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Abstract

In 1832 a long-standing boundary dispute between New York and New Jersey complicated the work of Chief Justice John Marshall and President Andrew Jackson. Long reviled by southern states' rights advocates, including the president, Marshall in 1832 faced the prospect of having the Court's decisions ignored by the state of Georgia. Federal authority was further challenged in the fall of 1832, when South Carolina nullified the tariff of 1828, thereby provoking a constitutional crisis. On December 10, 1832, to the amazement of many observers, Jackson issued a proclamation rejecting nullification and secession, and threatening military action if South Carolina did not change its course.

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New York, New Jersey, John Marshall, Andrew Jackson, nullification crisis

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Michael J. Birkner

In 1832 a long-standing boundary dispute between New York and New Jersey complicated the work of Chief Justice John Marshall and President Andrew Jackson. Long reviled by southern states' rights advocates, including the president, Marshall in 1832 faced the prospect of having the Court's decisions ignored by the state of Georgia. Federal authority was further challenged in the fall of 1832, when South Carolina nullified the tariff of 1828, thereby provoking a constitutional crisis. On December 10, 1832, to the amazement of many observers, Jackson issued a proclamation rejecting nullification and secession, and threatening military action if South Carolina did not change its course.¹

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¹ Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* (New York 1987), and William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York 1965), are the two best, albeit competing, comprehensive accounts of the nullification crisis. For a vivid delineation of the crisis from Jackson's viewpoint, see Robert V. Remini, *Andrew Jackson and the Course of American Democracy, 1833-1845* (New York 1984), chs. 2-3. Important works that frame their interpretations independently of Ellis but nonetheless share Ellis's emphasis on the ambiguous outcome of the crisis include Merrill D. Peterson, *Olive Branch and Sword: The Compromise of 1833* (Baton Rouge 1982), esp. ch. 4; and Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (New York 1990), esp. 128-131.

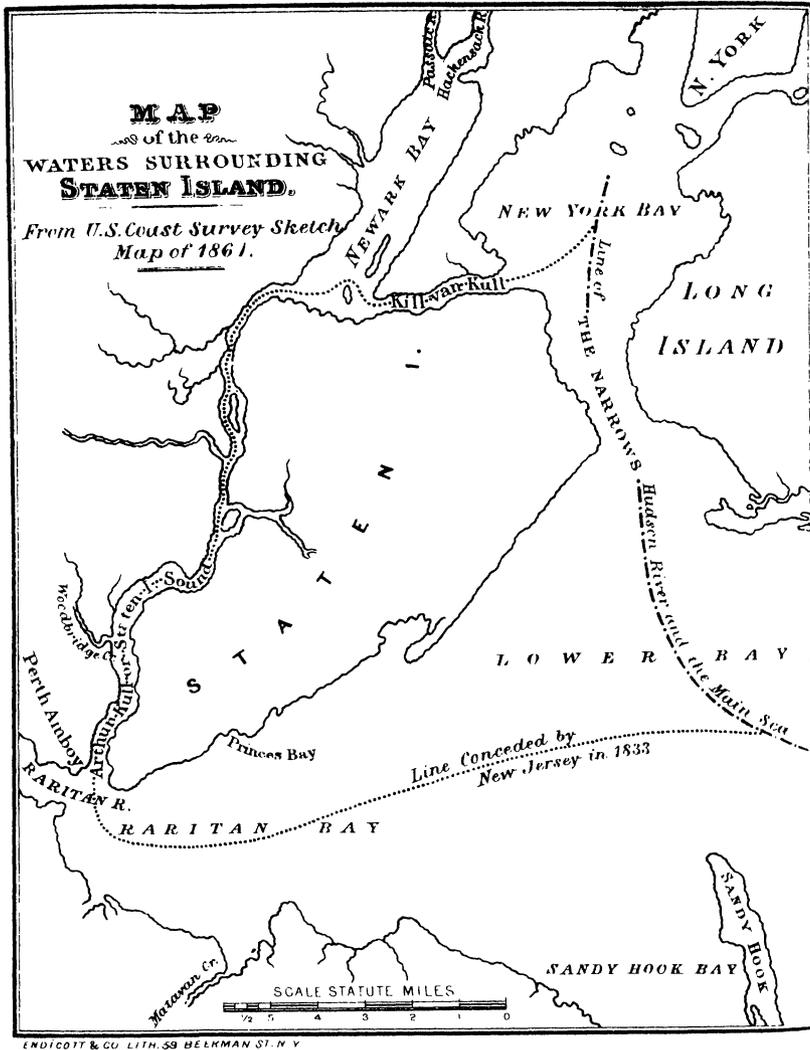
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During the winter of 1832-1833, as Jackson attempted to crush South Carolina's "treason," his political allies labored behind the scenes to insure that Georgia's concurrent challenge to the Marshall Court would not undercut the president's position. Ironically enough, some of the same people who sought to defuse the Cherokee crisis, including Vice President elect Martin Van Buren, were identified with a legal position in a case pending before the Court that echoed Georgia's position in the Cherokee cases.² That case involved a long-standing argument between New York and neighboring New Jersey over boundaries and possession of Staten Island. Quite unexpectedly to all parties concerned, the New York-New Jersey suit became enmeshed in a complex political and constitutional showdown. It had potentially disastrous implications for the Jacksonian political coalition and threatened the president's ability to enforce federal law in South Carolina.

