

THOMAS JEFFERSON, ORIGINAL INTENT, AND THE SHAPING OF AMERICAN LAW: LEARNING CONSTITUTIONAL LAW FROM THE WRITINGS OF JEFFERSON

PAUL FINKELMAN*

It was the first election of the new century. The race had been tight and close. The incumbent party might not be able to hold the presidency, despite relative prosperity in the nation. For weeks and weeks, the nation waited without knowing who would be President. No candidate had a clear majority of the electoral votes. The Electoral College might have been designed to insure a smooth election of the President,¹ but it was not working. The nation was in crisis. The outcome of the election might determine public policy for years, even decades. With no certain winner, one of the candidates, who was the outgoing Vice President, feared the election would be “stolen” from him. Thus, the Vice President of the United States discussed with his friends the possibility of calling on sympathetic governors to mobilize state militias to secure his transition to office. Politicians maneuvered, rumors spread, anxiety rose, and the outcome of the election remained in doubt. This was high-stakes drama, with the fate of the nation in balance.

This was not *Bush v. Gore*² in the making. The year was 1800, not 2000. The candidates were initially the incumbent President, John Adams, and the incumbent Vice President, Thomas Jefferson. When the electors cast their ballots, Adams was the clear loser, with only sixty-five electoral votes to Jefferson’s seventy-three. But Jefferson was not the clear winner. His putative running mate, Aaron

* President William McKinley Professor of Law and Public Policy and Senior Fellow in the Government Law Center at Albany Law School. I wrote portions of this article while I was a scholar-in-residence at the Center for Inquiry, a not-for-profit educational foundation in Amherst, New York. I thank the Center for its support. I also thank my former research assistants Carol Pettit and Brandy O’Brian at the University of Tulsa College of Law for their enormous help on this article. Throughout this article, the spelling and formatting of the original sources has been preserved.

1. It was certainly designed to make sure that slaves were counted to give extra power to the South through the three-fifths clause. Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 *CARDOZO L. REV.* 1145, 1154–55 (2002) [hereinafter Finkelman, *Proslavery Origins*].

2. 531 U.S. 98 (2000).

Burr, also had seventy-three electoral votes, leaving the election deadlocked. This led to the crisis.

The political and electoral crisis of 1800 is worth recalling as the United States begins to gear up for the next presidential election—a process that seems to begin earlier and earlier each time. The crisis of 1800–01 almost destroyed the nation. It was high drama and a potential tragedy. The players—Jefferson, Adams, Burr, and Alexander Hamilton—were giants in their own age and remain so today. By contrast, the crisis of 2000, with its hanging chads and less than stellar characters, was truly high farce.³

The two most recent volumes of *The Papers of Thomas Jefferson* cover the campaign and election of 1800.⁴ Volume 32 ends with the election undecided, with no candidate chosen and the nation truly in crisis. The publication of Volume 32 of the *Jefferson Papers* provides an opportunity to reflect on the significance of Jefferson in our early constitutional development. The publication of this volume also provides an opportunity to consider how legal scholars and jurists can make use of the Jefferson Papers and other collections of the writings of the Founders. The election of 1800 was not the first constitutional controversy our nation faced. Nor was it the first constitutional controversy that involved Thomas Jefferson. But it was certainly the greatest constitutional crisis of the early national period and the one most fraught with danger. Beyond the electoral crisis of 1800, *The Papers of Thomas Jefferson* shed great light on other significant constitutional issues of the early nation. The following article explores some of these issues.

This article has four general goals. First, it demonstrates how our understanding of constitutional complexity can be enhanced through the use of traditional historical documents and the lens of the lives and careers of key constitutional players. At one level, the

3. “[A]ll facts and personages of great importance in world history occur, as it were, twice[;] . . . the first time as tragedy, the second as farce.” KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 15 (Int’l Publishers Co. 1991). “Those who cannot remember the past are condemned to repeat it.” GEORGE SANTAYANA, *THE LIFE OF REASON* 284 (1936).

4. 31 *THE PAPERS OF THOMAS JEFFERSON* (Barbara Oberg ed., 2004) [hereinafter 31 *JEFFERSON PAPERS*]; 32 *THE PAPERS OF THOMAS JEFFERSON* (Barbara Oberg ed., 2005) [hereinafter 32 *JEFFERSON PAPERS*]. The process of publishing the papers of Jefferson has been arduous and, some might say, dilatory. Volume One of the *Papers*, edited by the late Julian Boyd, first appeared in 1950. In its first fifty-two years (1950 to 2002), the project produced only twenty-eight volumes and covered less than half of Jefferson’s adult life. The new editorial program under Barbara Oberg has produced four hefty volumes in three years, and it appears that the project will move more quickly in the future.

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goal is simply to help legal scholars better understand where law and legal history intersect with more traditional American history. Jefferson, who is the central figure in this article, is not generally seen as a great legal and constitutional player. He was never a judge; he never argued a case before the Supreme Court; his law practice ended before the American Revolution; he was not a delegate to the Constitutional Convention; he was in France during the ratification debates and did not participate in them; and he never wrote a legal treatise. Yet, as this article demonstrates, Jefferson was in fact deeply involved in the shaping of American constitutional law while serving as Secretary of State, Vice President, and President, and while participating in the development of early national political culture.

Second, this article attempts to alert legal scholars to the treasure trove of information found in the published papers of the founding generation. The goal here, in part, is to take aim at the debate over “original intent,” which has been a significant aspect of the jurisprudence of Justices Antonin Scalia and Clarence Thomas and the late Chief Justice William Rehnquist. These jurists have argued for nearly three decades that we should have a jurisprudence of original intent. The wisdom of this kind of constitutional analysis is somewhat questionable.⁵ But, if jurists wish to make such arguments when deciding cases, they should use the vast primary materials found in the newest volumes of the *Jefferson Papers*, as well as other collections of the papers of the leading figures of the American founding.

Third, this article illustrates how constitutional ideas and arguments that developed in the eighteenth century have remained vibrant since that time. The constitutional debates of two hundred years ago have an odd relevance for later developments. For example, in arguing against the constitutionality of the Bank of the United States, Thomas Jefferson asserted that under the Commerce Clause, Congress could not regulate the circulation of currency any more than it could regulate the production of “a bushel of wheat.”⁶

5. For a discussion of the limitations of this sort of jurisprudence, see generally Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989) [hereinafter Finkelman, *Intentions of the Framers*].

6. Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), in 19 JEFFERSON PAPERS 275, 276 (Julian P. Boyd ed., 1974) [hereinafter 19 JEFFERSON PAPERS].

Yet, of course, in *Wickard v. Filburn*,⁷ the U.S. Supreme Court would determine that under the Commerce Clause, Congress did indeed have the power to regulate the production of “a bushel of wheat.”

Finally, this article helps readers understand the potential, and the limitations, of a jurisprudence of original intent. A jurisprudence of originalism presumes that we can *know* in some meaningful way the intentions of the Founders or of the framers of the Constitution. This article illustrates the pitfalls of such a jurisprudence, as well as its possibilities.

While familiar to historians, the massive and incredibly valuable collections of the papers of the Founders are often unknown to legal scholars.⁸ This discussion of the Jefferson Papers will hopefully encourage scholars and jurists to use these collections to expand their understanding of the development of the Constitution and American law. It will mostly focus on high constitutional issues, but the papers of the Founders—such as the Jefferson Papers—are useful for understanding how the legal system worked, how lawyers organized their cases, and even how lawyers of the new nation thought about law. Scholars can even use them to understand the nature of legal education in this period. Many key Founders—Alexander Hamilton, John Adams, Thomas Jefferson, John Jay, and Aaron Burr—were lawyers who depended, to different degrees, on their law practice for their livelihood.⁹ Understanding how these early lawyer-politicians approached the law illuminates the nature of law as a learned profession. Seeing how they applied legal analysis to political and constitutional issues informs our own interpretation of law and the Constitution. While reminding us that law is political, these analyses also teach us that law and legal ideas can also constrain politics. The papers of the Founders also help us

7. 317 U.S. 111, 114 (1942) (upholding the power of Congress, under the Commerce Clause, to regulate the production of wheat, even if that grain was used only for personal consumption or sold locally).

8. In addition to the published papers of Jefferson, there are completed and ongoing projects to publish the papers of John Adams, Benjamin Franklin, John Jay, Alexander Hamilton, James Madison, John Marshall, and George Washington. Complementing these efforts are two outstanding projects that focus on the papers of our early institutions: the First Federal Congress Project and the Documentary History of the Supreme Court.

9. Two other examples of valuable collections of lawyers' papers from this period are JULIUS GOEBEL, JR. & JOSEPH H. SMITH, *THE LAW PRACTICE OF ALEXANDER HAMILTON* (1964–1981) and L. KINVIN WROTH & HILLER B. ZOBEL, *LEGAL PAPERS OF JOHN ADAMS* (1965). For an elaborate discussion of the Hamilton legal papers and an analysis of how they can be used for scholarship, see generally Paul Finkelman, *Alexander Hamilton, Esq.: Founding Father as Lawyer*, 1984 AM. B. FOUND. RES. J. 229 (1984).

understand how the leaders of the nation dealt with slavery and race. Jefferson's papers reveal his racism, his fear of free blacks, and his personal and political dependence on slavery. As Americans try to come to terms with our legacy of slavery and racial discrimination, it is important to remind ourselves of the role the Founders played in securing slavery in the new nation. Jefferson was a slaveholder, a racial theorist, and a determined friend of the peculiar institution, even as he bemoaned his personal dependence on slavery and the presence of slaves within the nation.¹⁰ His election in 1800 was in part a result of counting slaves for purposes of determining congressional representation and for allocating presidential electors. If presidential electors had been allocated only on the basis of free people, Adams, not Jefferson, would have had the electoral majority in the 1800 contest.¹¹

The publication of Volume 32 of the *Jefferson Papers*, which ends with the election of 1800 in the balance, offers an appropriate moment to consider why the Founders are important to constitutional law and why their papers are important to legal scholarship. This article will begin with a brief look at the crisis of 1800 and then consider two other key constitutional moments in Jefferson's pre-presidential career, the debate over the Bank of the United States and the controversy over the Sedition Act.

