargo as disastrous").

[63] See "A Republican" to Jefferson, March 22, 1808, Founders Online ("[O]ur friends are fast falling off & the Federalists gaining ground upon us in every direction and our prospects ar [sic] really most unpromising. so [sic] severely is the effects of the embago [sic] felt that no arguments are sufficient to retain our weaker Brethren."). The Republican governor resoundingly lost his seat to a Federalist during the state election, which was held in the middle of the *Black Snake* murder trials, when sympathy to the Republican cause should have been at a high. Shattuck, *Insurrection*, 238.

[64] Smith, "Patterns of Northern New England Smuggling," 37 (smuggling was widely accepted and treated as a civil offense and not as a criminal offense until the late nineteenth century).

treason was such a powerful tool that it could work to erode federal authority. The main legal devise to enforce federal laws was both too aggressive and too ineffectual.

President Washington had faced a similar predicament during the Whiskey Rebellion that erupted in western Pennsylvania after his administration levied a tax on domestic liquors in an effort to repay the federal government's assumed debts from the American Revolution—an important component of Alexander Hamilton's financial program.[65] The new taxes especially burdened small farmers along the Monongahela River, who regarded whiskey as "an indispensable necessity to life, healthy, and happiness," according to an early historian.[66] They sold whiskey, they bartered with whiskey, they drank whiskey the way Europeans drank beer or wine.[67] Farmers responded to the federal incursion on their way of life by reviving "the doctrines of the Declaration of Independence."[68] They raised their own flag, built mock guillotines, and established their own courts.[69] The invocation of revolutionary principles roused 7,000 armed men to march to Pittsburgh, provoking Washington to send 13,000 militiamen to quash the rebellion. Afterwards, two participants were found guilty of treason, but the juries accompanied their verdicts with a petition that the president show mercy, describing the defendants as simpletons who did not play significant roles in the uprising.[70] Similar petitions arrived from throughout the country. These were fairly easy cases for clemency. But Washington went further and extended a blanket pardon to everyone who had been involved if they agreed to submit to the authority of the United States.[71] Some historians have argued that the rebellion's defeat demonstrated the new federal government's strength.[72] But from a law-enforcement perspective, the national government remained weak and unable to collect its taxes.

Indeed, the next president, John Adams, confronted the very same issue during Fries's Rebellion, another tax revolt that arose after Congress for the first time levied a direct tax on land, houses, and slaves to pay for the national defense amid growing hostilities with France.[73] Like Washington, Adams had just a few options at his disposal. And like his predecessor, Adams sent the military and brought treason charges. He also pardoned the three men convicted of treason, contrary

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[65] Leland D. Baldwin, *Whiskey Rebels: The Story of a Frontier Uprising* (Pittsburgh: University of Pittsburgh Press, 1968), 56; William Hogeland, "Spirits Distilled Within the United States," chap. 3 in *The Whiskey Rebellion: George Washington, Alexander Hamilton, and the Frontier Rebels Who Challenged America's Newfound Sovereignty* (New York: Scribner, 2006).

[66] Baldwin, *Whiskey Rebels*, 28.

[67] Baldwin, 10, 27. See also *United States v. Insurgents of Pennsylvania*, 26 Fed. Cas. 499, 500 (C.C.D. Pa. 1795) (No. 15,443) ("Not only were whisky and rum articles of commerce and of consumption, but from the natural deficiency of specie in a wild country they also were used universally as currency.").

[68] Baldwin, *Whiskey Rebels*, 13.

[69] Wood, *Empire of Liberty*, 137.

[70] Carlton F.W. Larson, *The Trials of Allegiance: Treason, Juries, and the American Revolution* (New York: Oxford University Press, 2019), 239-240.

[71] George Washington, Proclamation of Pardons in Western Pennsylvania, July 10, 1795.

[72] See Wood, *Empire of Liberty*, 138 ("The rebellion was a test of the government's strength, and the government had been successful.").

[73] *Case of Fries*, 9 Fed. Cas. 924 (C.C.D. Pa. 1800) (No. 5,127). Cf. Nicholas R. Parrillo, "A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s," *Yale Law Journal* 130, no. 6 (April 2021): 1288, 1288 n.66, 1435 (noting that the Fries incident "was notable mainly for the Federal government's overreaction to it" and pointing out that "the early federal government levied a tax on literally every farm and house in every state and met no organized resistance much beyond a single county in a single state").

to his cabinet's unanimous advice and notwithstanding his own condemnation of the rebellion.[74] "What good, what example," he later queried, "would have been exhibited to the nation by the execution of three or four obscure, miserable Germans, as ignorant of our language as they were of our laws, and the nature and definition of treason?"[75]

But Fries was not so ignorant as Adams claimed. He was a veteran of the Revolutionary War who fought on the side of tax protestors; he had also marched with Washington to put down tax protesters during the Whiskey Rebellion.[76] Now, as leader of a group of tax protestors, Fries argued that unconstitutional taxes justified their actions. He had heard this argument before and knew that it could ultimately lead to secession, an oft-bandied idea in the backcountry during the post-Revolutionary period.[77] Fries posed a threat to the still-young republic, and—to answer Adams's question of "what good, what example" would result—punishing him would have shown the entire nation that the laws must be respected.

Punishment, however, could also stoke the wrong feelings. Both Washington and Adams backed down and granted pardons after defeating those who flirted with the subversion of government. If recent experience with England provided additional perspective, it was that charging treason to enforce tax laws actually reflected an inability to accomplish imperial, or national, goals. Jefferson undoubtedly learned from history, for he attenuated his desire to punish the Vermont smugglers; "my hope," he explained, was "that the most guilty may be marked as examples, & the less so suffer long imprisonment under reprieves from time to time."[78]

The government, however, faced an uphill task. As Professor Carlton Larson has pointed out, the U.S. Constitution's requirement of two witnesses to the same overt act and prohibition of out-of-court confessions made treason prosecutions significantly harder than under the British common law.[79] Practically, it was difficult to find two people who would cooperate and appear in court.[80] Grand juries frequently declined to return indictments, and petit juries often acquitted defendants. For example, after the Whiskey Rebellion, the attorney general sought indictments against thirty-six individuals. The grand jury issued indictments against twenty-four; eleven defendants were never found; three successfully argued that they were entitled to amnesty under Washington's proclamation, leaving only ten defendants who were tried. Eight were acquitted. Only two—out of the thousands who took up arms—were convicted.[81] The results after Fries's Rebellion were likewise dismal. The grand jury returned nine indictments, but the prosecutor then declined to bring some of the cases, and a few defendants absconded, leaving only five to face trial. The jury acquitted two and convicted three.[82]

Charging Hoxie with treason was a risky enforcement strategy. The case was difficult to prove and difficult to win and, even if successful, it would have been difficult to go forward with the death sentence. But charging treason was the only way to send an unequivocal message that the

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[74] Larson, *Trials of Allegiance*, 248 (on cabinet's advice); Hurst, *Law of Treason*, 269 (on Adams' abhorrence).

[75] Adams to James Lloyd, March 31, 1815, in *The Works of John Adams, Second President of the United States*, ed. Charles Francis Adams (Boston: Little, Brown and Co., 1856), 10:153.

[76] Larson, *Trials of Allegiance*, 243.

[77] Wood, *Empire of Liberty*, 134-135.

[78] Jefferson to Gallatin, September 9, 1808, Founders Online.

[79] Larson, *Trials of Allegiance*, 231.

[80] Larson, 239.

[81] Larson, 236, 239.

[82] Larson, 246-247.

United States government meant business when it imposed a trade restriction. Unfortunately, Justice Livingston took that option off the table.

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Henry Brockholst Livingston received a recess appointment to the U.S. Supreme Court from President Jefferson in November 1806 and was re-nominated for a permanent position a month later.[83] Jefferson, in an effort to break Chief Justice John Marshall's federalist stronghold on the high court, sought to appoint loyal Democratic-Republicans and believed he had found one in the patrician New Yorker who had supported him in the 1800 presidential election.[84] Livingston, friend of both Alexander Hamilton and Aaron Burr, had once been private secretary to John Jay, his sister's husband. But a personal dislike of his brother-in-law had turned into a political repudiation.

Jefferson should have examined Livingston's judicial record more closely. As a state judge, Livingston had repeatedly held customs officials personally liable for wrongful seizures and, in fact, had done so the very year he was appointed to the Supreme Court.[85] Politically he may have chosen to ally with Republicans, but his sympathies still lay with the merchant class.[86] Predictably, Livingston soon disappointed Jefferson.[87] As Circuit Justice of the Second Circuit, Livingston presided over *United States v. Hoxie* and admitted to the jury that it was "impossible, to suppress the astonishment which is excited at the attempt which has been made to convince a court and jury of this high criminal jurisdiction, that, between [the defendant's conduct] and levying war, there is no difference."[88]

Notwithstanding Livingston's certainty that Hoxie did not commit treason, the definition of treason was in flux during the age of revolutions.[89] American colonists had described their rebellion not as treason but as resistance to tyranny, then turned around and accused crown officials and loyalists of treason not against the king but against liberty itself.[90] What, exactly, was the difference between political opposition, justified protest, unlawful rebellion, and treason when they all shared the goal of attacking those in power?[91] What constituted treason during civil war had to be hammered out, and what would constitute treason against the newly formed United States had to be decided.[92] Recalling how King George had tried to use treason charges to oppress them—and how the newly independent states had pursued treason charges against friends and family who assisted

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[83] "History of the Federal Judiciary: Judges," Federal Judicial Center, accessed July 20, 2022, https://www.fjc.gov/history/judges/livingston-henry-brockholst.

[84] Henry J. Abraham, "President Jefferson's Three Appointments to the Supreme Court of the United States: 1804, 1807, and 1807," *Journal of Supreme Court History* 31, no. 2 (July 2006): 141, 147, 150-151.

[85] Rao, *National Duties*, 153.

[86] Peter Charles Hoffer has called Justice Livingston "a Republican in name only." *The Treason Trials of Aaron Burr* (Lawrence, Kansas: University Press of Kansas, 2008), 96-97.