Resolving the New York-New Jersey controversy quickly became a necessary quest of leading New York Jacksonians. By compromising the boundary question at the same time that they sidetracked a constitutional confrontation between Georgia and the federal government, Van Buren and his allies helped clear the field for a tariff compromise that was grudgingly accepted by all parties. The nullification crisis ended, if not on a note of high triumph for Andrew Jackson, at least with federal authority and presidential prestige intact.³

² For a recent reassessment of Georgia and the Cherokees, see Mary Young, "The Exercise of Sovereignty in Cherokee Georgia," *Journal of the Early Republic*, 10 (Spring 1990), 43-63. Edwin A. Miles, "After John Marshall's Decision: *Worcester v. Georgia* and the Nullification Crisis," *Journal of Southern History*, 39 (Nov. 1973), 519-544, offers a penetrating analysis of the Jackson administration's efforts to avoid a confrontation between Georgia and federal authority. See Ellis, *Union at Risk*, ch. 7.

³ Until recently, most scholars portrayed the nullification crisis as a Jacksonian triumph. But as Richard Ellis argued in his important revisionist study, Jackson's "victory" over the nullificationists was largely illusory. The president's nationalism did not rally all Democrats to his banner. Moreover, the legislative compromise that ended the crisis left nullifiers "secure and unrepentant," and states' rights theory became "fatefully entwined with the concepts of slavery and secession." Ellis, *Union at Risk*, ix. Ellis's argument earned widely favorable reviews, including one from Jackson biographer Robert Remini, despite the fact that in key respects Ellis was reviving and expanding arguments originally made in 1949 by Charles M. Wiltse in his highly sympathetic Calhoun biography, *John C. Calhoun: Nullifier, 1829-1839* (Indianapolis 1949), chs. 13-15. For Remini's positive assessment of Ellis, see *Civil War History*, 34 (Mar. 1988), 84-86.



United States Coast Survey map showing boundary between New York and New Jersey as defined in 1833.

Courtesy of the New Jersey Historical Society, Newark

The boundary dispute had deep roots in colonial history. It was made more difficult by the extraordinary vagueness of early crown grants and the simple fact that, at bottom, “no one knew where the New Jersey-New York border was.”⁴ New Jersey had originally been part of the grant given to James, Duke of York, by his brother Charles II in 1664, embracing also the larger jurisdiction of New York. James soon thereafter conveyed his stake in New Jersey to two friends and supporters, Sir George Carteret and Lord John Berkeley. Exactly what James had granted to Carteret and Berkeley was from the beginning a matter of dispute. Had he granted the power of government along with control over land? Did the grant include the largely uninhabited Staten Island, and other, smaller islands that hugged the Jersey shoreline? What did James mean by setting the northwestern boundary between the two colonies at 41°40' of latitude and the northernmost branch of the Delaware River? (Later survey work demonstrated that these were in fact two different places.) What did James mean by the Hudson River as the dividing line between New York and New Jersey? Did the Hudson River encompass the Arthur Kill, between mainland New Jersey and Staten Island?⁵

Sharp disagreements on these questions bedeviled the two jurisdictions for one hundred and fifty years. With its wealth and population advantage, New York held the strong hand in the dispute, essentially daring New Jersey to deny its claims to the high water mark on the Jersey shore, to build wharves and issue summons up to that point, to regulate commerce on the Hudson south into the Arthur Kill that separated Staten Island from the mainland, and to hold on to several islands that, from any logical map construction, should have been part of New Jersey rather than New York.

Throughout the eighteenth century, lackluster negotiations alternated with unneighborly behavior between New York and New Jersey. Conflicts continued into the 1830s. New Jersey became increasingly assertive after 1800, as it resisted New York's grant of a steamboat monopoly to the Fulton-Livingston interest, and on three occasions initiated commissions to resolve the outstanding disagreements over Staten Island and related boundary disagreements.

⁴ Philip J. Schwarz, *The Jarring Interests: New York's Boundary Makers, 1664-1776* (Albany, N.Y. 1979), 81.

⁵ Material from this and subsequent paragraphs are derived from Michael J. Birkner, “State Wrongs and States' Rights: The New York/New Jersey Boundary Controversy,” unpublished paper delivered at the Seminar on New Jersey History, Princeton University, March 29, 1989.

None of these efforts yielded a satisfactory settlement, primarily because New York was uninterested in compromise and felt no pressing need to assuage the smaller state. When New Jersey attempted to involve the federal government in the controversy, through congressional mediation, and indirectly in a steamboat case that in 1824 set an important legal precedent, the results were mixed. In *Gibbons v. Ogden*, rooted in New Jersey's opposition to a New York steamboat monopoly on the Hudson, the Marshall Court quashed New York's claims to control interstate commerce. But the case had no bearing on outstanding boundary questions between the two states.⁶ Congress, moreover, refused New Jersey's bid for intervention on behalf of a boundary settlement.⁷

At least one historian, Herbert Johnson, has recognized the connection between New York's "exaggerated" notions of its own sovereignty in its general relations with New Jersey and the specific points surrounding the steamboat case. Although New York infrequently acted on its formal claims to sovereignty up to the high water mark on the New Jersey shore, it continued to assert them in negotiations and various public forums. New York also occasionally aggravated New Jersey sensibilities by its expansive interpretation of oystering rights on the Jersey shore and occasional assertions of police power in the smaller state. Such aggressiveness, Johnson has argued, "would not long be tolerated in a federal union." John Marshall's famous opinion in *Gibbons v. Ogden*, in this context, was not simply the resolution of a federal-state conflict, but also was intended to

⁶ Many sources trace the origins of the two states' steamboat rivalry, which led ultimately to the Marshall Court's influential decision in *Gibbons v. Ogden*. Two recent accounts of the controversy's early stages are Michael Birkner, "Samuel L. Southard and the Origins of *Gibbons v. Ogden*," *Princeton University Library Chronicle*, 40 (Winter 1979), 171-182; and Herbert A. Johnson, "Gibbons v. Ogden Before Marshall," in *Courts and Law in Early New York: Selected Essays*, ed. Leo Hershkowitz and Milton M. Klein (Port Washington, N.Y. 1978), 105-113.