I. THE ELECTION OF 1800

The framers of the Constitution created a truly odd method for electing the nation's chief executive. Each state was assigned one "elector" for each of its two senators and one elector for every member of the House of Representatives it had.¹² Thus, the largest states had the most electors, but no state would have fewer than three electors. The state legislatures were free to choose electors by whatever method they wished. Under the original Electoral College system,¹³ each presidential elector voted for two candidates, but only one of those candidates could be from the home state of the elector.¹⁴ The framers of the Constitution assumed, incorrectly as it turned out, that electors would cast one ballot for a home-state

10. See generally PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (2d ed. 2001).

11. Finkelman, *Proslavery Origins*, *supra* note 1, at 1155.

12. See U.S. CONST. art. II, § 1, cl. 2.

13. Before it was changed by the Twelfth Amendment.

14. See U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend XII.

“favorite son,” and the other ballot for a national figure.¹⁵ They assumed that two or three leaders would emerge from this contest. To win the presidency, a candidate had to have the most electoral votes and also a majority of the votes of the total number of electors voting.¹⁶ The person with the second highest number of votes would be Vice President. If no candidate had a majority of the votes of the electors, then the top five candidates would be sent to the House of Representatives, which would choose the President.¹⁷ If two or three candidates with a majority of the votes of the electors were tied, then their names—and only their names—would go to the House of Representatives.¹⁸ Under the rules of the original Constitution (which still exist today), each state delegation in the House would have a single vote.¹⁹ The framers seem to have expected that many, perhaps most, elections would lead to inconclusive results, throwing the election into the House.²⁰ They expected that after the election of Washington, “the electors would cease to produce majorities and the chief executive would usually be chosen in the House.”²¹ Thus, with some understatement, Alexander

15. Finkelman, *Proslavery Origins*, *supra* note 1, at 1155 (describing how Virginia wanted to have an electoral college so it would have extra clout to elect its citizens to the presidency).

16. *See* U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend XII.

17. *Id.*

18. Because each elector cast two ballots, it was possible for three candidates to have the votes of more than half the electors and be tied. For example, in 1800 there were a total of 138 electors, and a total of 276 electoral votes cast. Three candidates could have each received seventy electoral votes—one more than half the total number of electors—with the remaining sixty-six electoral votes going to other candidates.

19. The absurdity of this process boggles the modern mind. Under this rule, seven states (Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, and Montana) with a total population of 4,812,380, could outvote the six states of California, Texas, New York, Florida, Illinois, and Pennsylvania, with a combined population of 114,388,650. *See* U.S. Census Bureau, GCT-PHI-R, Population, Housing Units, Area, and Density (geographies ranked by total population): 2000, <http://www.census.gov/census2000/states/us.html> (follow “States (ranked by population)” hyperlink) (last visited Feb. 20, 2006).

20. At the Convention, the first proposal was that instead of the House electing the President, the Senate would do so if no candidate had an outright victory in the Electoral College. The delegates assumed that “‘nineteen times out of twenty,’ the election of the president would be by the Senate.” ROBERT M. HARDWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* 81 (1994). This same expectation continued when the convention decided that the House, rather than the Senate, should choose the President if there was no electoral majority.

21. John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 811 (1961).

Hamilton explained in *The Federalist* No. 68 that “a majority of the votes might not always happen to centre in one man,” and thus the Constitution provided a mechanism for the House of Representative to choose the President.²² The framers assumed a number of candidates would vie for the presidency, with no one getting a majority of the electoral votes.²³

This, however, did not happen. The formation of political parties in the 1790s—something the framers did not anticipate—thwarted their expectations. By 1796, the Federalists and the Jeffersonian Democrats²⁴ had created political organizations that resembled modern parties. In 1796, most electors voted for the President along party lines, although neither party had a planned method of choosing the Vice President. Thus, John Adams won the most electoral votes and became President.²⁵ But the Federalist electors who voted for Adams did not coordinate their votes for a vice-presidential candidate. Rather, they scattered their votes among a number of Federalist candidates.²⁶ Similarly, supporters of Jefferson all cast one of their votes for him and scattered the rest of their votes among a number of other Jeffersonians.²⁷ Thus, Thomas Jefferson

22. See THE FEDERALIST NO. 68, at 333 (Alexander Hamilton) (Terence Ball ed., 2003) (“But as a majority of the votes might not always happen to centre on one man and as it might be unsafe to permit less than a majority to be conclusive, it is provided, that in such a contingency, the House of Representatives shall select out of the candidates, who shall have the five highest numbers of votes, the man who in their opinion may be best qualified for the office.”).

23. See Roche, *supra* note 21, at 811.

24. The names of political parties in this period are confusing. The followers and supporters of Thomas Jefferson are variously called “Republicans,” “Democratic-Republicans,” “Jeffersonian Democrats,” and “Democrats.” This article uses the term “Jeffersonian Democrats” to avoid confusion with the modern Republican Party. Jefferson’s party was the forerunner of the modern Democratic Party.

25. U.S. National Archives and Records Administration, U.S. Electoral College: 1796 Election for the Third Term, 1791–1801, http://www.archives.gov/federal-register/electoral-college/votes/1789_1821.html) [hereinafter U.S. Electoral College: 1796 Election].

26. *Id.* In 1796, thirteen different candidates received electoral votes. Adams received the vote of almost every Federalist elector and carried seventy-one votes, winning the presidency. Thomas Pinckney of South Carolina, who was also a Federalist, received fifty-nine votes, while Oliver Ellsworth of Connecticut got eleven electoral votes and John Jay got five. Jefferson received sixty-eight electoral votes and was elected Vice President. If Pinckney had won the eleven votes that went to Ellsworth, he would have edged out Jefferson and been Vice President. See 2 JAMES T. HAVEL, U.S. PRESIDENTIAL CANDIDATES AND THE ELECTIONS: A BIOGRAPHICAL AND HISTORICAL GUIDE 5 (1996).

27. U.S. Electoral College: 1796 Election, *supra* note 25. The Jeffersonians cast votes for nine different candidates. Jefferson received sixty-eight votes, but the next top vote-getter for his party was Aaron Burr, with only thirty votes. Uniquely

had the second highest number of votes and became Vice President. This outcome was both better and worse than what the framers anticipated. The framers anticipated the top vote getters being prominent leaders, famous men in their home states.²⁸ They could not have asked for two more prominent patriots than John Adams and Thomas Jefferson. On the other hand, the framers did not anticipate that the two top candidates would be political enemies, barely speaking to each other for the next four years, while preparing to face each other in a rematch in the next election. Such conditions made a harmonious administration impossible. It also set the stage for two early constitutional crises—the Sedition Act controversy of 1798 and the election debacle of 1800–01.

By 1800, the two parties had come to realize that the Constitution required coordination and planning, not just in electing the President, but also in electing the Vice President. However, the Federalists were far shrewder about this process—or at least more constitutionally adept—than were Jefferson’s supporters. When the presidential electors cast their ballots, all of the Federalists voted for Adams, and all but one voted for his vice-presidential choice, General Charles Cotesworth Pinckney of South Carolina.²⁹ One Federalist elector from Rhode Island cast his second ballot for John Jay.³⁰ Thus, had the Federalist electors been in the majority, they would have sent Adams back to the presidency and secured the election of their own candidate, Pinckney, as Vice President, with one electoral vote fewer than Adams received. But well-coordinated as they were, the Federalists were not in the majority.

The Democrats were in the majority, but they were not as well-coordinated. Jefferson was their candidate for President and Aaron

in American history, two sets of cousins were on opposite sides in this election. Samuel Adams competed as a Jeffersonian, picking up fifteen electoral votes while his cousin John won the presidency with seventy-one electoral votes. Thomas Pinckney of South Carolina ran third, as a Federalist, with fifty-nine electoral votes; his cousin, Charles Cotesworth Pinckney, running as a Jeffersonian, won one electoral vote. See HAVEL, *supra* note 26, at 5.

28. WILLIAM C. KIMBERLING, THE ELECTORAL COLLEGE 3, www.fec.gov/pdf/electioncoll.pdf (“In order to prevent Electors from voting only for a ‘favorite son’ of their own State, each Elector was required to cast two votes for president, at least one of which had to be for someone outside their home State. The idea, presumably, was that the winner would likely be everyone’s second favorite choice.”).

29. U.S. National Archives and Records Administration, U.S. Electoral College: 1800 Election for the Fourth Term, http://www.archives.gov/federal-register/electoral-college/votes/1789_1821.html.

30. *Id.*; Letter from Jefferson to James Madison (Dec. 19, 1800), in 32 JEFFERSON PAPERS, *supra* note 4, at 321, 322; Letter from Jefferson to Thomas Mann Randolph (Dec. 19, 1800), in 32 JEFFERSON PAPERS, *supra* note 4, at 324, 324.

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Burr of New York was their choice for Vice President. Everyone, including Burr himself, knew that if the party won, Jefferson was to be President and Burr was to be Vice President.³¹ When the ballots in the Electoral College were counted, both Jefferson and Burr had seventy-three votes. Jefferson assumed that he was elected President, but the Constitution did not lead to that result. With a tie in the Electoral College between two candidates with a majority of the votes of the electors, the Constitution specified that the House of Representatives would choose the President, with each state delegation having one vote. This set the stage for the crisis. Jefferson expected Burr to step aside and allow him to be President. But Burr did not. Instead, he asserted the constitutionally (but not politically) legitimate claim that he was just as entitled as Jefferson to be President. As the editor of the *Jefferson Papers* notes, "On 5 Jan. the *Philadelphia Gazette* reported that Burr 'was heard to insinuate that he felt as competent to the exercise of the Presidential functions as Mr. Jefferson.'"³² Here was a conflict between politics and constitutional law. Surely most political leaders in the nation assumed that the Democratic electors had cast their ballots for Jefferson as President and Burr as Vice President. But the Constitution did not allow the electors to designate which candidate was their choice for President and which was for Vice President. The Constitution made no provision for such a distinction.

The Federalists were surely the better constitutional lawyers of the period. They had carefully arranged for one of their electors to not vote for Pinckney, so that Adams, if he won, would be the sole winner of the election. When Adams ended up with fewer votes than Jefferson, the Federalists turned to a new plan. Fearful of Jefferson and angry that he had defeated Adams, the Federalists developed a superb constitutional strategy, once again demonstrating they were more skilled in constitutional politics than Jefferson and his followers. They used the Constitution's confusing election provision to frustrate Jefferson's ambitions. With sixteen states in the Union, Jefferson needed to win nine House delegations. Eight state delegations had Democratic majorities and were solidly for Jefferson. Six states had Federalists delegations and would have voted for Adams if the Constitution had allowed them to do so. But Adams was not available as a candidate. The Federalists then rallied around Burr. Some may have believed that Burr would be a better

31. See Letter from Jefferson to Hugh Henry Brackenridge (Dec. 18, 1800), in 32 JEFFERSON PAPERS, *supra* note 4, at 318, 318.

32. See 32 JEFFERSON PAPERS, *supra* note 4, at 400.

President, or more likely to support Federalist policies.³³ In addition, some Federalists may have seen Burr as less offensive than Jefferson because he was less likely to side with France in international relations. Moreover, Burr was connected to many Federalists and northern leaders. His father, also Aaron Burr, had been president of the College of New Jersey (now Princeton University), while his mother was the daughter of the great Puritan minister Jonathan Edwards. Burr had studied with Tapping Reeve, a Federalist lawyer who served on the Connecticut Supreme Court.³⁴ Given this background, Federalists may have seen him as “safer” than Jefferson. However, the real impetus for supporting Burr may not have been to elect him, but rather to stalemate the election altogether, and perhaps to allow Adams to simply remain in office.