[87] Justice Livingston would disappoint Jefferson beyond the *Hoxie* case. Notwithstanding his Jeffersonian loyalty, he often voted with Chief Justice Marshall. Abraham, "Jefferson's Three Appointments," 152.

[88] *Hoxie*, 26 F. Cas. at 399.

[89] Larson, *Trials of Allegiance*, 3-4, 31-34; Robert A. Ferguson, *Reading the Early Republic* (Cambridge: Harvard University Press, 2004), 120 ("Nothing conveys the utter fluidity in Revolutionary American Culture more dramatically than the concept of treason.").

[90] Larson, *Trials of Allegiance*, 37-40.

[91] These questions swirled in the 1790s with the emergence of Democratic-Republican Societies that challenged the political establishment and maintained that "the people had a continual right to organize and protest." Wood, *Empire of Liberty*, 163.

[92] See Larson, *Trials of Allegiance*, especially chapters 6-8.

the British during the Revolution—those who gathered at the Constitutional Convention defined treason narrowly: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."[93] By defining treason in the Constitution, the framers prevented all three branches of government from expanding its scope beyond the two instances of levying war against the United States and of giving aid to its enemies. These limitations reflected a concern, based on experience, that accusations of treason could be wielded as "an instrument of competition for political power," as Willard Hurst put it.[94]

Although the drafters sought to distinguish ordinary political struggles from treasonous conduct, it was more difficult to clarify the difference between rioting and high treason when both involved the use of force against government officials. Shortly after the ratification of the Constitution, James Wilson—to whom some scholars have given credit for the Treason Clause—remarked that the "line of division" between levying war and "an aggravated riot is sometimes very fine and difficult to be distinguished."[95] Twenty years of case law only somewhat clarified matters. Livingston surveyed all the treason trials that had taken place in the United States, including the recently tried case against Aaron Burr.[96] His jury charge, however, focused on a series of cases that came out of the Whiskey Rebellion and Fries's Rebellion in which the defendants were found guilty of treason by levying war against the United States. "If you look at the insurrections in 1794, and in 1799," Livingston's charge instructed, "you will be struck with the great difference between the cases which arose out of those occurrences, and the one on which you are now to decide."[97]

The cases of *United States v. Mitchell* and *United States v. Vigol* that Livingston cited were part of the Whiskey Rebellion, when rebel farmers assaulted and, in a symbolic gesture, tarred and feathered excisemen, looted their homes, and threatened their families to force their resignation. In July 1794, between four-hundred and eight-hundred men burned down the home of an excise collector, resulting in several deaths. Then in August came the march to Pittsburgh. The attorney general declared that the insurrection was "a well formed and regular plan for weakening and perhaps overthrowing the General Government."[98]

The third case that Livingston consulted, the *Fries* case, came out of the 1799 tax uprising during President Adams's administration, which followed the modus operandi of previous tax revolts: threats, harassments, and assaults to coerce tax assessors into resigning. After some

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[93] U.S. Constitution, art. III, § 3, cl. 1.

[94] Hurst, *Law of Treason*, 165-166; see also Ibid., 141 ("the historic policy restrictive of the scope of 'treason' under the Constitution was most consciously based on the fear of extension of the offense to penalize types of conduct familiar in the normal processes of the struggle for domestic political or economic power"), 142-143.

[95] James Wilson, "Of Crimes, Immediately Against the Community" (lecture, College of Philadelphia, 1790-1791), in *The Works of the Honourable James Wilson*, ed. Bird Wilson (Philadelphia: Lorenzo Press, 1804), 3:104. See Larson, *Trials of Allegiance*, 231; Hurst, *Law of Treason*, 135, 142.

As an example of a dispute about the difference between riot and treason, British officials viewed the Boston Tea Party as treason while tea partiers understood themselves as engaging in (justified) mob action. On the British view, see Larson, *Trials of Allegiance*, 32, 36-37. On the colonists' view, see Reid, "Defensive Rage."

[96] See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

[97] *Hoxie*, 26 F. Cas. at 400.

[98] William Bradford quoted in Wood, *Empire of Liberty*, 137; see generally Baldwin, *Whiskey Rebels*; Larson, *Trials of Allegiance*, 235-236.

protestors were arrested, nearly four-hundred armed men, led by John Fries, demanded the release of the prisoners.[99]

According to Livingston, there was "hardly a feature of resemblance" between what previous traitors had done and what Hoxie had done, that is, "forcing some lumber from the possession of a collector."[100] But, in truth, Hoxie had done more than that. He and the other men fired about a hundred shots at federal troops. Although no one was injured or killed, many bullets had struck the trees on the shore where the soldiers were standing, which suggested that the shots were "intended for execution," as the district attorney had alleged.[101] The differences between the cases were in scale, not in kind. The earlier episodes implicated more participants and resulted in more damage and injury to persons and property. Still, Hoxie and his men used deadly force against federal officers in order to obstruct the law, just as Mitchell, Vigol, and Fries had done.

The crucial distinction for Livingston lay not in the acts themselves, but in what we would today refer to as mens rea. Livingston identified the "essential ingredient" of treason as the "quo animo," that is, the intent "to prevent the execution of an act of congress, by force and intimidation."[102] Quoting *Vigol*, Livingston pointed out that treasonous acts were committed with the purpose to "suppress the office of excise," to "compel the resignation of the officer," and to "render null and void in effect an act of congress."[103] These were objects "of a general nature and of national concern," as *Mitchell* explained.[104] The *Fries* case phrased this principle conversely, that "the assembling bodies of men, armed and arrayed in warlike manner, for purposes only of a private nature, is not treason."[105] Livingston maintained that, unlike prior defendants, Hoxie was a hireling. Although he was armed and acted in a warlike manner, Hoxie obstructed the embargo laws "for the single object of personal emolument."[106] The distinction that Livingston drew thus depended on public versus private motivations.

But determining whether the object of a mob's violence was public or private wasn't always clear cut. In the *Fries* case, the defense had argued that because the object was to rescue only certain prisoners, the rebellion was "not of a general nature."[107] Justice Chase had rejected the argument.[108] Chase's broader view of Fries's intent could arguably apply to Hoxie as well. He was not merely rescuing a certain raft of lumber, but, more broadly, he was opposing "a great national and Constitutional object," as one senator declared when denouncing the "unprincipled Americans"

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[99] Larson, 243.
[100] *Hoxie*, 26 F. Cas. at 400.
[101] *Hoxie*, 26 F. Cas. at 396.
[102] *Hoxie*, 26 F. Cas. at 401.
[103] *Hoxie*, 26 F. Cas. at 401.
[104] *Hoxie*, 26 F. Cas. at 401 (quoting *United States v. Mitchell*, 26 F. Cas. 1277 (C.C.D. Pa. 1795) (No. 15,788)).
[105] *Hoxie*, 26 F. Cas. at 401 (quoting *United States v. Fries*, 9 F. Cas. 924 (C.C.D. Pa. 1800) (No. 5,126)).
[106] *Hoxie*, 26 F. Cas. at 400.
[107] *Fries*, 9 Fed. Cas. at 887.
[108] John Fries was tried and convicted twice. His first conviction was set aside because of a prejudiced juror. Justice Samuel Chase, who presided over the second trial, believed that armed resistance to the direct tax amounted to treason. Chase's opining on this issue before the jury prompted Fries's lawyers to quit the defense as a matter of principle. Fries declined Chase's offer to appoint new counsel, whereupon Chase appointed himself Fries's counsel. Not surprisingly, Fries was convicted a second time. When Justice Chase was impeached in 1804, the charges against him included his conduct during the Fries trial. Stephen B. Presser, "Samuel Chase: In Defense of the Rule of Law and Against the Jeffersonians," *Vanderbilt Law Review* 62, no. 2 (March 2009): 352-356.

engaging "in this scandalous traffic."[109] Prosecutors introduced evidence that Hoxie had undertaken several smuggling ventures and "had occasionally talked about fighting his way through," belying Livingston's claim that Hoxie had opposed the law "only in this instance, and for his own private emolument."[110] In all likelihood, Hoxie had taken part in the plot with a dual intent: he both detested the embargo and sought profit.

Livingston granted that it "may not be very easy … to fix the exact boundary between treason and some other offenses, which partake, more or less, of an opposition to government."[111] But "if every opposition to law be treason," he reasoned, then "who can say how many of them will in time become ranged under the class of treason."[112] There simply had to be a difference between treasonous and non-treasonous protest, and for Livingston, neither the mere violation of law nor the use of force, nor the two together, could be a sufficient factor to prevent treason prosecutions from becoming "as common as indictments for petit larcenies, assaults and batteries, or other misdemeanors."[113] Certainly, it was difficult to state the principle for determining when the intent motivating the act was sufficiently universal or general, but Livingston was sure that Hoxie never believed that he had a war on his hands.

And so, Livingston advised the jury that "the proofs on trial have fallen very far short" of demonstrating treason.[114] He concluded his charge around eleven o'clock at night, and the jury quickly returned a verdict of acquittal.[115] The next morning, the court dismissed the treason charges against Hoxie's two sons.[116] When the government brought a new indictment against the Hoxies for violating the embargo, they fled to Michigan.[117]

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The *Hoxie* verdict spurred Senator William B. Giles to action. Representing President Jefferson's state of Virginia, Giles was one of the staunchest defenders of the embargo. When several of his colleagues argued that the experiment had run its course and that the country was the worse for it, Giles gave a defiant speech.[118] Not even the *Hoxie* outcome dissuaded Giles, who immediately reached out to Treasury Secretary Gallatin for ideas to strengthen the enforcement of the embargo laws.[119] Gallatin responded with *Hoxie* front of mind, bemoaning that "every degree of opposition to the laws which falls short of treason is now, with but few exceptions, an offense

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[109] 19 Annals of Cong. 275-276 (1808) (Senator William B. Giles); *Fries*, 9 Fed. Cas. at 930 ("any insurrection or rising of any body or people, within the United States, to attain or effect by force or violence, any object of a great public nature, or of public and general (or national) concern, is a levying of war against the United States.").

[110] *Hoxie*, 26 F. Cas. at 396, 402.

[111] *Hoxie*, 26 F. Cas. at 400.