⁷ Details on New Jersey's bid to involve Congress are recounted in Michael Birkner, *Samuel L. Southard: Jeffersonian Whig* (Rutherford, N.J. 1984), 56; and *Annals of Congress*, 17th Cong., 1st sess., 390, 394. A copy of New Jersey Senator Mahlon Dickerson's bill, introduced in the Senate on January 10, 1822, is in the Samuel L. Southard Papers (Manuscript Department, Firestone Library, Princeton University). New York's states' rights position in the 1822 Congressional debate and subsequently in legal briefs marked a shift from its proclivity in the late eighteenth century to appeal in disputes with neighboring states to higher authority. See Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia 1983), 108-109. Onuf does not discuss New York's boundary disputes with New Jersey.

“eliminate the likelihood of interstate clashes based upon excessively optimistic assessments of state political powers over navigable waters.”⁸

Gibbons v. Ogden, however, did nothing to relieve New Jersey’s distress over New York’s refusal to resolve boundary and related controversies. On several occasions, following disputes over actions of New York constables serving process or making arrests across state lines, New Jersey’s remonstrances provoked formal negotiations. In 1807, 1826, and again in 1828, commissioners appointed by the governors of the two states met and discussed the eastern boundary question, without reaching any mutually agreeable compromise. The New Yorkers refused to renounce or ease their claims to the high water mark on the New Jersey shore, including, as the New Jersey commissioners noted in 1807, “shores, roads, and harbors entirely within the natural territorial limits of New Jersey.” Nor would the New Jersey delegations abandon their state’s claim to jurisdiction up to the midway point of waters conjoining the two states.⁹

In the wake of several border incidents and yet another failed negotiation with New York in 1828, Jersey officials reached the end of their patience. In the summer of 1828, New Jersey Governor Isaac Williamson authorized state Attorney General Theodore Frelinghuysen to bring a bill of complaint against New York before the United States Supreme Court, requiring that New York appear before the Court in equity proceedings.¹⁰ Frelinghuysen did some of this work, but in late January 1829 was elected to the United States Senate, after which time he became a secondary figure in the suit.

⁸ Johnson, “*Gibbons v. Ogden Before Marshall*,” 112.

⁹ *Report of the [New Jersey] Committee on the Correspondence Between Governor Clinton and Governor Williamson Touching the Arrest of a Ministerial Officer, of New-York . . .* (Trenton, N.J. 1826), 3. Copies of background material used by the New York Commissioners in the 1807 negotiations are in *New York Boundary Papers* (New-York Historical Society, New York City), vol. 4. For a summary of New Jersey’s efforts in 1806-1807, 1818, and 1826-1827 to reach some accommodation with New York on the boundary issue, see William A. Whitehead, “Eastern Boundary of New Jersey: A Review of a Paper on the Waters of New Jersey, Read Before the Historical Society of New York, by the Hon. John Cochrane, and a Rejoinder to the Reply of ‘A Member of the New York Historical Society,’” *Proceedings of the New Jersey Historical Society*, 10 (1865), 108-110.

¹⁰ See, for example, John Rutherford to Richard Stockton, Sept. 24, 1827, in *Papers Referring to the Negotiations in 1827* (New Jersey Historical Society, Newark). Also see Gov. Williamson, “Special Message to the Legislature,” Feb. 1828, Southard Papers. For New York’s position, see “Report of the Commissioners of New York, Relative to the Boundary Line Between This State and the State of New Jersey,” Jan. 26, 1828, New York Senate Document no. 74. See also Rutherford, “Memo on the Boundary Dispute,” [1827], Southard Papers. A printed copy of Frelinghuysen’s brief, which includes a long historical analysis of New Jersey’s claims to the middle of the waters between the two states, is available, untitled, in the Southard Papers.

Frelinghuysen's successor as attorney general, Samuel L. Southard, soon called on his colleague in the cabinets of James Monroe and John Quincy Adams, William Wirt of Maryland, to assume the major responsibility for the New Jersey case. Not merely a first rate litigator, Wirt would later become engaged in two prominent Georgia cases before the Supreme Court—*Worcester v. Georgia* and *Cherokee Nation v. Georgia*—that raised legal issues nearly identical to those in the New York-New Jersey dispute.¹¹ If New Jersey was serious about its claims, Southard believed, Wirt was the ideal person to argue their merits before the Marshall Supreme Court. Wirt accepted Southard's invitation.

Like Frelinghuysen, Wirt based his argument on the twenty-fifth section of the 1789 Judiciary Act, which provided that the Court could resolve jurisdictional disputes between states. New York authorities, however, refused to participate in the suit; they even deliberately avoided subpoenas served by representatives of the New Jersey attorney general. When the subpoenas were finally served by a New Jersey marshal, after a sustained and often frustrating effort, New York's attorney general, Greene C. Bronson, declined to honor it on the grounds that the United States Supreme Court had no jurisdiction to hear the case.¹²

Such intransigence did not deter Southard or Wirt, who believed that the larger state's defiance would spur the Court to order New York's appearance. If New York remained obdurate, the Court could issue a decree *ex parte*, a point Southard made to New York Governor Enos Throop and Attorney General Bronson early in 1830.¹³ In his correspondence with the New York officials, Southard made no overt

¹¹ Marvin R. Cain, "William Wirt Against Andrew Jackson: Reflections on An Era," *Mid-America*, 47 (Apr. 1965), 122-123. Wirt was retained as counsel for New Jersey while still attorney general of the United States. On this, see Wirt to Southard, Feb. 8, 1832, Southard Papers.