That Burr went along with this strategy underscores the complexity of politics at the time. In mid-January, Elbridge Gerry, who had been a delegate to the Constitutional Convention, assured Jefferson that Burr wanted no part of this scheme.³⁵ Gerry believed the Federalists were trying to start a civil war over the election.³⁶ But, in fact, Burr did not reject out of hand the idea that he should be President. Even if Burr had rejected the overtures of the Federalist Party, he might not have been able to stop the Federalists who supported him. At least some of Jefferson’s allies did not believe Burr could constitutionally remove himself from the contest. Hugh Henry Brackenridge told Jefferson that the right to withdraw from consideration for the presidency was “not a right of the individual

33. At least on the issue of slavery, this might have been true. The Federalists were more likely to oppose slavery and support black freedom than Jefferson and his southern followers. Adams wanted to recognize Haiti as an independent nation, but this effort ended with his defeat. Jefferson, a slaveholder who feared and hated free blacks, made economic war on Haiti, imposing an embargo on the island in an attempt to “destroy the black republic.” It is entirely possible that the New Yorker Burr would have been more sympathetic to black liberty. In addition, as a New York lawyer, Burr might have been more sympathetic to the commercial development that was central to Federalist policy. See Paul Finkelman, *The Problem of Slavery in the Age of Federalism*, in *FEDERALISTS RECONSIDERED* 151 (Doron Ben-Atar & Barbara Oberg eds., 1998).

34. See Steven E. Siry, *Burr, Aaron*, in *AMERICAN NATIONAL BIOGRAPHY ONLINE*, <http://www.anb.org/articles/03/03-00071.html>. Ironically, a few years after Jefferson took power, the administration would institute a common-law libel prosecution against Reeve for his articles attacking the Jefferson administration. See *infra* note 150 and accompanying text (discussing *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812)).

35. Letter from Elbridge Gerry to Jefferson (Jan. 15, 1801), in 32 *JEFFERSON PAPERS*, *supra* note 4, at 465, 466.

36. *Id.* at 466.

exclusive and independent.”³⁷ Rather, Brackenridge argued, in true Jeffersonian fashion, that it was “the right of the people to dispose to the office.”³⁸ In other words, once Burr tied Jefferson for the presidency, his candidacy belonged to Congress and the people, not to Burr himself.

Whatever the reason for Burr’s ongoing candidacy, Jefferson’s friends, and Jefferson himself, saw a massive Federalist conspiracy to overturn the will of the people.³⁹ Meanwhile, there was a rumor that the Chief Justice-designee, John Marshall, had concluded that if the House could not choose a President under the system set out in the Constitution—with nine House delegations voting for one candidate—then the entire Congress could appoint a President until the next election.⁴⁰ Another Jefferson ally pointed out that if no President was elected, the Speaker of the House might become President.⁴¹

The key to the Federalist strategy was two state delegations that were equally divided: Vermont and Maryland.⁴² On Wednesday, February 11, 1801, the House began to vote for the President.⁴³ For twenty-seven ballots, through Thursday morning, Jefferson carried eight states, Burr carried six, and two remained divided, thus unable to cast a vote at all.⁴⁴ The House voted six more times on Thursday afternoon, Friday, and Saturday, but after thirty-three ballots, the vote remained the same: eight states for Jefferson, six for

37. Letter from Hugh Henry Brackenridge to Jefferson (Jan. 19, 1801), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 483, 485.

38. *Id.*

39. *See* Letter from Benjamin Hichborn to Jefferson (Jan. 5, 1801), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 399, 399; Letter from John Vaughan to Jefferson (Jan. 10, 1801), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 441, 442; Gerry, *supra* note 35, at 466; Brackenridge, *supra* note 37, at 483–84; Letter from Jefferson to Thomas Mann Randolph (Jan. 29, 1801), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 516, 517; Letter from Hugh Henry Brackenridge to Jefferson (Jan. 30, 1801), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 518, 519; Letter from Benjamin Hichborn to Jefferson (Feb. 1, 1801), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 533, 533; Notes on a Conversation with Edward Livingston (Feb. 12, 1801), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 583.

40. Letter from James Monroe to Jefferson (Jan. 18, 1801), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 481, 481.

41. Brackenridge, *supra* note 37, at 484.

42. *See* JOHN FERLING, ADAMS VS. JEFFERSON 176–77 (2004).

43. *See id.* at 186; *see also* Letter from Jefferson to Tench Coxe (Feb. 11, 1801), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 571, 571–72.

44. *See* Jefferson’s Reports of Balloting in the House of Representatives: Editorial Note, *in* 32 JEFFERSON PAPERS, *supra* note 4, at 578, 578 [hereinafter Editorial Note on Balloting]; SUSAN DUNN, JEFFERSON’S SECOND REVOLUTION 208 (2004).

Burr, and two equally divided.⁴⁵ This continued for a total of thirty-five ballots.⁴⁶

The most recent volume of the *Jefferson Papers* ends here.⁴⁷ On February 15, 1801, Jefferson wrote James Monroe, saying that he had heard the next day there would be a “coalition” that would resolve the conflict.⁴⁸ But Jefferson had “no foundation for this belief.”⁴⁹ Furthermore, he feared that a compromise to end the deadlock would lead the House to place conditions on his presidency.⁵⁰ He feared that, in order to be elected, he would have to make concessions on presidential appointments. He also expressed his continuing concern that the Federalists would somehow seize the government and then “the middle states would arm.”⁵¹ In January, the Democratic governor of Pennsylvania intimated that he would mobilize the state militia to prevent what he feared would be a Federalist coup.⁵² One month later, in February 1801, the fate of the nation and of constitutional government was still in doubt.

Jefferson’s correspondence during this period reveals the peril of the newly created political system. The crisis of 1800–01 comes alive in these pages. The failure of the framers to devise a sound method for choosing the President also comes alive. The events of 1800–01 underscore the madness of the 2000 election—with the candidate who won the most votes not becoming President and the Supreme Court in effect deciding the outcome of the election. The 2000 election shows the Supreme Court at its most activist—deciding a presidential election. Even John Marshall, in 1801, did not have the audacity to believe that the Court could dictate the outcome of the presidential election.

The election of 1800 shows the framers at their least competent—in creating the Electoral College. Anyone who believes that

45. See Editorial Note on Balloting, *supra* note 44, at 578; DUNN, *supra* note 44, at 208–10; FERLING, *supra* note 42, at 187–88.

46. See Editorial Note on Balloting, *supra* note 44, at 578; DUNN, *supra* note 44, at 212; FERLING, *supra* note 42, at 192–93.

47. 32 JEFFERSON PAPERS, *supra* note 4.

48. Letter from Jefferson to James Monroe (Feb. 15, 1801), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 594, 594.

49. *Id.*

50. *Id.*

51. *Id.*

52. Letter from Thomas McKean to Jefferson (Jan. 10, 1801), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 432, 433.

the framers were “demigods” (as Jefferson called them)⁵³ and that their handiwork is beyond reproach should reexamine the events of 1800–01, perhaps through the lens of Jefferson’s papers. Similarly, any judges or legal theorists who would argue for originalism or original intent might do well to read through the papers of Jefferson and the other leaders of the nation for that period. What did these Founders really intend? They thought the presidential election might often be decided in the House.⁵⁴ Should we embrace the intentions of those who created such an undemocratic process, one that could easily lead to stalemate and chaos? The story of Jefferson’s election also shows that the founding generation was hardly made up of wide-eyed idealists, putting nation above party and patriotism above ambition.⁵⁵ None of the players comes off well at this moment. There was no popular vote tally in 1800, and so we cannot know if Jefferson would have won such a contest.⁵⁶ But Jefferson clearly had the electoral majority, and everyone in the

53. Letter from Jefferson to John Adams (Aug. 30, 1787), *in* 12 PAPERS OF THOMAS JEFFERSON 66, 69 (Julian P. Boyd ed., 1955) [hereinafter 12 JEFFERSON PAPERS].

54. *See* THE FEDERALIST NO. 68, *supra* note 22, at 333.

55. For an alternative view, see generally RALPH KETCHAM, PRESIDENTS ABOVE PARTY, 1789–1829 (1984).

56. It is entirely possible that Adams had more popular votes than Jefferson. In the end, the Republicans won seventy-three electoral votes—fifty-three from the South and twenty from New York and Pennsylvania. The Federalists won all of the electoral votes of New England, New Jersey, and Delaware, half of Maryland’s, seven of Pennsylvania’s fifteen, and a third of North Carolina’s, for a total of sixty-five electoral votes. Jefferson’s margin of electoral victory was a narrow eight votes. It is quite possible that, had there been a popular election, Jefferson would have lost. Jefferson won all of New York State’s votes because of Aaron Burr’s shrewd political maneuvering. A shift of a few hundred votes in New York City would have given Adams the state and the election. In fact, with the exception of New York, Adams did better in 1800 than he had in 1796. Moreover, most of Jefferson’s support came from slave states, whose electoral votes were augmented under the three-fifths clause. Without the electoral votes derived from slaves, Adams, not Jefferson, would have been the victor in 1800. Had the popular vote been counted, Adams might very well have had more votes than Jefferson, since his support came from the states with the most voters, while Jefferson’s support came from southern states with fewer voters. *See* Paul Finkelman, *Proslavery Origins*, *supra* note 1, at 1155. *See also* U.S. Electoral College: 1796 Election, *supra* note 25; Douglas R. Egerton, *Burr, Aaron*, *in* 1 ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY 136, 137 (Leonard W. Levy & Louis Fisher eds., 1994) (“Showing extraordinary organizational skill, Burr pieced together a popular slate of eleven candidates, headed by the ancient enemies George Clinton and Brockholst Livingston, for the state legislature. Burr’s machine carried the city by more than four hundred votes. With the election of his entire ticket, the closely balanced state assembly tipped to the Democratic-Republican side.”).

nation, including the Federalists, knew that he was the candidate of his party. Burr should have pulled out; for personal reasons he did not. The Federalists in Congress had no reason to support Burr for his own sake, or for the political positions he took. Surely, from their perspective, he was not much better than Jefferson. Elbridge Gerry, for example, told Jefferson that Burr knew perfectly well that the Federalists “abhor [him] as well as yourself, on account of your mutual predilection for republicanism”⁵⁷ Yet, for all their maneuvering, the Federalists were playing by the rules as set out in the Constitution. Jefferson and his allies were prepared to call out the state militias if they did not get their way. Calling his opponents monarchists,⁵⁸ Jefferson seemed to be preparing his followers for a military option, as if he were reliving the Revolution of a quarter-century before. If, somehow, the constitutional system led to an unintended—even an absurd—result, Jefferson acquiesced in letting his friends move to a military solution, and *coup d’etat* if necessary, to put Jefferson in the President’s chair. Jefferson’s potential willingness to use military force to secure the presidency may undermine his reputation as a man of peace, as a revered Founder, and as “the sage of Monticello.” Moreover, in the face of a crisis, he denounced any compromise, telling Monroe that he had rejected any bargains or agreements to help the nation through the crisis.⁵⁹ He asserted that he would not accept the office “with my hands tied,”⁶⁰ and was unwilling to compromise, even on presidential appointments.⁶¹ This rigidity, along with his willingness to use force to secure the presidency, surely does little to enhance Jefferson’s reputation as a constitutionalist or as an advocate of republican government.