[112] *Hoxie*, 26 F. Cas. at 402.

[113] *Hoxie*, 26 F. Cas. at 402.

[114] *Hoxie*, 26 F. Cas. at 403.

[115] Shattuck, *Insurrection*, 259.

[116] Shattuck, 259-260

[117] Shattuck, 260.

[118] Hillhouse speech on the resolution to repeal the embargo, Nov. 29, 1808; Giles speech on the resolution offered by Mr. Hillhouse, Dec. 2, 1808.

[119] Giles to Gallatin, November 14, 1808, quoted in Cunningham, *The Process of Government under Jefferson*, 202. See Noble E. Cunningham, "Executive-Congressional Relations," in *The Process of Government under Jefferson* (Princeton, NJ: Princeton University Press, 1978), 188-213 (on how congressional committees relied on executive officials for facts and recommendations).

undefined and unprovided for by the laws of the United States; whence it follows that such offenses remain unpunished."[120] Helpfully, Gallatin offered a few suggestions to remedy the situation.

Many of Gallatin's proposals focused on evasions along the coast, such as an increase in the amount of bond required for shipping vessels and additional forfeitures, which, he explained, was "the most efficient penalty."[121] Some of the action items addressed enforcement challenges both on land and at sea. A big problem was that opposition to the embargo sometimes devolved into acts of violence, and Gallatin complained of "the circuitous manner" of calling the troops, in which the president had to first issue a proclamation ordering insurgents to disperse.[122] Although this procedural requirement was not too onerous,[123] it delayed action until it was too late, after ships had sailed and wagons departed. Proclamations also had a counterproductive effect: calling protestors insurgents made them even more belligerent, as Jefferson learned during the Vermont affair.[124] So it was "with regret," Gallatin wrote, "that the necessity of authorizing, on the application of the collector, an immediate call for the local physical force of the country must also be stated."

Several recommendations sought to plug loopholes in the land embargo specifically. First, the "exportation of specie by land should be expressly prohibited," Gallatin advised. Moreover, the law should specify that the authority to detain embargoed goods in a warehouse also applied when they were "deposited in a wagon." Gallatin himself could "not perceive any reason for the distinction" between a warehouse and a wagon, but determined merchants were taking advantage of the technicality while "actually on their way to a foreign territory."

Lastly, Gallatin highlighted a more serious enforcement flaw. Forfeitures, which may have been *the most efficient penalty* for contraband in shipping vessels, unfortunately provided no solution to embargo violations "along our land frontier."[125] As Gallatin explained, the offense of smuggling "is not consummated till after the property has actually been carried beyond the lines, where, being in a foreign jurisdiction, it cannot be seized, so that forfeiture … can never apply to exportations by land."[126] The Van Dusens of the world remained untouchable. They well knew that they faced little meaningful sanction and acted accordingly. As a result, Gallatin concluded, "the only remedy is the uncertain one of recovering penalties against apparent offenders, who either abscond" (like Hoxie) "or have no property," which was no remedy at all.[127] In his letter to Senator Giles, Gallatin wondered "how far it may be practicable to make the act of preparing the means of exportation punishable" so that the government could take action before smugglers successfully thwarted

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[120] Gallatin to William B. Giles, November 24, 1808, in Adams, *Writings of Albert Gallatin*, 432.

Likewise, Attorney General Rodney vented to Jefferson, "I really wish in addition to the penalties & forfeitures contained in the [embargo] acts, all persons concerned in contravening any of their provisions, had been subjected to punishment by fine & imprisonment, or conviction by indictment." He was "glad to hear that congress will strenthen [sic] the existing laws on the subject before they adjourn." Caesar Augustus Rodney to Jefferson, April 22, 1808, Founders Online.

[121] Gallatin to Giles, November 24, 1808, in Adams, *Writings of Albert Gallatin*, 432.

[122] Act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions and to repeal the act now in force for those purposes, 1 Stat. 424 (February 28, 1795).

[123] Vladeck, "Militia Acts," 162-163.

[124] See Dumas Malone, *Jefferson the President: Second Term, 1806-1809*. *Jefferson and His Time* (Little, Brown & Co., 1974), 5:587.

[125] Gallatin to Giles, November 24, 1808, in Adams, *Writings of Albert Gallatin*, 431-432.

[126] Gallatin to Giles, November 24, 1808, 432.

[127] Gallatin to Giles, November 24, 1808, 432.

national policies.[128] But he wasn't certain how such proactive, preventative measures could be achieved and so asked Giles to submit the issue "to the committee" to figure out.[129]

Led by Giles, Congress responded to the Jefferson Administration's recommendations by enacting "An Act to enforce and make more effectual [the embargo] act."[130] It added new forfeitures and increased the bond requirement to "six times the value of the vessel and cargo" (embargo critics charged that this would be ruinous to coasters, "a respectable but not wealthy class of persons").[131] The act also specifically mentioned specie and wagons. More significantly, section 11 of the act authorized the president, "or such other person as he shall have empowered," to employ forces "for the purpose of preventing and suppressing any armed or riotous assemblage of persons, resisting the custom-house officers in the exercise of their duties, or in any manner opposing the execution of the laws laying an embargo, or otherwise violating, or assisting and abetting violations of the same."[132] No longer did the president—or empowered revenue collectors, for that matter—have to wait to call the militia while taking the potentially inflammatory step of declaring an insurgency.[133]

As for proactive measures to prevent embargo violations, Giles and his committee came up with new procedural mechanisms. They authorized collectors to detain any articles "when there is reason to believe that they are intended for exportation … until bond with sufficient sureties shall have been given."[134] One senator opposed this provision as a violation of the Fourth Amendment, since "without warrant founded on proof, from suspicion only, may this unbounded license be exercised."[135] Even worse, he continued, revenue collectors could summon the military to assist in the seizure, for section 11 could also be used "for the purpose of preventing the illegal departure of any ship or vessel, or of detaining, taking possession of, and keeping in custody any ship or vessel, or of taking into custody and guarding any specie, or articles of domestic growth, produce or manufacture." Most of the negative feedback on section 11 focused on this particular use of force, which several embargo opponents denounced as "military despotism."[136] A Massachusetts senator decried that the militia could be mobilized under a law purporting to regulate commerce based on the opinion of a single official, "who on the slightest circumstances in nature, on trifles light as air, gets his suspicions excited."[137] Another senator declared that the embargo laws "will become odious, more odious, if possible, than were the measures of the British Parliament, which drove us into the Revolution."[138] Of course, out of that revolution came several constitutional amendments guaranteeing due process before being deprived of property. Federalists were livid that within a

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[128] Gallatin to Giles, November 24, 1808, 432.

[129] Gallatin to Giles, November 24, 1808, 432.

[130] An Act to enforce and make more effectual an act intituled [sic] "An act laying an embargo on all ships and vessels in the ports and harbors of the United States," and the several acts supplementary thereto, 2 Stat. 506 (January 9, 1809); see also Wood, *Empire of Liberty*, 656.

[131] Sections 1-2; 19 Annals of Cong. at 250 (Lloyd).

[132] Section 11 of An Act to enforce and make more effectual [the Embargo Act], 2 Stat. 506, at 510 (1809). See also Wood, *Empire of Liberty*, 656; Jerry L. Mashaw, "Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era," *Yale Law Journal* 116, no. 8 (June 2007): 1666-1667.

[133] See Giles, 19 Annals of Cong. at 272 ("would it not be perfectly absurd to require that the President should be sent to from the extremes of the United States to issue his Proclamation commanding the insurgents to disperse &c., when their sole object is to disperse as soon as the mischief is accomplished?").

[134] Section 9.

[135] 19 Annals of Cong. at 246 (Goodrich).

[136] 19 Annals of Cong. at 249 (Goodrich); 284 (Hillhouse).

[137] 19 Annals of Cong. at 255 (Lloyd).

[138] 19 Annals of Cong. at 292 (Hillhouse).

single generation, their rights under the Fourth as well as the Fifth and Sixth amendments were under attack.[139]

Despite these serious criticisms, Giles's bill passed with twenty yeas and seven nays.[140] It was, however, a situation of winning the battle but losing the war. Fundamentally, the necessity of military action when enforcing the law amounted to an admission that the government had no good options. By the time a militia was required, the government was dealing with rebellion. The lack of an enforcement mechanism that was non-violent yet forceful, coercive but legitimate, and inexpensive but still effective, proved fatal to federal policies and nearly to government itself. Congress ended the embargo on Jefferson's last day in office, just two months after the act to make the embargo "more effectual" had passed.[141] Years later in Monticello, Jefferson recalled how he had "felt the foundations of the government shaken under my feet" during the embargo fiasco.[142] Jeffersonian Republicans had hoped to show the world that war, the scourge of monarchies, could be avoided.[143] The failure of economic sanctions spelled the failure of republican diplomacy, and the United States declared war on Great Britain in 1812.[144]

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Theoretically, Senator Giles could have avoided charges of unconstitutional legislation by directly criminalizing preparatory acts. With probable cause that a merchant or coaster was taking unlawful preliminary steps, the collector could then seize the goods within the confines of the Fourth Amendment. This would then trigger all the due process guarantees attending criminal proceedings. There was a world of constitutional difference between probable cause that a crime was committed and "reason to believe" that a crime *might* be committed, that is, between law enforcement and proactive enforcement, the latter of which American revolutionaries had condemned as arbitrary government action against the innocent.[145] The way to close the gap was simply to prohibit what Gallatin had phrased *the act of preparing the means of exportation*. Then, even acts of preparation would become a legitimate matter of law enforcement. In essence, criminal law itself would become an enforcement tool.

One way to do this was to make attempts unlawful. But in 1808, attempts had barely been recognized as a crime; Francis Sayre dated its first appearance to a 1784 opinion by Lord Mansfield.[146] Even if early nineteenth-century American federal courts followed recent developments in English common law, most acts of preparation would have been insufficient to

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[139] 19 Annals of Cong. at 246 (Goodrich).

[140] 19 Annals of Cong. at 298.

[141] See Wood, *Empire of Liberty*, 293, 657-658.

