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**Minority Report:
John Marshall and the Defense of the
Alien and Sedition Acts**

KURT T. LASH*
ALICIA HARRISON**

*In 1799, the Federalist minority of the Virginia House of Delegates produced an extended defense of the Alien and Sedition Acts. This Minority Report responded to Madison's famous Virginia Resolutions and efforts by Virginia Republicans to tar the Adams Administration with having exceeded its powers under the federal Constitution. Originally attributed to John Marshall by biographer Albert Beveridge, recent biographies of Marshall have omitted the episode or rejected Beveridge's claim and the current editors of the Papers of John Marshall omitted the Minority Report from their multi-volume collection of Marshall's work. What was once an assumed (if controversial) episode in Marshall's career has disappeared from otherwise exhaustive accounts of his life and work. As in Philip K. Dick's story, *Minority Report*, an alternate view of events has been unceremoniously erased from the official record.*

The authors of this Article challenge the decision to remove Marshall's name from the Minority Report. Marshall was the only person named at the time as the probable author, and Marshall had both reason and opportunity to draft the Address. The arguments of the Report not only track Marshall's views on the Constitution, they utilize constitutional arguments that were

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** J.D. Candidate, Loyola Law School, Los Angeles. I am deeply indebted to Professor Lash for the opportunity and rare privilege to work on his scholarship—both as a research assistant and especially as co-author. I also thank my brother, Mark Harrison, for sharing his university access to essential sources throughout the project; my mother, Marsha Harrison, for all the time and red lines she put into this work as well as the countless before; and my father, Michael Harrison, for inspiring me to be a lawyer and paying for my History degree. Lastly, I am grateful to the many reference librarians at the Library of Congress and Library of Virginia for their responsive and expert assistance.

wholly unique at the time and would appear again, almost verbatim, in the future Chief Justice's constitutional opinions. If Marshall penned this defense of the Acts, then this not only reveals the views of federal power he brought with him to the Supreme Court, it also helps illuminate public reaction to Chief Justice Marshall's nationalist jurisprudence. To his critics, Marshall's construction of federal power in *McCulloch* echoed the same arguments put forward to defend the hated Alien and Sedition Acts. The historical evidence suggests that not only were the arguments similar, they had flowed from the same pen.

"In the face of facts now known it must be supposed . . . that important letters were destroyed by [Bushrod] Washington and [John] Marshall during their lives or by other persons after their deaths."¹

I. INTRODUCTION

The country recently celebrated the 200th anniversary of Chief Justice John Marshall's decision in *Marbury v. Madison*.² The occasion inspired many scholarly symposiums on the particular importance of the decision itself and its author's role in establishing the contours of judicial review and national power.³ As has been the case since Albert Beveridge published his early twentieth century biography of the great Chief Justice,⁴ scholarly evaluation of Marshall's place in our constitutional history has been extraordinarily positive, bordering on the hagiographic.⁵ However, while

¹ 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, THE OLIVER WENDELL HOLMES DEVISE; HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15, at 99–100 (1981) (quoting and agreeing with Lawrence B. Custer, *Bushrod Washington and John Marshall: A Preliminary Inquiry*, 4 AM. J. LEGAL HIST. 34, 46 (1960)).

² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

³ See, e.g., Symposium, *Marbury v. Madison*, 71 TENN. L. REV. 217 (2004); *Marbury and Its Legacy: A Symposium to Mark the 200th Anniversary of Marbury v. Madison*, 72 GEO. WASH. L. REV. 1 (2003); *Marbury v. Madison: A Bicentennial Symposium*, 89 VA. L. REV. 1105 (2003); Symposium, *The Legacy of Chief Justice John Marshall*, 43 WM. & MARY L. REV. 1321 (2002); Symposium, *Judging Judicial Review: Marbury in the Modern Era*, 101 MICH. L. REV. 2557 (2003); Symposium, *Federalism: The Battle Recommences*, 16 ST. JOHN'S J. LEGAL COMMENT. 307 (2002); Symposium, *Chief Justice John Marshall and the United States Supreme Court, 1801–1835*, 33 J. MARSHALL L. REV. 743 (2000).

⁴ ALBERT J. BEVERIDGE, 2 THE LIFE OF JOHN MARSHALL (1916).

⁵ See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 1 (1996) [hereinafter SMITH, DEFINER OF A NATION] ("If George Washington founded the country, John Marshall defined it."); CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 212 (1996) [hereinafter HOBSON, THE GREAT CHIEF JUSTICE] ("More than anyone else, John Marshall invented American constitutional

Beveridge presented Marshall evenhandedly, warts and all, recent biographers and (more significantly) the editors of *The Papers of John Marshall*, have omitted an episode in Marshall's life that adds shadow and texture to Marshall's otherwise celebrated legal career; namely, *The Address of the Minority of the Virginia Legislature*.⁶ This so-called "Minority Report"⁷ defends the constitutionality of the infamous Alien and Sedition Acts and anticipates the broad reading of federal power that Marshall articulated in cases like *McCulloch v. Maryland*.⁸ If Marshall authored this Report, it would shed significant light on the roots of his theory of federal power as well as our understanding of the constitutional debates of the early nineteenth century. The popular and political struggle over the Alien and Sedition Acts constituted a seminal moment in American constitutional history, producing a corpus of political documents that informed judicial and political debate for the next century.⁹ If Marshall's role in this moment becomes obscured, so too will an important aspect of our constitutional history.

law . . ."); R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* (2001) (the title reflects Newmyer's treatment of Marshall throughout his book).

⁶ See 4 *THE PAPERS OF JOHN MARSHALL* (Charles T. Cullen ed., 1984) [hereinafter 4 *MARSHALL PAPERS*] (omitting the address from the text); SMITH, *DEFINER OF A NATION*, *supra* note 5 (omitting the episode from the text, but adding a footnote naming Lee as the author of the Minority Report); NEWMYER, *supra* note 5, at 125–26 (referring obliquely to Lee as the author of the Report); HOBSON, *THE GREAT CHIEF JUSTICE*, *supra* note 5, at 7 (describing Marshall's candidacy for federal office in 1798–99, but not mentioning the defense of the Alien and Sedition Acts).

⁷ For the purposes of this Article, we refer to the address as the "Minority Report," similar to *The Founders' Constitution* appellation. See John Marshall, *Report of the Minority on the Virginia Resolutions* (1798), partially reprinted in 5 *THE FOUNDERS' CONSTITUTION* 136–39 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter *Report of the Minority*]. This helps to distinguish it more clearly from the address of the majority ("Majority Address"). We confess it also allows the literary allusion to the work of Philip K. Dick, an allusion we find disturbingly appropriate. See PHILIP K. DICK, *THE MINORITY REPORT* (Pantheon Books 2002) (1956).

⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

⁹ See James Madison, *Virginia Resolutions* (1798), reprinted in 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 7, at 135 [hereinafter Madison, *Virginia Resolutions*]; *Kentucky Resolutions* (1798), reprinted in 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 7, at 131 [hereinafter *Kentucky Resolutions*]; James Madison, *Address of the General Assembly to the People of the Commonwealth of Virginia* (1799), reprinted in 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 7, at 139; *Report on the Minority*, *supra* note 7; James Madison, *Report of the Virginia Resolutions* (1800), reprinted in 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 7, at 141 [hereinafter Madison, *1800 Report*]. For a discussion of Madison's report and its influence, see Kurt T. Lash, *James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 *GEO. WASH. L. REV.* 1651 (2006) [hereinafter Lash, *Madison's Celebrated Report*].

In 1798, less than a decade after the Bill of Rights, freedom of speech came under assault. Swept up in the fear and political momentum of a cold war with France, the Federalist Congress, under the leadership of President John Adams, passed the Alien and Sedition Acts, which authorized the removal of dangerous aliens and effectively criminalized political dissent. James Madison and Vice President Thomas Jefferson responded to these "alarming" Acts by drafting the Virginia and Kentucky Resolutions.¹⁰ Their anonymous resolutions sought to form a nationwide petition for the Acts' repeal as beyond the powers of the federal government and in violation of First Amendment protection of speech and press. Although a Republican majority in the Virginia Assembly embraced the resolutions, the fifty-eight Federalists in the minority issued their own Report defending the constitutionality of the Acts. Until the twentieth century, historians commonly attributed this "Minority Report" to John Marshall.¹¹

More recently, however, biographers of Marshall have either failed to mention the Minority Report or expressly rejected the prior attribution.¹² This omission followed a decision by the editors of the multi-volume *The Papers of John Marshall* in 1984 to omit the Report as even a *disputed* work of the Great Chief Justice.¹³ In doing so, the editors of this critical collection of primary documents departed from almost one hundred years of historical

¹⁰ See Madison, *Virginia Resolutions*, *supra* note 9; *Kentucky Resolutions*, *supra* note 9.

¹¹ See, e.g., 2 BEVERIDGE, *supra* note 4, at 402; 2 THE WRITINGS OF JOHN QUINCY ADAMS 403 (Worthington Chauncey Ford ed., 1913); Jack L. Cross, *John Marshall on the French Revolution and on American Politics*, 12 WM. & MARY Q. 631, 637 (1955); JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 151 (1956) [hereinafter SMITH, FREEDOM'S FETTERS]; Morton J. Frisch, *John Marshall's Philosophy of Constitutional Republicanism*, 20 REV. POL. 34, 39 (1958); JOHN P. ROCHE, JOHN MARSHALL: MAJOR OPINIONS AND OTHER WRITINGS 32-34 (1967); RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 397 (1971); THE POLITICAL THOUGHT OF AMERICAN STATESMEN: SELECTED WRITINGS AND SPEECHES 75-76 (Morton J. Frisch & Richard G. Stevens eds., 1973); 22 THE PAPERS OF ALEXANDER HAMILTON 472 (Harold C. Syrett ed., 1975) [hereinafter HAMILTON PAPERS]; William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 933 (1978); Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 277 (1986); RICHARD R. BEEMAN, THE OLD DOMINION AND THE NEW NATION, 1788-1801, at 196 (1972); *Report of the Minority*, *supra* note 7.

¹² See, e.g., HOBSON, THE GREAT CHIEF JUSTICE, *supra* note 5 (making no mention of the Minority Report or the controversy regarding authorship); SMITH, DEFINER OF A NATION, *supra* note 5 (addressing briefly the issue in a footnote and claiming Henry Lee, not John Marshall, likely authored the Report); NEWMYER, *supra* note 5, at 125-26 (mentioning no controversy and asserting, without evidence, that Lee wrote the Report).

¹³ The Minority Report would have been included in the fourth volume of *The Papers of John Marshall*. See 4 MARSHALL PAPERS, *supra* note 6.

consensus. Although new research can and should call into question long-held assumptions, there had been no significant scholarship on the Minority Report since Beveridge published his work in 1929.¹⁴ The third volume of the *Marshall Papers* includes a brief footnote which ascribes (without analysis) the Minority Report to Henry Lee.¹⁵ The fourth volume, which chronologically would have carried the Report, omits the document without explanation. Belatedly recognizing the inadequate treatment of the subject, the editors of the *twelfth* and final volume in the series added a lengthy editorial note which attempts to justify the earlier omission.¹⁶ This Article explores that editorial note in depth. However, as it now stands, a once assumed (if controversial) episode in Marshall's career has simply disappeared from otherwise exhaustive accounts of his life and work. As in Philip K. Dick's science fiction story, *Minority Report*, an inconvenient alternative view has been unceremoniously erased from the official record.¹⁷

This Article challenges the decision to remove the Minority Report and thus obscure Marshall's possible role in the Alien and Sedition Act controversy. Even if the issue cannot be conclusively resolved, the available evidence suggests that Beveridge had good reason to name Marshall as the author. Marshall had a history (as well as a future) in drafting anonymous defenses of federal power, and he had both motive and opportunity to draft this particular defense. In addition, people debating the question at the time named only Marshall as the probable author. The Report itself contains arguments that not only track his views on the Acts, but also utilize unique constitutional reasoning which would reappear almost verbatim in the future Chief Justice's constitutional opinions. Marshall had a strong incentive, moreover, to keep his involvement secret. If his authorship had been

¹⁴ The issue of Marshall's authorship occasionally arose in legal scholarship, though without historical investigation. See, e.g., Gregg Costa, Note, *John Marshall, the Sedition Act, and Free Speech in the Early Republic*, 77 TEX. L. REV. 1011 (1999).

¹⁵ See 3 THE PAPERS OF JOHN MARSHALL 499 n.1 (Charles T. Cullen ed., 1979) [hereinafter 3 MARSHALL PAPERS].

¹⁶ See Charles F. Hobson, *Editorial Note to 12 THE PAPERS OF JOHN MARSHALL* (Charles F. Hobson ed., 2006) [hereinafter Hobson, *Editorial Note*].

¹⁷ See DICK, *supra* note 7. We use the term "erased" advisedly. The editors of the five-volume historical compendium, *The Founders' Constitution*, attributed the Minority Report to John Marshall. See *Report of the Minority*, *supra* note 7. The on-line edition of the work originally contained the same attribution. See Internet Archive Wayback Machine, http://web.archive.org/web/*/http://press-pubs.uchicago.edu/founders/tocs/amendI_speech.html (last visited Mar. 2, 2007) (showing the on-line edition's citation to Marshall as of March 10, 2005). However, as this Article was being prepared, editor Ralph Lerner removed Marshall's name from the on-line edition and replaced it. He first changed the citation to "Richard Henry Lee" and then to "Henry Lee" without citation or explanation. See *id.* (showing the citation changes as of October 17, 2005 and May 5, 2006).

discovered at the time of its presentation, it would have cost him his campaign for federal office; had it come to light in later decades, it would have further destabilized a country teetering on the brink of state nullification of federal law. A revelation that the author of controversial nationalist opinions like *McCulloch v. Maryland* also defended the Alien and Sedition Acts *with the same constitutional arguments* would have inflamed calls to reduce the powers of the Supreme Court and provided a powerful reason for states to join the incipient nullification movement. If Marshall was the author of the Report, then he—and anyone assisting him in its publication—had good reason to take that secret to their graves.