In the end, the nation survived the crisis. On Tuesday, February 17, 1801, Federalists in the Vermont, Maryland, Delaware, and South Carolina delegations abstained, thereby giving Jefferson the first two states and denying Burr the support of the latter two.⁶² Thus, on the thirty-sixth ballot in the House of Representatives, Jefferson carried ten states, four went to Burr, and two abstained.⁶³ No Federalists had actually voted for Jefferson, but the House had

57. Gerry, *supra* note 35, at 466.

58. Letter from Jefferson to Benjamin Smith Barton (Feb. 14, 1801), in 32 JEFFERSON PAPERS, *supra* note 4, at 588, 588.

59. Letter from Jefferson to James Monroe, *supra* note 48, at 594.

60. *Id.*

61. *Id.*

62. See DUNN, *supra* note 44, at 212–13; FERLING, *supra* note 42, at 193.

63. See DUNN, *supra* note 44, at 213; FERLING, *supra* note 42, at 193.

elected him President.⁶⁴ Ironically, a key player in this solution was Alexander Hamilton, who favored Jefferson over Burr.⁶⁵ Before the election, Jefferson had blamed the “cunning of Hamilton”⁶⁶ for “turn[ing] the government over to antirepublican hands.”⁶⁷ He described Hamilton as “the evil genius of this country.”⁶⁸ But, in the end, Hamilton helped negotiate the solution to the electoral crisis.⁶⁹

Three years after Jefferson took office, Congress would send to the states the Twelfth Amendment, which separated the ballots of President and Vice President, thus preventing two running-mates from tying for the office. The Amendment did not, however, eliminate the possibility of no candidate getting a majority of the electoral votes—that would happen again in 1824, with the House, ironically, electing John Quincy Adams, the son of the man who lost to Jefferson. Nor did the amendment guarantee that the candidate with the largest number of popular votes would win the election. In 1824, 1888, and 2000, the candidate with the greatest number of popular votes did not win the election. The Twelfth Amendment also did not preclude a tie in the Electoral College, which remains a constitutional train wreck waiting to occur.

64. See DUNN, *supra* note 44, at 213.

65. Letter from Jefferson to Martha Jefferson Randolph (Jan. 16, 1801), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 475, 476.

66. Letter from Jefferson to John Taylor [of Caroline] (June 4, 1798), *in* 30 THE PAPERS OF THOMAS JEFFERSON 387, 388 (Barbara B. Oberg ed., 2003) [hereinafter 30 JEFFERSON PAPERS].

67. *Id.*

68. Letter from Jefferson to Aaron Burr (Dec. 15, 1800), *in* 32 JEFFERSON PAPERS, *supra* note 4, at 306, 307. The *Aurora*, a leading voice of the Jeffersonians, called Hamilton “the arch-intriguer” and “the evil genius of America.” 32 JEFFERSON PAPERS, *supra* note 4, at 304.

69. “Many Federalists rallied behind the bargain that Hamilton had proposed: support for Jefferson in return for his pledge to meet their demands.” FERLING, *supra* note 42, at 184. Jefferson rejected such a deal, as he indicated in his letter to Monroe in February 1801. Letter from Jefferson to James Monroe, *supra* note 48, at 594. However, Ferling also contends that, while Jefferson denied having agreed to the Federalists’ terms, “[t]he evidence suggests otherwise” and that “Jefferson’s actions as president also lend credence to the allegations that a bargain was made.” One of the actions Ferling cites to support this argument is Jefferson’s acquiescence to “the Hamiltonian economic system,” including the Bank. FERLING, *supra* note 42, at 193–94.

II.
THE BANK OF THE UNITED STATES AND
THE PROBLEM OF INTERPRETATION

Jefferson's papers also provide insight into the nation's first major constitutional debate after ratification: the controversy over the creation of the Bank of the United States. Here, Jefferson was not the only player. To get a full understanding of the issues one needs to consult the papers of other Founders, especially Hamilton and Madison. Nevertheless, the Jefferson Papers illuminate this critical story of early constitutional interpretation.

In 1790, Secretary of the Treasury Alexander Hamilton proposed that Congress charter what became the Bank of the United States to regulate currency within the nation and to create a stable economy. In his *Report Relative to a Provision for the Support of Public Credit*, Hamilton argued that a national bank was necessary for a smoothly functioning economy.⁷⁰ The Senate unanimously passed a bill to create a bank. Almost half of the senators in 1790–91 had been delegates to the Constitutional Convention. These former delegates to the Convention obviously believed that the Constitution allowed Congress to create a national bank. However, in the House of Representatives James Madison opposed the bill, arguing that Congress did not have the power to incorporate a bank.⁷¹ Despite Madison's opposition, the bill passed handily in the House and then went to President George Washington's desk. Although he had been a delegate to the Constitutional Convention, Washington was uncertain about the constitutionality of the bill and asked members of his cabinet for their advice.

Secretary of the Treasury Alexander Hamilton responded with a detailed opinion,⁷² in which he argued it was incumbent to interpret the Constitution "according to the usual & established rules,"⁷³ which meant by common-law analysis of the text and the plain meaning of the language.⁷⁴ Anticipating Chief Justice John Mar-

70. Alexander Hamilton, *Report Relative to a Provision for the Support of Public Credit* (1790), in 6 *THE PAPERS OF ALEXANDER HAMILTON* 51, 69 (Harold C. Syrett ed., 1962).

71. For a discussion of Madison's arguments, see generally Finkelman, *Intentions of the Framers*, *supra* note 5.

72. Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), in 8 *THE PAPERS OF ALEXANDER HAMILTON* 97 (Harold C. Syrett ed., 1965).

73. *Id.* at 111.

74. On the meaning of common-law analysis in this context, see generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885 (1985).

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shall's opinion in *M'Culloch v. Maryland*,⁷⁵ Hamilton argued that the government possessed "*implied*, as well as *express* powers," and that the power to create a bank was one of the former.⁷⁶ He argued that congressional power to create a bank was implied by Congress's power to collect taxes and regulate trade⁷⁷ and that the Constitution required a broad interpretation of the word "necessary" in the Necessary and Proper Clause.⁷⁸

Jefferson, who was Secretary of State at the time, urged Washington to veto the bank bill. In opposing the bill, he marshaled arguments from common-law principles and his reading of the newly adopted Constitution. His *Opinion on the Constitutionality of the Bill for Establishing a National Bank*⁷⁹ is a fascinating combination of a narrow construction of the Constitution, a deeply conservative fidelity to the common law, and an emerging states' rights theory. Woven into his opinion is a deep hostility to banks, corporations, and finance. Jefferson offers a counterargument to the notion that commerce, trade, and even capitalism were at the heart of the new American nation. Jefferson would lose this argument, and the Bank would become a significant force in the new nation's economy. Indeed, Jefferson's constitutional arguments would be rejected by the overwhelming majority of the founding generation, especially by those men who had attended the Constitutional Convention. But his losing arguments help us understand how most of the Founders viewed law, constitutionalism, and the role of the national government.

Jefferson began his assault on the Bank by noting that the proposed bill would allow the entity to own land. This, he argued, violated rules against mortmain, alienage, descents, forfeiture and

75. 17 U.S. (4 Wheat.) 316 (1819). It seems just as likely, however, that Marshall borrowed much of his analysis from Hamilton.

76. Hamilton, *supra* note 72, at 100.

77. *Id.* at 121.

78. *Id.* at 101–06.

79. Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, *supra* note 6. His disgust at the opening of the Bank is clear in Letter from Jefferson to James Monroe (July 10, 1791), in 20 THE PAPERS OF THOMAS JEFFERSON 297–98 (Julian P. Boyd ed., 1982). He suggests that buying shares in the bank is "gambling." In this letter Jefferson opposes paper money and argues that "a dollar of silver disappears for every dollar of paper emitted: and for the paper emitted from the bank 7. per cent profits will be received by the subscribers [shareholders] for it as bank paper . . ." Significantly, later in his life Jefferson would allow the Virginia Legislature to organize a lottery on his behalf to raise money to help the nearly bankrupt ex-president pay off his debts.

escheat, and distribution.⁸⁰ These were not constitutional claims, but rather common-law and public policy arguments. Thus, Jefferson argued that the Bank could not own land because some of its stockholders would be aliens, and, under the common law, aliens could not own real estate. Significantly, Jefferson could not grasp the concept that the owners of stock in a corporation would not actually own any land directly. He did not understand that, in effect, stockholders would have no nationality as landowners, because they would not directly own the land. Furthermore, as long as the directors of the Bank were Americans, the land would not be controlled by foreigners.⁸¹

Similarly, he implied, but did not state clearly, that the Bank would violate the rule against perpetuities, because as a corporation it could exist forever and own land forever. This seems once again to reflect Jefferson's hostility to the very concept of a corporation, which itself can exist in perpetuity. Technically speaking, the rule against perpetuities could never be violated by a corporation, because as long as the corporation continues to exist, it does not die. It is, in the lexicon of the rule against perpetuities, *always* a life in being. Jefferson's arguments about land ownership and corporations are also consistent with his long opposition to English rules that limited and complicated the ownership of land, at least for American citizens. One of Jefferson's proudest accomplishments in his early career was his successful struggle to abolish primogeniture and entail in Virginia law. He considered this legal change as "a

80. Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank, *supra* note 6, at 275–76.

81. Jefferson's xenophobic fear of foreign stockholders can be seen as a precursor of opposition to multinational companies that have no allegiance to the nation where they were formed. It is also important to understand that his hostility to foreign investors may be seen as the flip side of his opponents' later hostility to some foreigners at the end of the 1790s. In 1798, the Federalist-dominated Congress passed three "alien acts," which tightened rules for naturalization and allowed the president to deport aliens who threatened national security. Naturalization Act of June 18, 1798, ch. 54, 1 Stat. 566 (1798); Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798); Act Respecting Alien Enemies, ch. 67, 1 Stat. 577 (1798). As a result of these laws, the Federalists have been tagged as xenophobic and nativist. However, the responses to foreign immigrants and foreign investors by both Federalists and Jeffersonians may merely be a function of political advantage and ideology. Jefferson saw investors in the Bank as probably coming from England and being wealthy. As an Anglophobe, he thus opposed the idea of foreign investment in an American financial institution chartered by Congress. Federalists, on the other hand, welcomed British capital and investment, but wanted to use the three Alien Acts of 1798 to regulate Irish and continental immigration, as well as that of English radicals like Thomas Paine.

foundation laid for a government truly republican.”⁸² Significantly, he argued that the abolition of entail would “prevent the accumulation and perpetuation of wealth, in select families, and preserve the soil of the country from being daily more and more absorbed in mortmain.”⁸³ Jefferson was also skeptical of traditional rules for inheritance. Thus, in a famous letter to Madison, Jefferson declared his belief that “no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.”⁸⁴ He even argued against the idea that the Constitution would be long-lasting, suggesting that “every constitution . . . naturally expires at the end of 34 years.”⁸⁵ Thus, his opposition to the Bank reflected hostility to inherited wealth and to continuity in law, land ownership, or even constitutional government.⁸⁶

Jefferson’s opposition to the Bank, based on the fact that the corporation would own land, was clearly a policy argument against the Bank, and indeed against the idea of corporations owning real estate. In the end, this argument illustrates Jefferson’s hostility to complicated concepts of business organization and economic development. The essence of a corporation was its ability to exist after the death of the original corporate officers or founders. Land could stay in the hands of the corporation as long as the corporation existed. Jefferson simply did not like such arrangements and so he opposed the Bank.