¹² Samuel Southard's correspondence between 1829 and 1831 includes many letters and documents relating to efforts to serve a legally binding subpoena on the New York attorney general and other Empire State officials. See particularly correspondence between Southard and Wirt, Southard and Supreme Court clerk William Carroll, and Southard and New York Marshall J.W. Livingston in 1829 and 1830, Southard Papers. On the attempts by New York attorney general to evade subpoenas, see the papers cited above, and Ellis, *Union At Risk*, 144. Bronson's argument may be found in printed form in Box 139, Southard Papers. See also the précis of his argument as of early 1832, "Points for the Defendant," *ibid.*

¹³ Southard to Enos Throop and Greene C. Bronson, Jan. 12, 1830, Southard Additional Papers.

mention of the Supreme Court's current composition, which presumably would favor New Jersey's position against New York's firm states' rights assertions, nor of a well-set precedent for acceptance of the Court's role as arbiter in federal-state disputes. But surely Southard had such matters in mind as he wrote to Throop and Bronson, and almost as certain he assumed the New Yorkers did, too.¹⁴

If Throop and Bronson were intimidated by Southard's actions, they well disguised it. When Southard and Wirt appeared before the Supreme Court on March 6, 1830, New York sent no opposing counsel. Bronson had earlier written to Chief Justice John Marshall arguing that the Supreme Court should not and could not interfere in "controversies between two or more states." Marshall rejected this reasoning, and issued a subpoena commanding New York's participation. When the New Yorkers failed to show up in court for a second time in January 1831, Wirt requested that the case be heard without New York's participation. Marshall granted the request for an *ex parte* proceeding, thereby lending the case a new significance as a test of wills between a powerful state and the Marshall Court at the very moment the Court was moving to reject Georgia's assertions of state sovereignty in its efforts to evict the Cherokee Indians from its borders.¹⁵

Despite the New Yorkers' rejection of Court jurisdiction in the boundary controversy, they did eventually participate in *New Jersey v. New York*, if only to emphasize their states' rights position. In the first week of March 1832, Attorney General Bronson was joined in Washington by another leader of the Albany Regency, Benjamin F. Butler. Both men were prepared to insist that the Court had no standing in the case. Such a position was strikingly similar to that made by Georgia's counsel in *Worcester v. Georgia*, which was argued before the Marshall Court only days earlier, and decided by the Court on March 3, just as Bronson and Butler arrived in the capital.¹⁶

¹⁴ For an authoritative account of the Marshall Court's views on sovereignty issues, see G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* (New York 1988), ch. 8. Relevant here is John R. Schmidhauser, "'States' Rights' and the Origins of the Supreme Court's Power as Arbiter in Federal-State Relations," *Wayne Law Review*, 4 (Spring 1958), 101-114.

¹⁵ White, *Marshall Court*, 703-740. See also Ellis, *Union At Risk*, 102-122, *passim*; and *New Jersey v. New York*, 4 Peters 284 (1831). For New York State as an "energetic and forceful" proponent of states' rights in the early 1830s, see Ellis, *Union at Risk*, 144-145. Ellis discusses *New Jersey v. New York* only briefly, but his treatment illuminates the difficulties facing the Marshall Court at this time.

¹⁶ *Worcester* focused on a Georgia law of 1830 that prohibited white men from entering Cherokee territory after March 1, 1831 without a state license. The Marshall

Andrew Jackson had made clear his sympathies for Georgia's position in relation to the Cherokees, and had left more than one member of the Supreme Court unsure whether he would sustain any decree against Georgia that the Court might issue. New York's official position in 1832, in this context, was easy to read: Why not put John Marshall in the position of rendering a verdict that yet another important state might choose to ignore?¹⁷ With New York following Georgia's lead in challenging the Court, the constitutional climate in the United States appeared unfavorable for nationalist-minded citizens. Working on parallel tracks, it seemed likely that New York and Georgia would frustrate John Marshall's jurisprudence and revive the doctrine of sovereign states. That the nullification crisis would put such an aggressive strategy in disrepute with Andrew Jackson could not have been foreseen.

Political considerations were not lost on the sagacious chief justice. Although it is impossible to know what Marshall was thinking as counsel for New York and New Jersey reached Washington, the record shows that he surprised New Jersey's lawyers, Southard and Wirt. Marshall did not affirm their position; indeed, he declined even to hear it. On the morning of March 14, following Bronson's day-long argument against the Court's jurisdiction, and before Wirt had a chance to make his argument (with which Marshall would be familiar, since he had heard Wirt present a version of it in *Worcester v. Georgia*), Marshall announced that "the court saw that the cause could not be decided this term, if the argument was completed, & that they had therefore come to the conclusion that the argument should be postponed" until February 1833.¹⁸

Court held this statute unconstitutional, a decision Georgia showed no signs of accepting. See Bronson's argument cited in n. 12; Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," *Stanford Law Review*, 21 (Feb. 1969), 500-531; and Anton-Hermann Chroust, "Did President Jackson Actually Threaten the Supreme Court of the United States with Nonenforcement of Its Injunction Against the State of Georgia?" *The American Journal of Legal History*, 4 (1960), 76-78. Robert V. Remini, *Andrew Jackson and the Course of American Freedom, 1822-1832* (New York 1981), 276-278, argues that Jackson acted with great discretion in response to Marshall's decision in *Worcester v. Georgia*, but concedes that the president "encouraged Georgia in its intransigence." For a similar argument, See Ellis, *Union at Risk*, 32.