As an alternative author of the Minority Report, some historians point to Virginia Federalist Henry Lee, mostly due to Lee's submission of the Report to the House of Delegates and his authorship of *Plain Truth*, a contemporaneous defense of the Alien and Sedition Acts.¹⁸ From our investigation, however, it appears that Lee wrote neither the Minority Report nor *Plain Truth*. Lee never claimed authorship of either work, the two biographies written by his sons (including Robert E. Lee) say nothing about them, and neither work appears in the Lee family papers. Had they researched the matter further, historians also would have discovered that Lee almost certainly *could not* have published two defenses of the Acts while also juggling his faltering finances and running a grueling (and likewise faltering) campaign for federal office. How the unfortunate Lee became associated with the Minority Report and *Plain Truth* is a remarkable tale of accident and error. Once examined, the case for Lee's significant role in drafting the Report is far too weak to justify shifting the attribution away from Marshall.

More is at stake, however, than a mere erroneous attribution. The political controversy surrounding the adoption and enforcement of the Alien and Sedition Acts had a compelling impact on the history of the United States Constitution. The debate occurred early in our constitutional history, before the contours of the Constitution had been established, making it a key moment in the development of federal power and the First Amendment.

¹⁸ See 3 MARSHALL PAPERS, *supra* note 15, at 498–99 & n.1, 500 & n.4 (“The content of the address suggests that Henry Lee was the author. The reasoning is akin to the views Lee expressed in *Plain Truth* . . .”); SMITH, DEFINER OF A NATION, *supra* note 5, at 601 & n.79 (discussing *Plain Truth* and stating in a footnote that “[t]he ornamental rhetoric of the Virginia minority address reflects the style of Henry Lee, not the lean prose of Marshall, and it was Lee who submitted the address to the House of Delegates”). The editorial note for the twelfth volume of *The Papers of John Marshall* stresses Lee's authorship of *Plain Truth* as evidence that Lee also wrote the Minority Report. See Hobson, *Editorial Note*, *supra* note 16, at 519 (“‘Plain Truth’'s arguments mesh neatly with the Minority Address, and the two documents contain no discernable differences in style and language of ‘Plain Truth’ and that of the address [sic], suggesting a single author likely composed both.”).

Although most often associated with early debates over freedom of speech,¹⁹ the Alien and Sedition Act controversy also involved critically unresolved issues of federal power and state autonomy. As such, the debate set the stage for later nineteenth-century disputes regarding state nullification of federal laws and, ultimately, the right of a state to secede from the Union.

Perhaps even more significant is the light the Minority Report could shed on Marshall's jurisprudence. If Marshall penned this defense of the Acts, it not only reveals the views of federal power he brought with him to the Supreme Court, but also helps illuminate public reaction to his nationalist jurisprudence. His opinion in *McCulloch v. Maryland*,²⁰ for example, triggered a blizzard of angry newspaper essays denouncing the Supreme Court's broad interpretation of federal power.²¹ To his critics, Marshall's construction of federal power in *McCulloch* echoed the same arguments put forward to defend the hated Alien and Sedition Acts.²² In fact, Marshall's arguments in favor of federal power in *McCulloch* closely tracked—sometimes almost verbatim—arguments in the Minority Report supporting federal authority to deport aliens and restrict speech. When viewed in the light of the Minority Report, the reaction to *McCulloch* seems less a reactionary claim of states' rights than a repeat of Madison's and Jefferson's earlier insistence that unduly broad construction of federal power endangered both individual and collective liberty.

Today, scholars tend to read opposition to Marshall's nationalism in light of the later southern secessionist movement. At the time of *McCulloch*, however, the advocates of state autonomy repeatedly raised the banner of the "1800 Revolution" and the triumph of individual liberty over the federal tyranny of the Sedition Act. The potential link between *McCulloch* and the Minority Report also calls into question the facile dismissal of *McCulloch*'s critics as no more than crypto-apologists for slavery. Broad construction of federal power jeopardized individual freedom. Recovering this history, particularly as the current Supreme Court struggles to balance broad Marshallian views of federal power against claims of state and individual autonomy,²³ informs our contemporary debate regarding how best to draw the line between state and federal power.

¹⁹ *The Founders' Constitution*, for example, places the historical documents on the Alien and Sedition Act controversy in the section on the First Amendment's freedom of speech clause. See 5 THE FOUNDERS' CONSTITUTION, *supra* note 7, at 131–47.

²⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

²¹ SMITH, DEFINER OF A NATION, *supra* note 5, at 446.

²² LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 606 (1974).

²³ See *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding federal ban on state-authorized medicinal use of marijuana); *Gonzales v. Oregon*, 546 U.S. 243 (2006) (construing the federal Controlled Substances Act to permit state-authorized physician assisted suicide).

In this Article, Part II outlines the legal and political context surrounding the Report's publication. Among other things, this section situates Marshall, an established leader among the Federalists, as a candidate for public office in Virginia, the oldest Republican stronghold, during an outcry against the Federalist administration's Alien and Sedition Acts. Here, we focus on the debates in the Virginia House of Delegates over the petitions which came to be known as the Virginia Resolutions. Authored anonymously by Madison and submitted by John Taylor, the resolutions triggered an unprecedented series of legislative actions that eventually compelled the Federalist minority in the Virginia Assembly to respond with the Minority Report.

Much of the dispute over who authored the Report concerns whether the content of the Report reflects or conflicts with the views of Marshall. Accordingly, Part III closely analyzes the Minority Report itself. The Report can be divided into three sections: (1) a policy discussion in support of the administration's military preparations in case of a war with France, (2) a constitutional defense of the Alien and Sedition Acts, and (3) an addendum in support of federal taxes. Each of these sections, particularly the last, has a recognizable style and structure that differentiates it from the others. For that reason, we believe there is a possibility that more than one hand contributed to the Report. The constitutional section of the Report is remarkable for its foreshadowing of the Marshall Court's interpretation of federal power. For example, although mischaracterized by Republicans at the time as embracing the view that the Constitution incorporated the vast jurisdiction of the common law, the Report took a more limited view of the role of the common law, a view expressly defended by John Marshall in his later writings.

