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Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison

Patrick J. Charles

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**ORIGINALISM, JOHN MARSHALL, AND THE
NECESSARY AND PROPER CLAUSE:
RESURRECTING THE JURISPRUDENCE OF
ALEXANDER ADDISON**

PATRICK J. CHARLES*

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I. INTRODUCTION

In the recently decided *United States v. Comstock*,¹ the Supreme Court invoked the long standing “choice of means” doctrine when it interpreted a federal criminal statute through the Necessary and Proper Clause.² The statute, 18 U.S.C. § 4248,

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¹ *United States v. Comstock*, 130 S. Ct. 1949 (2010).

² U.S. CONST. art. I, § 8, cl. 18.

granted the Department of Justice discretion to detain mentally ill, sexually dangerous prisoners beyond the date they would otherwise be released. The statute was challenged on the grounds that it exceeded the powers granted to Congress under Article I, Section 8 of the Constitution.³ The Supreme Court upheld the statute on the grounds that it is a

necessary and proper means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.⁴

In coming to this determination, the Court relied⁵ on the landmark opinion *McCulloch v. Maryland* where former Chief Justice John Marshall used a “choice of means” analysis to uphold the constitutionality of the Second Bank of the United States.⁶ The *Comstock* Court reiterated Marshall’s dicta in *McCulloch* stating that “the relevant inquiry” is simply “whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under” a power that the “Constitution grants Congress the authority to implement.”⁷ While some may view the Court’s reliance on Marshall’s “choice of means” doctrine as another footnote in the history of the law, the fact of the matter is that the Supreme Court has upheld Marshall’s definition of the Necessary and Proper Clause for nearly two hundred years. The *Comstock* opinion gives credence to the significance of Marshall’s interpretation of the Constitution in *McCulloch*, for the “choice of means” doctrine is the entire basis of our current federalist structure.

However, to give Marshall full credit for the “choice of means” doctrine is unfair, he was not the first to lay claim to the doctrine when interpreting the Necessary and Proper Clause. Indeed, the philosophical and legal influences of John Marshall have been the speculation of scholarly discourse for some time.⁸ For

³ *Comstock*, 130 S. Ct. at 1954.

⁴ *Id.*

⁵ *Id.* at 1965.

⁶ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁷ *Comstock*, 130 S. Ct. at 1957 (quoting *Gonzalez v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring in judgment)).

⁸ R. BERGER, *CONGRESS V. THE SUPREME COURT* 335-36 (1969); I W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 50-192 (1953); F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 14 (1937) (attributing Marshall’s jurisprudence to the “need of a strong central government”); RICHARD A. POSNER, *LAW AND THE LITERATURE: A MISUNDERSTOOD RELATION* 290 (1988) (attributing much of Marshall’s jurisprudence to the “immaturity” of the American legal system); C. TIEDMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 163 (1890); Richard A. Brisbin, Jr., *John Marshall and the Nature of Law in the Early Republic*, 98 VA. MAG. HIST. BIOGRAPHY 57, 60 (1990) (attributing Marshall’s jurisprudence to natural law and republican principles); Christopher L. Eisgruber & John Marshall, *John Marshall’s Judicial Rhetoric*, 1986 SUP. CT. REV. 439, 480 (1996) (attributing Marshall’s jurisprudence to using “sound means” to give popular justice); Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729 (2005) (attributing *Marbury v. Madison* to English and international influences).

instance, many legal commentators and historians have attributed the influence of Marshall's opinions to being a strong Federalist because many of his opinions echo the Federalist interpretation of the Constitution.⁹ However, Marshall's opinions were also influenced by factors that sometimes conflicted with Federalist thought.¹⁰ This Article does not set out to determine the extent of Marshall's judicial influences. Instead, this Article seeks to address the influence of Pennsylvania Circuit Judge Alexander Addison on Marshall's interpretation of the Necessary and Proper Clause.¹¹

Legal commentators and historians have traditionally attributed Marshall's interpretation of the Necessary and Proper Clause to that of Henry Lee, G.K. Taylor, and Alexander Hamilton.¹² It has gone seemingly unnoticed that the historical evidence strongly suggests that Marshall was influenced by Alexander Addison, for only Addison had used the phrase "choice of means" to describe the Necessary and Proper Clause.¹³ While men such as Alexander Hamilton influenced Marshall's opinions in *United States v. Fisher*¹⁴ and *McCulloch v. Maryland*,¹⁵ the life, jurisprudence, and legal works of Alexander Addison deserve more scholarly attention.

II. THE UNFORTUNATE CASE OF ALEXANDER ADDISON

It has been recently suggested that the 1805 impeachment proceedings of Associate Supreme Court Justice Samuel Chase are "often relegated to little more than a historical footnote" of our modern constitutional jurisprudence.¹⁶ If this is true, the story and impeachment of Alexander Addison has been relegated to much less. It is unfortunate that Addison has become essentially forgotten in the history of American jurisprudence and that he is almost exclusively associated with the judicial impeachments of the early nineteenth century.¹⁷ These impeachments, however,

⁹ E. CORWIN, COURT OVER CONSTITUTION 98 (1938) ("As a good Federalist, Chief Justice Marshall sought, naturally, to embody the point of his party . . . in constitutional law."); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 33-34 (1976); William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 956-60 (1978).

¹⁰ See Christopher Wolfe, *John Marshall and Constitutional Law*, 15 POLITY 5 (1982).

¹¹ U.S. CONST. art. I, § 8, cl. 18.

¹² See Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435, 485-509 (2007).

¹³ ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY, ON THE PROCEEDINGS OF SUNDRY OF THE OTHER STATES IN ANSWER TO THEIR RESOLUTIONS 39 (1800) [hereinafter ADDISON, ANALYSIS OF THE REPORT].

¹⁴ *United States v. Fisher*, 6 U.S. 358 (1805).

¹⁵ *McCulloch*, 17 U.S. 316 (1819).

¹⁶ Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 RUTGERS L. REV. 725, 726 (2010). See also Stephen B. Presser, *Samuel Chase: In Defense of the Rule of Law Against the Jeffersonians*, 62 VAND. L. REV. 349, 349-51 (2009).

¹⁷ Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 601 (1993); Lash & Harrison, *supra* note 12, at 492; Nelson, *supra* note

were not the result of “high crimes or misdemeanors” as is stipulated in the Constitution. They were extremely political in nature and the result of the Jeffersonian Republican administration’s sweeping victory at the local and national level.¹⁸ Instead of passing legislation to correct judicial decisions that they did not agree with, Jeffersonian Republicans sought impeachment proceedings to remove the judges that were thought to have a Federalist bias.¹⁹

Judge Addison’s association with the Federalist Party made him an easy target for these political impeachments, especially by the republican dominated Pennsylvania Assembly. In fact, at the end of his trial,²⁰ Addison was impeached by a strict party vote.²¹ Unfortunately, this impeachment has overshadowed Addison’s impact on John Marshall’s interpretation of the Necessary and Proper Clause and Addison’s impact on American jurisprudence altogether. Today it is rare that a legal commentator mentions Addison as impacting late eighteenth- and early nineteenth-century jurisprudence, let alone the Marshall Court. He has merely become one of many eighteenth-century sources that are quoted in passing.²²

This begets the question: “If Alexander Addison was truly significant in impacting American jurisprudence how has he gone unnoticed by so many in law and history?” To answer this question it should be noted that even before the ink was dry on the Constitution, its provisions were the subject of contentious political debate between Republicans and Federalists.²³ Party politics consumed

9, at 912; Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 195 (2007); Perlin, *supra* note 16, at 738.

¹⁸ Elizabeth K. Henderson, *The Attack on the Judiciary in Pennsylvania, 1800-1810*, 61 PA. MAG. HIST. & BIOGRAPHY 113, 113-14 (1937).

¹⁹ *Id.* at 118; 6 THE PAPERS OF JOHN MARSHALL 347 (Charles F. Hobson ed., 1990) (“[T]he present doctrine seems to be that a Judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment.”).

²⁰ For the trial, see THE TRIAL OF ALEXANDER ADDISON, ESQ. PRESIDENT OF THE COURTS OF COMMON PLEAS IN THE CIRCUIT CONSISTING OF THE COUNTIES OF WESTMORELAND, FAYETTE, WASHINGTON AND ALLEGHENY, ON AN IMPEACHMENT, BY THE HOUSE OF REPRESENTATIVES BEFORE THE SENATE OF THE COMMONWEALTH OF PENNSYLVANIA (2d ed. 1803) [hereinafter THE TRIAL OF ALEXANDER ADDISON].

²¹ Henderson, *supra* note 18, at 118.

²² Joel Fishman, *The Reports of the Supreme Court of Pennsylvania*, 87 LAW LIBR. J. 643, 674 (1995) (acknowledging Addison’s writing of Pennsylvania’s first reporter); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 501 (2007) (quoting Addison on the scope of federal power in relation to the States and local governments); Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205, 221 n.55 (2008) (quoting Addison as applying the “general law of nations” to congressional power over aliens); Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1074-75 (2009) (quoting Addison on First Amendment freedoms).

²³ Joseph McGraw, “*To Secure These Rights*”: *Virginia Republicans on the Strategies of Political Opposition*, 91 VA. MAG. HIST. BIOGRAPHY 54, 54-72 (1983); Kim T. Phillips & William Duane, *Philadelphia’s Democratic Republicans, and the Origins of Modern Politics*, 101 PA. MAG. HIST. BIOGRAPHY 365, 365-87 (1977); Colleen A. Sheehan, *Madison v.*

constitutional interpretation during the Early Republic, and maybe even more so during the John Adams administration.²⁴ As John Marshall wrote to George Washington, the actual issues involved in the bills did not matter because men “will hold power by any means rather than not hold it; & who would prefer a dissolution of the union to the continuance of an administration not of their own party.”²⁵ In other words, Marshall felt that the tumultuous politics of the era would have caused any bill to be “attackd with equal virulence.”²⁶

It is not surprising that politics also consumed public opinion on the judiciary. Matthew P. Harrington asserts that eighteenth-century public opinion explains why Addison’s jurisprudence was not widely accepted. Harrington believes Addison’s “views did not command universal acceptance at the time, [because] the way he went about putting them into practice subjected him to a great deal of criticism.”²⁷ However, Harrington’s thesis cannot survive given that Addison’s views were well known among Federalist circles. Not to mention that his writings were frequently published in what were known as “charges to the grand jury.” These charges were often political in nature, but expounded legal precedents to support arguments. As Stewart Jay writes, charges to the grand jury were judicial efforts to indoctrinate “the citizenry about the political theory of the new Constitution. Cast in extravagant language, the charges were also reminders of the need for patriotic support of the national government.”²⁸

Charges to the grand jury were quite common in the late eighteenth century.²⁹ In fact, few are aware that American independence was proclaimed in a charge just months before the Declaration of Independence.³⁰ On April 2, 1776, South Carolina Judge William Henry Drayton delivered this charge proclaiming the colonies took up

Hamilton: The Battle Over Republicanism and the Role of Public Opinion, 98 AM. POL. SCI. REV. 405, 405-24 (2004).

²⁴ This was especially prevalent during the Alien & Sedition Acts. See DOUGLAS BRADBURN, *THE CITIZENSHIP REVOLUTION: POLITICS AND THE CREATION OF THE AMERICAN UNION, 1774-1804*, at 168-206 (2009) [hereinafter BRADBURN, *THE CITIZENSHIP REVOLUTION*].

²⁵ 4 THE PAPERS OF JOHN MARSHALL 4 (Charles T. Cullen ed., 1984).

²⁶ *Id.* at 3.

²⁷ Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 417 (1999).

²⁸ Jay Stewart, *Origins of the Federal Common Law: Part One*, 133 U. PENN. L. REV. 1003, 1039 (1985).

²⁹ For examples, see THE CHARLESTON EVENING GAZETTE (Charleston, S.C.), Dec. 10, 1785, at 2 (cols. 1-2); THE COLUMBIAN HERALD OR THE PATRIOTIC COURIER OF NORTH-AMERICA (Charleston, S.C.), May 9, 1785, at 2 (cols. 1-2); THE COLUMBIAN HERALD OR THE PATRIOTIC COURIER OF NORTH-AMERICA (Charleston, S.C.), Nov. 9, 1785, at 3 (cols. 1-2); THE INDEPENDENT GAZETTEER (Philadelphia, Pa.), Apr. 23, 1785, at 2 (col. 4); THE PENNSYLVANIA EVENING POST (Philadelphia, Pa.), Aug. 14, 1781, at 127 (cols. 1-2); THE PENNSYLVANIA PACKET, AND DAILY ADVERTISER (Philadelphia, Pa.), Apr. 19, 1785, at 3 (cols. 1-3); THE PROVIDENCE GAZETTE (Providence, R.I.), Feb. 2, 1775, at 2 (cols. 3-4); THE SOUTH CAROLINA WEEKLY GAZETTE (Charleston, S.C.), Jun. 14, 1783, at 1 (cols. 1-3).

³⁰ WILLIAM HENRY DRAYTON, *THE CHARGE TO THE GRAND JURY (Apr. 2, 1776)*, reprinted in 1 AMERICAN ELOQUENCE: A COLLECTION OF SPEECHES AND ADDRESSES BY THE MOST EMINENT ORATORS OF AMERICA 50 (New York, D. Appleton & Co. 1859).

“arms in their own defence” to protect their constitutional rights.³¹ Such charges to the grand jury were so prominent that even the United States Supreme Court delivered them.³²

Interestingly enough, such charges to the grand jury were the impetus for the impeachment of Alexander Addison. From late 1796 through the turn of the century, Addison’s charges were highly critical of Jeffersonian Republicans.³³ He frequently accused Republicans of misleading public opinion,³⁴ poisoning “the source of our government,” and corrupting “the whole mass of the administration.”³⁵ Despite the content of Addison’s charges being the impetus for his impeachment proceedings, they were not the actual grounds of his impeachment. Addison was officially impeached for failing to allow a fellow judge on the court to similarly address the grand jury.³⁶

Addison’s impeachment may explain why so many legal scholars have overlooked his writings as influencing early American jurisprudence. However, a close examination of his work reveal the political and legal thought of many Founding Fathers on constitutional issues such as freedom of speech,³⁷ separation of powers,³⁸ the importance of virtue in a democratic republic,³⁹ the duty of courts and juries,⁴⁰ and the role of elected officials.⁴¹ Moreover, Addison’s writings were readily available in the popular print culture of the era,⁴² meaning that they would have influenced both the political and legal culture of the late eighteenth century.

³¹ *Id.* at 51. For more on William Henry Drayton and his charges, see Patrick J. Charles, “Arms for Their Defence”?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago, 57 CLEV. ST. L. REV. 351, 437-40 (2009); Charles L. Mowat, *The Enigma of William Drayton*, 22 FLA. HIST. Q. 3, 3-33 (1943).

³² Stewart, *supra* note 28, at 1040-114.

³³ Norman L. Rosenberg, *Alexander Addison and the Pennsylvania Origins of Federalist First-Amendment Thought*, 108 PA. MAG. HIST. BIOGRAPHY 399, 405-10 (1984).

³⁴ COURIER OF NEW HAMPSHIRE (Concord, N.H.), Nov. 22, 1800, at 1 (col. 4) (discussing how certain corrupt individuals tried to influence public opinion to claim George Washington was a monarchist).

³⁵ 2 ALEXANDER ADDISON, REPORTS OF CASES IN THE COUNTY COURTS OF THE FIFTH CIRCUIT AND IN THE HIGH COURT OF ERRORS AND APPEALS OF THE STATE OF PENNSYLVANIA 528 (1800) [hereinafter ADDISON, REPORTS OF CASES].

³⁶ THE TRIAL OF ALEXANDER ADDISON, *supra* note 20, at 16-17, 28-31.

³⁷ ALEXANDER ADDISON, LIBERTY OF SPEECH AND THE PRESS: A CHARGE TO THE GRAND JURIES OF THE COUNTY COURTS OF THE FIFTH CIRCUIT OF THE STATE OF PENNSYLVANIA (1798) [hereinafter ADDISON, LIBERTY OF SPEECH AND THE PRESS].

³⁸ 2 ADDISON, REPORTS OF CASES, *supra* note 35, at 178-87, 221-34.

³⁹ *Id.* at 150-66.

⁴⁰ *Id.* at 53-63.

⁴¹ *Id.* at 150-66.

⁴² See COLUMBIAN GAZETTEER (New York, N.Y.), Sept. 18, 1794, at 1 (cols. 3-4); THE HERALD OF LIBERTY (Washington, Pa.), Sept. 1, 1800, at 1 (cols. 3-4); THE INDEPENDENT GAZETTEER (Philadelphia, Pa.), Jan. 7, 1795, at 1 (cols. 1-4); KLINE’S CARLISLE WEEKLY

Addison's writings even stretch as far as providing advice to young professionals, legal and non-legal alike. In a letter to a "young gentleman" who "was about to enter the Office of the Judge, as a student of law,"⁴³ written just before Addison's death, he wrote:

It is no uncommon error in young men, to suppose, that when they have passed through the usual course of College studies, they are complete scholars, and have *finished their education*. This is a dangerous mistake; for it leads to inattention, indolence, and relaxation of mind. If it does this, the little knowledge they have acquired, is soon forgotten. The fact is, that Schools and Colleges do not make us scholars, but only fit us for becoming scholars, if by future industry we strive earnestly to this end. They qualify us for obtaining knowledge from books, which otherwise would be, if not altogether useless, at least dark and difficult to us.