¹⁷ Marshall's discomfort at this time is captured in Charles Warren, *The Supreme Court in United States History* (1922; rev. ed., 2 vols., Boston 1926), I, 769-772. See also White, *The Marshall Court*, 959-996.

¹⁸ *New Jersey v. New York*, 3 Peters 461 (1830), 5 Peters 284 (1831).

Why Marshall acted as he did remains a matter of doubt. At least one contemporary newspaper opinion-writer believed that the chief justice was affected by the compelling nature of Bronson's argument. "I understand from good authority," an anonymous correspondent for the New York *Courier* wrote, "that the array of names and authorities in favor of the ground assumed by the Attorney-General of New York, startled, in no small degree, the Supreme Bench, particularly the Chief Justice."¹⁹ Bronson had claimed, consistent with earlier arguments, that the Court had no jurisdiction in this case, observing that Congress had not furnished "the means by which the judicial power shall be carried into execution." He added that the New York-New Jersey boundary dispute was at bottom political, not judicial, in its nature.²⁰

There was nothing especially compelling in Bronson's argument. The *Courier* piece to the contrary notwithstanding, John Marshall was probably less impressed by the quality of Bronson's presentation than by the force with which New York was expressing a hard-edged states' rights position, barely a week after Marshall had pronounced Georgia's position in *Worcester v. Georgia* to be constitutionally untenable.²¹ Timing and substance, not brilliance on the part of New York's counsel, brought the chief justice up short. The Georgia and New York cases threatened the Court's standing because there was no likelihood that either Georgia or New York would voluntarily submit to an adverse ruling by the Court—or for that matter, that President Jackson could require them to do so. In what appears to have been a thinly veiled allusion to these cases, Marshall wrote his friend Joseph Story in September 1832 that he had become convinced that the Constitution "cannot last." Not only were southern states challenging federal

¹⁹ For Butler's participation in and view of the case, see William D. Driscoll, *Benjamin F. Butler: Lawyer and Regency Politician* (New York 1987), 220-226 (quotation at 225). Based on a comparison of Butler's letters to his wife and the argument in the *Courier*, Butler himself may have written and planted that piece. Whether that is the case or not, not everyone saw Bronson's argument as powerful. William Wirt, for example, dismissed it as claptrap. He told his co-counsel, Samuel Southard, that had he had the chance to rebut Bronson, he "would have demolished him." Wirt to Southard, May 29, 1833, Southard Papers.

²⁰ Bronson and Butler, "Points for the Defendant."

²¹ On the legal and political complications caused by Georgia's emphatic states' rights position in the Cherokee cases, the best analysis is that of Edwin Miles. He points out that because of technicalities inherent in administering cases like *Worcester v. Georgia*, in 1832 the Court could not assure immediate compliance with its judgment in favor of Worcester and his Indian allies; Miles, "After John Marshall's Decision," 527-530. See also Burke, "The Cherokee Cases," 529-530.

jurisdiction on crucial issues, but the North was not nearly so united against both states as Marshall had long assumed. "I had supposed," he wrote, "that North of the Potomack a firm and solid government competent to the security of rational liberty might be preserved. Even that now seems doubtful The Union has been prolonged thus far by miracles. I fear they cannot continue."²²

In this context, it seems fair to speculate that Marshall's decision to postpone the New York-New Jersey case lay in hopes, however feeble, that respect for the Court might somehow be more vibrant in 1833 than it was in 1832. All he could expect with a judgment against New York at this time was New York's emphatic refusal to comply—which of course would strengthen Georgia's own determination to resist the Court's directives. It is even possible, as James Brown Scott has argued, that Marshall feared a strong opinion against New York would provoke "a further amendment to the Constitution withdrawing the jurisdiction of the Supreme Court in such cases, as happened in the case of suits by individuals against the states."²³ Such a proposal had been introduced by southern members of the House of Representatives in 1830, and had been endorsed by the House Judiciary Committee, before being defeated in the full House in January 1831.²⁴ A year later Marshall had every reason to believe the idea was more dormant than dead. Whatever Marshall's reasoning in postponing the New York-New Jersey case, two facts stood: first, a nationalist interpretation of the Constitution faced serious challenges; and second, the two northern states were not an inch closer to settling their long-standing dispute.

The impasse between New York and New Jersey might have continued but for a strange coincidence. In June, 1832, several months

²² Marshall to Joseph Story, Sept. 22, 1832, quoted in Warren, *Supreme Court*, I, 769. Benjamin Butler's opinion on the matter overlapped the two approaches. In letters written to his wife Harriet, Butler consistently emphasized the force of Bronson's argument; but he also suggested that Marshall had postponed the case because, recognizing that the South rejected his decision in *Worcester v. Georgia*, he did not wish to risk provoking a new attack on the Court, this one from a powerful northern state. See Butler to Harriet Butler, Mar. 3, 14, 1832, Benjamin Butler Papers (New York State Library, Albany, N.Y.).

²³ James Brown Scott, *Judicial Settlement of Controversies Between States of the American Union: An Analysis of Cases Decided in the Supreme Court of the United States* (Oxford, Eng. 1919), 116. Burke, "Cherokee Cases," 530-531, argues that Marshall was mainly concerned to sustain the integrity and prestige of the Court.