Part IV considers the possible suspects. We begin with Henry Lee, the person a few Marshall biographers recently put forward as the most likely author. The case for Lee's authorship rests primarily on Lee's formal submission of the Report to the Virginia Assembly and Lee's assumed publication of a similar work, *Plain Truth*, at around the same time. An examination of legislative practices of the time, however, reveals that those who submitted reports and resolutions quite often were not the authors, particularly during the controversy over the Alien and Sedition Acts. As for *Plain Truth*, it turns out that there is no historical evidence whatsoever that Lee wrote these essays. Even a cursory investigation of Lee's life in 1799 shows that he was in a poor position to write either the Minority Report or the essays of *Plain Truth* (much less *both* at the same time). Lee suffered from debt and illness, lacked the trust of even his closest family and friends (including George Washington) due to disastrous real estate deals; arrived late to the critical debates in the Virginia legislature, and even failed to meet his military duties and run a competent campaign for office. He is not the man the Virginia legislature would have chosen to write the Minority Report nor is he a man who likely could have fulfilled such a remarkable double

publication. As far as the *Plain Truth* essays are concerned, the evidence points to Bushrod Washington as the likely author.

In their haste to name the most unlikely Lee, Marshall's biographers have generally overlooked another Virginia Federalist far more capable of collaborating with Marshall on the Minority Report. For the first time in any scholarly work, we investigate the possible role of minority leader George Keith Taylor. Although his reputation was primarily that of an orator, G.K. Taylor led the Federalists in the legislative debates, and his speeches contain a number of passages echoed in the final Report. Marshall himself considered G.K. Taylor a close friend and appears to have invited him to his home on a regular basis during the period when the Minority Report would have been drafted. Although it seems unlikely that G.K. Taylor produced the Report on his own, we believe it reasonably possible that he collaborated with Marshall.

We finally turn to Marshall himself and consider the arguments for and against his authorship; in particular, whether Marshall had the motive, opportunity, and ability to ghostwrite the Minority Report. We conclude that evidence strongly supports Beveridge's original conclusion. Marshall was closely connected with the leaders of the Virginia minority, and his reputation as a persuasive defender of federal power preceded him. He shared George Washington's escalating concern about the need to counter the divisive rhetoric of the Republicans, and he had a personal incentive to respond to the majority's attempt to paint him as a hypocrite. Although Marshall never claimed authorship, he had strong reasons to keep his role a secret. Compelling evidence suggests correspondence between Marshall and his lifelong publisher, Bushrod Washington, was purposefully destroyed. Turning to the content of the Minority Report, the constitutional arguments therein echo Marshall's known views on freedom of speech, the common law, and the proper construction of federal power. Although some of the arguments in the Report repeat those made by other contemporary Federalists, others are unique and bear a remarkable resemblance to the later judicial opinions of Chief Justice Marshall.

We anticipate that some may read this Article as an attempt to prove that John Marshall wrote the Minority Report (and that Henry Lee did not). We wish to make clear from the outset that we do not believe the historical evidence places the matter beyond doubt. We do believe that the evidence establishes Marshall as a far more likely candidate than Henry Lee. This does not mean that Marshall *must* have written the Report or that Lee *could not* have done so. It means that modern historians (such as the editors of the *Marshall Papers*) have provided no adequate justification for eliminating Marshall as a potential author of the Report. Erasing the Report from presentations of Marshall's life and work presupposes that the issue is beyond reasonable doubt. This is clearly not the case.

II. THE HISTORICAL BACKGROUND TO THE MINORITY REPORT

Telling the story of the Minority Report and its possible authors requires a degree of familiarity with the politics and personages of the day, both nationally and in Virginia. In this section, we trace the events leading to the enactment of the Alien and Sedition Acts, the response of the Virginia Republicans, and the ultimate counter-response of the Virginia minority. In doing so, we will introduce the reader to the major players in our tale, including three close associates and friends: John Marshall, Henry Lee, and George Keith Taylor, each in his own way a suspected author of the Report.

In the summer of 1798, party politics and a looming war with France spurred the enactment of the Alien and Sedition Acts²⁴ by the Fifth Congress of the United States.²⁵ Although citizens and statesmen had taken sides over the ratification of the Constitution a decade earlier, the fixed ideologies and affiliations of national parties had not yet developed. Within the next two years, however, two main parties would rise and battle over the federal government's broad exercise of fiscal power and the United States' recognition of the French Revolution.²⁶ The Republicans stressed the autonomy of the states and empathized with the French revolutionaries. Federalists, on the other hand, embraced broad definitions of national power and viewed with alarm the bloody regimes spawned by the revolutionaries' rush to freedom. Naturally, Republicans saw the Federalists as Anglophilic monarchists, while Federalists considered the Republicans French-loving disunionists. These mutual suspicions intensified after 1793 when antagonism between Britain and France rippled across the Atlantic and tossed America's ship of state.

When the Americans learned in April 1793 that the two empires had gone to war, President George Washington decreed that the United States would remain impartial throughout the conflict. This bitterly disappointed the pro-French Republicans, who challenged the constitutionality of such executive prerogative in foreign affairs and the wisdom of refusing aid to a

²⁴ Act of July 14, 1798, ch. 74, 1 Stat. 596 (amended 1918) (Sedition Act); Act of July 6, 1798, ch. 66, 1 Stat. 577 (Alien Act); Act of June 25, 1798, ch. 58, 1 Stat. 570 (amended 1812) (Alien Friends Act); Act of June 18, 1798, ch. 54, 1 Stat. 566 (Naturalization Act).

²⁵ See JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* 176 (1993).

²⁶ See generally Harry Ammon, *The Formation of the Republican Party in Virginia, 1789–1796*, 19 J. S. HIST. 283 (1953) [hereinafter Ammon, *Formation of the Republican Party*].

sister republic and former ally.²⁷ Federalists rallied to support the Neutrality Proclamation. Marshall, a devoted advocate of Washington since Valley Forge,²⁸ responded to Republicans' accusations by drafting resolutions in favor of the President and executive power,²⁹ and arranging for their adoption at a major public meeting in Richmond, Virginia.³⁰ He also answered the pseudonymous essays of James Monroe in the *Richmond Gazette and General Advertiser* by penning his own anonymous essays defending the Administration.³¹ These exploits earned Marshall a place among the Federalist leadership and in the "pantheon of Republican demons."³²

Although Federalists checked the opposition to the Neutrality Proclamation, they failed to diminish the hostility most citizens still felt for their old enemy, Britain. Since the end of the Revolutionary War, Britain had effectively dominated American trade, incited violent attacks by Indian tribes, and forcibly seized over 250 American merchant ships.³³ To avoid a new war of independence, Washington sent Chief Justice John Jay to Britain in 1793 as a special envoy to restore commercial and diplomatic relations. Jay's treaty, ratified by Washington with consent of the Senate two years later, outraged Republicans because they believed its terms appeased British interests at the expense of American sovereignty, and because the President again appeared to act contrary to the Constitution and the nation's best

²⁷ See Letter from James Madison to Thomas Jefferson, Sec'y of State, United States (June 19, 1793), in 15 THE PAPERS OF JAMES MADISON 33 (Thomas A. Mason et al. eds., 1985):

The proclamation was in truth a most unfortunate error. It wounds the National honor, by seeming to disregard the stipulated duties to France. It wounds the popular feelings by a seeming indifference to the cause of liberty. And it seems to violate the forms & spirit of the Constitution, by making the executive Magistrate . . .