[142] Jefferson to Joseph C. Cabell, February 2, 1816, Founders Online.

[143] See Wood, *Empire of Liberty*, 630-633.

[144] See Wood, *Empire of Liberty*, 643, 662; Rao, *National Duties*, 156. Smuggling continued apace during the war. See Andreas, "Traitorous Traders and Patriotic Pirates," chap. 5 in *Smuggler Nation*; Stuart D. Brandes, *Warhogs: A History of War Profits in America* (Lexington: University Kentucky Press, 1997), 56-57.

[145] For instance, the use of general writs of assistance authorized customs officials to search and seize suspected smuggled goods without probable cause.

[146] Francis Bowes Sayre, "Criminal Attempts," *Harvard Law Review* 41, no. 7(1928): 834-837.

amount to an attempt.[147] In any case, attempts were punished less than the intended crimes, which would not have helped Giles's cause in shoring up the embargo laws.

Another option was to criminalize conspiracies, which was a well-established criminal offense and could be punished more severely than the target crime, such as embargo evasions. And because the essence of conspiracy is an agreement to commit a crime—which is a separate offense, and separately punished, from the crime itself—an individual need not have committed the crime or have attempted it. It's the act of agreeing that's criminalized. Punishing both the target offense and the unlawful agreement to commit that offense may seem redundant. But it authorized the government to prosecute everyone involved, including someone like Van Dusen, who had orchestrated the operation without getting his hands dirty. The government could also initiate prosecution as soon as there was an unlawful agreement, without having to wait for preparatory acts to be committed. That is, a conspiracy law would have allowed a fledgling state with a minimal enforcement apparatus to pursue action before the offending deed took place, or even before resentment against the law became unmanageable and turned into an insurrection.

Congress, however, had just rejected a conspiracy law.[148] Giles, along with Representative John Randolph, also from Virginia, had worked on a bill to punish "conspiracy to commit treason against the United States" with a fine of up to five-thousand dollars and a sentence between two to ten years.[149] This came on the heels of Aaron Burr's treason case, during which Chief Justice Marshall interpreted the Constitution's Treason Clause to require an overt act of levying war and held further that conspiring to commit treason could not establish the overt act requirement.[150] The ruling created a problem for the prosecution, for there was no evidence that Burr had actually taken up arms against his country. The case rested entirely on a conspiracy. When the jury acquitted Burr after a mere twenty-five minutes, President Jefferson and his supporters blamed Marshall.[151] They talked of impeachment and even a constitutional amendment as a frontal attack on the judiciary's independence.[152] The attorney general proposed several laws, including a prohibition on "combinations and conspiracies for the purpose of committing treason," which directly repudiated Marshall's decision.[153] Giles and Randolph gladly took up the proposal. As Randolph justified the bill, "the public peace may be disturbed and the public safety endangered, by the previous preparations for such an event," that is, treason.[154] If a treasonous conspiracy law had been on the books, Giles certainly would have used it for the embargo as well. Violating the embargo was not treason, Giles conceded after the *Hoxie* verdict, but "the nature of the offences … partakes essentially of its character," he insisted.[155]

But the bill never passed. Its opponents argued that a treasonous conspiracy law was an end run around the Treason Clause.[156] There was much debate over whether Congress could prohibit treason-like conduct so long as it did not call it treason. During this parlay, critics insisted that

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[147] See Commonwealth v. Peaslee, 177 Mass. 267, 272 (1901) ("the familiar rule that preparation is not an attempt") (Holmes, J.).

[148] 18 Annals of Cong. 2279 (1808).

[149] S. 10, 10th Cong. (1808).

[150] See Hoffer, 159-164.

[151] Hoffer, 171.

[152] Lewis, 421.

[153] Lewis, 424.

[154] 18 Annals of Cong. 1717-1718 (1808).

[155] 19 Annals of Cong. 275 (Giles).

[156] See, e.g., 17 Annals of Cong. 109 (1808) (Senator Samuel Mitchell).

Congress simply could not change, or add to, the Constitution's definition of treason, especially after the Supreme Court had just ruled that a conspiracy to commit treason without an accompanying overt act could not be punished as treason.[157] But this legal argument probably did not have as much sway over the Jeffersonian Republicans in power as the political one. Memories of the notorious 1798 Sedition Act were still fresh.[158] During the "Quasi-War" with France—waged by embargoing trade and abrogating all treaties—President Adams's pro-British party, in control of Congress, had passed the Act and used it to prosecute pro-French, Republican journalists and editors for seditious libel. Less known, the Act also prohibited conspiracies to oppose or impede U.S. policies, including, especially, its foreign policies. Federalists had acted out of a deep fear of a Jacobin conspiracy to infiltrate American politics and destroy American society. But the tyrannically factional exercise of power so sullied them that they never recovered after they lost the presidency and both houses of Congress in what Thomas Jefferson called the "revolution of 1800."[159] For many Democratic-Republicans in 1808, the treasonous conspiracy bill seemed like the reincarnation of the 1798 seditious conspiracy law. Although the bill passed the Senate, the House postponed its consideration "indefinitely," and there it died.[160]

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The notoriety of the 1798 Sedition Act tainted conspiracy laws, and Congress did not enact such a law again throughout the antebellum period, not even as allegations of seditious activity abounded.[161] In 1851, when a Pennsylvanian Quaker by the name of Castner Hanway refused to help a slaveowner execute an arrest warrant under the Fugitive Slave Act, a riot ensued that ended with the slaveowner's death. Without a conspiracy law, and with a maximum sentence of just six months under the Fugitive Slave Act, the government resorted to charging Hanway with treason.[162] But the presiding judge, Supreme Court Justice Robert Grier (who, six years later, would vote with the majority in the *Dred Scott* case), instructed the jury that "the resistance of the execution of a law of the United States accompanied with any degree of force, if for a private purpose, is not treason"—citing *United States v. Hoxie*.[163] It took the jury only ten minutes to return a verdict of not guilty.[164]

Then, in 1859, John Brown attempted a slave revolt at Harpers Ferry. In the tense aftermath, Democratic Senator Stephen A. Douglas set aside the fraught lessons of history and proposed a seditious conspiracy law, expressing the same concerns that had compelled the Federalists to pass the Sedition Act: "I have no hesitation in expressing my firm and deliberate conviction that the Harpers Ferry crime was the natural, logical, inevitable result of the doctrines and teachings of the

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[157] The Supreme Court decision was *Ex Parte Bollman* and *Ex Parte Swartwout*, 8 U.S. (4 Cranch) 75 (1807), which was part of Aaron Burr's treason trial; see Tarrant, "To 'insure,'" 110-111.

[158] An Act for the Punishment of Certain Crimes Against the United States (Sedition Act), 1 Stat. 112 (July 14, 1798).

[159] Wood, *Empire of Liberty*, 239-277.

[160] 17 Annals of Cong. 207 (1808); 18 Annals of Cong. 2279 (1808).

[161] See Joshua T. Carback, "Charging Riots and Insurrections at the Seat of Government," *American Journal of Criminal Law* 49, no. 1 (2021): 20-21. Joshua Carback discusses an attempt to pass a treasonous conspiracy law in 1808, which was rejected for "creating a slippery slope leading to the endless proliferation of new types of treason—the very result the Founders attempted to avoid by explicitly defining treason in the Constitution in the first place." Ibid., 8.

[162] Section 7 of the Fugitive Slave Act, 9 Stat. 462, 464 (1850).

[163] *United States v. Hanway*, 9 West. Law J. 103 (1851).

[164] Andrew Delbanco, *The War Before the War: Fugitive Slaves and the Struggle for America's Soul from the Revolution to the Civil War* (New York: Penguin Books, 2018), 289-292.

Republican party, as explained and enforced in their platform, their partisan presses, their pamphlets and books, and especially in the speeches of their leaders in and out of Congress."[165] In Douglas's mind, abolition talk led directly to slave rebellion, and he sought to nip the former to prevent the latter. Congress "must punish the conspiracy," Douglas maintained; "then," he explained, "you will suppress it in advance."

Notwithstanding the terror and turmoil that the Harpers Ferry raid had unleashed, Congress didn't take up Douglas's bill. Jefferson Davis, then a senator, doubted whether it was the federal government's role to ensure domestic peace within the states.[166] Others feared that hyper-partisan uses of criminal law could backfire. A Republican senator warned that "there may be a time when the Federal action that you are now invoking for the protection of slavery" may be "employed for freedom as well as for slavery."[167] It "will be a dangerous precedent to set," he cautioned.[168]

It took the ultimate rebellion, civil war, to overcome constitutional and political scruples. In 1861, Congress, without its Southern section, passed "An Act to define and punish certain Conspiracies," which punished "two or more persons" if they

> shall conspire together to overthrow, or to put down, or to destroy by force, the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, possess any property of the United States against the will or contrary to the authority of the United States; or by force, or intimidation, or threat to prevent any person from accepting or holding any office, or trust, or place of confidence, under the United States.[169]

Tellingly, the word "sedition" was left out of the text. So was the word "treason." But the 1861 Act was, at its heart, a seditious, or treasonous, conspiracy law. Some congressmen saw right through it, repeating arguments made before that the law was a circumvention of the Constitution's strict requirements for a treason conviction. The Treason Clause, they maintained, was intended "to restrict the power of Congress in the creation of a political crime kindred to treason."[170] In response, Senator Lyman Trumbull argued that the law simply sought "to punish persons who conspire together to commit offenses against the United States not analogous to treason."[171] Both sides could point to some part of the text for support. Conspiracies to "overthrow" or to "levy war" against the government sounded in treason, while punishing conspiracies "to prevent, hinder, or delay the execution of any law" seemed more like an enforcement measure.

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[165] Cong. Globe, 36th Cong., 1st Sess. 553 (1860) (Stephen A. Douglas).

[166] Tarrant, "To 'insure,'" 115.

[167] Cong. Globe, 36th Cong., 1st Sess. 8 (1859) (John Parker Hale); see also Tarrant, "To 'insure,'" 113, 115-118.

[168] Hale, 9.

[169] 12 Stat. 284 (1861).