²⁴ "The Committee on the Judiciary . . . to Inquire into the Expediency of Repealing or Modifying the Twenty-Fifth Section . . .," *House Reports*, 21st Cong., 2d sess., no. 43; Thomas Hart Benton, *Abridgment of the Debates of Congress, From 1789 to 1856* (16 vols., New York 1857-1861), XI, 300-302, 304-305.

after Marshall put the boundary case in legal limbo, one of New Jersey's representatives in the failed 1828 negotiation, John Rutherford, was traveling by steamboat to Albany when he espied New York's Benjamin F. Butler, co-counsel for his state in the Supreme Court proceeding. In a letter to Democratic Governor Peter D. Vroom, Rutherford discussed what transpired:

Mr. B[utler] began [our conversation] regretting the existence of the controversy, and especially his great desire that an amicable settlement should take place. I of course accorded with these sentiments when he stated that if the least intimation was made by Gov[ernor] Vroom in a letter to Gov[ernor] Throop of a desire for an amicable settlement that he was confident Gov[ernor] T[hroop] would make a communication to the legislature of the state which would be in session in a few days, and that a law would immediately pass appointing commissioners to confer with others to be appointed by New Jersey for an adjustment of all unsettled matters

Rutherford had responded favorably to these remarks, but he made no promises about what New Jersey would do if New York, as Butler suggested, agreed to appoint yet another commission to negotiate with New Jersey. On his return home, Rutherford told Vroom about the conversation, and offered a little advice. "It would be more advantageous for us," he wrote, "to decline any proposition, for an accommodation, until after we had an opportunity of spreading our case of ancient boundary before the public, and stating the hardships and injustice N[ew] Jersey had sustained while a proprietary and colonial government . . . thus interesting the public in our favour." At the same time, he noted that Butler was next to Martin Van Buren "the most influential man" in the New York Democratic party. With Van Buren in Washington, Rutherford wrote, Butler was the person to deal with if Vroom wished to see movement on this matter.²⁵

Vroom immediately wrote to Rutherford expressing his thanks. He then contacted Attorney General Southard, to whom he sent a copy of Rutherford's letter. What, Vroom asked, did Southard think?²⁶ Southard proved open-minded, if not optimistic, about a settlement.

²⁵ Rutherford to Vroom, June 10, 1832, Southard Papers. Governor Vroom evidently passed the letter on to Southard who, as attorney general, was responsible for the state's lawsuit against New York. It should be noted that Butler's friendly private communication contrasted sharply with a strong states' rights slant in public speeches he made in the fall of 1832. Driscoll, *Butler*, 226-227.

²⁶ Vroom to Southard, June 25, 1832, Southard Papers.

His main concern, as expressed to Vroom, was that New Jersey not be in the position of making the first move. "I do not well see," he wrote to Vroom, "how you could make a communication on the subject. We have always, heretofore, been the applying party—and have not always been very courteously answered. All our efforts at accommodation have failed. N[ew] Y[ork] knows perfectly well that we are . . . anxious to meet her in the way of compromise, and I see no appearance in any public act that she has the same disposition." Southard added: "We were *driven* to our suit—and every effort on [New York's] part has been made to procrastinate & baffle us. In our present situation, therefore, I do not see how you can apply—but if N[ew] Y[ork] wishes to compromise—she can, *without loss of feeling or interest of any kind*, make the offer to us." Southard then explained the procedure by which this could be accomplished—namely, some formal communication from a New York official addressed either to him or to Vroom.²⁷

When Vroom followed Southard's advice, New York Jacksonians proved ready to respond in kind. Butler had apparently been speaking only for himself when he told Rutherford he was interested in meeting New Jersey halfway. But with the end of the presidential election campaign in early November, and the firebell of South Carolina's nullification doctrine ringing loudly in Jacksonian ears, there was more incentive to settle the dispute with New Jersey. Michael Hoffmann, a congressman from Herkimer and stalwart Regency politician, made this point to Martin Van Buren. It was, he told Van Buren on November 12, 1832, "of great importance" to "secure the good will of New Jersey towards the state of New York." Hoffmann said he did not expect New York to win the suit presently before the Supreme Court. But "while the bill [in court] is pending and the question of jurisdiction is undecided, there is hope—and now is our time to settle the dispute." Van Buren, he said, should speak to Governor-elect William Marcy and find a "mode" to bring the case to an amicable close.²⁸

Hoffmann's letter is the only extant document that directly expresses Regency leaders' anxiety over their dispute with New Jersey, and even it does not tie New York's desire for a settlement directly to the problem of nullification. It seems logical, however, to make that connection. Martin Van Buren was a canny politician. The nullification crisis with South Carolina threatened the Jacksonian

²⁷ Southard to Vroom, June 28, 1832, *ibid.*

²⁸ Hoffmann to Van Buren, Nov. 12, 1832, Martin Van Buren Papers (Library of Congress, Washington, D.C.).

coalition and it threatened Van Buren's standing in the South for 1836 should he speak out against Calhoun and his allies. The situation became especially alarming in light of President Jackson's forceful antinullification proclamation of December 10. As vice president elect, Martin Van Buren owed fealty to Jackson; but Van Buren also believed that strict construction of the Constitution and Jackson's current pronouncements were incompatible—not to mention his fear that Virginia might well side with the nullifiers if push came to shove.²⁹

Consequently, as Van Buren and his political allies worked to defuse the Cherokee Crisis in Georgia, he evidently told Governor-elect William L. Marcy in Albany that the New Jersey case had to be resolved as soon as possible, out of court. Van Buren doubtless hoped to get things moving before the end of the year, while Jacksonians still controlled the machinery of government in New Jersey. But he was prepared to move for a compromise regardless of who held power in that state.³⁰

Subsequently, in his first message to the legislature, Marcy formally announced on January 2, 1833, that “the interests of both states” would better be served by a privately negotiated compromise than by protracted legal action.³¹ This was followed by Marcy's promise of a good-faith effort by New York to resolve all pending issues. Nine days later, William Wirt addressed a long, confidential letter to Governor-elect Southard explaining why New Jersey should accept this overture—a letter that in critical respects mirrored Michael Hoffmann's recent letter to Van Buren in its pessimistic assessment of the Court's likely disposition of the boundary dispute.