It follows from this, that it is an error in education, to introduce a young man to the study of a particular profession, immediately after he leaves College, if he devote the whole of his time to the study of that profession. For one not a scholar, appears with much less advantage in a learned profession than one who is.

The most important period of life is when we have just left school. If we suffer, our exertions so relax then, from the energy that scholastic discipline has excited and made habitual, there is great danger that they cannot be revived, and that we shall sink into listless indolence and trifling levity.

Great part of your time, then ought to be devoted to revising, extending, and fixing deeply in your mind, your past learning. A careful study of the Greek and Latin Classics, will assist greatly to form a just taste. The English Essays of the Spectator, &c. will give you a relish for the beauties of our own language. Attention to the Mathematics, will improve and strengthen your faculty of reasoning. The study of Natural History and Philosophy, will form your heart to virtue. History will instruct you in the character of Man, and the ways of Providence. I now no book more deserving your attention than the Bible; you will find in it more useful maxims, than in any other work.

Read *good* books rather than *many* books. Your reading may be various, without being desultory or promiscuous, and it ought always to be attentive. Divide your time systematically, and carefully pursue the system you adopt. The morning, for instance may be employed with the Classics, ancient and modern; the forenoon with Law; and the afternoon and evening, with Science, History, &c.

GAZETTE (Carlisle, Pa.), Sept. 17, 1794, at 1 (cols. 1-4); THE MIRROR (Concord, N.H.), Feb. 11, 1799, at 1 (col. 1-4); THE PHILADELPHIA GAZETTE & UNIVERSAL DAILY ADVERTISER (Philadelphia, Pa.), Oct. 10, 1795, at 1 (cols. 1-4); SUPPLEMENT TO THE DAILY ADVERTISER (New York, N.Y.), Sept. 16, 1794, at 1 (col. 2).

⁴³ CITY GAZETTE AND COMMERCIAL ADVERTISER (Charleston, S.C.), Apr. 15, 1821, at 2 (col. 1).

Rise early; and, to do this, go early to bed. He loses almost half a day of his time, who spends much of the morning in sleep.

If you be not a good arithmetician, you ought to make yourself so. It is a most useful art.

The study of Moral Philosophy, especially the morality of the New Testament, is of the utmost consequence to a Lawyer—for the first qualification for that profession, is to be an honest man.

Alexander Addison⁴⁴

III. WASHINGTON, MARSHALL, ADDISON, AND THE 1798 ALIEN ACT

Despite Addison's writings being readily available in newspapers⁴⁵ and pamphlets up to 1798,⁴⁶ his work was not the frequent subject of discussion among the founding generation. One exception to this is a 1794 letter addressed to George Washington concerning the Whiskey Rebellion. The author, Alexander Hamilton, was concerned with some of Addison's judicial practices, particularly his acknowledgement of the doctrine of "constitutional resistance" in a charge to the grand jury.⁴⁷ Hamilton thought this doctrine was "not easy to understand" given that the "[t]heory of every constitution presupposes as a *first principle* that the *Laws are to be obeyed*," especially laws that are "constitutionally enacted."⁴⁸ However, it seems that he did not even read the charge and relied on secondary accounts in writing to Washington⁴⁹ because Addison and Hamilton were in absolute agreement on the law. Addison's charge to the grand jury stated:

If ever the hand of an individual be lifted up against the lawful exercise of public authority, the essential dignity of government receives a wound, dangerous to the state, and to be cured only by the submission and atonement of the offender. If one man, or one set of men, may, without

⁴⁴ *Id.*

⁴⁵ See *supra* note 42.

⁴⁶ See generally ADDISON, LIBERTY OF SPEECH AND THE PRESS, *supra* note 37; ALEXANDER ADDISON, AN INFALLIBLE CURE FOR POLITICAL BLINDNESS, IF ADMINISTERED TO PATIENTS POSSESSING SOUND MINDS, HONEST HEARTS, AND INDEPENDENT CIRCUMSTANCES (1798); ALEXANDER ADDISON, AN ORATION ON THE RISE AND PROGRESS OF THE UNITED STATES OF AMERICA, TO THE PRESENT CRISIS; AND ON THE DUTIES OF CITIZENS (1798); ALEXANDER ADDISON, OBSERVATIONS ON THE SPEECH OF ALBERT GALLATIN, IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, ON THE FOREIGN INTERCOURSE BILL (1798); ALEXANDER ADDISON, CAUSES AND ERROR OF COMPLAINTS AND JEALOUSY OF THE ADMINISTRATION OF THE GOVERNMENT: BEING A CHARGE TO THE GRAND JURIES OF THE COUNTIES OF THE FIFTH CIRCUIT, OF THE STATE OF PENNSYLVANIA, AT MARCH SESSIONS, 1797 (1797); ALEXANDER ADDISON, A DISCUSSION OF THE QUESTION LATELY AGITATED IN THE CONGRESS OF THE UNITED STATES . . . (1796).

⁴⁷ 17 THE PAPERS OF ALEXANDER HAMILTON 187 (Harold C. Syrett ed., Columbia Univ. Press 1972). For the charge to the grand jury, see 2 ADDISON, REPORTS OF CASES, *supra* note 35, at 35-53.

⁴⁸ 17 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 47, at 187.

⁴⁹ See *id.*; 13 THE PAPERS OF ALEXANDER HAMILTON 278 n.2 (Harold C. Syrett ed., Columbia Univ. Press 1967).

constitutional authority, assume the right of opposing laws, every man, for any cause, may do the same It is no longer law, reason, and justice, but force, fraud, and malice, that govern . . .⁵⁰

Another notable appearance of Addison's writings is in an exchange between James Madison and James Monroe. It serves as a great example of the political turmoil that existed in the Early Republic. Not only does it reveal that Addison's writings were well disseminated among the public, but also that they were well written observations on the law, politics, and the Constitution.

It was at the height of the Federalist-Republican print culture war that Monroe wrote to Madison, "[m]y friends in Phila[delphia] think some attention due to the publication of" Judge Addison.⁵¹ Monroe was concerned with Addison's characterization of him as a "weak zealot, subservient to [French] ambition and insolence," and accusing Monroe of a variety of other sins.⁵² Madison replied that he had not "seen nor heard of" Addison's pamphlet, but he advised Monroe to tread carefully because an improper reply could prove politically disastrous.⁵³ Madison further wrote:

The sortie of Mr. A[ddison] presents, as you observe, more difficult questions. On one hand silence may beget misconstructions from opposite quarters. On the other it is not easy to find an objectionable & at the same time adequate mode of repelling the aggression Any summons of a personal nature on Mr. A[ddison] is I think forbidden by the considerations you have glanced at. Nor is it perhaps unworthy of consideration in the present composition & spirit of the two Houses any think like an occasion may be seized for wreaking party revenge through the forms of the Constitution. It is even possible that the fury of the moment may have suggested the unwarrantable attack as a snare that might answer the purpose. Whatever the difficulties might obstruct such a proceeding, they would probably be got over by the same spirit which is overleaping so many others in such a publication there would be room for such ideas relative to yourself, as justice to yourself might render eligible, and also for such relative to Mr. A. as prudence would permit. You will be able to decide on it with more deliberation than I have bestowed on it.⁵⁴

⁵⁰ 2 ADDISON, REPORTS OF CASES, *supra* note 35, at 50-51. The case was that of William Faulkner and concerned a 1792 riot. Hamilton seems to have relied on secondary accounts and not the actual charge itself. For more on what would be the lawful constitutional resistance that Hamilton was referring to, see generally Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18 (2010) [hereinafter Charles, *The Right of Self-Preservation and Resistance*].

⁵¹ 17 THE PAPERS OF JAMES MADISON 145 (David B. Mattern et al. eds., Univ. of Va. Press 1991).

⁵² *Id.* at 146 n.2. For quote in pamphlet, see ADDISON, AN INFALLIBLE CURE FOR POLITICAL BLINDNESS, *supra* note 46, at 13.

⁵³ 17 THE PAPERS OF JAMES MADISON, *supra* note 51, at 148.

⁵⁴ *Id.* at 148-49.

After mulling over this advice, Monroe agreed with Madison and thought it best to not respond to Addison in the press, not even through an anonymous editorial.⁵⁵ He wrote back to Madison, “I rather think, every thing considered that contempt is the best notice that can be shewn to the calumnies of Mr. Addison at least for the present”⁵⁶

Other than these mentions, it seems that George Washington was the first prominent Founding Father to truly appreciate Addison’s legal talents. It began on November 1798 when Addison sent the former President a copy of his most recent charge entitled *Liberty of Speech and the Press*.⁵⁷ The charge addressed the Alien & Sedition Acts, including whether the President had the power to remove any alien considered “dangerous to the peace and safety of the United States.”⁵⁸ Incorporating Emer De Vattel’s *Law of Nations*,⁵⁹ Addison believed that “every government must be [the] sole judge of what is necessary to be done, for its own safety or advantage, within its own territory.”⁶⁰ To paraphrase, only the law of nations bound the political branches in determining whether laws respecting aliens were permissible.⁶¹ Addison further wrote:

The restraint or expulsion of aliens . . . has, by almost all nations, been considered as a necessary measure of protection and self-defence: and, from the nature of the case, the law of nations, and the general constitutional authority of the government, I cannot permit myself to doubt, that a power to restrain or expel them necessarily exists in the government of the United States, as in every government charged with the general welfare and common defence, and protection against invasion and domestic violence. If this be a *necessary and proper means* of

⁵⁵ See 3 THE WRITINGS OF JAMES MONROE 144-47 (Stanislaus Murray Hamilton ed., 1900).

⁵⁶ 17 THE PAPERS OF JAMES MADISON, *supra* note 51, at 289.

⁵⁷ 3 THE PAPERS OF GEORGE WASHINGTON: RETIREMENT SERIES 244 (Dorothy Twohig et al. eds., 1999) [hereinafter THE PAPERS OF GEORGE WASHINGTON]. For Addison’s charge, see ADDISON, LIBERTY OF SPEECH AND THE PRESS, *supra* note 37.

⁵⁸ Alien Enemies Acts, 1 Stat. 571 (1798).

⁵⁹ See EMER DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF THE APPLIED CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (New York, Messrs. Berry and Rogers, no. 35, Hanover-Square 1787). For Vattel’s influence on the Founding Fathers, see BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN 297 (1834); Andrew Lenner, *Separate Spheres: Republicanism Constitutionalism in the Federalist Era*, 41 AM. J. LEGAL HIST. 254, 259 (1997); James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AM. J. LEGAL HIST. 208, 219 (1974); Andrew C. Lenner, *John Taylor and the Origins of American Federalism*, 17 J. EARLY REPUBLIC 399, 406, 408, 411 (1997); JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 188 (1978); PETER & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTION, 1776-1814, at 123-44 (1993) [hereinafter ONUF, FEDERAL UNION, MODERN WORLD].

⁶⁰ ADDISON, LIBERTY OF SPEECH AND THE PRESS, *supra* note 37, at 18.

⁶¹ *Id.* (“[T]he Constitution leaves aliens, as in other countries, to the protection of the general principles of the law of nations, or of the particular provisions of treaties made between the United States, and the government whose subjects or citizens the aliens severally are.”). For more on Alexander Addison and the Sedition Act, see Rosenberg, *supra* note 33.

accomplishing any object, with which the government of the United States is charged; the power of exerting it is clearly vested in that government.⁶²

Addison's *Liberty of Speech and the Press* was one of many writings left in Washington's library at the time of his death. Washington intended to "read it with the same pleasure, and marked approbation" that he had done with Addison's "other productions of a similar nature which have come to [his] hands."⁶³

Of course, Addison was just one of many commentators to write on the Alien Act. Print culture was flooded with pamphlets arguing for or against its constitutionality.⁶⁴ Nevertheless, Addison's analysis was unique in that it provided judicial gloss that was absent from other pamphlets. In fact, Addison's legal arguments were so convincing that George Washington wrote to John Marshall that they were "flushed conviction as clear as the Sun in its Meridian brightness."⁶⁵ Washington similarly wrote to his nephew, soon to be Associate Supreme Court Justice Bushrod Washington, that Addison will "produce conviction on the minds" of the opposition.⁶⁶ After receiving a second charge to the jury from Addison on January 31, 1799, Washington even wrote to the Judge himself of the "good example" he has set by acquainting the people with the "proper understanding" of the "[l]aws & principles of their Government."⁶⁷

John Marshall concurred. He wrote back to Washington that Addison's constitutional analysis of the Alien Act was "well written" and that he hoped "other publications on the same subject could be more generally read . . . to make some impression on the mass of the people."⁶⁸ Whether Marshall viewed the Alien Act as a constitutional exercise of federal power has been the subject of debate.⁶⁹ However, the historical evidence available weighs in favor of the conclusion that Marshall believed it was.

The evidence begins with a 1793 oral argument Marshall delivered before Chief Justice John Jay and Associate Supreme Court Justice James Iredell, who were riding circuit in Virginia. The case concerned the seizure of loyalist property during the American Revolution and the subsequent 1783 Treaty of Paris. Defending the

⁶² ADDISON, *LIBERTY OF SPEECH AND THE PRESS*, *supra* note 37, at 24.

⁶³ *Id.*

⁶⁴ For examples, see THOMAS EVANS, *AN ADDRESS TO THE PEOPLE OF VIRGINIA, RESPECTING THE ALIEN & SEDITION LAWS* (1798); THE COMMUNICATIONS OF THE SEVERAL STATES, ON THE RESOLUTIONS OF THE LEGISLATURE OF VIRGINIA (1799); ST. GEORGE TUCKER, *A LETTER TO A MEMBER OF CONGRESS* (1799); REPORTS OF THE COMMITTEE IN CONGRESS TO WHOM WERE REFERRED CERTAIN MEMORIALS AND PETITIONS COMPLAINING OF THE ACTS OF CONGRESS, CONCERNING THE ALIEN AND SEDITION LAWS (1799); OBSERVATIONS ON THE ALIEN AND SEDITION LAWS OF THE UNITED STATES (1799); CHARLES LEE, *DEFENCE OF THE ALIEN AND SEDITION LAWS* (1798); JAMES OGILVIE, *A SPEECH DELIVERED IN ESSEX COUNTY* (1798).

⁶⁵ 3 THE PAPERS OF JOHN MARSHALL 531 (Charles T. Cullen et al. eds., 1979).

⁶⁶ 3 THE PAPERS OF GEORGE WASHINGTON, *supra* note 57, at 303.

⁶⁷ *Id.* at 407.

⁶⁸ 4 THE PAPERS OF JOHN MARSHALL, *supra* note 25, at 3-4.

⁶⁹ Lash & Harrison, *supra* note 12, at 500-03.

state's interests, Marshall argued that the government "may pass any law not inconsistent with its constitution" and not contrary to the international laws of war.⁷⁰ Marshall elaborated on the latter argument by reciting the law of nations from authorities such as Hugo Grotius and Emer de Vattel.⁷¹ In particular, Marshall recited the international principle of self-preservation, the very same principle that Addison would rely on in arguing the constitutionality of the 1798 Alien Act.⁷²

Although Marshall's reference to international commentary and the right of self-preservation predates the 1798 Alien Act, it shows that Marshall was familiar with the tenets of international law. Furthermore, it places Marshall's personal opinions on the Alien Act in their proper context. Marshall's opinion on the Alien Act became public when he responded to a 1798 editorial written by the anonymous writer A Freeholder.⁷³ At this time, Marshall was at the height of his popularity⁷⁴

⁷⁰ James Iredell, *Middle Circuit, 1793, Virginia* 4, 5 (1793) (unpublished journal of oral arguments, on file with the Library of Congress Rare Books Division, Washington, D.C.). This oral argument also included Patrick Henry, and Iredell wrote how he was impressed of the arguments of the two sides:

P[atrick] Henry has been speaking these two days, & tho' he spoke 4 hours each day I was not in the least tired. He is certainly the first orator I ever heard—speaks with the most ease, the least embarrassment, the greatest variety, and with an illustration of imagery altogether original but perfectly correct. His manner too in respect to his adversaries is very gentlemanly, and I am told it always is, and that notwithstanding he is the Idol of every popular Assembly he never was known to say anything personally offensive but in his own defense and then he is always sure to make his adversaries repent their attack. He is a much more solid character and better Reasoner than I expected to find him, and I have every reason to believe from accounts received of him here by many gentlemen that he is a man of real benevolence and integrity. You may imagine as to his oratory I am quite impartial for in the course of many points he has argued he has not satisfied me in the slightest degree as to anything but the Payments into the Treasury about which I still hesitate. I am astonished to find that the Defendant's Lawyers here, who are certainly very able Men [which includes John Marshall] think the defence as to the breach of the Treaty by G.B. seriously tenable. But I was much more so to find that Mr. Johnson and Mr. Griffin were doubtful about it, and I believe for this reason principally directed a second argument. On this point neither Mr. [Chief Justice John] Jay or myself had a shadow of a doubt for one moment. Perhaps we may differ eventually about the payments into the Treasury but I am not sure. The indication of my opinion at present is in support of them. The court will certainly not be over till next week but what time in the week I can't conjecture. I will not fail to acquaint you of our determination.