The real weakness of these arguments was not his mischaracterization of them as “constitutional,” when they were not, but rather his failure to understand that even if the charter of the Bank violated the common law, or common-law principles, the common law could not trump federal law or the Constitution. Thus, if it was constitutionally permissible for Congress to create a bank, then the common law could not be an impediment to congressional action. *If* Congress had the power to establish a bank, then it could over-

82. THOMAS JEFFERSON, *Autobiography of Thomas Jefferson*, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 3, 51 (Adrienne Koch & William Peden eds., 1944).

83. *Id.*

84. Letter from Jefferson to James Madison (Sept. 6, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 392, 395–96 (Julian P. Boyd ed., 1958) [hereinafter 15 *JEFFERSON PAPERS*].

85. *Id.*

86. It is of course worth noting that in his personal life Jefferson happily inherited land and slaves from his parents and from his wife (who had inherited them from her father). Furthermore, in death he took no steps to emancipate his own slaves. The earth may have belonged “to the living,” but he apparently did not believe that slaves were entitled to any part of that ownership.

ride traditional common-law limitations and rules, just as the Virginia legislature was able to abolish the common-law rules of primogeniture and entail and other common-law rules governing inheritance and property ownership. Jefferson was politically sophisticated and understood theories of government. But, at least at this point in his career, he had either not yet grasped the idea that a constitution was paramount over ordinary laws, or, more likely, he simply did not want to consider that theory because it hurt his anti-Bank position. Jefferson's support for the Bill of Rights a few years earlier supports the idea that while he understood the primacy of a constitution, he simply did not want to admit that primacy on the issue of the Bank.

During the debates over the ratification of the Constitution, Jefferson had urged Madison to work for the addition of a bill of rights to the Constitution.⁸⁷ Jefferson had complained of "the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land"⁸⁸ Clearly, Jefferson understood that a bill of rights, or any constitutional provision, could overrule both common law and statutory law. For example, in urging Madison to support the addition of a bill of rights to the Constitution, Jefferson surely demonstrated his belief that a constitutional protection of freedom of the press would overrule the English common law of seditious libel. Indeed, he wanted a bill of rights so that the Constitution could trump English common law and American statutory law. In his opening salvo in the debate over the Bank of the United States, however, he rejected his notion that the Constitution trumped common law and statutory law.

After setting out his common-law arguments against the Bank, Jefferson offered a constitutional analysis.⁸⁹ Here Jefferson set out two of the major pillars of what would later emerge as states' rights theory. Jefferson's arguments against the Bank set the stage for later southern arguments in favor of nullification, secession, and in the twentieth century, opposition to integration. In the first three decades of the twentieth century, the Supreme Court would use

87. Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 328 (1990) [hereinafter Finkelman, *James Madison*].

88. *Id.*; Letter from Jefferson to James Madison (Dec. 20, 1787), in 12 JEFFERSON PAPERS, *supra* note 53, at 438, 440.

89. Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank, *supra* note 6, at 276–79.

similar arguments to strike down federal laws regulating the economy.⁹⁰ This states' rights/limited federal government theory was presumably killed and buried by the Civil War, the Reconstruction Amendments, and finally the New Deal.⁹¹ However, in the past decade this jurisprudence has come back to life through the state-centered Tenth Amendment and Commerce Clause jurisprudence that marked the last years of the Rehnquist Court.⁹² Much of the analysis in these cases limiting the Commerce Clause and expanding the scope of the Tenth Amendment resembles the losing arguments set out by Jefferson in opposition to the Bank of the United States. An understanding of the origins of the Rehnquist Court's Commerce Clause and Tenth Amendment jurisprudence illustrates that the Court's recent positions have an old lineage—dating from Jefferson's years as Secretary of State—but that the Court's positions reflect a theory of the Constitution rejected by almost all of the framers of the Constitution and leaders of the nation at the founding. Ironically, many of the justices in the majority in these cases advocated implementing an "originalist" jurisprudence or a "jurisprudence of original intent." But an examination of the debates at the time of the founding illustrates that they are not following the intentions of the vast majority of the Founders, but instead are following the losing and rejected theories of Jefferson,⁹³ which metamorphosed into the long-discredited theories of John C. Calhoun, Jefferson Davis, and, in the modern period, Strom Thurmond, Harry Byrd, George Wallace, and Lester Maddox.

Jefferson's states' rights argument was predicated on the theory that the Constitution created a national government that had very few powers and that those few powers were narrowly defined. He began this analysis of the Constitution with a discussion of what

90. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941) (striking down a federal law regulating child labor on the theory Congress lacked the power to regulate "local" aspects of commerce, such as labor conditions).

91. See, for example, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *N.L.R.B. v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Darby*, 312 U.S. at 100; and *Wickard v. Filburn*, 317 U.S. 111 (1942). For a concise history of this period, see 2 MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 687–712 (2d ed. 2002).

92. See, for example, *United States v. Lopez*, 514 U.S. 549 (1995); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 527 U.S. 706 (1999); *United States v. Morrison*, 529 U.S. 598 (2000).

93. Since Jefferson took no part in the writing or ratification of the main body of the Constitution, one might even argue that he cannot be considered a "founder" for purposes of original intent analysis.

he called the “XIIth Amendment,” which in fact is the Tenth Amendment.⁹⁴ That Jefferson chose to cite this amendment is somewhat curious. Jefferson wrote his *Opinion on the Constitutionality of a National Bank* on February 15, 1791. However, what became the Tenth Amendment would not be ratified until the following December. Not only did Jefferson assume that the amendment would be added soon, but he also assumed that it was legitimate to base his constitutional arguments on the as yet unratified amendment.

Jefferson quoted the language of what became the Tenth Amendment—“all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people”—claiming that this statement was “the foundation of the Constitution.”⁹⁵ This is in itself a curious argument, since clearly this language was not in the original Constitution and the Founders certainly did not want it there.⁹⁶ Significantly, the amendment did not contain the word “expressly” before “delegated,” as many anti-Federalists had wanted. Nevertheless, writing as though the Amendment were more sweeping than it was, Jefferson argued that “[t]o take a single step beyond . . . is to take possession of a boundless feild [sic] of power, no longer susceptible of any definition.”⁹⁷ This was the beginning of a rigid theory of strict construction in American constitutionalism and the opening salvo in Jefferson’s struggle to weaken the national government at the expense of the states. Jefferson followed this opening statement with a series of arguments that centered on the exact language of the Constitution. Yet, as just noted, he read the not-yet-ratified Tenth Amendment as if the word “expressly” had been included in the language, when it had not. In this analysis of the Constitution, he argued that incorporation of a bank, or anything else, was not one of the “powers specially enumerated” in the Constitution. Thus, he claimed Congress lacked the power to pass such a bill.

94. Jefferson called it the “XIIth Amendment” because although Congress initially sent twelve amendments to the states for ratification, at the time the states only ratified ten of them. The first two were not ratified at the time, although ultimately the original second amendment was ratified as the modern Twenty-Seventh Amendment. Thus, in the present Constitution, the original Twelfth Amendment is now our Tenth Amendment.

95. Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, *supra* note 6, at 276.

96. See Finkelman, *James Madison*, *supra* note 87, at 304.

97. Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, *supra* note 6, at 276.

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Jefferson's opposition to the Bank led to an analysis of the powers of Congress under the Constitution that has striking implications for more modern problems. Hamilton argued that the Bank was necessary to facilitate commerce. Jefferson answered that "[h]e who erects a bank creates a subject of commerce in it's [sic] bills,"⁹⁸ but that the bank itself was not part of interstate commerce. He further noted that just as the bank created "bills" that would be the "subject of commerce," so too "does he who makes a bushel of wheat, or digs a dollar out of the mines."⁹⁹ Jefferson's point was that the creation of wealth, or even the creation of goods that traveled in interstate commerce, was not the same as commerce, and thus not properly subject to congressional regulation, or proactive legislation on the part of Congress. Jefferson argued that the creation of such goods could not be regulated because they were part of the "internal commerce of every state."¹⁰⁰

Jefferson would lose the immediate battle on this issue, and Washington would sign the bank bill. But, on the larger issue of what constituted interstate commerce, Jefferson's ideas would come into their own almost a century after he died.¹⁰¹ There is a great irony in the way this played out, and how Jefferson's analysis of the Constitution came to haunt the reformers of the Progressive Era, who often fancied themselves to be followers of the Jeffersonian legacy of the "little man" fighting the rich, the well-born, and the "interests," as progressives called big business. The Federalists rejected Jefferson's theory of limited government in the antebellum period. But in the late nineteenth and early twentieth century, the Supreme Court, dominated by pro-business Republicans, would apply the logic of Jefferson's analysis to protect large corporations—the very entities Jefferson hated and feared—from federal regulation. In decisions that would doubtless have been anathema to Jefferson, the late nineteenth- and early twentieth-century Court made a distinction between manufacturing and commerce that is almost identical to the one Jefferson offered in opposition to the Bank. Thus, in *United States v. E.C. Knight Co.*,¹⁰² the Court found that a monopoly in the refining of sugar was not the same as a monopoly in the interstate sale of the product, and thus while the Sherman

98. *Id.*

99. *Id.*

100. *Id.*

101. For example, see the majority opinion in *United States v. Butler*, 297 U.S. 1 (1936), striking down the Agricultural Adjustment Act of 1933.

102. 156 U.S. 1 (1895).

Act¹⁰³ prohibited a monopoly in the sale of goods in interstate commerce, neither that law nor the power of Congress to regulate commerce could be used to regulate the manufacturing of a product. Similarly, in *Hammer v. Dagenhart*, the Court would strike down a federal law banning child labor on the grounds that labor was a function of manufacturing, and therefore not subject to regulation under the Commerce Clause.¹⁰⁴ Progressives, who often saw themselves as latter-day Jeffersonians fighting against the “interests” of big business, were in fact fighting against the very ideological and constitutional arguments set out by Jefferson in opposition to the Bank. Far too often, the Progressives were defeated by a Court majority that adhered to these Jeffersonian ideas.