Id.

²⁸ See SMITH, DEFINER OF A NATION, *supra* note 5, at 4.

²⁹ BAKER, *supra* note 22, at 196 (stating that the 1793 resolutions defended American neutrality, praised Washington, and criticized the actions of Genet).

³⁰ See Harry Ammon, *The Genet Mission and the Development of American Political Parties*, 52 J. AM. HIST. 725, 732 (1966) [hereinafter Ammon, *Genet Mission*] (describing the meeting on August 17, 1793 as a Federalist "masterstroke," which received extensive publicity because Richmond was usually a Republican stronghold, and the meeting's chairman, Chancellor George Wythe, was a close friend of Jefferson).

³¹ Harry Ammon, *Agricola versus Aristides: James Monroe, John Marshall, and the Genet Affair in Virginia*, 74 VIRG. MAG. OF HIST. & BIOGRAPHY 312 (1966) (stating that Marshall responded to Monroe's "Agricola" essays under the penname "Aristides" on Sept. 11, Nov. 13, and Nov. 20, 1793; and "Gracchus" on Oct. 16 and Nov. 13, 1793).

³² See SMITH, DEFINER OF A NATION, *supra* note 5, at 173.

³³ SHARP, *supra* note 25, at 114–15; see SMITH, DEFINER OF A NATION, *supra* note 5, at 175.

interest.³⁴ Marshall countered the partisan attack as he had before—drafting resolutions that vigorously defended Washington’s valid exercise of authority, and supporting the Administration at a popular meeting in Virginia’s capitol.³⁵ Ultimately, Marshall delivered a decisive speech on the constitutionality of the Jay Treaty while in the Virginia House of Delegates that silenced any remaining argument that the Treaty was unconstitutional.³⁶ Once published, the speech garnered its author even wider recognition in the national circles of Republicans and Federalists.³⁷

Republicans were not the only ones outraged by the Neutrality Proclamation and the Jay Treaty. The most alarming opponent to the two acts was the French government, which claimed the acts obstructed the 1778 Franco-American alliance. The former ally expressed its displeasure by capturing American merchant ships, engaging in a number of sea battles with the United States Navy, and expelling the United States envoy.³⁸ When American newspapers hotly criticized these acts as well as the political indiscretions of French Minister Edmund Genet, the French Directory blamed the federal government for not suppressing the inflammatory publications.³⁹ Marshall, already experienced in vindicating Federalist policies, responded to this international crisis by accepting President John

³⁴ BAKER, *supra* note 22, at 207–08.

³⁵ See Ammon, *Formation of the Republican Party*, *supra* note 26, at 308 (stating that the Richmond meeting held at the state capitol building on April 25, 1796, was another “master stroke arranged by John Marshall” that drew approximately 400 people and took Republicans by complete surprise).

³⁶ BAKER, *supra* note 22, at 207 (stating that visiting Justice James Iredell observed, “I am told there were few members who were not convinced by Mr. Marshall’s arguments as to its being constitutional, which few members thought it was before the debate began . . . and some of the speakers on the other side had the candor to acknowledge their conviction, though not in the House.”).

³⁷ 2 BEVERIDGE, *supra* note 4, at 122 (stating that Washington was so impressed with Marshall that he took “the earliest opportunity” to try to appoint him Attorney General) (quoting Letter from George Washington to John Marshall, Aug. 26, 1795); *id.* at 139 (stating that Jefferson believed Marshall “will be able to embarrass the republican party in the [Virginia] assembly a good deal . . . [and] has been, hitherto, able to do more mischief . . .”) (quoting Letter from Thomas Jefferson to James Madison, Nov. 26, 1795) (spelling in original).

³⁸ See SMITH, *DEFINER OF A NATION*, *supra* note 5, at 183.

³⁹ Letter from Charles-Maurice de Talleyrand, Minister of Foreign Affairs, French Executive Directory, to John Marshall, Envoy Extraordinary, United States (Mar. 18, 1798), in 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS 196–97 (1832) (Publication No. 13), available at <http://memory.loc.gov/l1/llsp/002/0200/02030197.tif> (complaining that American newspapers “have since the [Jay] treaty redoubled the invectives and calumnies against the republic and against her principles, her magistrates, and her envoys . . . without a state of things so scandalous having ever drawn the attention of the Government, which might have repressed it”).

Adams' appointment of envoy extraordinary and minister plenipotentiary to France.⁴⁰ On April 3, 1798, after a year of delays and intrigues by French Foreign Minister Charles-Maurice de Talleyrand, Marshall drafted a reply to each grievance alleged by the French government against the United States. In particular, he defended the freedom of the press as among those sacred rights considered

as forming the bulwark of their liberty, which the Government contemplates with awful reverence, and would approach only with the most cautious circumspection That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered.⁴¹

Although Marshall did not deny that the federal government *could* regulate journalistic excesses, particularly when they harmed international relations, he clarified that “[h]owever desirable those measures might be which might correct without enslaving the press, they ha[d] never *yet* been devised in America.”⁴²

In late July 1798, Marshall would return to the United States a hero for vindicating the nation's honor and persevering against French demands for bribes and threats.⁴³ Before the welcome jubilation, however, Congress passed the Alien⁴⁴ and Sedition⁴⁵ laws. The Alien Act authorized the

⁴⁰ Letter from John Adams, President, United States, to the Senate, United States (May 31, 1797), in 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS 19 (1834) (Publication No. 123), available at <http://memory.loc.gov/cgi-bin/ampage> (stating that Adams commissioned Marshall, Pinkney, and Justice Francis Dana (later replaced by Elbridge Gerry) “to dissipate umbrages, to remove prejudices, to rectify errors, and adjust all differences” between the two republics).

⁴¹ Letter from John Marshall, Envoy Extraordinary, United States, to Charles-Maurice de Talleyrand, Minister of Foreign Affairs, French Executive Directory (Apr. 3, 1798), in 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 39, at 196.

⁴² *Id.* (emphasis added).

⁴³ Soon after Marshall arrived in Paris, France, three French agents (later given the diplomatic pseudonyms “X, Y, and Z”) demanded a \$10,000,000 loan and a \$250,000 bribe in order for the envoys to negotiate with Talleyrand. The envoys firmly refused to give either sum since capitulation would threaten American independence and dignity abroad. Congress published Marshall's reports to President John Adams concerning the events, and the perceived insult to American envoys (and, by extension, America) incensed the American public. BAKER, *supra* note 22, at 239–52.

⁴⁴ See Naturalization Act, 1 Stat. 566–69 (1798), reprinted in SMITH, FREEDOM'S FETTERS, *supra* note 11, at 435; Alien Act, 1 Stat. 570–72 (1798), reprinted in SMITH, FREEDOM'S FETTERS, *supra* note 11, at 438. Together, the Alien Laws increased the residency requirement for American citizenship from five to fourteen years, and authorized the President to summarily remove any dangerous foreign resident.