Letter from James Iredell to Mr. Johnston (May 29, 1793) (on file with the Library of Congress Manuscripts Division, Washington, D.C.).

⁷¹ Iredell, *supra* note 70, at 4-7.

⁷² *Id.* at 6.

⁷³ THE VIRGINIA HERALD (Fredericksburg, Va.), Oct. 2, 1798 at 2 (col. 3).

⁷⁴ THE GAZETTE OF THE UNITED STATES (Philadelphia, Pa.), Oct. 6, 1798, at 1 (col. 2). Washington's nephew, Bushrod Washington, was also running for a seat at the same time as John Marshall. See THE VIRGINIA HERALD, Sept. 11, 1798, at 3 (col. 2).

and running for a congressional seat at the urging of George Washington.⁷⁵ He had just returned from a successful mission as a diplomat⁷⁶ and had retired his militia commission.⁷⁷ The editorial sought to be a question and answer piece, between the writer and Marshall, about his views on certain controversial topics for the upcoming election.⁷⁸ Marshall obliged the writer because he believed “[e]very citizen has a right to know the political sentiments of the man who is proposed as [their] representative.”⁷⁹ One of the questions asked was: “Are you an advocate for the alien and sedition bills? or, in the event of your election, will you use your influence to obtain a repeal of those laws?”⁸⁰ Marshall answered:

I am not an advocate for the alien and sedition bills: had I been in congress when they passed, I should, unless my judgment not think them fraught with all those mischiefs which many gentlemen ascribe to them. I should have opposed them, because I think them useless; and because they are calculated to create, unnecessarily, discontents and jealousies at a time when our very existence, as a nation, may depend on our union—I believe that these laws, had they been opposed on these principles by a man, not suspected of intending to destroy the government, or of being hostile to it, would never been enacted. With respect to their repeal, the effort will be made before I can become a member of congress. If it succeeds, there will be an end of the business—if it failes, I shall, on the question of renewing the effort, should I be chosen to represent the district, obey the voice of my constituents.⁸¹

At no point did Marshall write that the Alien Act was unconstitutional or an unlawful exercise of congressional authority. This was intentional, for it was common knowledge that the Republicans were asserting this as part of their political platform.⁸² Instead, Marshall described the Alien Act as not being “fraught with all

⁷⁵ JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* 67-68 (2002).

⁷⁶ *THE VIRGINIA HERALD* (Fredericksburg, Va.), Aug. 14, 1798, at 3 (cols. 3-4); *AMERICAN MERCURY* (Hartford, Conn.), Nov. 1, 1798, at 2 (col. 1).

⁷⁷ *COLUMBIAN MIRROR AND ALEXANDRIA GAZETTE* (Alexandria, Va.), Sept. 9, 1798, at 3 (col. 2).

⁷⁸ The editorial was widely published. See *THE UNIVERSAL GAZETTE* (Philadelphia, Pa.), Sept. 9, 1798, at 1 (cols. 3-4); *NEW JERSEY JOURNAL* (Elizabethtown, N.J.), Oct. 23, 1798, at 1-2 (cols. 1-3); *FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER* (Baltimore, Md.), Oct. 6, 1798, at 2 (cols. 3-4); *THE SPECTATOR* (New York, N.Y.), Oct. 13, 1798, at 1 (cols. 1-2); *THE SUN* (Dover, N.H.), Oct. 31, 1798, at 2 (cols. 1-3); *THE MINERVA* (Dedham, Mass.), Nov. 1, 1798, at 1 (cols. 3-4).

⁷⁹ *THE VIRGINIA HERALD* (Fredericksburg, Va.), Oct. 2, 1798, at 2 (col. 3).

⁸⁰ 3 *THE PAPERS OF JOHN MARSHALL*, *supra* note 65, at 503.

⁸¹ *Id.* at 505-06.

⁸² To be specific, the Republicans viewed the Alien Act as violating the Constitution because it conflicted with the Sixth Amendment’s right to trial by jury and because there was no express federal government power to remove “alien friends.” The actual act of expelling or removing aliens was not the issue of constitutional debate. The issue was where this power

those mischiefs” that “gentlemen” had ascribed the Act.⁸³ “Gentlemen” was a direct reference to the Republican opposition. Personally, Marshall had attributed the contentious politics of the time to the Republican party. Marshall conveyed these sentiments to Washington in the context of the Alien Act, writing, “it seems that there are men who will hold power by any means rather than not hold it; & who would prefer a dissolution of the union to the continuance of an administration not of their own party.”⁸⁴

Marshall’s omission of defining the Alien Act as “unconstitutional” did not go unnoticed by *A Freeholder*. The anonymous writer inscribed another editorial, in response to Marshall’s answers, stating that the people are to “infer” that he “do[es] not think [the Alien & Sedition Acts] unconstitutional—otherwise [Marshall] would certainly [have made] that ground the principle basis” of his opposition.⁸⁵ The editorial went on to propose a query to Marshall:

Be pleased to say this inference is correct or not? If it is, please put your finger upon that clause of the Federal Constitution, which confers on Congress a power If you cannot point out such a clause, but you infer this power, under any general clause in the instrument, be pleased to say, what security we have for any other inestimable right which Congress may deem expedient to invade?⁸⁶

Marshall did not respond to this editorial, leaving historians to speculate what would have been his response. Perhaps he did not reply because *A Freeholder* used Marshall’s answers to accuse him of intending to “destroy the *government*.”⁸⁷ This explanation is plausible given that at this time Marshall had previously replied to editorial letters.⁸⁸ However, this cannot be the sole reason because *A Freeholder* was not the only writer to comment on Marshall’s answers. Across the United States, Marshall’s answers were published and received nation-wide comments in editorials.⁸⁹ Some editorials defended Marshall outright,⁹⁰ some supported Marshall

over “alien friends” resided—with the States or the federal government. *See* Lenner, *supra* note 59, at 413; TUCKER, *supra* note 64, at 10.

⁸³ Lash & Harrison, *supra* note 12, at 505.

⁸⁴ 4 THE PAPERS OF JOHN MARSHALL, *supra* note 25, at 3.

⁸⁵ THE INDEPENDENT CHRONICLE AND UNIVERSAL ADVERTISER (Boston, Mass.), Oct. 25, 1798, at 3 (col. 1).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ For an example, see CLAYPOOLE’S AMERICAN DAILY ADVERTISER (Philadelphia, Pa.), Oct. 27, 1798, at 2 (col. 1).

⁸⁹ *See supra* note 78.

⁹⁰ *See* AMERICAN MERCURY (Hartford, Conn.), Nov. 1, 1798, at 2 (cols. 1-3); MASSACHUSETTS MERCURY (Boston, Mass.), Dec. 11, 1798, at 2 (cols. 1-2).

except for his opinion on the Alien & Sedition Acts,⁹¹ and others were outright hostile.⁹²

What these different editorials reveal is one important historical fact—Marshall never wrote, stated, or declared that the 1798 Alien Act was unconstitutional. These editorials also reveal is that the public opinion was that Marshall considered the Alien Act a constitutional exercise of congressional power. For instance, one anonymous writer believed Marshall’s answers “deserve[] great praise” because he “speaks the language of true Americans.”⁹³ Despite the proclamation of Marshall as a “firm friend of the Constitution,” the writer did not support Marshall’s stance on the Alien Act. The writer commented that he could not support it even though “most Americans, think [the Alien Act is] necessary and expedient at *this crisis*.”⁹⁴

Conversely, a string of editorials⁹⁵ by John Thomson chastised Marshall for not proclaiming the Alien & Sedition Acts unconstitutional.⁹⁶ Similar to the editorial by A Freeholder,⁹⁷ Thomson baited Marshall with comments such as his answers were “unsatisfactory to the public and unworthy of you.”⁹⁸ He particularly did not appreciate Marshall’s silence on the constitutionality of the Alien & Sedition Acts, believing it was the duty of Marshall to vindicate “the charge of usurpation and tyranny” and to “remove the alarms of an agitated people.”⁹⁹ Perhaps this silence is what upset Thomson the most, as Marshall did not personally respond to any of Thomson’s five editorials. All Thomson could do was speculate as to Marshall’s

⁹¹ See FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER (Baltimore, Md.), Oct. 15, 1798, at 2 (col. 2); NORWICH PACKET (Norwich, Conn.), Oct. 31, 1798, at 2 (col. 1); WINDHAM HERALD (Windham, Conn.), Nov. 8, 1798, at 1.

⁹² See GREENLEAF’S NEW YORK JOURNAL & PATRIOTIC REGISTER (Greenleaf, N.Y.), Dec. 19, 1798, at 3 (cols. 1-4); GENERAL AURORA ADVERTISER (Philadelphia, Pa.), Dec. 21, 1798, at 2 (cols. 1-3); THE INDEPENDENT CHRONICLE AND THE UNIVERSAL ADVERTISER (Boston, Mass.), Jan. 7-10, 1799, at 1 (col. 3); THE VIRGINIA ARGUS (Richmond, Va.), Dec. 24, 1798, at 1 (cols. 3-4).

⁹³ FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER (Baltimore, Md.), Oct. 15, 1798, at 2 (col. 2); NORWICH PACKET (Norwich, Conn.), Oct. 31, 1798, at 2 (col. 1); WINDHAM HERALD (Windham, Conn.), Nov. 8, 1798, at 1 (col. 3).

⁹⁴ *Id.*

⁹⁵ These editorials were originally published in the Richmond newspaper *The Virginia Argus*. For reprints of the different editorials, see GREENLEAF’S NEW YORK JOURNAL & PATRIOTIC REGISTER (Greenleaf, N.Y.), Dec. 19, 1798, at 3 (cols. 1-4); GENERAL AURORA ADVERTISER (Philadelphia, Pa.), Dec. 21, 1798, at 2 (cols. 1-3); THE INDEPENDENT CHRONICLE AND THE UNIVERSAL ADVERTISER (Boston, Mass.), Jan. 7-10, 1799, at 1 (col. 3); THE VIRGINIA ARGUS (Richmond, Va.), Dec. 24, 1798, at 1 (cols. 3-4).

⁹⁶ See generally Edward A. Wyatt, IV, *John Thomson, Author of “The Letters of Curtius” and a Petersburg Contemporary of George Keith Taylor*, 16 WM. & MARY Q. 19 (1936).

⁹⁷ See *supra* notes 78, 85.

⁹⁸ THE INDEPENDENT CHRONICLE AND THE UNIVERSAL ADVERTISER (Boston, Mass.), Jan. 7-10, 1799, at 1 (col. 3). See Curtius, *To General Marshall*, AURORA GENERAL ADVERTISER (Philadelphia, Pa.), Dec. 22, 1798, at 2 (cols. 1-3).

⁹⁹ THE INDEPENDENT CHRONICLE AND THE UNIVERSAL ADVERTISER (Boston, Mass.), Jan. 7-10, 1799, at 1 (col. 4).

arguments as to the constitutionality of the Alien & Sedition Acts. At one point, Thomson hypothesized that Marshall's answers and subsequent silence were an attempt at political posturing and accused Marshall of being "guilty of deception and treachery."¹⁰⁰ Thomson went so far as to misquote Marshall's answers and accuse him of political cowardice, writing, "You have adopted the same obscene and evasive language by which you have attempted to shelter yourself in all your answers."¹⁰¹ Again, Marshall gave no response in public or private correspondence.

Marshall's silence can be attributed to many factors, including his understanding of the law of nations and congressional power over aliens, his tutelage under prominent political figures such as George Washington and George Wythe, his experience as an officer in the Continental Army and Virginia militia, and his recent tenure as a successful diplomat. This silence can also be attributed to the fact that Marshall was running for congressional office and may have thought it best not to get entangled in an editorial debate. Whatever the reason, the historical record is unclear in this regard.

Perhaps Marshall did not have to respond because anonymous editorials were written in his defense. For example, an editorial signed by An American Citizen responded to Thomson and the writers of *The Virginia Argus* by accusing both of being "prime supporters of the Jacobin Clubs."¹⁰² Meanwhile an editorial signed by A Yankee Freeholder outright defended Marshall, writing:

General Marshall is a citizen too eminent for his talents, his virtues, and his public services, to merit so severe a punishment as the applause of disorganizers. The gratitude due to his spirit . . . & his eloquence, in the late negotiation with the Despots of France, demand that we should snatch him from the impending and threatening admiration of the *seditions* The General has always been, from habit as well as feeling, opposed to an introduction into public life. Solicitation and duty have hitherto proved ineffectual to persuade him to suffer himself to stand a candidate The four first answers do great honour to the talents, and great credit to the political character of General Marshall. They are such as the President has publicly avowed, in a late Answer to the Address, and such as every enlightened Federalist, notwithstanding *the lies* of the *Chronicle*, is proud to maintain. As to the answer, respecting the Alien and Sedition Bills, although I do not agree with him in sentiment, yet I am satisfied that he has been grossly misunderstood If Gen. Marshall thought them unconstitutional, or dangerous to liberty, would he say that "he did not think them *fraught with the mischiefs* which some had ascribed to them?"—Would he hold this language in the same page in which he had professed a profound respect for the CONSTITUTION?—Would he talk of suffering laws to expire, without repeal, if he esteemed them to be violations of the Constitution, or subversive to Liberty? Would a man of General Marshall's force of reasoning, simply denominate *laws useless*, against which such powerful arguments can be applied?—No—the idea is

¹⁰⁰ *Id.* at 2. Thomson hoped that Marshall would "declare a correct opinion" on the matter so that the people may reward "your candor with unbounded love." *Id.*

¹⁰¹ THE VIRGINIA ARGUS (Richmond, Va.), Dec. 1798, at 1 (col. 3).

¹⁰² MASSACHUSETTS MERCURY (Boston, Mass.), Dec. 11, 1798, at 2 (col. 1).

too absurd to be indulged. General Marshall simply says, and meant to say no more, that the existing laws now in force, are perfectly competent to the suppression of the offences contained in that Bill¹⁰³

As this editorial makes clear, the public perception was that Marshall viewed the Alien & Sedition Acts as constitutionally permissive. Although A Yankee Freeholder did not agree with Marshall's "answer" on the Alien & Sedition Acts, the anonymous writer not only answered A Freeholder's second set of questions, but also confidently asserted that Marshall would have declared the laws unconstitutional if in fact they were.¹⁰⁴

However, if there is any historical doubt that Marshall's silence on the Alien & Sedition Acts confirms his sentiments as to their constitutionality, Marshall's reply to George Washington removes it:

I thank you for the charge of Judge Addison; 'tis certainly well written & I wish that as well as some other publications on the same subject could be more generally read I believe that no argument can moderate the leaders of the opposition—but it may be possible to make some impression on the mass of the people. For this purpose the charge of Judge Addison seems well calculated. I shall forward it to Mr. [Bushrod] Washington.¹⁰⁵

IV. THE NECESSARY AND PROPER CLAUSE AND ADDISON'S "CHOICE OF MEANS" DOCTRINE

As addressed earlier in this article, Addison was the first and only pre-Marshall commentator to describe the Necessary and Proper Clause under a "choice of means" analysis.¹⁰⁶ Addison's first documented analysis of the Necessary and Proper Clause appears to have occurred in December 1796 when he delivered the charge entitled *The Constitution and Principles of our Government a Security of Liberty*.¹⁰⁷ In this charge to the grand jury, Addison addressed how the Constitution prescribes the respective state and federal spheres of government. He wrote:

In this [the federal] government is vested all authority over general or national and external subjects And to this government we must owe the prosperity of our commerce, the payment of our debts and our national defence. To the government of each state is severally reserved authority over local and internal subjects, the administration of justice, and protection of persons and property within the territory of each. And to this government we owe the security of those personal enjoyments which we regard life, liberty, reputation and estate.¹⁰⁸

¹⁰³ A Yankee Freeholder, *General Marshall defended against Jacobin Praises*, AMERICAN MERCURY (Philadelphia, Pa.), Nov. 1, 1798, at 2 (cols. 1-2).

¹⁰⁴ *Id.*

¹⁰⁵ 4 THE PAPERS OF JOHN MARSHALL, *supra* note 25, at 3.

¹⁰⁶ ADDISON, ANALYSIS OF THE REPORT, *supra* note 13, at 39.

¹⁰⁷ 2 ADDISON, REPORTS OF CASES, *supra* note 35, at 188-207.

¹⁰⁸ *Id.* at 189.