Not until the late 1930s would the Supreme Court uphold Congressional legislation that regulated manufacturing and commercial activities within the states, on the grounds that they affected interstate commerce. Ironically, the key cases on this subject involved precisely the issues that Jefferson found so persuasive as an argument *ad absurdum* against the Bank. In opposing the Bank, Jefferson argued that just as a bank created “bills” that would be the “subject of commerce,” so too “does he who makes a bushel of wheat, or digs a dollar out of the mines.”¹⁰⁵ But, clearly, in Jefferson’s mind, Congress could not regulate mining, create a corporation to operate a mine, or regulate the production of wheat. In *Wickard v. Filburn*,¹⁰⁶ the U.S. Supreme Court would uphold the power of Congress, under the Commerce Clause, to regulate the production of wheat at the local level. Three years later, in *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*,¹⁰⁷ the Court would uphold federal regulation of mines under the Fair Labor Standards Act.¹⁰⁸ The final irony of this jurisprudence is that the Court that reached these decisions had been shaped by Democrats who traced their political lineage to Jefferson and who stood for the common man against the “interests,” which was precisely the position Jefferson claimed to hold.

Even without knowing the subsequent history of the Constitution during the New Deal, it is clear that Jefferson’s analysis was flawed. Bank notes were not like bushels of wheat or ingots of silver

103. Sherman Act, ch. 647, 26 Stat. 209 (1890).

104. 247 U.S. 251 (1918).

105. Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank, *supra* note 6, at 276.

106. 317 U.S. 111, 114 (1942).

107. 325 U.S. 161 (1945).

108. Fair Labor Standards Act of 1938, 52 Stat. 1060 (1938) (amended 2004).

or gold. Bank notes were not a “subject of commerce,” but were the tools of commerce. In that way, they might have been properly compared to roads which began in one state and ended in another. Like a national road, banknotes did not remain within one state. If they had, then the nation could not have had interstate or international commerce. Furthermore, the logical implication of Jefferson’s analysis would have been the absurd result that Congress had the power to regulate the interstate circulation of bank notes, but did not have the power to create a national bank which could issue these notes. Logically, under Jefferson’s theory of commerce, Congress lacked the power to charter a bank, but could have declared that only the bank notes of a particular bank could be used in interstate commerce. This would have had the effect of creating a national currency without having given Congress any power to control the bank issuing the currency. Oddly, this was almost exactly the result Jefferson feared when he complained about foreign investment in the Bank. He feared that foreigners would be able to control the economy by owning shares of bank stock, but these stockholders would have no allegiance to the national government. However, Jefferson’s analysis would have led to a far more problematic result. Under Jefferson’s constitutional theory a private bank, under the control of no government authority (except perhaps the state that chartered it), could produce currency which would circulate throughout the nation. Congress could declare that this currency would be legal tender—perhaps the only legal tender—to be used in interstate commerce. But Congress would have had no authority to regulate the issuing bank. This would have created power without oversight and set the stage for enormous corruption and private manipulation of the economy. Surely this would not have been a good policy and should have been anathema to Jefferson. Also, it seems reasonable that *if* Congress had the power to regulate currency circulating in interstate commerce, as Jefferson seemed to concede,¹⁰⁹ then Congress probably had the power to create an institution to issue that currency, as Hamilton argued.

A national system of currency might not have been absolutely vital for the economy—after all, the United States functioned without one from the demise of the Second Bank of the United States in 1836 until the Civil War. But a system of national currency certainly made the economy run more efficiently and more smoothly. However, since a bank was not an object of commerce, Jefferson’s

109. See Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank, *supra* note 6, at 276.

position was not completely without merit, and the President might have agreed with the Secretary of State that creating a bank was not actually a regulation of commerce. President Washington might have agreed that if the only constitutional basis of the bank was as a regulation of commerce, the bill could not be signed.

But Hamilton had also argued that the bill was constitutional under the Necessary and Proper Clause. He would make this a centerpiece of his opinion on the Bank's constitutionality, which he would give to Washington after Jefferson finished his opinion.¹¹⁰ Jefferson did not need to see Hamilton's finished product to know what his argument would be. Thus, the Secretary of State set out to explain why the Bank could not be supported under the Necessary and Proper Clause. Jefferson argued a bank might be useful or "convenient" for the national government,¹¹¹ but that "a little *difference* in the degree of *convenience*, cannot constitute the necessity which the constitution makes the ground for assuming any non-enumerated power."¹¹² He asserted that the argument for "convenience," if accepted, would "swallow up all the delegated powers, and reduce the whole to one phrase"¹¹³ Unable to stick to a constitutional argument for long, Jefferson quickly slid into a discussion of policy. He noted that "existing banks" could provide loans and other services to the government, but a national bank would undermine their independence. Acknowledging the "convenience" of a national currency, he argued that the bank would undermine the role of the states, and noted, as he had at the beginning of his opinion, that this would ultimately overturn state laws banning or regulating mortmain, alienage, rules of descent, and monopolies.¹¹⁴

110. Alexander Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 97 (Harold C. Syrett ed., 1965). "It may be truly said of every government, as well as of that of the United States, that it has only a right to pass such laws as are necessary & proper to accomplish the objects intrusted to it." He then asserted that "[t]he *degree* in which a measure is necessary, can never be a test of the *legal* right to adopt it. That must ever be a matter of opinion; and can only be a test of expediency. The *relation* between the *measure* and the *end*, between the *nature* of the *mean* employed towards the execution of a power and the object of that power, must be the criterion of constitutionality not the more or less of *necessity* or *utility*." *Id.* at 103-04.

111. Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank, *supra* note 6, at 278.

112. *Id.* at 279.

113. *Id.* at 278.

114. *Id.* at 279.

Jefferson's whole opinion boiled down to three principles. First, that state laws on alienage, descent, and other aspects of property should not be undermined by national policy. This was the beginning of a states'-rights interpretation of the Constitution. Bolstering this position was his second main point that, under the soon-to-be-ratified Tenth Amendment, the right to charter a bank or any other company belonged entirely to the states. Of course, the Tenth Amendment did not say this and might easily have been interpreted to support the idea that both the states and Congress had the power to create corporations. But this was not Jefferson's view, and this reading would have conflicted with his third principle. That principle asserted that the powers of Congress had to be narrowly and strictly interpreted. In Jefferson's view, the Constitution created a government of limited powers that were narrowly defined. Any attempt to go beyond them would destroy the nation by destroying the states.¹¹⁵

III. THE SEDITION ACT AND THE RISE OF STATES' RIGHTS CONSTITUTIONAL THEORY

The period from 1798 to early 1801 is one of the darker moments of American history. Between June 18 and July 6 of 1798, Congress passed three Alien Acts¹¹⁶ to regulate naturalization and immigration. On July 14, Congress passed the Sedition Act,¹¹⁷ which was designed to regulate speech. The three alien acts were ostensibly designed to empower the government to deport foreigners in time of war and to slow down the process of naturalization to make sure that new citizens were thoroughly "Americanized" before they could vote and participate in government. The Sedition Act was in theory designed to prevent "false, scandalous and malicious" writings about the President and government of the United States.¹¹⁸ In fact, all four acts were designed to intimidate the opponents of John Adams, who were the supporters of Thomas Jefferson. These laws were party measures, passed by a powerful

115. We know, of course, that as President Jefferson would have a more flexible view of national power. Despite the restrictions of the Constitution, and his theories set out in the 1790s, Jefferson was willing to acquire Louisiana from France and to impose embargoes on both Haiti and then Europe.

116. Naturalization Act of June 18, 1798, ch. 54, 1 Stat. 566 (1798); Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798); and Act Respecting Alien Enemies, ch. 67, 1 Stat. 577 (1798).

117. Sedition Act, ch. 74, 1 Stat. 596 (1798).

118. Sedition Act, section 2.

Federalist majority in Congress and aimed at the political opponents of the majority party. Even before Congress had passed them, Jefferson firmly believed that the Alien Acts were aimed at one of his most important and brilliant advisors and supporters, Albert Gallatin, a native of Switzerland.¹¹⁹

The partisan nature of the Sedition Act is illustrated by its text and timing. The law prohibited “false, scandalous and malicious” statements and publications about the President and the United States government as a whole, but did not prohibit such comments directed at the Vice President. Thus, in the upcoming election campaign, the opponents of President Adams had to be careful what they said, or they might go to jail. But the supporters of Adams could say anything they wanted about Vice President Jefferson. The timing of the law was also political. The law was to “be in force until the third day of March, one thousand, eight hundred and one,”¹²⁰ which was the day before the new President would be inaugurated. If the law was successful, and helped John Adams win reelection, then it would no longer be necessary to have such a statute on the books, and if it was needed, presumably the new Congress could pass a new law. But, if Adams lost, then Jefferson could not immediately turn this repressive law on his enemies, the supporters of Adams. Even before Congress passed the Sedition Act, the federal prosecutor in Pennsylvania, unwilling to wait for Congress to actually pass the new law, obtained a common-law sedition indictment against Benjamin Franklin Bache (the grandson of his namesake) for his attacks on Adams in the *Philadelphia Aurora*.¹²¹ The Federalists, firmly in power, were moving towards a repressive regime that would go after immigrants, naturalized citizens, and American-born opponents of John Adams. Jefferson feared the Adams administration could soon be arresting his friends and allies. Nevertheless, he bravely asserted that with “a little patience” his supporters could survive until “the reign of witches pass over, their spells dissolve, and the people recovering their true sight, restore their government to it’s [sic] true principles.”¹²²

Significantly, Jefferson saw the crisis as one caused by democracy itself. He believed Adams, and more importantly, Hamilton, had in effect bewitched the people, blinding them with fears of a war with France, and thus they had accepted the Federalists’ repres-

119. Letter from Jefferson to James Madison (Apr. 26, 1798), in 30 JEFFERSON PAPERS, *supra* note 66, at 299, 299–300 (“their threats point at Gallatin”).

120. Sedition Act, section 4.

121. See generally RICHARD N. ROSENFELD, *AMERICAN AURORA* (1997).

122. Letter from Jefferson to John Taylor, *supra* note 66, at 389.

siveness. Jefferson intuitively understood that civil liberties might be ignored or violated when a nation was at war—even in an undeclared war that involved almost no actual combat—as was the case with the “phony war” with France in the 1790s. Furthermore, Jefferson seemed to understand that under such wartime circumstances, the people might be easily misled by a venal and power-hungry President, who would urge the passage of repressive laws to counteract external threats. Once the people regained “their true sight,”¹²³ however, Jefferson was certain they would return to republican principles—which meant they would support him and his policies, but also that they would oppose the government’s arbitrary attacks on aliens and its suppression of freedom of expression. After the passage of the Alien and Sedition Acts, Jefferson did his part to give Americans back their sight—by secretly authoring an attack on the Acts, which was issued by the Kentucky Legislature as the *Kentucky Resolutions*.