[170] Protest of the minority of the Senate of the United States against the passage of the House bill No. 45, entitled "An act to define and punish certain conspiracies," Cong. Globe, 37th Cong., 1st Sess. 276-277.

[171] Cong. Globe, 37th Cong., 1st Sess. 277 (Lyman Trumbull).

In wartime, the value of a seditious conspiracy law seemed obvious, and the law easily passed.[172] Nevertheless, there was evidence of unease. According to one scholar, not a single indictment under the 1861 Act resulted in a conviction during the Civil War.[173] Another indication of misgivings comes after the war, during congressional debates about a bill to enforce the Fourteenth Amendment against Ku Klux efforts to deprive black citizens of their life, liberty, and property. It ultimately passed as the Enforcement Act of 1871 (also known as the Civil Rights Act or the Ku Klux Klan Act) and is today known for creating a private cause of action against state actors who violate federal rights, the foundation of modern civil rights legislation. The Act also contained a conspiracy provision—the first third of which was practically identical to the 1861 conspiracy law—which received heavy criticism. Opponents of the 1871 Act, like opponents of the 1861 Act, expressed concerns that conspiracy prosecutions would be used for "political warfare" and pointedly brought up Senator Douglas's efforts to pass a seditious conspiracy law to uphold slavery.[174]

Supporters responded with legal precedent and experience. First, the 1861 law already punished conspiracies to violate U.S. laws, and the 1871 Act was no different.[175] Moreover, as the Republican senator from Nevada maintained, "If the power to preserve this Union, to suppress rebellion, to suppress Ku Klux organizations … is not in the Constitution, we have no Government [and] secession is a fixed fact."[176] In other words, without a conspiracy law, government would fail, and the result would be another civil war. Ultimately, the provision survived and became Section 2 of the Enforcement Act.[177]

In 1883, however, the Supreme Court struck down Section 2, concluding that Congress had exceeded its authority to legislate under the Fourteenth Amendment, which applied only to state

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[172] Tarrant, 119-121.

War prompted a reconsideration of seditious conspiracy laws in peacetime as well. Peleg Sprague, a federal district judge in Massachusetts, maintained that if the 1861 law had been on the books "and had been faithfully executed for the last twenty years, the catastrophe in which we are now involved would probably have been prevented" because the government would have been able to deal with "the incipient steps which lead to resistance and rebellion." Judge Sprague did not refrain from explicitly identifying the bad actors who might have been prosecuted under the law, thereby averting civil war. "Under the influence or pretence [sic] of this doctrine"—the doctrine of states' rights—"we have seen high functionaries and officials, of almost every grade, guilty of the most appalling perfidy," Sprague deplored. He continued:

> Even legislative bodies and public conventions have assembled for the purpose of devising plans and carrying out measures for the overthrow of the government, and they have prosecuted their work by public ordinances and declarations, and made preparations for actual hostilities; and all this with legal impunity, there being no statute of the United States by which any one of these conspirators could be arrested as a criminal.

Cas. No. 18277, at 292 (1861); Cas. No. 18274, at 296-298 (1863). Sprague was not the only one who saw the value of conspiracy laws to prevent political views from blossoming into rebellion. Senator Clement L. Vallandigham, a Democrat from Ohio, asserted that the 1861 law should have been passed "four or five years ago, because there are not a few, I believe, in some portions of the free States of this Union, who might have been justly and properly punished under it for conspiracies to resist the fugitive law." Cong. Globe, 37th Cong., 1st Sess. 232 (1861).

[173] Tarrant, 121-122.

[174] Cong. Globe, 42nd Cong., 1st Sess. 688 (1871) (Carl Schurz).

[175] When Congressman John F. Farnsworth voiced concerns about the constitutionality of Section 2, his colleague Samuel Shellabarger interrupted to point out that "he and I were both in Congress when [the 1861 conspiracy law] passed" and that "I think the gentleman voted" for that law. Cong. Globe, 42nd Cong., 1st Sess., app. 113 (1871).

[176] Cong. Globe, 42nd Cong., 1st Sess. 830 (1871) (Senator Stewart).

[177] See, e.g., Cong. Globe, 42d Cong., 1st Sess. 686-688 (1871) (Senator Carl Schurz).

actions and not to private individuals.[178] The 1861 conspiracy law, by contrast, is still on the law books today, but rarely used.[179] As scholars have recently explained, "To label something sedition goes beyond normal criminality, suggesting that the conduct strikes at the heart of American democracy and falls within the same conceptual category as the most serious political crimes, such as rebellion, insurrection and treason."[180]

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Politically charged issues, like the prosecution of a former vice-president or former confederate belligerents, made conspiracy laws seem analogous to treason laws and, therefore, were controversial. As a result, the more lasting cause of change in American criminal justice came not from civil rights enforcement but from tax enforcement.[181] Indeed, within the Justice Department's first six months, there were 2,272 internal revenue cases, which comprised *two-thirds* of all federal criminal cases; by contrast, only forty-three Enforcement Act cases were in the docket.[182] To be sure, protecting the civil rights of the formerly enslaved transformed federalism and required new bureaucracies, like the Freedman's Bureau and the Department of Justice.[183] But the American Civil War also marked a watershed in the structure of the U.S. fiscal state and, significantly, the need to enforce revenue laws blunted conspiracy laws' partisan edge.

The Union's expenditures in 1861, the first year of war, were six times the previous year's budget and only grew as the fighting continued.[184] At one point, outlays reached $2.5 million per day.[185] To pay for war, the government decided to borrow. When borrowing costs spiked, Congress

[178] *United States v. Harris*, 106 U.S. 629 (1883). Section 2's civil liability portion survived *Harris* and was later codified and remains today in 42 U.S.C. § 1985. In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court held that state action was not required to sue under § 1985 and that the statute was within Congress's power to regulate private actions under the Thirteenth Amendment.

[179] See 18 U.S.C. § 2384.

[180] Scott R. Anderson et al., "Seditious Conspiracy: What to Make of the Latest Oath Keepers Indictment," *Lawfare*, January 14, 2022, https://www.lawfareblog.com/seditious-conspiracy-what-make-latest-oath-keepers-indictment ("seditious conspiracy remains an exceptionally serious, and rarely prosecuted, criminal offense").

[181] Cf. "Conspiracy: 'Darling Of the Prosecutor's Nursery," *New York Times*, May 30, 1971 (reporting that "This doubt on the part of jurors [against the government] apparently does not apply to conspiracy cases where political figures are not involved").

[182] 1870 Attorney General Report, 6. The breakdown was:

Customs cases	135
Internal revenue cases	2,272
Post office cases	135
Cases under the 1870 Enforcement Act	43
Cases under the 1870 Naturalization Act	2
Miscellaneous	782
TOTAL	3,369

[183] Cf. Jed Handelsman Shugerman, "The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service," *Stanford Law Review* 66, no. 1 (2014).

[184] Roger Lowenstein, *Ways and Means: Lincoln and His Cabinet and the Financing of the Civil War* (New York: Penguin Press, 2022), 50; Lev Menand and Joshua Younger, "Money and the Public Debt: Treasury Market Liquidity as a Legal Phenomenon," *Columbia Business Law Journal* (2023): 243-246.

[185] Lowenstein, *Ways and Means*, 262.

turned to printing money.[186] Because money doesn't grow on trees, Congress imposed new taxes for the first time since the War of 1812.[187] The 1862 Revenue Act was "the longest and most detailed statute the country had ever seen," according to Roger Lowenstein.[188] It instituted the nation's first federal income tax and established the Bureau of Internal Revenue.[189] In two years, internal revenue surpassed duties on foreign trade for the first time and raised a record $110 million.[190] But as war dragged on, Congress raised taxes again in 1864, seeking to double the nation's tax receipts.[191] By the time Confederate General Robert E. Lee surrendered at Appomattox in 1865, Union debt amounted to $2.68 billion, forty-one times as much as at the start of hostilities.[192]

The government needed more revenue to pay off its debts, but the American public did not like taxes any more than it did before war. To reconcile these two conflicting imperatives, Congress reduced income tax rates in the 1867 Revenue Act such that ninety percent of all revenue came from taxes on whiskey and tobacco.[193] The decision to target these two items can be explained. Both were considered luxury goods, and as the House Ways and Means Committee chairman reasoned in 1866, "all civilized nations requiring large revenues" sought to "squeeze out of those articles considered as luxuries by mankind."[194] The United States, he concluded, "should doubtless conform to that of the world." The temperance movement also helped to keep whiskey taxes in place.[195] And not coincidentally on the heels of Union victory, taxing whiskey and tobacco leaf disproportionately burdened the former Confederate states.[196]

Americans also did not like large centralized government, but the Bureau of Internal Revenue remained. Nonetheless, it did not resemble its European counterparts.[197] As Treasury Secretary Hugh McCulloch observed in 1868, the "systems of revenue which are suited to England, or Germany, or France [were] unsuited to this country."[198] In a federal system that was politically

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[186] In 1862, Congress authorized the Treasury to issue a new series of paper notes, "greenbacks," a precursor to contemporary cash, with no underlying value other than the full faith and credit of the United States. Lowenstein, 90.

[187] See "Statement of revenue collected from the beginning of the government to June 30, 1875, from the following sources," in 1875 Annual Report, 571-573.

[188] Lowenstein, *Ways and Means*, 128.

[189] Technically, the 1861 Revenue Act included the first income tax, but it was never implemented. See Lowenstein, 126; "Historical Highlights of the IRS," IRS, last modified November 2, 2021, https://www.irs.gov/newsroom/historical-highlights-of-the-irs.

[190] Lowenstein, *Ways and Means*, 262, 286.

[191] Lowenstein, *Ways and Means*, 286.

[192] Lowenstein, *Ways and Means*, 314.

[193] An Act to Amend Existing Laws relating to Internal Revenue and for other Purposes, 14 Stat. 471 (March 2, 1867); Lowenstein, *Ways and Means*, 328; Huret, "The Contested State," 101; IRS, "Historical Highlights of the IRS." [See also Ron Chernow, *Grant*, 796] On liquor taxes, see Prohibition website. See also Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940* (New Haven, CT: Yale University Press, 2013), 273-275 (on criminal statutes and prosecutions for enforcing excise on liquor and tobacco).