But why should New Jersey now compromise, given that the Supreme Court had been consistently unsympathetic to states' rights

²⁹ See Miles, “After John Marshall's Decision,” 535-537; Donald B. Cole, *Martin Van Buren and the American Political System* (Princeton 1984), 238-240; and Richard B. Latner, *The Presidency of Andrew Jackson: White House Politics, 1829-1837* (Athens, Ga. 1979), 152-154.

³⁰ For the Georgia-New Jersey connection, see Ellis, *Union at Risk*, 149-150. The absence of a paper trail from Van Buren is unsurprising, given that Van Buren was in Albany for much of the fall of 1832, and consequently was in a position to communicate personally with Marcy (who was occasionally in the capital after the elections) and leading members of the legislature.

³¹ Charles Z. Lincoln, comp., *Messages From the Governors . . . 1823-1842* (Albany, N.Y. 1909), 422-424. Benjamin Butler followed up on the governor's message by writing privately to Southard—now Governor of New Jersey—that New York would be willing to negotiate seriously if New Jersey agreed to postpone any court proceeding for one year. Butler to Southard, Jan. 3, 1833, Southard Papers.

views such as New York was taking in this controversy? The answer lay less in the politics of nullification or the Court's current posture than Wirt's sober assessment of the *future* composition of the Court. New Yorkers well understood, Wirt said, that New Jersey "has no hope for success but before the present judges of the Supreme Court." But with several visibly aging justices on the high bench, change that did not favor New Jersey lay ahead. As Wirt put it, "every probability is in favor of a states' rights chief justice, ere long." Such a change in personnel, long promised by President Jackson, "must inevitably lead to the dismissal of our bill, by the denial of the jurisdiction of the court."³²

Wirt emphasized that he was simply being realistic. The Court was at this time closely divided, and two of its leading nationalists could depart the bench at any time. They were certain to be replaced by states' rights jurists appointed by Andrew Jackson. Chief Justice Marshall, seventy-seven years old and in uncertain health, talked periodically about retirement. Another nationalist, Justice William Johnson, was visibly failing. If either man resigned or died before the New York-New Jersey case was decided, Wirt expected a Jacksonian Democrat from Virginia, Philip P. Barbour, "or some other anti-court partisan" to be appointed. Then, Wirt observed, "the last spark of hope w[oul]d be extinguished in that quarter. New Jersey w[oul]d then have to take arms against the giant state—and if it came to that issue, may they prove to be the Heaven directed arms of David."³³ New Jersey's most practical option was to settle out of court, said Wirt. Marcy's conciliatory tone in his recent annual message had sent the right signal. It would be foolish for New Jersey to reject this overture out of simple pride. Act now, he counseled, while there was a chance to do so.

³² Wirt to Southard, Jan. 11, 1833, *ibid.* A year earlier, following New York's request for more time to prepare its case, Wirt had written to his co-counsel Samuel Southard that such "delay is full of danger." Wirt added that the complexion of the Court could change to New Jersey's disadvantage. Wirt to Southard, Feb. 8, 1832, *ibid.*

³³ Wirt to Southard, Jan. 11, 1833, *ibid.* On Marshall's health and outlook in 1832, see Leonard Baker, *John Marshall: A Life in Law* (New York 1974), 742, 746-750, 764. Johnson's skein of physical ailments, beginning in 1831 and culminating in his death following an operation in early 1835, is treated in White, *The Marshall Court*, 343. Yet another Supreme Court judge, Henry Baldwin, was mentally ill, and there was speculation about his future on the Court; *ibid.*, 194n., 299. For an overview of Andrew Jackson's commitment to reshaping the federal judiciary in a states' rights direction, see Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (2d ed., New York 1985), 94-102.

Wirt's argument resonated with Southard despite the latter's inclination to let the Jacksonians suffer the consequences of their ideological schizophrenia. Southard respected Wirt's opinion, feared Wirt's predictions might come true, and in the end, believed that settling this long-standing dispute, promptly, made more sense than risking everything by putting hopes in a continued nationalist majority on the Supreme Court. At the same time, New Jersey Jacksonians understood that continuing their lawsuit could only lend moral support to the nullificationists and fracture their party.³⁴

In view of the Jacksonians' quandary over states' rights, Southard had more leverage to ease tensions with New York, and he took advantage of it. Within days of receiving Marcy's letter, Southard penned a cautiously optimistic response, reminding New York that it had to approach negotiations with a true compromising spirit or progress would be impossible. Specifically, Southard noted that the central issue to be resolved remained the eastern boundary, and in particular New Jersey's insistence on a line in the middle of all waters between the states.³⁵

By late February, each state had passed measures authorizing yet another formal boundary negotiation. Commissioners were appointed, and when they met during the late summer of 1833, they quickly reached a compromise resembling New Jersey's fallback position of 1828. Specifically, the nautical boundary between the two states was set in the middle of the waters between them. New York retained its jurisdiction over Barlow's and Ellis Islands; New Jersey would maintain exclusive jurisdiction over all wharves, docks and improvements on its own shores; New Jersey would repudiate its claims to Staten Island; the two states were to have equal rights on the

³⁴ Unlike the tepid response to President Jackson's nullification proclamation among New York Jacksonians, most Jersey Democrats applauded the president and chided Southard when he would not fully endorse Jackson's constitutional theory. See Birkner, *Southard*, 139-140; and Herbert Ershkowitz, *The Origin of the Whig and Democratic Parties: New Jersey Politics, 1820-1837* (Washington, D.C. 1982), 162.