Herein rests the basis of what would constitute Addison's first analysis on the Necessary and Proper Clause. He viewed the Constitution as the "work of the whole people, the system which they [the people] have chosen to promote their happiness,"¹⁰⁹ and the binds that prevent "a number of separate and hostile states, mutually hating, embarrassing and injuring each other, unhappy at home and contemptible abroad."¹¹⁰ In other words, Addison felt the Constitution was "established to promote the good of the whole people," not the "happiness of one or a few" including that of individual states.¹¹¹ The constitutional means to establish this "good" was enumerated in the Necessary and Proper Clause. To paraphrase Addison, the "principles necessary and proper" for the "good" of the people are "laid down in the constitution, and carried into effect by the acts of the several branches of the government."¹¹²

Addison's writings would not discuss the Necessary and Proper Clause again until he delivered his December 1798 charge *On the Alien Act*.¹¹³ Invoking eighteenth-century international law, Addison defended the 1798 Alien Act on the grounds that it was a "*necessary and proper mean* of accomplishing" a power "which the government of the United States is charged."¹¹⁴ The constitutional power Addison associated with this means was every nation's right of self-preservation and defense.¹¹⁵

Certainly, in making these observations, Addison would have read, analyzed, and borrowed from the other Alien Act pamphlets of the era. Others had made the self-preservation argument upon which Addison heavily relied. For instance, Thomas Evans attested to the constitutionality of the Alien Act on the grounds that it "attain[ed] the most important of all political ends, the *preservation of our national existence*."¹¹⁶ Charles Lee similarly wrote, "[there] can be no complete sovereignty without the power of removing aliens; and the exercise of such a power is inseparably incident to the *nation*."¹¹⁷ Conversely, the same can be said of these authors borrowing from Addison because his charges were widely distributed and provided a judicial and constitutional gloss that other pamphlets did not.

In the 1800 tract *Analysis of the Report of the Committee of the Virginia Assembly*,¹¹⁸ Addison provided his third and final examination of the Necessary and Proper Clause. The tract reads as a culmination of Addison's two previous analyses

¹⁰⁹ *Id.* at 190.

¹¹⁰ *Id.* at 189.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ ALEXANDER ADDISON, ON THE ALIEN ACT: A CHARGE TO THE GRAND JURIES OF THE COUNTY COURTS OF THE FIFTH CIRCUIT OF THE STATE OF PENNSYLVANIA AT DECEMBER SESSIONS, 1798 (Washington, John Colerick 1799).

¹¹⁴ *Id.* at 10.

¹¹⁵ *Id.* at 1, 10.

¹¹⁶ EVANS, *supra* note 64, at 15.

¹¹⁷ LEE, *supra* note 64, at 8-9.

¹¹⁸ ADDISON, ANALYSIS OF THE REPORT, *supra* note 13.

because it invokes the international right of national self-preservation within the Constitution's spheres of government¹¹⁹ and discusses how the power over aliens could only rest with the federal government. It is here that Addison penned the "choice of means" doctrine.

Addison begins by reiterating the spheres of government principle. This being that the Constitution prescribes limits on the federal government, defines exclusive powers, and balances power between the States and federal government. Addison writes that these "restrictions of the constitution are not restrictions of external and national right, but of internal and municipal right" because the "power over aliens is to be measured, not by internal and municipal law, but by external and national law."¹²⁰ Part of this "national law" was that the federal government was "exclusively vested with the means" to carry out essential powers.¹²¹ Addison responded to the Tenth Amendment¹²² argument that a power not delegated to the federal government is a power exclusively reserved to the States, writing:

The constitution could never intend to make the government of the United States, as the [Virginia] report would make it, a government of duty without powers: for it was framed expressly to add powers to duties. The constitution was established by the people of the United States, "to form a more perfect union, insure domestic tranquility, provide for the common defence, and promote the general welfare." Any construction of this constitution, not unavoidable, which would deprive the government of any proper means to promote those ends will be rejected. Whatever is fairly involved in any power granted by the constitution, and cannot be restrained by the provision that the powers not delegated are reserved.¹²³

Naturally, Addison's interpretation of the Constitution is nothing new to us today. Few will disagree that the Constitution grants the federal government broad authority in providing for our defense or handling foreign affairs. This was not the case in 1800. Jeffersonian Republicans had been persistently asserting a limited Constitution similar to the failed Articles of Confederation.¹²⁴ A Constitution where

¹¹⁹ Many contemporary pamphlets made a similar self-preservation argument. See EVANS, *supra* note 64, at 15-19; LEE, *supra* note 64, at 8-9; OBSERVATIONS ON THE ALIEN AND SEDITION LAWS OF THE UNITED STATES, *supra* note 64, at 9; AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE 6-11 (1799) [hereinafter AN ADDRESS OF THE MINORITY]. For an Anglo-American understanding of this international right, see generally Charles, *The Right of Self-Preservation and Resistance*, *supra* note 50.

¹²⁰ ADDISON, ANALYSIS OF THE REPORT, *supra* note 13, at 21.

¹²¹ *Id.*

¹²² U.S. CONST. amend. X.

¹²³ ADDISON, ANALYSIS OF THE REPORT, *supra* note 13, at 21.

¹²⁴ The general argument was, "That the Constitution of the United States contains a limitation of powers, to be exercised in the form and manner therein prescribed; and never can authorize the use of any powers but what are expressly enumerated to it." THE CENTINEL OF FREEDOM (Newark, N.J.), Jan. 22 1799, at 3. The Articles of Confederation prevented the federal government from adequately exerting national power, including with other nations. There was general agreement that the Articles needed to be amended to fix these disparities. ONUF, FEDERAL UNION, MODERN WORLD, *supra* note 59, at 124-26; GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 15-16 (2009).

all powers not enumerated are exclusively reserved to the States. Addison disagreed with this approach on the principle of international sovereignty, writing:

Nothing appears from the constitution, that can shew, that the people of the United States meant to deny their own government any right, which, by the law of nations, any other sovereignty enjoys with respect to foreign nations The limits of power of any government, towards its own subjects, were never meant to be applied as limits of power of that government towards the subjects of other governments. And the question, whether a government conducts itself well towards a subject of another government, is not a question of municipal, but of national law: it cannot arise between the subject of another government and the government of which he complains, but between this and his own government.¹²⁵

Addison also disagreed with the Jeffersonian interpretation of the Constitution because he thought it is impossible to “put every law in express words.”¹²⁶ He gave the example of the Declaration of Independence.¹²⁷ Addison asserted that the Continental Congress never had express authority to draft such a resolution. Yet, the authority was the necessary result of “the change of situation.”¹²⁸ Addison felt that the framers understood this principle of necessity when drafting the Constitution, for there were times when “certain powers and duties arise; a sort of common law for the good of all concerned in the organisation” of government.¹²⁹ What Addison was describing was a Constitution of incidental powers to address national problems through congressional legislation. He elaborated, writing:

Incidental powers, without being expressed, result from every civil organisation: for it is the will of those concerned that it should be effectual for its purposes. Thus, before the [Articles of] confederation, which gave the power, Congress formed treaties; by a sort of common law, which gave to Congress, as the only general organ, the authority usually annexed to such government The people of every state modify it [their national common law] according to their several circumstances; and, so modified, it has been constantly preserved, and will be forever preserved as a rule of right, and standard of action.¹³⁰

It is in this constitutional paradigm that Addison viewed the Necessary and Proper Clause as essential to the preservation of national government because the

¹²⁵ ADDISON, ANALYSIS OF THE REPORT, *supra* note 13, at 26.

¹²⁶ *Id.* at 30.

¹²⁷ For a drafting history of the Declaration of Independence, see generally PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE (1997). For a history of the events that shaped the Declaration, see generally PATRICK J. CHARLES, IRRECONCILABLE GRIEVANCES: THE EVENTS THAT SHAPED THE DECLARATION OF INDEPENDENCE (2008).

¹²⁸ ADDISON, ANALYSIS OF THE REPORT, *supra* note 13, at 30.

¹²⁹ *Id.*

¹³⁰ *Id.* at 31.

“national law” was how the “common law” could be modified.¹³¹ Addison rationalized that to interpret the Constitution otherwise would be to eliminate what he described as the national common law altogether. He wrote that if the “common law be *not a law of the United States*” amendable through the Necessary and Proper Clause, and if “the constitution be a *precise and complete enumeration*,” the “rules of the common law” must be excluded altogether.¹³² In other words, the people would have no redress in the federal courts for “natural rights, the rules of common justice, of debts, contracts, and property, and the redress of wrongs.”¹³³

Addison’s acknowledgment of a federal common law was a topic of contentious debate among Federalists and Republicans.¹³⁴ His combining the “choice of means” doctrine with a federal common law¹³⁵ would have certainly raised concerns among Jeffersonian Republicans because the claim that the Constitution implies such broad unenumerated powers within the constraints of the Necessary and Proper Clause was in total conflict with an interpretation of a limited Constitution.¹³⁶

Naturally, Addison disagreed with his Republican counterparts because he knew that the Constitution had to grant Congress implied powers. However, he also knew this authority had to have constitutional limitations. Addison’s view was that Congress was limited in that it could only make “laws necessary or proper for the defence of its own authority.”¹³⁷ This authority could be either express in the Constitution itself or implied as inherent to national sovereignty. Powers that did not fall into either of these categories were outside Congress’s “common law jurisdiction.”¹³⁸ Jeffersonian Republicans and many Americans feared this interpretation provided uncertainty as to the scope of congressional power to legislate, Addison reminded them that this is why the federal judiciary was independent.¹³⁹ The federal judiciary determined whether Congress had a power over the “end” it sought to remedy “*for the judiciary alone can determine the propriety of the law or the means.*”¹⁴⁰

It is here that Addison begins his analysis of the “choice of means” doctrine. First, he reminds the reader of the importance of the judiciary in the constitutional process, writing, “[t]he judiciary will execute their preventive authority by all the means prescribed by the law” and the Constitution.¹⁴¹ At the same time though,

¹³¹ *Id.*

¹³² *Id.* at 35.

¹³³ *Id.*

¹³⁴ DAVID HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* 13 (2003); BRADBURN, *THE CITIZENSHIP REVOLUTION*, *supra* note 24, at 98 (discussing that much of the debate centered around the Federalist and Republican interpretation of the Constitution’s preamble).

¹³⁵ ADDISON, *ANALYSIS OF THE REPORT*, *supra* note 13, at 30-39.

¹³⁶ *See supra* note 124.

¹³⁷ ADDISON, *ANALYSIS OF THE REPORT*, *supra* note 13, at 36.

¹³⁸ *Id.*

¹³⁹ *Id.* at 32-36.

¹⁴⁰ *Id.* at 39.

¹⁴¹ *Id.*

Addison recognized that Congress must “execute [its] preventive power by statutes.”¹⁴² This power included “discretion of the choice of means, necessary or proper, for executing their powers.”¹⁴³ Addison elaborated, writing:

[T]he means used by the Congress . . . for the execution of their powers, presume themselves wiser than the constituted authorities. A power over the end implies a power over the means; and a power to make laws, for carrying any power into execution, implies a power to make laws for preventing or removing obstructions to the execution¹⁴⁴

It is fascinating that much Addison’s interpretation of the Constitution still rings true today, including his discussion of congressional deference. What is even more fascinating is that Addison’s interpretation was seemingly borrowed from the “Big Chief” John Marshall. It began in 1805 when the Supreme Court heard *United States v. Fisher*.¹⁴⁵ One of the questions presented was the constitutionality of a congressional bankruptcy statute. In particular, the statute gave the United States creditor preference in bankruptcy proceedings, and the respondent argued that it was not “indispensably necessary to give effect to a specified power” in the Constitution.¹⁴⁶ There was no disagreement that Congress had the authority to settle national debt.¹⁴⁷ Instead, Fisher’s argument rested on the Jeffersonian interpretation of the Necessary and Proper Clause—the statute had to be absolutely necessary to be constitutionally permissive.

Similar to Addison’s *Analysis of the Report of the Committee of the Assembly*,¹⁴⁸ Marshall began his analysis discussing the seriousness of the judiciary examining the constitutionality of congressional statutes. He wrote, “[T]he court can never be unmindful of the solemn duty imposed on the judicial department when a claim is supported by an act which conflicts with the constitution”¹⁴⁹ Marshall considered Fisher’s interpretation of the Necessary and Proper Clause, but concluded that following this line of thinking “would be incorrect and would produce endless difficulties.”¹⁵⁰

It is here that Marshall analyzed the issue within the constraints of Addison’s “choice of means” doctrine, writing:

Where various systems might be adopted for that purpose it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the *choice of means*, and must be empowered to use any means which are in fact conducive to

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *United States v. Fisher*, 6 U.S. 358 (1805).

¹⁴⁶ *Id.* at 396.

¹⁴⁷ U.S. CONST. art. I, § 8, cl. 1.

¹⁴⁸ ADDISON, ANALYSIS OF THE REPORT, *supra* note 13, at 39.

¹⁴⁹ *Fisher*, 6 U.S. at 396.

¹⁵⁰ *Id.*

the exercise of a power granted by the constitution. The government is to pay the debt of the union, and must be authorised to use the means which appear itself most eligible to effect that object. It has consequently a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe.¹⁵¹

Marshall's use of language is eerily similar to that of Addison, and the comparisons that can be drawn are infinite. However, one must qualify Marshall's opinion on the federal common law within the Constitution. While Marshall would later acknowledge the existence of federal civil common law and international common law (i.e., the law of nations),¹⁵² he rejected the idea of a federal criminal common law.¹⁵³ Meanwhile, it is unclear whether Addison saw any distinction between the three. Based on the context of *Analysis of the Report of the Committee of the Assembly*, it seems that Addison was merely quantifying the concept of an international common law or the law of nations. This being that every nation state must possess powers to exercise its right of self-preservation. This is a concept that Marshall undoubtedly agreed with.¹⁵⁴

Naturally, the infinite comparisons that can be drawn to Addison do not preclude other writings from impacting Marshall's interpretation of the Necessary and Proper Clause. The writings most often credited are (1) Alexander Hamilton's 1791 opinion as to the constitutionality of the Bank of the United States,¹⁵⁵ and (2) the 1799 tract entitled *The Address of the Minority of the Virginia Legislature*.¹⁵⁶

First, let us address the similarities to Alexander Hamilton's bank memorandum. The comparison to Hamilton seems to rest on the subject matter of Marshall's opinion in *McCulloch v. Maryland*,¹⁵⁷ where the establishment of the Bank of the United States was held to be within the constitutional constraints of congressional power through the Necessary and Proper Clause—the very same thesis that Hamilton penned during the ratification of the Constitution. However, to rest the comparison solely on this fact fails in one important regard: *McCulloch* was decided in 1819 and *Fisher* was decided in 1805. Therefore, the idea that Marshall was primarily influenced in adopting the “choice of means” doctrine from Hamilton is fourteen years late. The following is Hamilton's analysis on the Necessary and Proper Clause:

¹⁵¹ *Id.*

¹⁵² See *Johnson v. McIntosh*, 21 U.S. 543, 572 (1823).

¹⁵³ See *United States v. Hudson and Goodwin*, 11 U.S. 32, 32 (1812).

¹⁵⁴ See *Johnson*, 21 U.S. at 572. See also *supra* notes 70-73.

¹⁵⁵ See David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 933 n.332 (1982); Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, 20 CONST. COMMENT. 679, 699-714 (2004); Louis H. Pollak, “Original Intention” and the Crucible of Litigation, 57 U. CIN. L. REV. 867, 870 (1989); J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1186 (1989).

¹⁵⁶ See Lash & Harrison, *supra* note 12, at 495-516.

¹⁵⁷ *McCulloch v. Maryland*, 17 U.S. 316, 400-36 (1819).

The whole turn of the [Necessary and Proper Clause is] . . . that it was the intent of the [Constitutional] Convention . . . to give liberal latitude to the exercise of specified powers. The expressions have peculiar comprehensiveness. They are thought to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. To understand the word [narrowly] . . . would be to depart from its obvious and popular sense, and to give a restrictive operation, an idea never before entertained. It would be to give it the same force as if the word absolutely or indispensably had been prefixed to it. Such a construction would beget endless uncertainty and embarrassment.¹⁵⁸

Certainly, parallels between Hamilton's analysis and Marshall's opinion in *Fisher* can be drawn. For instance, the last two sentences of Hamilton's analysis are comparable to the portion of *Fisher* that reads: "In construing [the Necessary and Proper Clause] it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorised which was not indispensably necessary to give effect to a specified power."¹⁵⁹ Conversely, the same parallel can be drawn to Addison's writings. Addison did not agree with limiting the definition of "necessary" because this would establish a "government of duties without powers."¹⁶⁰ Addison thought this interpretation could not be maintained because the Constitution "was framed expressly to add powers to duties."¹⁶¹

Most importantly, at no point does Hamilton incorporate the phrase "choice of means" in characterizing the Necessary and Proper Clause. Instead, Hamilton's "means" test reads as follows:

The means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent, and complexity, that there must of necessity be great latitude of discretion in the selection and application of those means. Hence, consequently, the necessity and propriety of exercising the authorities intrusted to a government [are] on principles of liberal construction.¹⁶²

There is no denying that Hamilton's "means" test is just as constitutionally flexible as Addison's "choice of means" doctrine. Unfortunately, when one contrasts Hamilton's selection of language with Marshall's opinion there is little, if any, comparison. Meanwhile, Marshall's use of the phrases "choice of means" and "conducive to the exercise of a power granted by the constitution"¹⁶³ are reminiscent

¹⁵⁸ 4 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 109-10 (John C. Hamilton, ed. 1859).