President to summarily deport any dangerous foreign residents. The Sedition Act criminalized seditious libel against the federal government. Republicans immediately assailed both laws as unconstitutional attempts by Federalists in power to prevent the enfranchisement of immigrants⁴⁶ and suppress rival publications.⁴⁷ In Virginia, James Madison received a letter from Vice President Thomas Jefferson that condemned the laws as “so palpably in the teeth of the constitution as to [show] they mean to pay no respect to it.”⁴⁸ Between August and December 1798, Madison secretly collaborated with the vice president, drafting one of two resolutions that denounced the federal government’s abuses of authority, specifically the Alien and Sedition Laws,⁴⁹ and urged other states to declare the laws unconstitutional.⁵⁰ Madison then arranged for John Taylor of Carolina, an ardent Republican and state delegate, to submit his anonymous Resolutions in the Virginia Assembly.⁵¹

⁴⁵ See Sedition Act, 1 Stat. 596–97 (1798), reprinted in SMITH, FREEDOM’S FETTERS, *supra* note 11, at 441–42. The Sedition Law temporarily criminalized “any false, scandalous and malicious writing or writings against the government of the United States . . . with intent to defame the said government . . . or to stir up sedition within the United States.” *Id.* at 442.

⁴⁶ JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 47 (1951) (“The purpose of this law was to make the Republican party wither on the vine by cutting off its supply of foreign-born voters.”)

⁴⁷ SHARP, *supra* note 25, at 218 (“Among others, Republican editors of the *New York Time Piece*, the *Boston Independent Chronicle*, the *Bennington Vermont Gazette*, the *New London, Connecticut, Bee*, the upstate *New York Mount Pleasant Register*, the *New York Argus*, and the *Philadelphia Aurora* were prosecuted under the Sedition Law.”).

⁴⁸ Letter from Thomas Jefferson, Vice President, United States, to James Madison (June 7, 1798), in 7 WRITINGS OF THOMAS JEFFERSON 266–67 (Paul Leicester Ford ed., 1896).

⁴⁹ Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM. & MARY Q. 145, 161 (1948).

⁵⁰ *Id.* at 159–60. After Madison finished his resolutions, which merely implied that states could ignore federal laws, Jefferson altered them to reflect his own views that the laws were utterly “null, void, and of no force or effect.” This controversial phrase was stricken from the resolutions prior to their adoption probably due to Madison’s own hasty intervention. *Id.* at 160.

⁵¹ *Id.* at 159. Besides the Virginia Resolutions, Madison published anonymous articles in 1787 to defend ratification of the Constitution, in 1792 to defend the character of then Secretary of State Jefferson, and in 1793 to oppose executive prerogative in foreign affairs. See KETCHAM, *supra* note 11. Later, in 1799, Madison may have again used Virginia delegate John Taylor to present his *Address of the General Assembly to the People of the Commonwealth of Virginia*; however, some scholars have disputed his authorship of this address. 3 THE PAPERS OF GEORGE WASHINGTON: THE RETIREMENT SERIES 347 n.1 (W.W. Abbot & Edward G. Lengel eds., 1999) [hereinafter 3

By ghostwriting the resolutions, Madison hoped to avoid any political backlash and possible prosecution under the very law he protested.⁵² Jefferson followed suit, sending his resolutions with John Breckinridge to the Kentucky legislature.⁵³

Observing from his home in Mount Vernon, former President Washington viewed the unrest in the states with growing dismay. Convinced that the Republicans pursued an agenda that would destroy the Union, Washington summoned his nephew, Bushrod Washington, and John Marshall to his home and convinced them to run for public office.⁵⁴ Although Virginia was a Republican stronghold, Marshall's efforts in France had garnered him a wealth of public acclaim.⁵⁵ The only major obstacle to a seat in the Sixth Congress was his party's association with the hated Alien and Sedition Acts. Consequently, one of Marshall's first campaign moves was to distance himself from the Acts by publishing an artful reply to "Freeholder,"⁵⁶ which criticized the Acts on policy grounds but avoided the issue of their constitutionality.⁵⁷ In his private correspondence, Marshall

WASHINGTON: RETIREMENT SERIES] (noting the editors in the latest edition of *The Papers of Madison* refute Madison's authorship).

|| ⁵² Koch & Ammon, *supra* note 49, at 147–48.

⁵³ *Id.* at 155–56. Besides the Kentucky Resolutions, Jefferson convinced Congressman William Branch Giles to present his resolutions against the financial schemes of Secretary of Treasury Alexander Hamilton in 1793, Virginia delegate Peter Carr to present his petition against the presentment of Congressman Samuel Cabell in 1797, and Virginia delegate W.C. Nicholas to present his petition to reform the state grand jury system in 1799. See NORMAN K. RISJORD, *CHESAPEAKE POLITICS 1781–1800*, at 422 (1978); Koch & Ammon, *supra* note 49, at 152–54.

⁵⁴ JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* 67–68 (2002) (describing how Marshall announced his candidacy after Washington had "flattered, cajoled, and entreated" him from September 3 to 6, 1798, during a special meeting at Mount Vernon).

⁵⁵ See 2 BEVERIDGE, *supra* note 4, at 345.

⁵⁶ 3 MARSHALL PAPERS, *supra* note 15, at 503.

⁵⁷ John Marshall, *Marshall's Answers to Freeholder's Questions* (1798), reprinted in ROCHE, *supra* note 11, at 29, 32 ("I should have opposed them because I think them useless; and because they are calculated to create unnecessary discontents and jealousies at a time when our very existence, as a nation, may depend on our union."). Most scholars believe that Marshall penned both Freeholder's "questions" and his own "answers," given Freeholder's artful choice of questions, and its complete evasion of the constitutionality issue. See BAKER, *supra* note 22, at 307–10; see also 2 BEVERIDGE, *supra* note 4, at 394; 3 MARSHALL PAPERS, *supra* note 15, at 499 n.1; SMITH, *FREEDOM'S FETTERS*, *supra* note 11, at 151. Not only did voters believe Marshall's public criticism of the Alien and Sedition Laws signaled a moderation of political conviction, but many High Federalists interpreted it as a betrayal of the party. SMITH, *DEFINER OF A NATION*, *supra* note 5, at 244 (relating that Fisher Ames said Marshall had sacrificed his character by giving his name to the enemy and Theodore Sedgwick said Marshall "had 'degraded himself by a mean and paltry electioneering trick'").

praised those who defended the Acts' constitutionality⁵⁸ and expressed his extreme sorrow over those who viewed the laws "as unwarranted by the constitution."⁵⁹ Despite his belief that the Acts were constitutional, Marshall knew that their passage placed the Federalists in political danger. In April 1799, Marshall wrote Washington that Republicans could use the Acts to excite hatred for the federal government as they had in the Virginia and Kentucky Resolutions.⁶⁰ Although Marshall's letter to "Freeholder" carefully avoided addressing whether the Acts violated the Constitution, his policy-based criticism of the Acts outraged High Federalists who viewed Marshall's criticism as a political betrayal.⁶¹ Republicans, on the other hand, mocked Marshall's failure to address the key issue—whether Congress had violated the Constitution in passing the Acts.⁶²