Most Americans revere Jefferson as an icon of liberty. At first glance, his opposition to the Sedition Act stands out as an example of this. However, a careful examination of the *Kentucky Resolutions* and of his other writings on freedom of the press undermines this view. As his papers reveal, Jefferson was not much of a civil libertarian.¹²⁴ More significantly, his opposition to the Sedition Act turns out to be based on a commitment not to civil liberties, but rather to states’ rights theory.

Well before the Sedition Act crisis, Jefferson showed that his views of freedom of the press were quite limited. In 1789, he urged James Madison to reject the sweeping language of what became the press clause of the First Amendment for a more constricted notion of freedom of expression. Madison had proposed a comprehensive protection of freedom of expression, declaring that “[t]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”¹²⁵ This was apparently too much liberty for Jefferson, who suggested that the wording be changed to “[t]he people shall not be deprived or abridged of their right to speak to write or *otherwise* to publish any thing but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign

123. *Id.*

124. For a more complete analysis along these lines, see generally LEONARD W. LEVY, *JEFFERSON & CIVIL LIBERTIES* (Ivan R. Dee 1989).

125. Speech of James Madison (June 8, 1789), in 12 *THE PAPERS OF JAMES MADISON* 201 (Charles F. Hobson & Robert A. Rutland eds., 1979).

nations.”¹²⁶ Ironically, this language was very similar to that of the Sedition Act that Jefferson so despised.¹²⁷ In a libertarian advance over the common law, the 1798 Act allowed for truth as a defense to an indictment. Indeed, most of Jefferson’s supporters who were convicted under the Act argued that their offensive publications were in fact true. But in politics, one man’s truth has often been another man’s libel. Had Madison and the Congress followed Jefferson’s advice, the nature of free speech in America would have been dramatically altered. Moreover, the Sedition Act of 1798, and subsequent attempts to limit free speech, would probably have been presumptively constitutional.¹²⁸

In response to the Alien and Sedition Acts, Jefferson secretly drafted a series of resolutions that the Kentucky Legislature adopted. In these documents, known as the *Kentucky Resolutions*, Jefferson set out why he thought the Sedition Act was not constitutional. The structure of the document is much like the Declaration of Independence, especially in its use of “mannered and repetitious statements” and “a structured set of indictments and explications meant to justify extraordinary action.”¹²⁹ However, unlike the Declaration, this document lacks a ringing endorsement of liberty. Significantly, while denouncing the Sedition Act, Jefferson does not stand up for freedom of the press. On the contrary, Jefferson endorses the idea of suppressing expression, as long as the proper political entity—a state—acts. The *Kentucky Resolutions* are not, in the end, about freedom of expression, but rather are an argument

126. Letter from Jefferson to James Madison (Aug. 28, 1789), in 15 JEFFERSON PAPERS, *supra* note 84, at 364, 367.

127. Section 2 of the Sedition Act, ch. 74, 1 Stat. 596 (1798), imposed a fine on anyone who:

shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame

Id. If anything, the language of the Sedition Act was in some ways less restrictive than the language proposed by Jefferson. The Sedition Act prohibited only those false statements made against the U.S. government, Congress, and President, while Jefferson’s proposal for the First Amendment would have allowed prosecution for all false statements that negatively affected anyone’s reputation.

128. The Supreme Court never heard any cases under the 1798 Sedition Act, so it was never declared unconstitutional. Most scholars, however, agree with the Supreme Court’s assertion in *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964), that the Sedition Act was found unconstitutional “in the court of history.”

129. Editorial Note in 30 JEFFERSON PAPERS, *supra* note 66, at 535.

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for state sovereignty, states' rights, and nullification. The document did not go so far as to suggest the legitimacy of secession, but it is not hard to draw a line from this document to the actions taken by most of the South in 1861.

The states' rights and nullification thrust of the *Kentucky Resolutions* is found in its first numbered resolution, which is one exceedingly long sentence:

1. Resolved, that the several States composing the United States of America, are not united on the principle of unlimited submission to their General Government; but that by compact under the style and title of a Constitution for the United States and of amendments thereto, they constituted a General Government for special purposes, delegated to that Government certain definite powers, reserving each state to itself, the residuary mass of right to their own self Government; and that whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force: that to this compact each state acceded as a state, and is an integral party, its co-states forming as to itself, the other party: That the Government created by this compact was not made the exclusive or final *judge* of the extent of the powers delegated to itself; since that would have made its discretion, and not the constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.¹³⁰

It is hard to imagine any later advocate of states' rights making a more forceful claim for the right of the states to ignore or nullify—to declare “void”—the laws of the federal government.

Jefferson's third resolution was the only one of the nine separate resolutions to focus on the Sedition Act. Like the first resolution, it began with a discussion of states' rights. He began by quoting the Tenth Amendment, asserting, “[t]hat it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution that ‘the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people’”¹³¹ This led to an extraordinary assertion *in favor* of the suppression of the press, provided it was done at the state level. Jefferson wrote:

130. Resolutions Adopted by the Kentucky General Assembly (Nov. 10, 1798), in 30 JEFFERSON PAPERS, *supra* note 66, at 550, 550.

131. *Id.* at 550–51.

and that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people: That thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed.¹³²

This resolution then noted that the First Amendment prohibited Congress from regulating the press, and thus that the act “entitled ‘An Act in addition to the act for the punishment of certain crimes against the United States,’ which does abridge the freedom of the press, is not law, but is altogether void and of no effect.”¹³³

Nowhere else in the Resolutions did Jefferson mention freedom of the press, or even the Sedition Act. The other resolutions also focused on states’ rights, the power of the national government, and the limitations placed on the government by the Constitution. Perhaps still smarting from the defeat he suffered when Washington signed the bill to create the Bank of the United States, Jefferson, noted “[t]hat the construction applied by the General Government (as is evidenced by sundry of their proceedings)”¹³⁴ to the taxing power and the “necessary and proper clause” threatened the nation because it would lead “to the destruction of all the limits prescribed to their power by the Constitution—That words meant by the instrument to be subsidiary only to the execution of the limited powers, ought not to be so construed as themselves to give unlimited powers”¹³⁵

The *Kentucky Resolutions* reveal much about Jefferson’s constitutional theory. In the end, the author of the Declaration of Independence was far more concerned about states’ rights and limiting the national government than he was about abstract notions of freedom of expression. He did not reject the idea of sedition prosecutions. He only wanted to leave that power in the hands of the states. It seems unlikely that state governments would be less repressive than the national government. Indeed, as Justice Robert Jackson would observe nearly a century and a half later, “There are village tyrants as well as village Hampdens, but none who acts under

132. *Id.* at 551.

133. *Id.*

134. *Id.* at 552–53.

135. *Id.*

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color of law is beyond reach of the Constitution.”¹³⁶ Jefferson, however, was fully prepared, so it would seem, to turn over the regulation of freedom of expression to the village tyrants of America without any theoretical support for the Hampdens. His only objection to the suppression of speech and press was that it came from the federal government, especially a federal government run by his enemies.

After taking office Jefferson pardoned those who had been convicted under the Sedition Act, and Congress ultimately remitted their fines. The “reign of witches” seemed to be over. But it was not. As President, Jefferson found that suppression of ideas might be a good idea, especially if those ideas differed from his own.

Thus in 1803, Jefferson wrote Governor Thomas McKean of Pennsylvania, asking that he use the power of his state government to institute a “few prosecutions” of “selected” Federalists.¹³⁷ Jefferson believed that such prosecutions “would have a wholesome effect” on his political opponents.¹³⁸ The author of the Declaration of Independence wrote:

On the subject of prosecutions, what I say must be entirely confidential, for you know the passion for torturing every sentiment & word which comes from me. The federalists having failed in destroying the freedom of the press by their gag-law, seem to have attacked it in an opposite form, that is by pushing it's licentiousness & it's lying to such a degree of prostitution as to deprive it of all credit. And the fact is that so abandoned are the tory presses in this particular that even the least informed of the people have learnt that nothing in a newspaper is to be believed. This is a dangerous state of things, and the press ought to be restored to it's credibility if possible. The restraints provided by the laws of the states are sufficient for this if applied. And I have therefore long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses. Not a general prosecution, for that would look like persecution: but a selected one. The paper I now inclose appears to me to offer as good an instance in every respect to make an example of, as can be selected. However of this you are the best judge. I in-

136. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

137. Jefferson to Thomas McKean (February 19, 1803), in 9 *THE WORKS OF THOMAS JEFFERSON* 449, 451–52 (Paul Leicester Ford ed., 1905), available at http://memory.loc.gov/ammem/collections/jefferson_papers/mtjser1.html (search for “Feb. 19, 1803”).

138. *Id.* at 452.

close it lest you should not have it. If the same thing be done in some other of the states it will place the whole band more on their guard. Accept my friendly salutations & assurances of my high respect & consideration.¹³⁹

Jefferson's allies in Pennsylvania then indicted and arrested Joseph Dennie, editor of *The Port Folio*, a Federalist paper in Philadelphia. The case lingered until 1805, when a jury acquitted him after a charge from a Federalist state judge, Jasper Yeates, who told the jury that a free nation needed a relatively free press.¹⁴⁰

Similarly, Jefferson's allies in New York prosecuted the Federalist publisher Harry Crosswell for common-law seditious libel after he criticized Jefferson.¹⁴¹ Crosswell had accused Jefferson of paying James T. Callender to denounce George Washington and John Adams. Crosswell wanted to call Callender as a witness to prove the truth of his article, but the judge, a Jeffersonian Democrat, would not postpone the trial long enough to allow the witness to arrive. Not that it would have mattered. Reverting to the pre-Sedition Act theory of libel law, the trial judge, Morgan Lewis (who would soon become the Democratic governor of New York), charged the jury that truth was not a defense to a libel prosecution. Crosswell appealed to New York's highest court, where his lawyer, Alexander Hamilton, eloquently, but unsuccessfully, argued for the right of Crosswell to prove the truth of his accusations. Hamilton made a strong argument for a freedom of the press, asserting that "[t]he liberty of the press consisted in publishing with impunity, truth with good motives, and for justifiable ends, whether it related to men or to measures."¹⁴² New York's highest court was equally divided on whether to give Crosswell a new trial, and so the conviction remained. However, in April 1805, the New York legislature passed a law declaring that truth would be a defense in a seditious libel case.¹⁴³ In the wake of this statute the state's highest court ordered a new trial,¹⁴⁴ which apparently never took place, and Crosswell went free. The Jeffersonians were not willing to let a jury hear the sordid truth of Jefferson's involvement with Callender, whom he in fact

139. *Id.* at 451.

140. *Respublica v. Dennie*, 4 Yeates 267, 271 (Pa. 1805); LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 341-42 (1985).

141. *People v. Crosswell*, 3 Johns Cas. [337], [337] (N.Y. Sup. Ct. 1804) [no numbering in original].

142. *Id.* at 352.