[194] Cong. Globe, 39th Cong., 1st Sess. 2436 (1866) (Justin Morrill).

[195] 1868 Treasury Annual Report xiv ("The late exorbitant tax on distilled spirits, intended, perhaps, not merely as a revenue measure, but as an encouragement to temperance…"); see also Lowenstein, *Ways and Means*, 258.

[196] Certainly, whiskey and tobacco were produced and sold throughout the country. But taxing the production of goods affected small-time farmers and producers more than large manufacturers, and the former were concentrated in the South. See Patrick Mulford O'Connor, "Tobacco Politics and the Reconstruction of American Governance, 1862-1933" (PhD diss., University of Montana, 2019), 44, 89-98; Lowenstein, *Ways and Means*, 328; Ron Chernow, *Grant*, 796. Cf. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (updated ed. 2014), 450-451 (on the limited federal largesse that the Northern Republican-controlled Congress allocated to the South).

[197] See José Luís Cardoso and Pedro Lains, ed., *Paying for the Liberal State: The Rise of Public Finance in Nineteenth-Century Europe* (New York: Cambridge University Press, 2010).

[198] Treasury Annual Report (1868), XI.

and philosophically wedded to limited government, national legislators put together a minimalist bureaucracy. In 1867, the Bureau had roughly 6,000 employees.[199] Bureau Commissioner Edward A. Rollins thought that "the number of persons employed directly and indirectly in the collection of internal revenue is very large," but conceded that "it certainly is not large in comparison with the civil list for like service abroad."[200] (Actually, the bureaucrat may have been conceding the former point to highlight the latter.) Indeed, France in 1774 had nearly 30,000 employees in its tax collection agency, the Ferme Générale.[201] Although the federal government had emerged from the Civil War with a muscular taxing power, it had not yet created a comparably muscular collections agency.

So, how did the postbellum American state extract revenue with such a barebones bureaucracy? Here, the similarities ended between whiskey and tobacco taxes; enforcement was altogether a different matter. The government negotiated its authority with tobacconists, while it dealt punitively with distillers.[202] This differential treatment had to do with class, politics, as well as differences in the production of tobacco and whiskey.

The tobacco industry was dominated by established manufacturers, many of whom were prominent citizens. They were critical of federal tax policy not because they had to pay taxes—they accepted that luxuries would be taxed—but because tax evasion resulted in an inequitable revenue system.[203] In other words, a government without an effective enforcement made fools out of those who paid their taxes. So tobacco manufacturers organized and formed trade associations, which lobbied Congress to revise the 1867 Revenue Act. As one industry leader declared, "We are the taxpayers of tobacco and must be protected."[204] The subsequent 1868 Revenue Act did so by mandating the sale of tobacco leaf to federally licensed tobacconists, who paid taxes upon purchase.[205] This not only facilitated the collection of tobacco taxes; the significant capital requirements for a license also protected them from competition and kept prices of raw leaf low.[206] The licensing system essentially created a monopsony. Federal regulations allowed large manufacturers to control the nation's supply of tobacco and thereby secure record profits. In turn, the government saw its tobacco receipts increase. Between 1868 and 1869 (a comparison that captures the difference between the 1867 and 1868 revenue laws), tobacco taxes jumped from 18.7 to 23.4 million dollars.[207] A year later, that number leaped again to 31.3 million dollars. By the early

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[199] Treasury Annual Report (1867), 266-267. The Internal Revenue Commissioner's Report indicated 240 collectors, 240 assessors, 3,110 assistant assessors, 778 temporary assistant assessors, 10 revenue agents, between 135-219 revenue inspectors (depending on the month), 506 inspectors of tobacco, 545 inspectors of distilled spirits, 88 inspectors of petroleum and coal, 219 detectives, and an unspecified number of clerks. Clerks for assessors were paid from the public treasury, while clerks for collectors were paid by the collectors themselves.

[200] 1867 Treasury Annual Report 268. On Rollins, see Stephen W. Dana, *Sermon in Memory of Hon. E.A. Rollins* (1885) [requested at UTS and NYHS].

[201] Of its 28,762 employees, over 20,000 were tasked with policing. In addition, the Crown itself had 685 employees overseeing the Ferme Générale. White, "Eighteenth-Century France," 647, 657.

[202] The phrase "negotiated authority" comes from Gautham Rao's *National Duties*, which describes the federal government's method of collecting customs duties during the revolutionary era and early republic; customs officials and local merchants negotiated how, and how much, importers would pay. Their working relationship was a boon for the fragile, new national government, which gained both legitimacy and revenue as merchants cooperated with its officers.

[203] O'Connor, "Tobacco Politics."

[204] Quoted in O'Connor, "Tobacco Politics," 54.

[205] O'Connor, "Tobacco Politics," 39; see also *id.* at 69-70.

[206] The licensing-based tax system benefitted everyone except for leaf growers and dealers primarily in the South. O'Connor, "Tobacco Politics," 89, 93.

[207] Commissioner of Internal Revenue, *Annual Report: Fiscal Year Ended June 30, 1900* (1900), https://www.irs.gov/pub/irs-soi/1900dbfullar.pdf, 387.

1880s, the *U.S. Tobacco Journal* declared that tobacco tax frauds had become non-existent.[208] Regardless of the verity of that observation, the fact that it was made is indicative of the cozy relationship between the Bureau of Internal Revenue and the tobacco industry. In fact, a leading New York cigar manufacturer later became a revenue collector who embarked on raids against "moonshine" distillers.[209]

That the federal government—whose agents included a tobacconist—relied on searches and seizures of distilleries shows how differently it collected whiskey taxes. One reason was that mandating the sale of raw goods to license holders was not possible when distilled spirits could be made from just about any grain or fruit. So, the government relied on self-reporting and inspections. The 1862 Revenue Act required distillers to keep a daily record of the amount of ingredients used for production as well as the number of gallons distilled and sold.[210] Inspectors would measure the proof of each barrel, which they would mark on the barrel along with the number of gallons and date of inspection.[211] Finally, the collector would compare the books with the markings, collect taxes, and issue a sales permit or transportation bond.[212]

A system based largely on individual disclosures was certain to fail, especially when those individuals were not inclined to be cooperative. Unlike tobacconists, distillers didn't form national associations whose leaders wined and dined Washington bureaucrats. Their relationship with the federal government was not a collaborative one.[213] Those from the mountain regions of the former Confederacy were particularly hostile to federal authority and, as an extension, to federal taxes. To them, whiskey taxes not only curtailed what they deemed an economic necessity (rather than a luxury); taxes on their "traditional mountain dew" also undermined what they viewed as an inalienable right that they had long enjoyed—grievances that echoed the protests of the Vermont embargo evaders, insurrectionists during the Whiskey Rebellion and Fries's Rebellion, and, before them, America's founding fathers.[214] In 1870, a Raleigh, North Carolina, publication directly compared the liquor tax to the hated taxes of the British empire.[215] Their grievances also mirrored the objections of slaveowners and secessionists. In fact, during the Civil War, many mountain distillers had embraced the confederate cause and, after the war, opposed Reconstruction and aligned with the Ku Klux Klan.[216] Moonshiners and Klansmen intimidated and attacked revenue collectors, who were often also tasked with enforcing civil rights laws.[217] Revenuers reported that

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[208] O'Connor, "Tobacco Politics," 79.

[209] O'Connor, "Tobacco Politics," 71-72.

[210] § 45, p. 448.

[211] § 43, pp. 447-448.

[212] §§ 45-46, pp. 448-449.

[213] See Bruce E. Stewart, "Distillers and Prohibitionists: Social Conflict and the Rise of Anti-Alcohol Reform in Appalachian North Carolina, 1790-1908" (PhD diss., University of Georgia, 2007); Huret, "The Contested State." According to Bruce Stewart, northern distillers in the early 1860s didn't object to the whiskey tax out of a sense of patriotism. Stewart, "Distilleries and Prohibitionists," 114.

[214] See Gordon B. McKinney, "Moonshiners, Law Enforcement, and Violence: Legitimacy and Community in Western North Carolina, 1862-1882" (unpublished manuscript, November 1995, on file with author), 4; Wilbur R. Miller, "The Right to Make a Little Licker: Moonshiner Resistance to Federal Authority," chap. 3 in *Revenuers & Moonshiners: Enforcing Federal Liquor Law in the Mountain South, 1865-1900* (Chapel Hill: University of North Carolina Press, 1991). Wilbur R. Miller, "The Revenue: Federal Law Enforcement in the Mountain South, 1870-1900," *Journal of Southern History* 55, no. 2 (1989).

[215] Stewart, "Distilleries and Prohibitionists," 143.

[216] Stewart, 149-154; Huret, "The Contested State"; Miller, *Revenuers & Moonshiners*, 43-44, 53-54; see also Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Resistance* (New York: Harper & Row, 1971).

[217] During the 1871 debate on a bill to enforce the Fourteenth Amendment and eliminate the Ku Klux Klan, Senator William Morris Stewart mentioned the murder of revenue officers as a reason for the bill. Cong. Globe, 42d

they dared not attempt to collect taxes for fear of being "Ku-kluxed."[218] It was overdetermined that collecting taxes on whiskey would be more difficult than for tobacco.

It did not help that taxes were too high.[219] The 1862 Act had begun with a 20-cent tax per gallon; in 1866, the tax had increased tenfold to two dollars per gallon (nearly forty dollars today).[220] As Bureau Commissioner Rollins explained the economics of the situation, "the limit of tax is reached when its amount not only becomes an incentive to fraud on the part of the producer, as most high taxes have proven, but where no inconsiderable portion of it may safely be used for the corruption of officers employed in its collection."[221] The people would pay "cheerfully" if taxes were fair, he continued, but they would feel justified in evading exorbitant taxes.