¹⁵⁹ *Fisher*, 6 U.S. at 396.

¹⁶⁰ ADDISON, ANALYSIS OF THE REPORT, *supra* note 13, at 21.

¹⁶¹ *Id.*

¹⁶² HAMILTON, *supra* note 158, at 111.

¹⁶³ *Fisher*, 6 U.S. at 396.

of Addison. Regarding the latter phrase's use of "conducive," a parallel can be found in Addison's *Analysis of the Report of the Committee of the Assembly*. In one of his many analyses of the Necessary and Proper Clause, Addison writes that Congress "must be vested with all means conducive to these ends, and consistent to their respective objects."¹⁶⁴

Yet there may be another historical connection to Hamilton's bank memo and Marshall's interpretation of the Necessary and Proper Clause. In 1807, Marshall would complete the fifth and last volume of the series *The Life of George Washington*.¹⁶⁵ The volume addresses the constitutional debate of establishing the Bank of the United States, referencing an "investigation" into the "measure."¹⁶⁶ This "investigation" was in fact Alexander Hamilton's bank memo, which Marshall included a detailed discussion in an appendix note.¹⁶⁷

For the most part, the appendix note paraphrases Hamilton's memo and the contentious debate that existed between Federalists and Jeffersonian Republicans.¹⁶⁸ While there are instances when Marshall quotes Hamilton verbatim, there is no reference or quotation whatsoever to the opinion in *Fisher*. Certainly, one can draw philosophical and ideological comparisons between Hamilton's bank memo, Marshall's *The Life of George Washington*, and Marshall's opinion in *Fisher*. This includes the constitutional flexibility of the "means" test.¹⁶⁹ However, the linguistic and stylistic differences in all three documents are blatantly obvious. Not to mention, Marshall wrote the fifth volume of *The Life of George Washington* two years removed from *Fisher*, leaving us to ponder whether (1) Marshall intentionally omitted any mention of *Fisher*, or (2) Marshall was not influenced by Hamilton's memo at all.

The other writing credited for influencing Marshall's interpretation of the Necessary and Proper Clause is the infamous *The Address of the Minority of the Virginia Legislature*.¹⁷⁰ It has been hypothesized that Marshall may have contributed to its writing.¹⁷¹ However, it has also been hypothesized that the report could have been authored by G.K. Taylor, Henry Lee, or some combination that may have included Marshall.¹⁷² This Article does not set out to answer whether G.K. Taylor or Henry Lee took part in authoring the report. What this Article's findings will contend is that there are few, if any, linguistic and stylistic similarities to Marshall's opinions in *Fisher* and *McCulloch* and that of *The Address of the Minority of the*

¹⁶⁴ ADDISON, ANALYSIS OF THE REPORT, *supra* note 13, at 21.

¹⁶⁵ 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON, COMMANDER IN CHIEF OF AMERICAN FORCES DURING THE WAR WHICH ESTABLISHED THE INDEPENDENCE OF HIS COUNTRY AND FIRST PRESIDENT OF THE UNITED STATES (1807) [hereinafter MARSHALL, THE LIFE OF GEORGE WASHINGTON].

¹⁶⁶ *Id.* at 297.

¹⁶⁷ *Id.* app. at 3-11.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* app. at 9-10.

¹⁷⁰ See AN ADDRESS OF THE MINORITY, *supra* note 119.

¹⁷¹ Lash & Harrison, *supra* note 12, at 489-509.

¹⁷² *Id.* at 479-89.

Virginia Legislature. Concerning the constitutional scope of the Necessary and Proper Clause, the address reads:

The government of the United States is indubitably limited as to its objects, however it may be as to means of obtaining those objects. It possesses only delegated powers, and it is proper to enquire whether the power now under consideration be delegated or not. It is necessary, in pursuing this enquiry, to bear in mind that we are investigating a constitution which must unavoidably be restricted in various points to general expressions, making the great outlines of subject, and not a law which is capable of descending to ever minute detail. If we construe the former by rules strictly applicable to the latter the power of fortifying our ports and harbours might well be questioned; nor could the utility of the clause authorising Congress to make all laws necessary and proper for carrying into the execution all powers vested by the constitution in the government of the United States, or in any department or officer thereof, be readily pointed out In reviewing then our constitution, to decide on the powers vested for general purposes, in our general government we must examine the whole paper, we must examine it fairly, but liberally.¹⁷³

As with Hamilton's bank memo, similarities can be drawn as to the substance of the argument put forth.¹⁷⁴ Regrettably, few, if any, linguistic or stylistic similarities can be drawn. There is no disputing that it is plausible for *The Address of the Minority of the Virginia Legislature* to have aided Marshall in forming his judicial opinions in *Fisher* and *McCulloch*.¹⁷⁵ However, other than this conclusion much is left unanswered.

Certainly, excluding the issue of authorship, it can be asserted that *The Address of the Minority of the Virginia Legislature* was widely disseminated and therefore would have been more likely to impact Marshall's thinking.¹⁷⁶ Such an assertion, while plausible, is misleading because Addison's charges on the Alien & Sedition Acts were just as influential in the popular print culture.¹⁷⁷ The exchange between

¹⁷³ AN ADDRESS OF THE MINORITY, *supra* note 119, at 7.

¹⁷⁴ *See supra* notes 157-69 and accompanying text.

¹⁷⁵ *See* Lash & Harrison, *supra* note 12, at 496-99 (comparing the *Address of the Minority of the Virginia Legislature* to Marshall's opinion in *McCulloch*).

¹⁷⁶ For newspapers publishing its contents, see THE POLITICAL REPOSITORY (Brookfield, Mass.), Apr. 16, 1799 (cols. 1-3); THE GAZETTE (Portland, Me.), Mar. 4, 1799 (cols. 2-4); THE PROVIDENCE JOURNAL, AND TOWN AND COUNTRY ADVERTISER (Providence, R.I.), Feb. 20, 1799, at 1 (cols. 1-4); PHILADELPHIA GAZETTE, (Philadelphia, Pa.), Mar. 1, 1799, at 3 (col. 1) (advertisement for pamphlet); GENERAL AURORA ADVERTISER (Philadelphia, Pa.), Apr. 4, 1799, at 4 (col. 4) (advertisement for pamphlet). The Address was sometimes used as the basis to make political arguments. *See* THE MIRROR (Concord, N.H.), May 6, 1799, at 1 (col. 3). For an editorial response, *see* THE SPECTATOR (New York, N.Y.), May 8, 1799, at 1 (cols. 1-3).

¹⁷⁷ *See supra* notes 42, 46; THE GAZETTE OF THE UNITED STATES (Philadelphia, Pa.), Apr. 19, 1800, at 2 (col. 2) (advertisement for pamphlet); *id.*, Apr. 22, 1800, at 1 (col. 3) (advertisement for pamphlet); *id.*, Apr. 23, 1800, at 1 (col. 3) (advertisement for pamphlet); *id.*, May 2, 1800, at 1 (col. 4) (advertisement for pamphlet); *id.*, May 6, 1800, at 3 (col. 4) (advertisement for pamphlet); *id.*, May 14, 1800, at 3 (col. 5) (advertisement for pamphlet);

Madison and Monroe over Addison's charges to the grand jury, and Washington's acknowledgement of reading Addison's other works show that the Judge's works were widely distributed.¹⁷⁸

Not to mention, a 1799 editorial by John Carson dispels the myth that either one of the three works was more prominent than the other. Defending the Alien & Sedition Acts, Carson combined the impact of the reports of the Committee in Congress,¹⁷⁹ the anonymous *The Address of the Minority of the Virginia Legislature*, and Addison as "clearly establish[ing]" the "constitutionality of these laws."¹⁸⁰ Thus, print distribution cannot be the determining factor as to what influenced Marshall's thinking. Other factors must be examined, such as the contemporaneous impeachment proceedings of Supreme Court Associate Justice Samuel Chase.

V. THE IMPEACHMENTS OF ADDISON AND SAMUEL CHASE—THE FINAL IMPETUS IN MARSHALL ADOPTING THE "CHOICE OF MEANS" DOCTRINE

Just as the legal substance of Addison's writings have gone overlooked by legal commentators in understanding the constitutional scope of the Necessary and Proper Clause, so too has the politics of Addison's impeachment in persuading Marshall's opinion in *United States v. Fisher*. As addressed above, Addison's charges to the grand jury were the impetus for his impeachment proceedings. Officially he was impeached for failing to allow fellow judge John Lucas to similarly address the juries.¹⁸¹ However, Addison's charges had excited passionate responses from critics and were the true cause of his impeachment.¹⁸²

Political backlash of Addison's charges were quite common. For instance, the *Herald of Liberty* criticized Addison's stance on the Alien & Sedition Acts as hypocritical because he too "emigrated to America," yet "so freely denounces every alien."¹⁸³ Just weeks later, John Cloyd published a letter defending his honor against an Addison charge in which Cloyd was supposedly called a "[f]ool and [l]iar."¹⁸⁴ Although he complimented Addison as a "living library of learning" and a "[l]eviathan of knowledge," Cloyd was under "embarrassment" to have even placed

id., May 19, 1800, at 1 (col. 3) (advertisement for pamphlet); *id.*, May 20, 1800, at 1 (col. 3) (advertisement for pamphlet). For an editorial on Addison's later charge criticizing the Virginia and Kentucky resolves, see PHILADELPHIA GAZETTE, (Philadelphia, Pa.), Mar. 18, 1801, at 2 (cols. 1-4).

¹⁷⁸ See *supra* notes 51-63 and accompanying text; 3 THE PAPERS OF GEORGE WASHINGTON, *supra* note 57, at 244.

¹⁷⁹ This was in reference to a 1799 pamphlet that compiled all the reports of Congress. See REPORTS OF THE COMMITTEE IN CONGRESS TO WHOM WERE REFERRED MEMORIALS AND PETITIONS COMPLAINING OF THE ACTS OF CONGRESS, CONCERNING THE ALIEN AND SEDITION LAWS . . . RESPECTING DANGEROUS ALIENS AND SEDITIOUS CITIZENS (1799).

¹⁸⁰ THE ORACLE OF DAUPHIN AND HARRISBURGH ADVERTISER (Harrisburg, Pa.), Aug. 8, 1799, at 3 (col. 1).

¹⁸¹ THE TRIAL OF ALEXANDER ADDISON, *supra* note 20, at 6, 16-17, 28-31. See also THE REPORTER (Washington, Pa.), Oct. 12, 1818, at 4 (col. 1).

¹⁸² Rosenberg, *supra* note 33, at 405-10.

¹⁸³ THE HERALD OF LIBERTY (Washington, Pa.), Aug. 26, 1799, at 1 (col. 1).

¹⁸⁴ THE HERALD OF LIBERTY (Washington, Pa.), Dec. 16, 1799, at 3 (col. 1).

his “name along side of yours in public print.”¹⁸⁵ Judge Hugh H. Brackenridge was similarly disgusted by Addison’s charges to the grand jury and asserted that the charge delivered at Crawford County¹⁸⁶ was an “*indictable or impeachable*” offense.¹⁸⁷ Brackenridge even went so far as to accuse Addison of “[p]ropagating lies” with “language which marks your want of natural delicacy, or your low breeding.”¹⁸⁸

Given the political nature of his impeachment, Addison rightfully speculated that men like Brackenridge had a hand in bringing forth the proceedings.¹⁸⁹ Ultimately, the articles of impeachment were that Addison limited John Lucas from delivering differing charges to the jury on “22d December, 1800 and . . . the 22d June, 1801.”¹⁹⁰ However, the historical evidence shows that there were attempts to impeach Addison well before these violations ever took place.

In response to his infamous charges to the grand jury, on December 16, 1799, there was a petition presented to the Pennsylvania House of Representatives to remove and impeach Addison. The petition was “forwarded to the different townships, and lodged in the most public places” to save the “citizens the trouble of traveling” to sign it.¹⁹¹ The petition drew nearly 2,000 signers¹⁹² and even reached Boston, stating:

That we are sensible of the great difficulty of the situation of a Judge, and the tenderness and delicacy with which his character ought to be toughed, or complaint made. But for a considerable time, unfavorable impressions have existed with regard to Alexander Addison, Present of this District as oppressive, tyrannical and partial in the administration of justice, and guilty of great abuses and indelicacies as a man unbecoming his station and trust We solicit therefore that you appoint a Committee of your house, or other fit persons for this purpose, in order to report to the next Assembly¹⁹³

The petition failed, but it shows the political nature of the Addison impeachment. Even Addison’s defenders took notice of this fact. For instance, one editorial noticed that the allegations against Addison had gone “unnoticed and *unimpeached*” until the Republicans had come to power.¹⁹⁴ The editorial made sure to defend Addison as “one of the ablest and most upright Judges in the State of Pennsylvania,”

¹⁸⁵ *Id.*

¹⁸⁶ See COURIER OF NEW HAMPSHIRE (Concord, N.H.), Nov. 22, 1800, at 1 (cols. 1-2).

¹⁸⁷ THE DAILY ADVERTISER (New York, N.Y.), Dec. 9, 1800, at 2 (col. 4).

¹⁸⁸ *Id.*

¹⁸⁹ THE TRIAL OF ALEXANDER ADDISON, *supra* note 20, at 51-53, 64-73, 134-35.

¹⁹⁰ *Id.* at 6.

¹⁹¹ THE HERALD OF LIBERTY (Washington, Pa.), Dec. 16, 1799, at 3 (col. 3).

¹⁹² *Id.*, Jan. 20, 1800, at 3 (col. 2).

¹⁹³ THE CONSTITUTIONAL TELEGRAPH (Boston, Mass.), Dec. 25, 1799, at 2 (col. 3).

¹⁹⁴ COMMERCIAL ADVERTISER (New York, N.Y.), Mar. 17, 1802, at 3 (col. 1).

writing, “[h]is volume of Reports, and his several charges to the grand juries . . . shew him to be an accurate lawyer and an enlightened politician.”¹⁹⁵

In the fall of 1802, a number of editorials took a different approach by publishing George Washington’s sentiments on Addison’s work. These editorials sought to “unequivocally convey[]” that Addison was well respected in the “opinion of the *first man* America ever produced”¹⁹⁶ by publishing Washington’s March 4, 1799 letter, which reads:

Your favor of the 31st January, enclosing your Charge to the Grand Jury . . . has been duly received, and for the enclosure I thank you. I wish, sincerely, that your good example in endeavoring to bring the People of these United States more acquainted with the laws and principles of their government, was followed. They only require a proper understanding of these to judge rightly on all great national questions—but *unfortunately, infinite more pains is taken to BLIND them by ONE DESCRIPTION OF MEN, than there is to open their eyes by the other; which, in MY opinion, is THE SOURCE OF MOST OF THE EVILS WE LABOR UNDER.*

With very great esteem,
I am, Sir,

Your most obedient servant,
George Washington¹⁹⁷

Whether Addison had a hand in the publication of these editorials is unclear, and it is here that historians can produce two scenarios as to how the newspapers obtained copies of Washington’s letter. Perhaps the easiest scenario is that Addison distributed the copies himself. Although this is highly plausible, historians have limited evidence as to the extent of Addison’s personal correspondence and whether he kept a copy of the letter itself.

This brings us to a more interesting scenario that would have involved Chief Justice John Marshall, Associate Justice Bushrod Washington, or the combined effort of both distributing copies of the letter. Support for this conclusion rests on an interesting sequence of events that would place George Washington’s papers in the combined hands of the Chief Justice and Bushrod by the spring of 1802, nearly six

¹⁹⁵ *Id.*

¹⁹⁶ See THE SPECTATOR (New York, N.Y.), Oct. 20, 1802, at 2 (col. 4); ALEXANDRIA ADVERTISER AND COMMERCIAL INTELLIGENCER (Alexandria, Va.), Oct. 22, 1802, at 3 (col. 3); BOSTON GAZETTE (Boston, Mass.), Oct. 25, 1802, at 2 (col. 2); WINDHAM HERALD (Windham, CT), Nov. 4, 1802, at 3 (col. 1); THE REPUBLICAN OR, ANTI-DEMOCRAT (Baltimore, Md.), Oct. 25, 1802, at 3 (col. 4); WASHINGTON FEDERALIST (Georgetown, D.C.), Oct. 25, 1802, at 2 (col. 4); THE UNIVERSAL GAZETTE (Washington, D.C.), Oct. 28, 1802, at 3 (col. 4); THE UNITED STATES ORACLE AND PORTSMOUTH ADVERTISER (Portsmouth, N.H.), Oct. 30, 1802, at 2 (col. 3); FARMER’S MUSEUM, OR LITERARY GAZETTE (Walpole, N.H.), Nov. 2, 1802, at 2 (col. 3); THE NEWPORT MERCURY (Newport, R.I.), Nov. 2, 1802, at 2 (col. 2); GAZETTE (Boston, Mass.), Oct. 25, 1802, at 2 (col. 2); NEW HAMPSHIRE SENTINEL (Keene, N.H.), Nov. 6, 1802, at 2 (col. 1).