In the Virginia Assembly, the issue of the Acts' constitutionality engrossed the House of Delegates in an eight-day debate as Federalists and Republicans contested "Mr. Taylor's Resolutions."⁶³ Republicans accused the Adams Administration of violating the Constitution. Federalists defended the Acts and raised their own accusations of Republican overreaching.⁶⁴ Henry Lee and George Keith Taylor presented the principal arguments for

⁵⁸ Letter from John Marshall to George Washington (Jan. 8, 1799), in 4 MARSHALL PAPERS, *supra* note 6, at 3 (thanking Washington for forwarding him a copy of Judge Alexander Addison's *Liberty of Speech, and of the Press, in A CHARGE TO THE GRAND JURIES OF THE COUNTY COURTS OF THE FIFTH CIRCUIT, OF THE STATE OF PENNSYLVANIA* (1799)).

⁵⁹ Letter from John Marshall to Timothy Pickering, Sec'y of State, United States (Aug. 11, 1798), in 3 MARSHALL PAPERS, *supra* note 15, at 484–85.

⁶⁰ Letter from John Marshall to George Washington (Jan. 8, 1799), in 4 MARSHALL PAPERS, *supra* note 6, at 3.

⁶¹ See SMITH, DEFINER OF A NATION, *supra* note 5, at 244–45. *But see* Letter from Timothy Pickering, Sec'y of State, to Theodore Sedgwick, Sen., United States (Nov. 6, 1798) in THE PAPERS OF TIMOTHY PICKERING ("I have not met with one good federalist who does not regret his answers to the Freeholder: but I am sorry that it should be imagined to be an 'electioneering trick.' Rely upon it, my dear sir, that General Marshall is incapable of doing a dishonorable act.").

⁶² See 2 BEVERIDGE, *supra* note 4, at 396.

⁶³ Although popularly known today as the Virginia Resolutions, contemporaries of Madison's resolutions designated them "Mr. Taylor's Resolutions" after their presenter.

⁶⁴ See Virginia General Assembly, Journal of the House of Delegates of the Commonwealth of Virginia for 1798, at 21, 23–24, 26–27, 29–31 (Dec. 13–15, 17, 18–21, 1798) [hereinafter J. H.D. 1798]; see also THE VIRGINIA REPORT OF 1799–1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798, THE DEBATE AND PROCEEDINGS THEREON IN THE HOUSE OF DELEGATES OF VIRGINIA AND SEVERAL OTHER DOCUMENTS ILLUSTRATIVE OF THE REPORT AND RESOLUTIONS (J.W. Randolph ed., 1850) [hereinafter VIRGINIA REPORT].

the Federalist minority, though the latter delegate clearly held the lead role.⁶⁵ Despite the efforts of the minority, on December 21, 1798, the House adopted Madison's resolutions 100 to 63.⁶⁶ Republicans quickly followed this success by adopting the *Address of the General Assembly to the People of the Commonwealth of Virginia*, which publicly promoted the legislature's actions.⁶⁷ In a sharp political move, the Majority Address made express use of Marshall's defense of the press in his memorial to Talleyrand, further emphasizing the congressional candidate's non-responsiveness to a key political issue.⁶⁸ When Republicans distributed the address as a campaign platform, Marshall was left doubly vulnerable for failing to declare the unpopular Acts unconstitutional and appearing to retreat from a prior political conviction.

At this moment of high tension, with Republican rhetoric on the edge of nullification and Marshall's candidacy (and character) also on the line, Lee submitted the Minority Report to the Virginia legislature on behalf of the fifty-eight Federalist delegates. The Report presented a full defense of the Alien and Sedition Acts' constitutionality, including a number of arguments similar to those presented by Lee and G.K. Taylor in the prior debates. However, the Report also contained new (and newly structured) constitutional arguments. On January 22, 1799, the Federalists moved to subjoin the Minority Report to the *Address of the General Assembly*, so it too would be published at state expense.⁶⁹ Republicans defeated this motion, but the Minority Report still entered the public forum through several Federalist newspapers and independently published pamphlets.⁷⁰ A number of these

⁶⁵ Edward A. Wyatt, IV, *George Keith Taylor, 1769–1815, Virginia Federalist and Humanitarian*, 16 WM. & MARY Q. 1, 11, 14 (1936); cf. NOEL B. GERSON, LIGHT-HORSE HARRY: A BIOGRAPHY OF WASHINGTON'S GREAT CAVALRYMAN, GENERAL HENRY LEE 206 (1966) (stating that Lee was merely "one of a small minority who voted in vain against the measure").

⁶⁶ J. H.D. 1798, *supra* note 64, at 32 (Dec. 21, 1798).

⁶⁷ *Id.* at 88–90 (Jan. 22, 1799).

⁶⁸ Compare J. H.D. 1798, *supra* note 64, at 89 (Jan. 22, 1799) with *supra* note 41.

⁶⁹ J. H.D. 1798, *supra* note 64, at 89 (Jan. 22, 1799).

⁷⁰ AN ADDRESS OF THE FIFTY-EIGHT FEDERAL MEMBERS OF THE VIRGINIA LEGISLATURE TO THEIR FELLOW-CITIZENS IN JANUARY, 1799 (Peter Edes ed., 1799) (Augusta, Me.); ADDRESS OF THE MINORITY OF THE LEGISLATURE OF VIRGINIA, TO THEIR FELLOW CITIZENS (William Prentis ed., 1799) (Petersburg, Va.); THE ADDRESS OF THE MINORITY IN THE VIRGINIA LEGISLATURE TO THE PEOPLE OF THAT STATE; CONTAINING A VINDICATION OF THE CONSTITUTIONALITY OF THE ALIEN AND SEDITION LAWS (Loring Andrews ed., 1799) (Albany, N.Y.); THE ADDRESS OF THE MINORITY IN THE VIRGINIA LEGISLATURE TO THE PEOPLE OF THAT STATE; CONTAINING A VINDICATION OF THE CONSTITUTIONALITY OF THE ALIEN AND SEDITION LAWS (Augustine Davis ed., 1799) (Richmond, Va.) [hereinafter MINORITY REPORT]; THE AWFUL CRISIS WHICH HAS ARRIVED (Thomas Nicolson ed., 1799) (Richmond, Va.); VA. GAZ. & GENERAL

publications included an introduction that described the effort by “the Member from Prince George” (G.K. Taylor) to pass counter-resolutions and the presentation of the Minority Report by “the Member from Westmoreland” (Lee).⁷¹ No one at the time, or anytime thereafter, claimed authorship.