143. An Act Concerning Libels, ch. 90, 1805 N.Y. Sess. Laws 450.

144. *Crosswell*, 3 Johns Cas. at [413].

paid to write attacks on Jefferson's opponents.¹⁴⁵ While Croswell's case was on appeal, Alexander Hamilton also represented Samuel Freer of Kingston, New York, the Federalist publisher of the *Ulster Gazette*, who was prosecuted for contempt of court by Jeffersonians for reporting on the Croswell trial.¹⁴⁶ Freer had published an attack on the Croswell prosecution, not, he said, to attack the court, but rather in response to a vitriolic piece attacking his paper in a Jeffersonian paper, the *Plebeian*. The Jeffersonian majority on the court charged him with contempt. In February 1804, speaking for the New York Supreme Court, James Kent rejected the idea that Freer could be charged with libel for reprinting material from the Croswell case, and said his motive—to answer a rival paper—was sufficient to relieve him of any criminal intent. Nevertheless, Kent gave Freer a token fine of \$10.00 for his contempt towards the court itself.¹⁴⁷

In Connecticut, where the Federalists controlled the state government, Jefferson could not count on state officials to prosecute his enemies.¹⁴⁸ So, there he allowed a newly-appointed federal judge—one of his allies—to persuade a grand jury to indict a number of Federalists for their criticism of the President. The author of the *Kentucky Resolutions* was now no longer certain that the Constitution prohibited the national government from suppressing the press. Among those indicted was Tapping Reeve, a leader of the Connecticut bar who had been Aaron Burr's tutor and later became his brother-in-law. By this time, of course, Jefferson considered Burr a political enemy and an enemy of the nation itself.¹⁴⁹ These prosecutions were based on common law, rather than statutory law. Jefferson and his allies may have seen a distinction between a statutory suppression of the press and common-law suppression. The first required a law to be passed, which under the analysis in the *Kentucky Resolutions*, Congress had no power to do. The second required no specific legislation. But, in fact, Jefferson had always believed there could be no federal common law. He had certainly opposed the use of the common law by the federal prosecutor in Pennsylvania to indict his ally, Benjamin Franklin

145. See MICHAEL DUREY, "WITH THE HAMMER OF TRUTH": JAMES THOMSON CALLENDER AND AMERICA'S EARLY NATIONAL HEROES 117, 119–21 (1990).

146. *People v. Freer*, 1 Cai. R. 485, 485–86 (N.Y. Sup. Ct. 1803).

147. *People v. Freer*, 1 Cai. R. 518, 518–19 (N.Y. Sup. Ct. 1804).

148. The governor of Connecticut from 1798 to 1809 was Jonathan Trumbull, Jr., described as "an ardent Federalist." John Ifkovic, *Trumbull, Jonathan, Jr.*, in AMERICAN NATIONAL BIOGRAPHY ONLINE, <http://www.anb.org/articles/01/01-00901.html>.

149. See Siry, *supra* note 34.

Bache. Given Jefferson's narrow view of the Constitution in 1791 and 1798, he certainly could not have argued with a straight face that the executive branch could carry out prosecutions without Congress passing statutes. It is possible, however, that Jefferson's reading of the Constitution with regard to freedom of expression changed when he became President, just as Madison's view of the constitutionality of the Bank changed during his administration.

Whatever the constitutional analysis, the Supreme Court put an end to such federal common law sedition prosecutions when the Connecticut cases came before the Court in *United States v. Hudson and Goodwin*. The Supreme Court held that there was no federal common law of crimes, and that all federal prosecutions had to be conducted under statutory authority.¹⁵⁰ This dovetailed with Jefferson's long-term views of the Constitution. But he and his allies seem to have forgotten these views when in office.

IV.

CONCLUSION: JEFFERSON AND CONSTITUTIONAL INCONSISTENCY

Jefferson's change of heart on press suppression dovetails with his other actions while President. Indeed, as President, Jefferson would have a far more flexible view of national power than he did as Secretary of State or as Vice President. Under the theories of constitutional interpretation set out by Jefferson in the 1790s, it is hard to imagine how he had the power to authorize the purchase of Louisiana. Future volumes of the *Jefferson Papers* will contain his correspondence on this issue. We know, of course, that despite the restrictions of the Constitution and his theories set out in the 1790s, Jefferson was willing to acquire Louisiana from France. Similarly, he willingly imposed embargoes on Haiti and then Europe during his presidency. We could argue that Jefferson was hypocritical on these matters, or that he was merely inconsistent. It is equally likely that, once in power, he simply could not resist using his office to get the results he wanted. Perhaps this illustrates the greatest lesson we can learn from the Founders: that even the best leaders must be carefully watched when in power.

There are two other plausible explanations for these changes. Jefferson was a firm supporter of a limited national government and states' rights when he was out of power. He did not trust the Federalists and so he framed his policy disagreements with Hamilton and Adams in terms of states' rights constitutionalism, falling

150. 11 U.S. (7 Cranch) 32, 34 (1812).

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back on a limited reading of the Necessary and Proper Clause and an expansive reading of the Tenth Amendment. But, when in power, Jefferson no longer feared the national government and so was more willing to expand the power of Congress and the executive branch to accomplish his goals. Under this analysis, Jefferson's constitutional principles collapsed as his political power grew. An alternative version of this analysis is the possibility that Jefferson and, even more so, his colleague Madison saw their own views of the Constitution evolve in this period. As such, their understanding of original intent changed. Sitting in the President's chair changed their constitutional views because from that vantage point the Constitution just seemed to be different.

The best illustration of this possible explanation is Madison's support for the Second Bank of the United States. This story suggests that the most important originalist goal of Madison may have been to create a successful government and ensure that the nation could function. Thus, Madison's original views on the Bank changed dramatically while he was President.

The story of the Second Bank of the United States illustrates the way constitutional understanding was a work in progress during the first fifty years of nationhood. In 1811, the charter of the Bank of the United States expired, which pleased President Madison and the Democratically-controlled Congress. The Bank continued to operate under a charter from Pennsylvania but was no longer a national bank. Madison, like his ally Jefferson, had long been on record as opposing the Bank both on policy grounds and because he believed it to be unconstitutional. In 1790–91, Madison had led the fight against the Bank in the House of Representatives. Like Jefferson, he argued a bank was unconstitutional. Thus, when the twenty-year charter of the first Bank of the United States expired, Madison happily watched the Bank disappear as a national institution. The strict constructionists were now in power and they were certainly not going to continue an institution they despised and believed was unconstitutional. A year after the bank charter expired, the War of 1812 began. By the end of the War of 1812, Madison was convinced that a national bank was not only useful, but actually necessary for the functioning of the nation. He was embarrassed during the War because the United States had such a dysfunctional economy.

In 1814, Congress passed legislation rechartering the Bank. In January 1815, President James Madison vetoed this bill. Significantly, however, Madison did not veto the bill on constitutional grounds. Nor did he veto it on policy grounds. Rather, in his veto

message Madison declared that he would not sign the bill because he felt it did not “answer the purposes of reviving the public credit, of providing a national medium of circulation, and of aiding the Treasury” by allowing it to secure credit with anticipated tax revenues.¹⁵¹ In his veto message, Madison made it clear that there were some problems with the proposed charter that he wanted to Congress to change, but that he no longer opposed the bank on policy grounds. Quite the contrary: he now *wanted* a national bank. More importantly, he no longer believed the bank was unconstitutional. He was not rejecting the bill on constitutional grounds. Indeed, Madison declared he was:

[w]aiving the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation¹⁵²

Madison, it seems, was willing to modify his understanding of the Constitution because of the “repeated recognitions” by others of the constitutionality of the bank. This suggests that James Madison, the “father of the Constitution,” either could no longer be certain what the intentions of the framers had been in 1787, or more likely, that he did not believe those intentions could possibly govern the nation over a quarter of a century later. Jefferson apparently would have approved of Madison’s position.

For scholars and judges—including Justices Scalia and Thomas—who are interested in a jurisprudence of original intent, Madison’s position (as well as Jefferson’s support of it) should be extremely troublesome. Here was a leading framer of the Constitution—indeed the “father of the Constitution”—who had radically changed his mind as to what the Constitution permitted. In 1791, Madison was certain that the framers had emphatically *not* intended to allow the Congress to charter a bank or any other corporation. In 1815, however, Madison believed that the Constitution allowed such an act by Congress.

Eleven months later, Madison made clear that his change of heart on the constitutionality of the Bank was sincere. He had also

151. Veto Message of President James Madison (Jan. 30, 1815), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 540 (James D. Richardson ed., 1897) [hereinafter MESSAGES OF THE PRESIDENTS].

152. *Id.*

revised his opinion on the utility of the Bank. In his annual message he declared that “the probable operation of a national bank will merit consideration”¹⁵³ The man who had so strenuously argued against the constitutionality of the Bank in 1791 was now asking Congress to create such a bank. Madison’s position was endorsed by Thomas Jefferson, who had also opposed the Bank on constitutional grounds in 1791.

Congress quickly endorsed Madison’s call for a new national bank. The bill to incorporate the Bank was introduced by the chairman of the House Committee on Currency, John C. Calhoun, of South Carolina. This future strict constructionist found no constitutional objections to the Bank. In 1816, with relative ease, the Congress chartered the Second Bank of the United States.¹⁵⁴ This was possible because, in 1816, the former opponents of the Bank now not only favored it, but also believed it was constitutional.

In 1819, in *M’Culloch v. Maryland*, Chief Justice John Marshall gave his stamp of approval to the Bank, with a powerful argument in favor of expansive congressional power. Marshall, it should be noted, was not at the Philadelphia convention, but was a delegate to the Virginia ratification convention, where he supported the Constitution. This opinion says little, however, about the specific intentions of the framers. He did, however, talk about the general intentions of those who framed the Constitution and the meaning of the Necessary and Proper Clause of article I:

It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if

153. Seventh Annual Message of President James Madison to Congress (Dec. 15, 1815), in 2 MESSAGES OF THE PRESIDENTS, *supra* note 151, at 547, 550–51.

154. An Act to Incorporate the Subscribers to the Bank of the United States, ch. 44, 3 Stat. 266 (1816).

foreseen at all, must have been seen dimly, and which can be best provided for as they occur.¹⁵⁵

Jefferson did not like Marshall or his jurisprudence. He did not like the nationalizing aspects of *M'Culloch*. Future volumes of the *Jefferson Papers* will, no doubt, explore in great detail his response to *M'Culloch*. But it is clear that in the long run Marshall got it right in 1819 and Jefferson got it wrong for most of the 1790s. Exploring Jefferson's papers up to the eve of his presidency illuminates these debates, which are still with us today. As courts and scholars contemplate new issues and new constitutional problems, we can only hope that they will return to the language and arguments of the Founders, not as a crystal ball into the past, or an oracle into their intentions, but rather to simply learn from the debates they had and the questions they considered. In this context, the publication of the Jefferson papers is a great gift to legal scholarship and modern jurisprudence.

155. 17 U.S. (4 Wheat.) 316, 415 (1819).