³⁵ Southard's reply to Marcy is not in his papers at Princeton University; presumably it followed the lines of his positive private response to Benjamin F. Butler, Jan. 9, 1833, Southard Papers. See also Theodore Frelinghuysen to Southard, Feb. 10, 1833, and Southard to William L. Marcy, Feb. 26, 1833, *ibid.* Southard's appointment of commissioners was one of his last acts as governor, since he resigned in late February, barely two months into his term as governor, to take a seat in the United States Senate.

service of process within the other's jurisdiction under specific circumstances.³⁶

The essential reasonableness of the settlement was reflected in the lack of complaint or bragging on either side. Several New Jersey partisans grumbled that the case should have been carried to conclusion before the Supreme Court, but the general attitude expressed was relief. In New York, Governor Marcy's annual message in 1834 offered a terse endorsement of the settlement, arguing that it was "compatible with our honor and our interest."³⁷ Both state legislatures promptly ratified the agreement, as did the United States Congress. A long friction between New York and New Jersey was now eased.

Suspension of the lawsuit with New Jersey in early 1833, like the delicately contrived settlement Van Buren had encouraged in the aftermath of Marshall's judgment in *Worcester v. Georgia*, simplified the Jackson administration's position in the nullification crisis. Jackson could now more readily seek congressional authority to use force against South Carolina without being embarrassed by the existence of a

³⁶ *Acts of the Fifty Eighth General Assembly of the State of New Jersey, 2nd Sitting* (Trenton, N. J. 1834), 118-121. Marcy wrote to Southard's replacement as governor, Elias Seeley, seeking support for the appointment of Benjamin Butler as a boundary commissioner and was evidently told this would be acceptable. See Marcy to "Governor of New Jersey," Mar. 2, 1833, William L. Marcy Papers (Library of Congress). Correspondence between the New York governor and other boundary commissioners can be found in Marcy to A. Jay, Mar. 5, 1833, and Henry Seymour to Marcy, Mar. 14, 1833, *ibid.* These letters suggest no agenda beyond reaching a satisfactory compromise. Background materials on the dates of the meetings of the commissioners are in James Parker's memo, "Of my attendance as a Commissioner to Settle the Line Between New York & New Jersey," James Parker Papers (Special Collections Department, Rutgers University Library, New Brunswick). On the exchange of official documents confirming the compact, see Peter Vroom to James Parker, Feb. 10, 1834, *ibid.*; James Parker to Peter Vroom, Mar. 7, 1834 and Vroom to William D. Marcy, Mar. 10, 1834, Peter D. Vroom Papers (Rare Book and Manuscript Library, Columbia University). The final folder in the Philhower Collection Box, marked "Vroom-Wall-Rhea-Trenton Militia" (Rutgers University Library), contains a draft of Vroom's letter to President Andrew Jackson, Mar. 20, 1834, enclosing a copy of the agreement between New York and New Jersey.

³⁷ Lincoln, comp., *Messages From the Governors, 1823-1842*, 442. Examples of letters from leading New Jersey political figures emphasizing the benefits of fighting the case in Court include Lewis Condict to Southard, Jan. 21, 1833, and Theodore Frelinghuysen to Southard, Jan. 11, 1833, Southard Papers. Benjamin F. Butler, who served on the boundary commission of 1833, privately pronounced the settlement "good & right." See Butler to Harriet Butler, Sept. 18, 1833, Butler Family Papers (Firestone Library).

controversy between two important states and another branch of the federal government.³⁸ To be sure, the dragon of nullification was not destroyed, but neither was it triumphant. With the canny and constructive intervention of Henry Clay, a true compromise was forged, offering something important to each of the antagonists.³⁹ Not least important, the Jacksonian coalition remained intact, South Carolina was pacified, a moderate states' rights doctrine held sway among Democrats, and the Marshall Court avoided any damaging blow to its authority.

Set in this context, the New York-New Jersey boundary controversy transcended its inherently parochial nature. Studying *New Jersey v. New York* in terms of national controversies helps clarify Martin Van Buren's sense of discomfort in the fall of 1832, following his election as vice president. It suggests how politically sensitive and adept John Marshall was towards the end of his tenure in office. And it underscores the difficulties Jackson faced in holding the line against South Carolina's challenge to federal authority. Had New York Democrats not been positioned to support the president's stance against nullification, pressure would have intensified for Jackson to ally more formally with his erstwhile National Republican foes, and the Union cause would have been even more clearly at risk.⁴⁰

³⁸ Miles, "After John Marshall's Decision," 541. Ellis, *Union at Risk*, 147-156, illuminates the New York states' rights position by describing the Regency's confused reaction and varied response to Jackson's nullification proclamation and his Force Bill message.

³⁹ Harry Watson, author of the best recent overview of Jacksonian politics, notes that the compromise of 1833 "gave substantive relief to the South, at a pace that manufacturers could bear, and gave unionists a symbolic assertion of federal supremacy in the Force Act." Watson, *Liberty and Power*, 129. For William W. Freehling's recent reassertion that Jackson emerged triumphant in the nullification crisis, see *The Road to Disunion: Secessionists at Bay, 1776-1854* (New York 1990), esp. 281-286.

⁴⁰ See Norman D. Brown, *Daniel Webster and the Politics of Availability* (Athens 1969), 15-52; Sydney Nathans, *Daniel Webster and Jacksonian Democracy* (Baltimore 1973), 48-73; Maurice G. Baxter, *One and Inseparable: Daniel Webster and the Union* (Cambridge, Mass. 1984), 220-222; and Remini, *Jackson and the Course of American Democracy*, 9-10, 35-37.