¹⁹⁷ 3 THE PAPERS OF GEORGE WASHINGTON, *supra* note 57, at 407. See, e.g., sources cited *supra* note 196.

months prior to the time that Washington's letter to Addison would first appear in editorials.¹⁹⁸

The story begins with George Washington's death in 1799 when the General bequeathed: "To my nephew Bushrod Washington, I give and bequeath all the Papers in my possession, which relate to my Civ[i]l and Military Administration of the affairs of this Country; I leave to him also such of my private papers as are worth preserving"¹⁹⁹ Those that are familiar with George Washington's papers know that he maintained copies of almost his entire correspondence because the General seemingly knew the historical importance of the contents upon the outbreak of the American Revolution.²⁰⁰ These copies included Washington's correspondence with Addison.²⁰¹

Naturally, Bushrod Washington immediately saw the importance of the papers and sought to compile a biography of the esteemed General. The work became the five volume series entitled *The Life of George Washington*.²⁰² The project was too daunting for Bushrod to undertake given his weak vision for extensive scholarly pursuits.²⁰³ He knew that the public expected a detailed and proper "history of a life

¹⁹⁸ See sources cited *supra* note 196.

¹⁹⁹ 37 THE WRITINGS OF GEORGE WASHINGTON 275, 284 (J.C. Fitzpatrick ed., 1938).

²⁰⁰ One exception is that almost all of Washington's correspondences to Martha Washington were destroyed at the General's request upon his death. Some of the correspondence with Lund Washington, the General's cousin, has also been lost. See PATRICK CHARLES, WASHINGTON'S DECISION: THE STORY OF GEORGE WASHINGTON'S DECISION TO REACCEPT BLACK ENLISTMENTS IN THE CONTINENTAL ARMY, DECEMBER 31, 1775, at 66-68 (2006).

²⁰¹ The first attempt to compile George Washington's papers was by Jared Sparks and at the request of Bushrod Washington. The Addison correspondence was not published in these writings except for Washington's letter to Marshall, but much was omitted from these first editions. Sparks disclosed this to the readers, writing:

With these materials, it will readily be supposed, the work might have been extended to a much larger number of volumes. A limit was fixed, which it was believed would embrace all the most valuable parts of Washington's writings, and at the same time not surpass too much on the means of purchasers.

1 THE WRITINGS OF GEORGE WASHINGTON: BEING HIS CORRESPONDENCE, ADDRESSES, MESSAGES, AND OTHER PAPERS, OFFICIAL AND PRIVATE, at viii (Jared Sparks ed., 1834). However, the Addison correspondence would appear in the next editions of Washington's papers, which confirms that copies of the letters to Addison were in the papers and not published by Sparks. See 1 THE WRITINGS OF GEORGE WASHINGTON, at xxxvii (John C. Fitzpatrick ed., 1931) (indicating that a "*" signifies the papers were written in Washington's handwriting); 37 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 199, at 27 (letter to Addison with "*" denoting Washington's handwriting). The latest publication of Washington's writings entitled *The Papers of George Washington* confirms that copies of letters sent to Addison were in fact within George Washington's papers as bequeathed to Bushrod. See 3 THE PAPERS OF GEORGE WASHINGTON, *supra* note 57, at 244, 407 (indicating that both letters to Addison concerning his charges to the grand jury were located in the original collection).

²⁰² See generally MARSHALL, THE LIFE OF GEORGE WASHINGTON, *supra* note 165.

²⁰³ Lawrence B. Custer, *Bushrod Washington and John Marshall: A Preliminary Inquiry*, 4 AM. J. LEGAL HIST. 34, 40 (1960); 3 THE PAPERS OF GEORGE WASHINGTON, *supra* note 57, at

so conspicuously employed as [George Washington's] was in the civil and military Affairs of this Country."²⁰⁴ However, Bushrod felt that the "diffidence" of his "own talents for such an undertaking, together with weak eyes and want of time" would forbid him "from attempting it," but he trusted "that the selection of a fit character may be in [his] power."²⁰⁵ The "fit character" to which Bushrod referred would turn out to be Marshall whom he personally approached to take on the project in February 1800.²⁰⁶

The collaboration on the Washington biography was not the first time the two gentlemen had crossed paths. In fact, Marshall and Bushrod's relationship dates back to their legal tutorship under George Wythe in 1780.²⁰⁷ They were also both members of the Society of Phi Beta Kappa, had frequently argued against each other in court in the 1790s, occasionally litigated on the same side, and would even run for Congress together in 1798.²⁰⁸ Not to mention, Bushrod's appointment to the Supreme Court was the result of Marshall declining the appointment and then recommending his esteemed friend.²⁰⁹ Their relationship was so close that Bushrod was one of the few Justices with whom Marshall regularly corresponded.²¹⁰ This even includes Marshall's letter to Bushrod that forwarded Addison's work at the request of George Washington.²¹¹

113. For the publication of Bushrod's legal notes, see BUSHROD WASHINGTON, REPORTS OF CASES ARGUED IN THE COURT OF APPEALS OF VIRGINIA (1797-98). *See also* Letter from Bushrod Washington to Thomas Porter (December 27, 1796) (on file with the Mount Vernon Ladies' Association, Mount Vernon, Va.) ("As for myself I can truly say that from the time I left Balt[imore] I have not had a moment to have from Courts & Court business. And I never take pleasure in writing to a friend me[re] letters of regard, unless I can feel myself somewhat of leisure and releas[e]d from the pressure of less agreeable employment. You are generous enough to excuse me in . . . my engagements in Law . . .").

²⁰⁴ Custer, *supra* note 203, app. B at 48.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 36.

²⁰⁸ *Id.* at 36-41.

²⁰⁹ *Id.* at 42. *See also* 3 THE PAPERS OF GEORGE WASHINGTON, *supra* note 57, at 113-14 (letter from Bushrod confirming his acceptance of the position); 3 THE PAPERS OF JOHN MARSHALL, *supra* note 65, at 507 (letter from Timothy Pickering to John Marshall asking whether Bushrod Washington will accept the appointment to the Supreme Court); *id.* at 508 (John Marshall writes back to Timothy Pickering confirming Bushrod Washington would take the appointment and that he was "equally confident that a more proper person cou[ld] not be named for it."). Bushrod replaced his mentor in law, James Wilson, on the Bench. 6 THE DIARIES OF GEORGE WASHINGTON 319 (Donald Jackson & Dorothy Twohig eds., 1979). Bushrod had studied under Wilson from March 1782 to January 1784. Custer, *supra* note 203, at 38 n.18.

²¹⁰ Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1451 (2006).

²¹¹ 4 THE PAPERS OF JOHN MARSHALL, *supra* note 25, at 3-4; 3 THE PAPERS OF GEORGE WASHINGTON, *supra* note 57, at 302-03, 308-09.

The importance that Bushrod placed on the forthcoming biography can be seen in the national press releases concerning the work.²¹² For example, *Claypoole's American Daily Advertiser* published Bushrod's letter promoting the work verbatim, which stated: "Having at length engaged a gentleman of distinguished talents to assist in writing a History of the Life of the late George Washington, this work will be immediately commenced, and will be completed expeditiously as the nature of such an undertaking will permit."²¹³

No mention was made of Marshall in the press release, leaving speculation as to who would author the great work until November.²¹⁴ An August 20th edition of *The Daily Advertiser* commented on the mystery of the author, writing:

It has not been thought proper to mention the name of the gentleman who has engaged in this important undertaking: but we learn that he is an eminent literary character The invaluable manuscripts bequeathed to Judge Washington, by his venerated uncle, are numerous and will afford ample materials for furnishing not only authentic Memoirs, of one of the greatest men that ever trod the earth, but will also exhibit a complete History, both civil and military, of American affairs, from the discovery down to the close of last year.²¹⁵

In the end, *The Life of George Washington* never progressed as quickly as Bushrod had hoped. The breadth of Washington's writings was too expansive for even the esteemed Marshall, and the first volume was not published until nearly four years after Bushrod enlisted the aid of his friend.²¹⁶ All five volumes were published from 1804 to 1807, with the entire project encompassing a seven-year collaborative effort.²¹⁷ This includes the period encompassing the impeachment proceedings of both Addison and Chase.

²¹² See, e.g., CLAYPOOLE'S AMERICAN DAILY ADVERTISER (Philadelphia, Pa.), Aug. 18, 1800, at 3 (col. 3); COMMERCIAL ADVERTISER (New York, N.Y.), Aug. 19, 1800, at 3 (col. 2); AMERICAN CITIZEN & GENERAL ADVERTISER (New York, N.Y.), Aug. 20, 1800, at 2 (col. 2); THE DAILY ADVERTISER (New York, NY), Aug. 20, 1800, at 3 (col. 1); MERCANTILE ADVERTISER (New York, N.Y.), Aug. 20, 1800, at 3 (col. 1); THE SPECTATOR (New York, NY), Aug. 20, 1800, at 3 (col. 4); WEEKLY MUSEUM (New York, N.Y.), Aug. 23, 1800, at 3 (col. 3); THE COURIER (Norwich, Conn.), Aug. 27, 1800, at 3 (col. 3); THE PROVIDENCE JOURNAL (Providence, R.I.), Aug. 27, 1800, at 3 (col. 3); WINDHAM HERALD (Windham, Conn.), Aug. 28, 1800, at 3 (col. 1); ORIENTAL TRUMPET (Portland, Me.), Sept. 3, 1800, at 2 (col. 3); THE FARMER'S MONITOR (Litchfield, Conn.) Oct. 22, 1800, at 2 (col. 4); SOUTH CAROLINA STATE GAZETTE & TIMOTHY'S DAILY ADVERTISER (Charlestown, S.C.), Oct. 23, 1800, at 2 (col. 4).

²¹³ CLAYPOOLE'S AMERICAN DAILY ADVERTISER (Philadelphia, PA.), Aug. 18, 1800, at 3.

²¹⁴ One newspaper speculated the author was Joseph Dennie. See GEORGETOWN GAZETTE (Georgetown, S.C.), Nov. 5, 1800, at 4 (col. 4). For confirmation that Marshall was the author, see AMERICAN CITIZEN (New York, N.Y.), Nov. 5, 1802, at 2; MERCANTILE ADVERTISER (New York, N.Y.), Nov. 5, 1800, at 3.

²¹⁵ THE DAILY ADVERTISER (New York, N.Y.), Aug. 20, 1800, at 3.

²¹⁶ FRANCOIS FURTENBERG, IN THE NAME OF THE FATHER: WASHINGTON'S LEGACY, SLAVERY, AND THE MAKING OF A NATION 139-40 (2006).

²¹⁷ For a great summary of the story of the publication and writing process, see *id.* at 139-45.

Given that Bushrod was the custodian of George Washington's papers, one would peg him as the primary suspect to disseminate Washington's letter to the press. The facts seem straightforward. Bushrod had read Addison's work, was a staunch Federalist, and firmly believed in an independent judiciary. However, a letter to Alexander Hamilton conveys Bushrod's reluctance to share Washington's papers with anyone. In November 1801, it seems that Hamilton sought to gain copies of Washington's letters to help the political agenda of the Federalist Party. Bushrod, although sympathetic to the cause, did not comply with the request. His answer reads:

As to the propriety of sending copies of those you want I am not satisfied, and have felt considerable embarrassment in consequence of the application. On the one hand, my esteem for you produces a correspondent wish to oblige you, whilst on the other I apprehend that a compliance would probably expose me to perhaps a just censure, as well as to the future perplexity in consequence of similar applications Acting with the fairness which shall always mark my conduct, I could not upon such a subject refuse to one what I have granted to the other party, and thus the papers might be used in a way very different from that which I am persuaded was intended by the person who confided them to my care.²¹⁸

Thus, if we take Bushrod on his word, it is unlikely that he would have released the letters of his great uncle. He was clearly cognizant of the political consequences in taking part of such requests. He sought to honor Washington and not make his uncle's correspondence the center of political discontent. However, Bushrod did allow others to access Washington's papers albeit on limited terms. For instance, after Hamilton's death, Bushrod willingly allowed Hamilton's widow to examine her late husband's correspondence to determine whether Hamilton himself had a hand in drafting Washington's farewell address.²¹⁹ Another request to view the papers came from Marquis de Lafayette, who wishfully hoped that his correspondence with Washington would be shipped "by a frigate under the Seal of Government" so long as "Mr. Madison and the Members of Congress [knew] where it is."²²⁰ It is unknown whether Bushrod sent copies of the correspondence to Lafayette, but it is highly probable that he would have obliged the esteemed General and longtime friend of Washington.

It must be emphasized that Bushrod was not the only party in possession of Washington's papers at the time of the Addison editorials. According to Marshall's account, the papers were in the joint possession of two Justices at the start of "the

²¹⁸ 25 THE PAPERS OF ALEXANDER HAMILTON 433 (Harold C. Syrett ed., 1977).

²¹⁹ See Letter from Elizabeth Hamilton to Bushrod Washington (Mar. 2, 1818) (on file with the Mount Vernon Ladies' Association, Mount Vernon, Va.); Letter from Elizabeth Hamilton to Bushrod Washington (May 16, 1818) (on file with the Mount Vernon Ladies' Association, Mount Vernon, Va.); Letter from Elizabeth Hamilton to Bushrod Washington (July 2, 1818) (on file with the Mount Vernon Ladies' Association, Mount Vernon, Va.).

²²⁰ Letter from Marquis de Lafayette to Bushrod Washington (Dec. 15, 1811) (on file with the Mount Vernon Ladies' Association, Mount Vernon, Va.).

spring of 1802” when Bushrod “came to this place when we examin[e]d the trunks together.”²²¹

Could Marshall and Bushrod have acted together or separately in disseminating the Addison letter to the press? A May 3, 1802 letter to William Paterson sheds some doubt on the possibility. It reveals that Marshall and Bushrod had similar opinions on the dissemination of Washington’s papers for political purposes. Marshall wrote:

I form[e]d a resolution shortly after the papers came to my possession, not to use or permit them to be us[e]d, for party purposes. If I open[e]d them to my political friends, I could not refuse like access to those from whom I differ[e]d in opinion. How cou[ld] I, without incurring imputations of unfairness, & subjecting my self to charges which nothing but a resort to the papers cou[ld] remove. Suppose for instance I should be accus[e]d of publishing partial parts of a correspondence, how cou[ld] I defend myself, & why should I involve myself in difficulties, from which I shou[ld] never be able to extricate myself without opening the papers to both parties? The unmerited abuse of the democratic party I shou[ld] disregard, but were I to use these papers as weapons against them, I should feel myself wrong when they sought aid from them, to refuse their request. I should not in short act as I believe Genl. Washington wou[ld] have wished, cou[ld] he have foreseen that I shou[ld] be called upon to act at all upon the case. From these considerations I declin[e]d complying with a request of General Hamiltons to send him copies of some papers, & I must be consistent (tho[ugh] in error) in the present instance.²²²

Despite Bushrod and Marshall’s assurances that they would not release Washington’s letters to members of either political party, this does not completely dispel the possibility that either Justice or both made a personal exception to defend an independent judiciary, the very judiciary that both were sitting on in the fall of 1802. Thomas Jefferson surely had his suspicions about Washington’s papers being in the hands of a Federalist like Marshall. In fact, on the same day that Marshall wrote to Paterson that he would not allow them to be used for political purpose, Jefferson wrote to Joel Barlow that he thought the forthcoming biography was “to com[e] out just in time to influence the next presidential election.”²²³

How expansive were the rumors that Marshall was using Washington’s letters for political purposes? Historians may never know. However, it is not the most important question left unanswered. The most important question is whether in fact Marshall, Bushrod, or both had disseminated Washington’s letter. The answer may rest in the lost correspondence between Bushrod and Marshall. Historians Lawrence B. Custer and A.J. Beveridge have speculated that the breadth of this correspondence would have been as expansive and informative as Marshall’s correspondence with

²²¹ 6 THE PAPERS OF JOHN MARSHALL, *supra* note 19, at 199. The only other party that had possession of these papers was Tobias Lear. It is highly unlikely, however, that Tobias made copies and disseminated them in the spring of 1802, for he was a member of the Republican Party that sought the impeachments of men like Judge Addison. *See id.* at 192-93.

²²² *Id.* at 117.

²²³ 8 THE WRITINGS OF THOMAS JEFFERSON 151 (Paul Leicester ed., 1892-99).

Justice Joseph Story.²²⁴ Perhaps some of this correspondence concerned the impeachments of Addison and Chase. Perhaps it would reveal the combined effort of Bushrod and Marshall releasing George Washington's letters to newspapers in 1802 to defend Addison, and again in 1804 to compare Chase's plight to that of Addison.