This breakdown in lawfulness was troubling, but for Rollins, even more serious than cooked books was dishonest officials. And there were many of them, for not only was it cheaper to bribe tax officials than it was to pay taxes; it was easy, too. In fact, the government's very collection scheme made it *too* easy to collude with the taxman. For one thing, inspectors were recommended by local collectors, who often received names from distillers themselves.[222] Regulators were clearly familiar with the regulated; sometimes, too familiar. Given the travel involved in their duties, some inspectors boarded in a distiller's home, setting up ideal conditions for collusion.[223] Even worse, distillers, not the government, paid inspectors.[224] This was "simply the institution of a farce," an 1867 report decried.[225] A fee-payment system may have ostensibly saved the government money, but it ended up costing the government in lost revenue. The same report estimated that "at least seven-eighths of the entire amount of spirits manufactured under the present law have escaped taxation."[226]

One obvious solution was to reduce the tax rate. As Rollins pointed out, "Most countries now deem it advisable to levy only a moderate tax upon spirits."[227] So, the following year, Congress lowered the tax to 50 cents per gallon.[228] This seemed to make a difference. In 1868, when taxes

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Cong., 1st Sess. 830 (1871) ("If the power to preserve this Union, to suppress rebellion, to suppress Ku Klux organizations that murder American citizens because they love the Union, is not in the Constitution, we have no Government, secession is a fixed fact, any State that desires to be hostile to the General Government can, by assassination, murder those who are friendly to the Government, murder your revenue officers, murder them as they have done and are doing daily."); see also Stewart, "Distilleries and Prohibitionists," 122; McKinney, "Moonshiners," 9.

[218] J.B. Eaves to Pinkney Rollins, April 20, 1871, quoted in Stewart, "Distilleries and Prohibitionists," 151.

[219] Distilled spirits were the largest source of revenue for the federal government. See 1868 Treasury Annual Report xiv, 471-472; see also Raitz, "Making Bourbon," 267. See also "Price-Chart of Cheapest Grade Whiskey for 56 Years," in *Scribner's Statistical Atlas of the United States* (New York: Charles Scribner's Sons, 1883), plate 82. The lowest prices of whiskey per gallon in New York jumped from $0.15 in 1861 to $2.10 in 1867.

[220] 1862 Revenue Act § 41, p. 447; 1866 Revenue Act § 32, p. 157.

[221] 1867 Treasury Annual Report 271.

[222] 1867 Treasury Annual Report 268-269.

[223] Raitz, "Making Bourbon," 280.

[224] 1862 Revenue Act § 43, p. 448.

[225] Select Committee Report, 4.

[226] Select Committee on Internal Revenue Frauds Report (February 25, 1867), 1. Others estimated around half of the revenue was collected. See James Ford Rhodes, *History of the United States from the Compromise of 1850* … vol. 4 (New York: Macmillan Co., 1912), 233 (citing David A. Wells, Special Commissioner of the Revenue); his Dec. 1866 report: U.S. Congress, House, Committee of Ways and Means, Report of the Special Commissioner of the Revenue, 40th Cong., 2d Sess., 1868

[227] 1867 Treasury Annual Report 273.

[228] July 20, 1868 Revenue Act § 1, 15 Stat. 125.

were two dollars a gallon, receipts totaled almost $19 million; in 1869, with the lower taxes, receipts more than doubled to $55 million.[229] But tax fraud persisted.

Another proposal was to base the tax on the capacity of distilleries, a number that could not be as easily fabricated as the amount produced.[230] But Rollins rejected the idea. It sounded simple in theory, but it was actually unworkable, he explained. Using capacity as the basis would require a standard of measurement, but coming up with one was not so straightforward. Besides the size of the still and tubs, capacity also depended on a number of irreducible factors, such as the quality of the ingredients, fermentation methods, temperature, time, and, perhaps most importantly, the skill of the distiller.[231] Moreover, someone—no doubt, a government official—would have to ensure that whatever standard was established would be applied uniformly. Rollins concluded that "the government could no more dispense with the agency of officers or representatives than it can under the present system."[232] The need for government officials who exercised discretion created "inducements to private and official corruption [that] would be equally great," Rollins pointed out.[233] In the end, taxing capacity wouldn't reduce government bureaucracy or surveillance, and neither would it stamp out fraud.[234]

According to Rollins, this left one last solution: a new and improved civil service. Rollins and many congressmen blamed tax evasion on revenue officers, especially local inspectors. The 1867 report on internal revenue frauds noted that "inspectors are not generally a superior class of men, nor are they always distinguished for intelligence, character, or social position."[235] The post did not attract qualified people who would be less susceptible to financial temptation because there was no job security for political spoils and because pay was insufficient. Rollins maintained that a civil service "like that existing in either of several countries abroad" could even secure "a very large part" of the hard-to-pay-cheerfully "tax of two dollars per gallon."[236] He pointed out that countries like England, France, and Germany all mandated civil service exams, granted promotions based on merit, and required cause for removals.[237] British officers had to be free of debt, while German officers passed educational and moral fitness requirements. In these countries and "any where [sic] else where a proper system determines appointments," Rollins reported, corruption "very rarely exists."[238]

In addition to higher standards, European bureaucracies employed more people. Although Rollins did not specify numbers or even ask for a larger staff, he made two points when comparing the Bureau with the English tax service that together highlighted the difference that more manpower could make. First, England imposed "a duty of ten shillings per imperial gallon, about the present

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[229] Raitz, "Making Bourbon," 269.

[230] See Select Committee Report, 5.

[231] 1867 Treasury Annual Report 279.

[232] 1867 Treasury Annual Report 280.

[233] 1867 Treasury Annual Report 280.

[234] Rollins acknowledged that current regulations did require distillers to provide information on capacity. See also See also July 20, 1868 Act § 10, p. 129. But Rollins explained that such disclosure was simply "a means for the prevention and detection of fraud"—by raising a red flag "if the product returned is unreasonably small"—rather than as a basis for taxation, which "has always been regarded as impracticable." 1867 Treasury Annual Report 280.

[235] Select Committee Report, 4.

[236] 1867 Treasury Annual Report 284.

[237] 1867 Treasury Annual Report 269-270. Cf. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (1982), 47 ("A civil service career system is one of the hallmarks of the modern state. Its chief characteristics are political neutrality, tenure in office, recruitment by criteria of special training or competitive examination, and uniform rules for the control of promotion, discipline, remuneration, and retirement.").

[238] 1867 Treasury Annual Report 270.

tax of this country," which would have created the same incentives to defraud the government as in the United States.[239] But also, a revenue officer visited every distillery three times a day and recorded the condition of every vessel and its contents.[240] Officers could also make night visits and require changes to distilling equipment. "Thus," Rollins concluded, "it will be seen that the government, in the person of its officers, has a constant guard over production, removal, and almost over consumption itself." All this activity required a sufficient headcount. The most effective way to collect burdensome taxes, the commissioner implied, was to adequately staff the Bureau with salaried civil servants, just like in England.

Rollins's call for civil service reform resonated with many leaders in business and in Congress, but their support was based on the potential to make government administration more efficient and, thus, smaller.[241] Indeed, the congressional committee that worked on reforming civil service was named the "Joint Select Committee on *Retrenchment*."[242] The committee's bills never passed, for patronage was too entrenched to uproot, especially when proposals modeled on European examples were denounced as undemocratic, aristocratic, and monarchical.[243] But the reformers did succeed in establishing the Department of Justice, which Jed Shugerman has shown was a measure to reduce bureaucracy by professionalizing it.[244]

It was one thing to augment the independence of the government's law department; it was quite another to strengthen its investigatory agencies. "I fully admit," Rollins conceded in the context of tax enforcement, "that the spirit of our people is somewhat averse to the permanent service I so strongly recommend."[245] Congress soon confirmed his sense of the American spirit. While the 1867 Revenue Act authorized the Bureau commissioner to hire as many detectives "as may in his judgment be necessary," the 1868 Act curtailed his power "to employ competent detectives, not exceeding twenty-five in number."[246] Despite the challenges of tax enforcement, the Treasury's 1868 Annual Report noted that the numbers of special agents, inspectors, and assessors were "being gradually reduced."[247]

With weak enforcement, revenue frauds continued, which finally prompted a congressional investigation. Although the House resolution directed the select committee to look into "alleged fraud of any parties concerned in the manufacture of distilled spirits, tobacco, and cigars," the committee's three-hundred-page report focused entirely on whiskey tax evasion.[248] The report noted that the problem existed throughout the country and not just in the formerly belligerent South.

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[239] 1867 Treasury Annual Report 273.

[240] 1867 Treasury Annual Report 275.

[241] Ari Hoogenboom, "Thomas A. Jenckes and Civil Service Reform," *Mississippi Valley Historical Review* 47, no. 4 (1961); Jed Handelsman Shugerman, "The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service," *Stanford Law Review* 66, no. 1 (2014).

[242] Shugerman, "Creation of DOJ," 141.

[243] Hoogenboom, "Jenckes and Civil Service Reform," 641-642, 650. The Pendleton Civil Service Reform Act, which was enacted in 1883, was modest. As Jed Shugerman has observed, "Unlike their European counterparts, America's civil service reformers did not gather momentum in the 1870s; they hit stiff resistance. Today, most Western democracies protect their prosecutors and law officers with more political independence, in contrast with the United States." Shugerman, "Creation of DOJ," 169.

[244] Shugerman, "Creation of DOJ."

[245] 1868 Treasury Annual Report 488.

[246] 1867 Revenue Act § 7, p.473; 1868 Revenue Act § 50, p. 145.

[247] 1868 Treasury Annual Report 473. There was some progress. In 1872, inspectors, now called gaugers, were paid by the federal government, not by distillers. Revenue Act of June 6, 1872, § 14.

[248] Select Committee Report 1. O'Connor suggests that the committee report didn't delve into tobacco fraud not because it didn't exist but because illicit tobacconists were difficult to detect. O'Connor 50.

"Few, if any, of the distilleries in the large cities of the United States now in operation are doing a legitimate business," it decried, thereby depriving the government of "one of the principal sources of internal revenue."[249]

Significantly, the report ignored the structural deficiency in the civil service and identified the cause of the problem as a lack of individual "integrity" and "fidelity."[250] Accordingly, the proposed solutions centered on greater criminalization and prosecution. Rather than allowing the Treasury "to compromise and settle cases," the report suggested that tax violations be handled like any other legal violation, that is, by using "courts, open to the observation of the public, in which cases are prosecuted by public officers, and evidence is received according to the rules of law, subject to the test of cross-examination and liable to rebuttal."[251] In other words, revenue fraud ought to be treated as a criminal offense, not as a regulatory matter. This "would be far more effective in holding a rod of terror over the heads of evil doers," the committee members maintained.[252] Reading the report in the context of urgent calls for civil service reform, it was unmistakable that the committee had opted for criminal prosecution over a European-style civil service.