Although the content of the entire Bushrod-Marshall correspondence is lost, it is highly probable that Custer and Beveridge have understated its magnitude and that it would have exceeded that of Marshall's correspondence with Story.²²⁵ Bushrod and Marshall were long time friends, classmates, courtroom adversaries, and political colleagues. In June 1802 they were two of the three trustees appointed to create a monument "in such a manner as in their wisdom may be deemed most honourable to the memory of Washington."²²⁶ Furthermore, if we can gauge anything from *The Life of George Washington* project it is that the correspondence and communication between Bushrod and Marshall must have been as voluminous as the correspondence between Marshall and the printer of Washington's biography, Caleb P. Wayne.²²⁷ This is due to the fact that Marshall frequently references obtaining the consent or opinion of Bushrod on a variety of subjects within the Wayne correspondence, yet most of the correspondence is non-existent. Thus, one can only imagine the amount

²²⁴ See A.J. BEVERIDGE, 3 THE LIFE OF JOHN MARSHALL 238 (1918); Custer, *supra* note 203, at 35, 44-46.

²²⁵ From what has survived, there is evidence of Bushrod corresponding with other Judges concerning legal matters. See Letter from Bushrod Washington to Justice Thompson (May 9, 1826) (on file with the Mount Vernon Ladies' Association, Mount Vernon, Va.); R. Kent Newmyer, *Justice Joseph Story on Circuit and a Neglected Phase of American Legal History*, 14 AM. J. OF LEGAL HIST. 112, 131 (1970) (discussing the exchanges between Joseph Story and Bushrod Washington on legal matters).

²²⁶ THE DAILY ADVERTISER (New York, N.Y.), Jun. 14, 1802, at 3. A December 18, 1802 edition of *The Providence Gazette* advertised:

However the true friends of America may differ in sentiment on many points, it is presumed that they are all of one accord in acknowledging the virtues and services of the late illustrious friend and father of his country, and in wishing to behold their gratitude and affection testified by some spontaneous and durable expression. They are all therefore invited to contribute to the intended MONUMENT to his memory, without suffering party or prejudice to impair the merit of their voluntary contributions to an object so patriotic and desirable . . . Subscriptions will be received at the Providence Insurance Company's office, and at the store of Mr. *William Blodget* . . . where a general plan of the intended work, with the system by which the contributions are to be regulated, and the monies secured and applied, may be seen. The money, as it is collected, will be deposited in one of the banks, in the name of BUSHROD WASHINGTON, and his associate . . . JOHN MARSHALL, Chief Justice of the Supreme Court of the United States, and BENJAMIN STODDERT, late Secretary of the Navy.

PROVIDENCE GAZETTE (Providence, R.I.), Dec. 12, 1802, at 3 (col. 3).

²²⁷ The letters that have survived may not be comprehensive, but are numerous. See, e.g., 6 THE PAPERS OF JOHN MARSHALL, *supra* note 19, at 237-39, 240, 244-45, 245-55, 257-58, 270, 273-74, 286-87, 289-90, 292-93, 293-94, 295, 296, 297-98, 300-01, 301-02, 304-05, 320-21, 322-23, 325, 327-28, 331-32, 333-34, 335-36, 338-40, 340-41, 345-46, 358, 373-74, 375-78, 379-80, 380-81, 381, 382, 402, 403-05, 406, 428, 448-49, 450, 452-53.

of letters and conversations that must have been exchanged between Bushrod and Marshall.

Also, one cannot forget that the two worked side-by-side on the Supreme Court. A March 13, 1826 letter to Jared Sparks reveals the interplay among the Justices, and their respect for Washington's papers. Bushrod wrote:

Your Letter . . . was handed me by Mr. Justice Story, and I owe you an apology for the delay which has taken in answering it. The truth is that, although living under the same roof,²²⁸ the important cases which the Judges have had to examine and discuss in conference diverted the attention of the C. Justice & myself from the subject, insomuch, that it is but lately that we had an opportunity of conversing upon it.

The only answer which it is now in my power to give your proposal [to publish Washington's papers] will be contained in the following statement of facts. A part of the work which you contemplate writing has for some years past engaged the attention, & commanded the labour, of the C. Justice & myself. It is now completed, and we expect in the course of the next summer to put to press about three volumes of what we judge to be the most interesting of Genl. Washington's letters, written during the war of the revolution, and subsequent to its termination. It is further our intention to publish many of the letters addressed to him by the governors of the several states, foreign officers & others during those periods. The letters written by him prior to and during the French war, are, many of them, copied, and will be published at some future period.²²⁹

Although this letter displays Bushrod and Marshall's intent to publish the papers themselves and a reluctance to permit Sparks to participate in the project, within the year an agreement was struck for Sparks to publish the twelve volume set entitled *The Writings of George Washington*. Naturally, Bushrod and Marshall's concerns regarding the misuse of the papers was included in the agreement, for it had a catch all that gave the two Justices discretion to withhold "any paper" that they "do not deem suited or proper for publication."²³⁰

Again, whether Bushrod, Marshall, or both forwarded Washington's letters to Addison is unclear, but it is interesting that these letters would surface again at the impeachment proceedings of fellow Supreme Court Justice Samuel Chase.²³¹

²²⁸ When the Supreme Court was in session, the seven Justices frequently boarded together. See Howell J. Heaney, *The Letters of Joseph Story (1779-1845) in the Hampton L. Carson Collection of the Free Library of Philadelphia*, 2 AM. J. OF LEGAL HIST. 68, 73 (1958).

²²⁹ Letter from Bushrod Washington to Jared Sparks (Mar. 3, 1826) (on file with the Morristown National Historic Park, Morristown, N.J.), available at http://www.nps.gov/archive/morr/Sparks/Sparks_Letters/Sparks/Welcome.htm (last visited Jan. 11, 2011).

²³⁰ Articles of Agreement, publication contract between Jared Sparks, Bushrod Washington, and John Marshall (March 7, 1827) (on file with the Morristown National Historic Park, Morristown, N.J.), available at http://www.nps.gov/archive/morr/Sparks/Sparks_Letters/Sparks/Welcome.htm (last visited Jan. 11, 2011).

²³¹ See *supra* notes 181-217.

Proceedings that Marshall thought were “sufficient to alarm the friends of a pure & of course an independent judiciary,”²³² and Bushrod felt were politically motivated and make the judiciary “not more independent than a doorkeeper!”²³³ Bushrod further displayed his disfavor with the proceedings and John Randolph’s attack on the judiciary to his close friend Edward S. Burd, writing:

You would have been shocked to heard the replication of Chase’s answer, read by [John] Randolph. In [Chase’s actual] reply it was said that . . . [he] would prove everything false . . . in justification of his conduct . . . If Judge Chase should be acquitted it is a doubt with me whether this acquittal will check the party in power. I rather think that being disappointed in their favorite scheme they will exasperated to more violent measures.²³⁴

To Chase himself, Bushrod conveyed his sympathies, writing “you will repel” these charges and “satisfactorily . . . [gain] the opinions of disinterested & candid men.”²³⁵ He had “no doubt . . . that a majority of such [virtuous] men” would acquit Chase²³⁶ because Bushrod viewed Chase’s dilemma akin to the concurrent 1804-05 impeachment proceedings of three Pennsylvania Judges.²³⁷ In fact, Bushrod seemed so emotionally invested in the issue of these impeachments that he hoped James Duane, the man responsible for the Pennsylvania impeachment proceedings, would “commit suicide.”²³⁸ He even exclaimed in a letter to Burd that “God grant he would!”²³⁹

For the purposes of vindicating Addison and the judiciary, it did not matter who disseminated copies of the Washington letter to the press because the editorials were ineffective in swaying the Pennsylvania Senate. Addison was impeached by a strict party vote.²⁴⁰ Seemingly knowing his fate, Addison informed the Senate that if he was removed he had “no desire for another [public office], for I know not how I could behave in any other, than I think I have done” as a judge.²⁴¹

If Marshall had no part in the dissemination of the Washington letter or Addison’s impeachment did not resonate with a staunch “judicial independence”

²³² 6 THE PAPERS OF JOHN MARSHALL, *supra* note 19, at 278.

²³³ Howell J. Heaney, *The Letters of Bushrod Washington (1762-1829) in the Hampton L. Carson Collection of the Free Library of Philadelphia*, 2 AM. J. LEGAL HIST. 161, 165 (1958).

²³⁴ Letter from Bushrod Washington to Edward S. Burd (Feb. 7, 1805) (on file with the Mount Vernon Ladies’ Association, Mount Vernon, Va.).

²³⁵ Letter from Bushrod Washington to Samuel Chase (Jan. 24, 1804) (on file with the Mount Vernon Ladies’ Association, Mount Vernon, Va.).

²³⁶ *Id.*

²³⁷ *See* Letter from Bushrod Washington to Edward S. Burd, *supra* note 234.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Henderson, *supra* note 18, at 118.

²⁴¹ THE TRIAL OF ALEXANDER ADDISON, *supra* note 20, at 152.

advocate like Marshall,²⁴² the impeachment of Samuel Chase would have certainly illuminated Addison's plight, and perhaps even reminded Marshall of his fondness for Addison's work.²⁴³ From the very outset, the politics concerning Chase's impeachment drew comparisons to that of Addison. So much so, that George Washington's March 4th letter would again be published throughout the United States.²⁴⁴ This time the letter was incorporated in a widely published editorial that claimed the "real motive" behind Chase's impeachment was his "official charges to the grand jury."²⁴⁵ The writer highlighted that this was the very "same cause [that] produced the ruin of Judge Addison, in the state of Pennsylvania."²⁴⁶ It is here that Washington's letter came into play, for the editorial requested that in "respect for the memory of George Washington" the people read and remember Washington's sentiments on Addison's jurisprudence.²⁴⁷ In other words, Addison was to be viewed as a martyr to the cause of judicial independence. The very same independence that the 1789 *Federal Gazette* reported as the "rule of civil policy" that the "wisdom of every free country had adopted."²⁴⁸

Other editorials had no difficulty in drawing similar comparisons concerning the politics of Chase's impeachment with that of Addison. For instance, an editorial signed by "Fred. Her." advocated for "judicial independence," yet felt that the "case of Judge Addison . . . is too recent to be forgotten," thus had no reason "to expect that [Judge] Chase will receive more justice than he did."²⁴⁹ Another anonymous editorial in the *New Hampshire Sentinel* described how Chase was going through the "democratic ordeal" that other Federalist minded judges had faced.²⁵⁰ Similar to "Fred. Her.," the author drew a parallel to "the most extraordinary proceeding[s]" against Addison, "one of the ablest men in the union [who] was impeached, and

²⁴² See *Marbury v. Madison*, 5 U.S. 137 (1803); 6 THE PAPERS OF JOHN MARSHALL, *supra* note 19, at 278 (discussing Chase's impeachment and the effect on an independent judiciary); David E. Marion, *Judicial Faithfulness or Wandering Indulgence?: Original Intentions and the History of Marbury v. Madison*, 57 ALA. L. REV. 1041, 1074 (2006) (discussing Marshall's opinions on an independent judiciary even before appointment to the Supreme Court). See generally Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31 (1998).

²⁴³ See 4 THE PAPERS OF JOHN MARSHALL, *supra* note 25, at 3-4.

²⁴⁴ Here again, it is uncertain whether Addison, Bushrod, or both participated in this endeavor. The newspapers could have simply republished the letters from the earlier prints of Addison's impeachment. See *supra* notes 181-217.

²⁴⁵ N.Y. HERALD (New York, N.Y.), Jan. 14, 1804, at 3 (col. 2). See also PORTSMOUTH ORACLE (Portsmouth, N.H.), Jan. 28, 1804, at 2 (col. 2); CONNECTICUT COURANT (Hartford, Conn.), Jan. 25, 1804, at 2 (cols. 3-4); SALEM GAZETTE (Salem, Mass.), Jan. 24, 1804, at 2 (cols. 1-2); TRENTON FEDERALIST (Trenton, N.J.), Jan. 23, 1804, at 2 (cols. 3-4); ALBANY CENTINEL (Albany, N.Y.), Jan. 20, 1804, at 2 (cols. 2-4).

²⁴⁶ N.Y. HERALD (New York, N.Y.), Jan. 14, 1804, at 2 (col. 1).

²⁴⁷ *Id.* See also sources cited *supra* notes 194, 196, 245.

²⁴⁸ THE FEDERAL GAZETTE (Philadelphia, Pa.), Jun. 30, 1789, at 3 (col. 2).

²⁴⁹ THE REPERTORY (Boston, Mass.), Feb. 7, 1804, at 4 (col. 3); NEWPORT MERCURY (Newport, R.I.), Feb. 18, 1804, at 2 (col. 2).

²⁵⁰ NEW HAMPSHIRE SENTINEL (Keene, N.H.), Apr. 13, 1804, at 3 (col. 2).

removed from office.”²⁵¹ Meanwhile, in the *New York Spectator* an editorial addressed the impeachment proceedings occurring at the federal and state level. In doing so, the editorial compared the current crisis to that of Addison’s impeachment, writing, “Nothing is more strongly marked with inconsistency, and nothing can be more inexpressibly base and contemptible . . . [than that the] legislature of Pennsylvania can arraign, convict, and drive from office, the President of a Court, a learned and elegant Addison, for discharging the duties of his station.”²⁵²

Not to mention, Addison’s impeachment, as well as that of the other Pennsylvania judges,²⁵³ were used by both sides at Chase’s trial.²⁵⁴ Arguments went back and forth as to the importance of Addison’s impeachment in the proceedings. On February 23, 1805, Luther Martin, who defended Chase, felt it was important to distinguish Addison’s case in that “he was not impeached for the breach of any law, but only for rude or unpolite conduct” to John Lucas.²⁵⁵ Martin also referenced the political nature of those proceedings. He described the Pennsylvania Senate’s impeachment of Addison as having “overleaped their constitutional limit” and the “warmth and violence” of the Republican party as being concerned more with “influence” than “justice.”²⁵⁶

Another one of Chase’s attorneys, Robert Goodloe Harper distinguished Addison’s impeachment from the current proceedings. Harper corrected his co-counsel Luther Martin by stating that Addison was not impeached “for rude and ungentleman like behavior . . . but for a supposed usurpation of power, in preventing” Lucas from addressing the grand jury.²⁵⁷ “Whether the acts done by that learned and distinguished judge, did amount to an usurpation of unconstitutional power,” Harper would not say.²⁵⁸ However, he would comment on the fact that politics were the true purpose behind the impeachment proceedings. Harper knew that the real issue was not the eight articles levied against Chase, but the silencing “the practice of introducing political matter into charges to grand juries,” especially from a Federalist viewpoint.²⁵⁹ Harper defended the constitutionality of such charges, stating:

[Charges to the grand jury] have been sanctioned by the custom of this country, from the beginning of the revolution to this day. Need I adduce any other proof of the fact than its general notoriety? Need I refer to the charge delivered in South Carolina, in 1776, by William Henry

²⁵¹ *Id.*

²⁵² The SPECTATOR (New York, N.Y.), Nov. 24, 1804, at 3 (col. 1).

²⁵³ For a history, see generally Henderson, *supra* note 18.

²⁵⁴ 2 TRIAL OF SAMUEL CHASE . . . IMPEACHED . . . FOR CRIMES AND MISDEMEANORS, BEFORE THE SENATE OF THE UNITED STATES 144-46, 256, 328-30, 397-99 (1805) [hereinafter TRIAL OF SAMUEL CHASE].

²⁵⁵ *Id.* at 145.

²⁵⁶ *Id.* at 146.

²⁵⁷ *Id.* at 256.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 328.

Drayton,²⁶⁰ for which he has been so much admired and applauded Shall I refer to the case of judge Addison in Pennsylvania, who has delivered many political charges, and against whom when he was lately impeached, those charges made no part of the accusation It is unnecessary to dilate on these instances. They have been given in evidence, and are fresh in the memory of the honorable court And yet have the authors of none of these political charges been censured. No mark of public or private disapprobation has been fixed on their conduct. No legislative act has forbidden this practice. From the time of judge Drayton to the time of judge Chase, it has been considered as innocent.²⁶¹

Thus, it was disturbing to Harper, his co-counsel, and Chase that the Republicans were criminalizing lawful judicial conduct. It was the same conduct that Drayton, Addison, Chase, and even Republican judges had carried out since America declared its independence. Harper argued that if the Senate wished to impeach Chase for delivering constitutionally permissive charges to the grand juries, Congress should pass legislation declaring “this custom is dangerous or improper.”²⁶² Only then will the so-called “mischief be prevented” and the “principles of liberty, and justice [be] respected.”²⁶³

Just as Chase’s attorneys used Addison’s impeachment and charges to the grand juries for their defense, the prosecution did the same. Attorney Joseph Nicholson cast Addison’s impeachment proceedings as akin to that of Chase.²⁶⁴ He asserted one similarity that could be deduced was the political nature of the charges delivered. Nicholson stated, “had it not been for the extreme anxiety of Judge Addison to propagate his political dogmas from the bench, he would never have been reduced to this serious dilemma.”²⁶⁵ He compared Addison to Chase, stating, “[l]ike the defendant, [Addison] converted the sacred edifice of justice into a theatre for the dissemination of doctrines, to which I hope I shall never subscribe.”²⁶⁶

In the end, Chase survived impeachment and was found “not guilty” on all eight counts levied against him.²⁶⁷ What is of historical significance for this study, however, is that Chase’s impeachment illuminated the plight of Alexander Addison. Both the public²⁶⁸ and the attorneys involved²⁶⁹ saw the importance of Addison in the impeachment proceedings. The underlying motive of Addison’s impeachment was his political charges to the grand juries, not his credibility as a judge or a

²⁶⁰ For more on Drayton’s charge and American independence, see CHARLES, *supra* note 127, at 40, 58-63, 72, 136. *See also supra* notes 30-31.