Notwithstanding his more contextualized views, Rollins, too, could not help describing tax evasion in terms of "evil."[253] His analysis went further by identifying two hurdles to criminal prosecution. First, "men of capital but without conscience have sometimes been silent partners of those whom they have put to the front for bribery and perjury and the perils of detection." These silent businessmen were the most culpable, but not having committed the illicit deed, they were the hardest to pursue. Second, it was "exceedingly difficult" to detect collusion between dishonest proprietors and revenue officers. As Rollins explained, "It can rarely be done except upon the disclosure of some party privy to the arrangement, and that can hardly be expected when all are equally guilty and equally liable to punishment."

The answer to these problems of agency and secrecy was a conspiracy law that prohibited unlawful agreements and punished all co-conspirators. In 1866, Congress passed a law prohibiting "any inspector, assistant inspector, or officer" from conspiring "with the proprietor of any distillery … to defraud the United States of the revenue or tax arising from distilled spirits."[254] This conspiracy provision, however, did not encompass the *silent men of capital*. So when Congress amended the revenue laws the following year—less than a week after the House select committee presented its report—it added a broader conspiracy law. Section 30 of the 1867 Revenue Act criminalized conspiracies to defraud or violate the laws of the United States.[255] It also set punishment at a fine of one-thousand to ten-thousand dollars and a sentence of not more than two years—much less than the punishment for treason, but more serious than the penalty for embargo violations or tax evasion. Not only did Section 30 set forth real consequences, but it also authorized the government to go after individuals simply for agreeing to violate the Revenue Act.

The reception of Section 30 was completely different from the 1798 Sedition Act, the 1861 conspiracy law, and the 1871 Enforcement Act. For one thing, Section 30 appears to have been uncontroversial. According to one scholar, there were no hearings or debate, and no reports, on

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[249] Select Committee Report 1-2.
[250] Select Committee Report 1.
[251] Select Committee Report 2-3.
[252] Selection Committee Report 3.
[253] 1867 Treasury Annual Report 273.
[254] 14 Stat. 159 (July 13, 1866).
[255] An Act to Amend Existing Laws relating to Internal Revenue, and for other Purposes, 14 Stat. 471, at 484 (March 2, 1867).

Section 30.[256] Moreover, the Supreme Court did not just uphold the 1867 conspiracy provision; it ruled that Section 30 applied to *all* federal laws, even though the historical and statutory contexts suggested that Section 30 was intended to deal specifically with the nonpayment of taxes.[257] While many conspiracy cases in the late nineteenth century involved tax prosecutions, they also included a conspiracy to steal money from the national bank and even a conspiracy to commit voting fraud.[258] In the 1898 West's *Digest* of federal cases, sixteen of the thirty-three reported conspiracy cases involved taxes (of those sixteen, thirteen involved whiskey taxes). Section 30, which arose from the need to enforce the revenue laws, thus became the federal government's first general conspiracy statute, the predecessor to the contemporary "catch-all" conspiracy law found in 18 U.S.C. § 371.[259]

That the first two conspiracy laws enacted right after the Civil War were intended to enforce whiskey taxes and the rights of Black citizens makes sense given that Southern malefactors tended to violate both. But legislators clearly did not view the Revenue Act's conspiracy provision as a partisan measure, in part because it didn't target politicians or newspaper editors and in part because resistance to whiskey taxes didn't seem to pose a serious threat of renewed civil war. To be sure, farmers and distillers could have political impact when acting in concert. This was Justice Livingston's dilemma when trying to distinguish between public and private intent, between treasonous and non-treasonous opposition. A resolution to the dilemma appeared by 1867 in the Revenue Act: distinguish prosecutions for treasonous conspiracies, which would be rare and hard to prove, from prosecutions for general conspiracies, which would be used as an enforcement mechanism.[260] If *Hoxie* had come up at the end of the nineteenth century rather than at the beginning, the defendant would have been charged not with treason or conspiracy to commit treason, but with smuggling and conspiracy to evade the embargo.

Section 30 was a turning point in the development of the American state. To collect taxes and, more generally, to enforce its laws, the president could not always use military force against wayward citizens, at least not without diminishing the people's trust in government.[261] Nor could the

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[256] Goldstein, "Conspiracy to Defraud," 418; Cong. Globe, 39th Cong., 2d Sess. 1920 (1867); *Report of the Select Committee on Internal Revenue Frauds to the House of Representatives*, 39th Cong., 2d Sess. (Washington: Government Printing Office, 1867).

[257] *United States v. Hirsch*, 100 U.S. 33 (1879) ("the section does not mention the revenue or the revenue laws, but in terms includes every form of conspiracy against the United States"); Goldstein, "Conspiracy to Defraud," 418-419.

[258] *United States v. Martin*, 4 Cliff. 156, 26 F. Cas. 1175 (C.C.D. Mass. 1870) (No. 15,728) (conspiracy to steal money from national bank); *United States v. Wrape*, 4 Cin. Law. Bul. 433, 28 F. Cas. 780 (1879) (voting fraud).

[259] Section 30 became section 5440 of the Revised Statutes, which then became section 37 of the 1909 Crimes Act, 35 Stat. 1096 (March 4, 1909), which in 1934 became 18 U.S.C. § 88, which in 1948 became 18 U.S.C. § 371. See also Goldstein, "Conspiracy to Defraud the United States," 418-419; Steven R. Morrison, "The System of Modern Criminal Conspiracy," *Catholic University Law Review* 63, no. 2 (Winter 2014): 388; Congressional Research Service, "Federal Conspiracy Law: A Brief Overview" (April 3, 2020), https://fas.org/sgp/crs/misc/R41223.pdf, 4.

[260] In the mid-1970s, Professor Paul Marcus's survey of prosecutors, defense attorneys, and judges found that "federal prosecutors generally will include a conspiracy charge whenever a case involves multiple defendants," which did not surprise him "considering the practical benefits of charging conspiracy." Paul Marcus, Conspiracy: The Criminal Agreement, in Theory and in Practice, 65 Georgetown L. Rev. 925, 947 (1977); see also Beth Allison Davis and Josh Vitullo, Federal Criminal Conspiracy 38, Am. Crim. L. Rev. 777, 778 n.9 (2001) (about 20,000 out of about 70,000 federal criminal defendants were charged with conspiracy in 1997). A former federal prosecutor recalled the same practice during his decade in the Southern District of New York in the 2000s.

[261] In *A Hercules in a Cradle*, Max Edling argues that from its beginning in the founding era, the United States used war to achieve its policy goals, which, in turn, required the ability to tax and to borrow money. This chapter, as part of my larger project, further argues that to be able to collect taxes, the government relied not only on voluntary

government rely on treason charges that had to be softened with pardons, especially after *Hoxie* narrowed the definition of "levying war." So conspiracy laws provided an alternative to violence, a legal tool between treason and pardons.[262]

The argument that criminal law—specifically, conspiracy laws—compensated for relatively, and historically, small and underfunded government bureaucracies may seem at odds with much recent scholarship that have depicted "active and significant political institutions" from the beginning of the early republic.[263] In the past two decades, historians have corrected the "myth of the 'weak' American State," pointing to a flurry of federal activities, from postal services to land sales and western expansion.[264] But they have also been perplexed by a state "that seemed contradictorily strong and weak," and historian Gautham Rao has called for more studies investigating "how federal governance worked in action."[265] To see government *in action*, we must look beyond laws that were enacted, policies declared, or even agencies created. We must look at how bureaucrats and officials actually collected revenue, regulated finance, supplied the military, and more. By doing so, we may find that the weak/strong state dichotomy unhelpful in understanding the challenges of implementation. A "strong" state could prohibit trade with the two largest empires in the world but still be without sufficient manpower to nip the illicit traffic. More important than whether this ultimately belies a weak state is how, exactly, understaffed agencies tried to execute federal laws. Understanding criminal law as a state-building tool can illuminate how the U.S. government functioned with as minimal a bureaucratic apparatus as possible, which, in turn, explains the breathtakingly broad conspiracy liability in the United States.

The history of Frederick Hoxie's treason case in 1808 all the way through its appearance as a conspiracy case in West's 1898 *Digest* encourages this view of criminal laws. One way to understand conspiracy laws is to see how the law made up for an inadequately resourced American state. Another way to understand conspiracy laws is to see how the criminal laws laid the foundation of American governance in the modern era.

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compliance but also on the criminal law. If American greatness depended on a robust financial system, see Edling, *Hercules*, 12, then it also rested on the development of a criminal legal system.

[262] Gautham Rao traces a parallel development towards criminalization in the enforcement of customs at the nation's ports, arguing that after the War of 1812, the government's strategy shifted from reliance on customs officials' discretion to negotiate how much merchants would pay duties owed, to prosecutions for fraud on the revenue brought by US attorneys. Rao, *National Duties*, 182-190.

[263] Gautham Rao, "The New Historiography of the Early Federal Government: Institutions, Contexts, and the Imperial State," *William and Mary Quarterly* 77, no. 1 (January 2020): 101.

[264] William J. Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113, no. 3 (June 2008); Rao, "New Historiography," 101-102, 116; see also Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge: Harvard University Press, 1995).

[265] Rao, "New Historiography," 100, 117; see also Nicolas Barreyre and Claire Lemercier, "The Unexceptional State: Rethinking the State in the Nineteenth Century (France, United States)," *American Historical Review* 126, no. 2 (June 2021): 481-503 (arguing that France and United States in the nineteenth century did not build the state by setting up bureaucracies staffed with civil servants but by embedding state power in local social relations); 485 ("It is in those daily actions, the *practices* of the state—sending letters, selecting staff, chartering corporations, etc.—that we are more interested here.").