²⁶¹ 2 TRIAL OF SAMUAL CHASE, *supra* note 254, at 329.

²⁶² *Id.* at 330.

²⁶³ *Id.*

²⁶⁴ *Id.* at 393.

²⁶⁵ *Id.* at 398.

²⁶⁶ *Id.* at 398-99.

²⁶⁷ *Id.* at 484-93.

²⁶⁸ *See supra* text accompanying notes 232-52.

²⁶⁹ *See supra* text accompanying notes 254-66.

constitutional commentator. In fact, even prosecution attorney Joseph Nicholson described Addison as a “gentleman of considerable celebrity both in the legal and political world, and of unquestionable talents.”²⁷⁰

In a sense, Addison was vindicated. Addison’s critics had always respected his ability as a constitutional commentator.²⁷¹ His resume was impressive. He had assisted James Wilson in drafting the Pennsylvania Bill of Rights,²⁷² written Pennsylvania’s first reports,²⁷³ received the respect and admiration of George and Bushrod Washington,²⁷⁴ and was even viewed as a martyr for the Chase impeachment proceedings.²⁷⁵ Also, a week after Chase was exonerated in the Senate, George Washington’s letter to Addison reappeared in a *New York Herald* editorial. This time the letter was used as an educational tool to prove Chase’s actions would have been supported by the “Immortal Washington.”²⁷⁶ At the same time, though, Addison himself was exonerated. As the editorial stated:

It will be recollected that it was for this same praiseworthy conduct, as Washington thought it, that Judge Addison was afterwards impeached, tried, and, as democracy had arrived at a higher state of perfectibility in the Senate of Pennsylvania than in the Senate of the United States, was fully convicted of a high crime and misdemeanor and punished by being deprived of office But in the selection of Judge Chase for [Jeffersonian Republicans] first victim [at the Supreme Court], they most egregiously mistook their man. They relied on his want, as they supposed of personal popularity His triumph over his and our enemies, affords a proud day for the cause of Federalism and sound principles On the whole, we heartily congratulate ever lover of truth and justice, every friend to innocence, ever friend to social order, every man who sees a virtuous indignation against the proud oppressor and the arbitrary tyrant, on the righteous issue of this solemn trial.²⁷⁷

If Marshall’s use of the “choice of means” doctrine is not enough of an indication that he was influenced by the jurisprudence of Alexander Addison, the timeliness of the Chase impeachment and the concurrent Pennsylvania impeachment

²⁷⁰ 2 TRIAL OF SAMUAL CHASE, *supra* note 254, at 398.

²⁷¹ See John Cloyd, *Letter to the Editor*, HERALD OF LIBERTY (Washington, PA), Dec. 16, 1799, at 3 (describing Addison as a living library); 2 TRIAL OF SAMUEL CHASE, *supra* note 254, at 398.

²⁷² Rosenberg, *supra* note 33, at 411 n.34.

²⁷³ See generally ADDISON, REPORTS OF CASES, *supra* note 35.

²⁷⁴ 3 THE PAPERS OF GEORGE WASHINGTON, *supra* note 57, at 303, 407.

²⁷⁵ See *supra* text accompanying notes 240-63.

²⁷⁶ George Washington, Editorial, N.Y. HERALD (New York, N.Y.), Mar. 13, 1805, at 1 (col. 2). This editorial was republished in other newspapers. For an example, see NEWPORT MERCURY (Newport, R.I.), Mar. 25, 1805, at 2 (col. 1).

²⁷⁷ George Washington, Editorial, N.Y. HERALD (New York, N.Y.), Mar. 13, 1805, at 1 (col. 3).

proceedings²⁷⁸ confirms it. *Fisher* was decided on February 13, 1805,²⁷⁹ thus, it was decided in the mist of the Chase impeachment controversy. It would not be surprising that a staunch Federalist and advocate for “judicial independence” such as John Marshall would incorporate the work of a judge who was improperly impeached—a judicial colleague that Marshall himself had acknowledged as producing “well written” work and whom he agreed with on the Alien & Sedition Act debate.

Marshall must have been attuned to the events around him and their relation to Addison. All the newspaper reports attest to this correlation.²⁸⁰ Furthermore, Marshall’s papers acknowledge his dissatisfaction with the articles of impeachment lodged against Chase. In writing to his brother James M. Marshall, the Chief Justice wrote the articles are “sufficient to alarm the friends of a pure & of course an independent judiciary.”²⁸¹ To Chase himself, Marshall wrote that the impetus of the impeachment “seems to be that a Judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment.”²⁸² Marshall had even served as a witness at Chase’s trial.²⁸³ Thus, he must have been well aware of Addison’s relation to the proceedings.

Perhaps Marshall’s decision in *Fisher* was a political statement from the bench to the Jefferson administration. He may have viewed the case as the opportune time to resurrect a fallen judicial colleague because Marshall had resurrected Addison’s interpretation of the Necessary and Proper Clause and Addison’s reputation altogether by incorporating the “choice of means” doctrine. While skeptics will argue there is no definitive proof that Marshall sought to convey a political platform or resurrect Addison in *Fisher*, Marshall’s correspondence reveals that he thought two of the eight articles lodged against Chase were “extraordinary ground[s] for an impeachment[.]” and the other six were “altogether unfounded.”²⁸⁴ Moreover, the fact that the Republicans openly discussed their plans to impeach other Supreme

²⁷⁸ See Henderson, *supra* note 18, at 125-27. Bushrod Washington made notice of this fact in a letter to Edward S. Burd, writing:

Your favor of the 30th Jan. came in time to confirm the report of the acquittal of your Judges. I am happy that here remains some virtuous men in your legislature to which the vast and destructive proceedings often designed. I am the more astonished at their acquittal as it did not meet Duane’s appropriation, for certainly he has great influence. Duane is now in Washington and outraged against your states; and is sure that the court of impeachment here . . . [will avail] themselves as yours did. Should he be disappointed in his calculations he will commit suicide. God grant he would!

Letter from Bushrod Washington to Edward S. Burd, *supra* note 234.

²⁷⁹ United States v. Fisher, 6 U.S. 358 (1805).

²⁸⁰ See *supra* text accompanying notes 232-52.

²⁸¹ 6 THE PAPERS OF JOHN MARSHALL, *supra* note 19, at 278.

²⁸² *Id.* at 347.

²⁸³ 1 TRIAL OF SAMUEL CHASE, *supra* note 254, at 254-63.

²⁸⁴ 6 THE PAPERS OF JOHN MARSHALL, *supra* note 19, at 347-48.

Court Justices, including Marshall,²⁸⁵ must have been stenciled in Marshall's mind. Such whispers even made an editorial in the *New York Spectator*, which read:

Thus, it seems that a secret, which has been long whispered in certain circles . . . [is that] Marshall, Patterson, and Washington, are to be impeached, tried, convicted, and removed. Why is this sacrifice to be made? Is it because they have been guilty of "high crimes and misdemeanors?" No—against their unspotted characters, calumny itself has not dared to mutter a reproach.—It is ostensibly because they have been guilty of what Mr. G[iles] is pleased to consider—*an error of judgment!!* Thus the independence of the Judiciary, the boast and the only safe-guard of a republican government, is to be destroyed, and the Judges of the supreme court are to hold heir offices—not, as the constitution states, "during good behaviour"—but during the pleasure of the legislature.—We venture to predict, that, before the close of the next session of Congress, these distinguished characters will be removed from their elevated stations, and that this same Mr. Giles will be raised to the office of Chief Justice of the United States!²⁸⁶

Furthermore, it cannot be forgotten that Marshall revered Washington in all facets including his handling of political matters. Perhaps it was fate that the *Fisher* opinion was delivered nine days prior to George Washington's highly celebrated birthday and that the Chase impeachment proceedings were taking place on that very date.²⁸⁷ Marshall had served under Washington in the American Revolution, corresponded with him frequently, and even wrote one of Washington's first biographies.²⁸⁸ In addition to this iconic reverence for Washington as a man, Marshall also seemed to adopt the ever so important Washingtonian principle of political silence.²⁸⁹ In other words, like Washington, Marshall learned to become self-aware of the political ramifications of his words, correspondence, and relationships. This silence existed even more so during the Chase impeachment, for

²⁸⁵ MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795-1848, at 322 (Charles Francis Adams ed., 1970); BALANCE AND COLUMBIAN REPOSITORY (Hudson, N.Y.), Feb. 7, 1804, at 42 (col. 2) ("When the unbending spirit and just principles of Judge Chase have ruined him, they will attack his brethren: and Marshall, Cushing, Patterson and Washington must soon follow.").

²⁸⁶ Editorial, THE SPECTATOR (New York, N.Y.), Jan. 9, 1805, at 3 (col. 1). Other newspapers published this editorial. See Editorial, COMMERCIAL ADVERTISER (New York, N.Y.), Jan. 8, 1805, at 3 (col. 5); Editorial, NEW HAMPSHIRE SENTINEL (Keene, N.H.), Feb. 2, 1805, at 3 (col. 1).

²⁸⁷ George Washington's birthday is February 22 and was highly celebrated around the United States. For newspaper accounts, see VIRGINIA ARGUS (Richmond, Va.), Feb. 24, 1801, at 3 (col. 2) (describing companies of militia parading around and firing volleys in celebration); POULSON'S AMERICAN DAILY ADVERTISER (Philadelphia, Pa.), Mar. 2, 1803, at 2 (col. 4) (celebrated in Richmond by discharges of cannon and military parades).

²⁸⁸ See *supra* note 206 and accompanying text.

²⁸⁹ See *supra* text accompanying notes 93-103; Dorothy Twohig, "The Species of Property": Washington's Role in the Controversy of Slavery, in GEORGE WASHINGTON RECONSIDERED 116 (Don Higginbotham ed., 2001).

Marshall's answers were narrowly tailored.²⁹⁰ This gives weight to the argument that Marshall was dissatisfied with the proceedings altogether.

One must also consider the widely publicized George Washington letter on Addison's work.²⁹¹ Outside of Addison, the only other parties whom would have had copies of the letter would have been Bushrod Washington and Marshall. Thus, it is likely that Bushrod, Marshall, or both had personally taken part in publishing these editorials.

Lastly, one cannot forget that Bushrod and Marshall were intensively working together on creating a monument for Washington²⁹² and writing the five volume series entitled *The Life of George Washington*.²⁹³ The project took nearly seven years to complete, including throughout the impeachment proceedings of both Addison and Chase. Correspondence concerning this writing endeavor must have been expansive as they sifted through the General's extensive papers and perhaps it concerned the impeachments of Addison and Chase or conveyed Marshall's reverence for Washington's opinion of a falsely accused judge.

Unfortunately, absent any new findings outside of this study, all historians and legal scholars can do is speculate as to exactly what transpired and why Marshall adopted Addison's "choice of means" doctrine. Whether he merely admired Addison's work and interpretation of the Constitution, was nudged by Bushrod Washington, took part in the publication of Washington's letter, sought to vindicate Addison's reputation, or was delivering a political message to the Jefferson administration is unclear. What is certain is that the "choice of means" doctrine was the work of Addison and an influential factor in Marshall penning our longstanding jurisprudence on the Necessary and Proper Clause.

VI. CONCLUSION—ADDISON'S LEGACY IN AMERICAN JURISPRUDENCE

It can be stated with confidence that Alexander Addison's legacy remains in our constitutional jurisprudence today in two respects: (1) our interpretation of the Necessary and Proper Clause through the "choice of means" doctrine and (2) an independent judiciary. Regarding the Necessary and Proper Clause, we most frequently associate the "choice of means" doctrine with Marshall's decision in *McCulloch v. Maryland*.²⁹⁴ Marshall's opinion in *McCulloch* repeatedly emphasizes the importance of the "choice of means" in determining the constitutionality of congressional legislation. At one point he even writes that for the judiciary to "impose on [Congress] the necessity of resorting to means which it cannot control . . . is incompatible with the language of the constitution[]" because the "choice of means implies a right to choose" a preference in carrying out its powers, "and congress alone can make the election."²⁹⁵

Ultimately, the *McCulloch* decision rested on what was in the interest of the "public good." It was a subject that Addison had written extensively on many times

²⁹⁰ 1 TRIAL OF SAMUEL CHASE, *supra* note 254, at 254-63.

²⁹¹ See *supra* text accompanying note 245.

²⁹² See *supra* text accompanying note 226.

²⁹³ See MARSHALL, THE LIFE OF GEORGE WASHINGTON, *supra* note 165.

²⁹⁴ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

²⁹⁵ *Id.* at 424.

over, especially within the constraints of congressional legislation.²⁹⁶ Perhaps Addison influenced Marshall's judicial thinking on the "public good" as well as the "choice of means" doctrine, because Marshall stressed the importance the "public good" within its constraints. He first posed it in a question, writing, "Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means?"²⁹⁷

Marshall's answer to his self-imposed question was simple and to the point:

[W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.²⁹⁸

To phrase it another way, Marshall viewed the "choice of means" not as a discretionary right of the "people of a particular state," "the constituents of the legislature, which claim the right to tax them, but by the people of all the states . . . for the benefit of all."²⁹⁹ Whether Marshall's emphasis on the "public good" reflects Addison's constitutional jurisprudence is less certain than that of the "choice of means" doctrine. However, when future historians and legal commentators delve into this subject, they should not dismiss Addison's views because he was clearly a respected figure in legal and political circles.

Addison's legacy is also intertwined with our jurisprudence because it has ensured an independent federal judiciary. It should come as no surprise that the year Addison was impeached is the very same year *Marbury v. Madison* was decided.³⁰⁰ This study does not answer whether there is a historical connection between them. What is certain is that Addison's impeachment was described as highly improper and politically motivated. During the Chase impeachment proceedings, this fact was repeated over and over, and Addison's plight provided the perfect example of the

²⁹⁶ 2 ADDISON, REPORTS OF CASES, *supra* note 35, at 18, 93-100, 121, 150-65, 175, 179, 220-21.

²⁹⁷ *McCulloch*, 17 U.S. at 408.

²⁹⁸ *Id.* at 421.

²⁹⁹ *Id.* at 428.

³⁰⁰ Addison's interpretation of judicial review was penned in September 1796 when he wrote:

No law can be enforced on the citizens without the interposition of the judiciary. If the legislature enact a law, repugnant to any of the principles or provisions of the constitution, any citizen affected by it, may, by calling in question the validity of any act done under it, arraign this law before the judiciary;—which has power to declare it null and void, and altogether prevent its execution.

2 ADDISON, REPORTS OF CASES, *supra* note 35, at 184. Addison would also write, "An unconstitutional law may be in effect annulled by the judiciary." *Id.* at 186.

dangers the judiciary faced in the early nineteenth century. One can only imagine the effects of Jefferson's impeachment agenda had it succeeded. The judiciary would not be the independent and exclusive branch of government we know today.

It is interesting that Addison addressed this very scenario in his writings on "tyranny." To Addison, it was "immaterial what branch of the government it is, whether the most popular or not, that succeeds" in attempting to subvert the independence of another branch.³⁰¹ Tyranny in a branch of government was established when one branch usurps "a power not given it by the constitution," for this "violates the constitution; and a constitution violated will soon be a constitution destroyed."³⁰²

What other contributions Addison's writings have had on our current jurisprudence is beyond the scope of this article. Certainly the breadth of Addison's scholarship can provide historians and legal commentators with other insights into our legal past, including freedom of speech,³⁰³ separation of powers,³⁰⁴ the importance of virtue in a democratic republic,³⁰⁵ the duties of courts and juries,³⁰⁶ and the role of elected officials.³⁰⁷ One can only hope these writings are further examined in understanding the origins of our Constitution and jurisprudence.

³⁰¹ *Id.* at 183.

³⁰² *Id.* at 184.

³⁰³ *See generally* ADDISON, LIBERTY OF SPEECH AND THE PRESS, *supra* note 37.

³⁰⁴ 2 ADDISON, REPORTS OF CASES, *supra* note 35, at 178-87, 221-34.

³⁰⁵ *Id.* at 150-66.

³⁰⁶ *Id.* at 53-63.

³⁰⁷ *Id.* at 150-66.