A number of statesmen immediately attributed the Minority Report to Marshall. In his correspondence to both Alexander Hamilton⁷² and Rufus King,⁷³ Senator Theodore Sedgwick reported that Marshall had penned the report. His choice of words between the first and second letters even show an increased confidence in his attribution.⁷⁴ Across the Atlantic, William Vans Murray, Minister to the Netherlands, read the report in a Federalist newspaper and wrote to fellow Minister to Prussia, John Quincy Adams, that he too believed Marshall had authored the report.⁷⁵ In his reply, J.Q. Adams admitted that while he was not convinced, “[t]he question had occurred likewise to [his] mind whether J. Marshall did not write the address.”⁷⁶ Unlike the Virginia and Kentucky Resolutions, whose authors ultimately came to light,⁷⁷ no confession of authorship emerged to provide an easy answer to the mystery of the Minority Report. We begin our hunt for clues by considering the *corpus delicti*, the Report itself.

ADVERTISER, Feb. 1, 1799, at 3 (Richmond, Va.); *Address*, GAZ. OF THE U.S. & PHILA. DAILY ADVERTISER, Feb. 5, 1799, at 2 (published at the request of “Alpha”); *Address of the Federal Part of the Virginia Legislature*, J. RUSSELL’S GAZ., Feb. 21, 1799, at 1 (Boston, Mass.); *Address of the Minority in the Virginia Legislature*, PHILA. GAZ. & UNIVERSAL DAILY ADVERTISER, Feb. 9, 1799, at 1.

⁷¹ MINORITY REPORT, *supra* note 70, at 1.

⁷² Letter from Theodore Sedgwick, Sen., United States, to Alexander Hamilton, Sec’y of Treasury, United States (Feb. 7, 1799), in 22 HAMILTON PAPERS, *supra* note 11, at 469–70.

⁷³ Letter from Theodore Sedgwick, Sen., United States, to Rufus King, Minister to Britain, United States (Mar. 20, 1799), in 2 THE LIFE AND CORRESPONDENCE OF RUFUS KING 579, 581 (Charles R. King ed., 1895).

⁷⁴ *Id.*

⁷⁵ Letter from Williams Vans Murray, Minister to Netherlands, United States, to John Quincy Adams, Minister to Prussia, United States (Apr. 5, 1799), in ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1912, at 535–36 (Worthington C. Ford ed., 1913).

⁷⁶ Letter from John Quincy Adams, Minister to Prussia, United States, to Williams Vans Murray, Minister to Netherlands, United States (Apr. 13, 1799) (on file with the Mass. Hist. Soc’y).

⁷⁷ In 1809, John Taylor of Carolina published a reply to an earlier attack in the Richmond *Enquirer* revealing Madison’s authorship of the Virginia Resolutions. See Koch & Ammon, *supra* note 49, at 148. Though his authorship was previously known, see *id.*, Jefferson’s draft of the Kentucky Resolutions was discovered in 1832. See RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES’ RIGHTS, AND THE NULLIFICATION CRISIS 9 (1987).

III. THE MINORITY REPORT

The Minority Report consists of three parts described as follows: (1) a history behind the Acts and policy arguments in favor of national armed forces, (2) a constitutional defense of the Alien and Sedition Acts with its own concluding paragraph, and (3) an addendum containing a policy argument in support of financing the national debt. Although stylistically distinct, the first two sections work as an organic whole to address all of the major contentions against the Acts and close with a decisive paragraph on the proper means to repeal unpopular laws. The third part, however, which we have labeled an “addendum,” appears markedly different in structure, style, and subject matter, introducing an issue that has nothing to do with the Acts or the Majority Address.⁷⁸ However, readers are encouraged to read the Report itself and come to their own conclusions.⁷⁹

We believe the distinction between the three parts of the Minority Report is fairly clear. As later sections of this Article will explain, we conclude that the main body of the address likely was a collaborative effort between G.K. Taylor and Marshall—the Virginia Statesman most likely drafting the dramatic policy argument, and the future Chief Justice drafting the constitutional defense of the Alien and Sedition Acts. It is possible that Lee added the final addendum just prior to submitting it to the Virginia House of Delegates.

A. Raising a Professional Army

1. *The Opening and Historical Section of the Report*

As the opening paragraphs explain, the fifty-eight Federalists in the Virginia legislature did not sponsor the Minority Report in response to Madison’s Resolutions. Instead, they felt compelled to oppose the majority’s *General Address*, a dangerous departure from legislative practice that exacerbated the “present crisis” over the Alien and Sedition Acts and increased the risk of a “disunited America.”⁸⁰ The Report reminds its audience that the Constitution established two mechanisms to ensure a perpetual republican government: a bifurcated amendment process and a

⁷⁸ A conclusion apparently shared by others. See, e.g., *Report of the Minority*, *supra* note 7 (omitting this final part from its version of the Minority Report).

⁷⁹ A full version of the Minority Report can be found online at <http://www.lli.edu/academics/faculty/lash.html>. We have chosen to use the copy printed by Augustine Davis in Richmond, Virginia. See MINORITY REPORT, *supra* note 70 (containing the Introduction, which identifies Henry Lee and George Keith Taylor’s roles, and the Addendum).

⁸⁰ MINORITY REPORT, *supra* note 70, at 2.

fixed system of periodic elections.⁸¹ By adopting the Resolutions, the Minority Report clearly implies that the Virginia Assembly illegitimately rejected these safer paths to reform in a manner that threatened the life and safety of the Union.

The Report next recounts the history of the disputed Acts from the early negotiations for peace with England to the growing military threat from France. It enumerates French aggressions against the United States as well as the efforts of two presidents to preserve peace with honor (such as the commission of the three envoys extraordinary). Although the Report fails to mention Marshall by name, it tells in detail how France spurned this peace mission to the point where “we had but to choose between submission to the will of a foreign nation, and the maintenance of our independence.”⁸² National security thus required “the equipment of a fleet, the raising of an army, a provision for the removal of dangerous aliens, and for the punishment of seditious citizens.”⁸³ The remainder of the Report presents a comprehensive defense for each of these actions.

2. *Raising an Army and Equipping a Fleet*

The brevity of the minority’s argument for equipping a fleet and raising an army suggests the delegates did not believe that, on this issue at least, the people of Virginia required much convincing. When threatened by “the most powerful nation in Europe,” there are no measures “more convenient or more likely to secure our defence” than a superior navy and a professional army.⁸⁴ The new nation could not abandon its defense to local militias since France’s “veteran army” would surely overwhelm them.⁸⁵ In addition, the people had no reason to fear an American army (as it would mercenary corps) since it was led by the beloved Washington and “composed of our brothers and our sons, levied by law, paid by law, and embodied to defend their and our common rights.”⁸⁶ According to the Minority Report, publishing unfounded epithets and suspicions against such an army would be “disastrous to America, and calamitous to Virginia[!]”⁸⁷ With this emphatic declaration, the Report concludes its opening part.⁸⁸

⁸¹ *Id.* at 1.

⁸² *Id.* at 4.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ MINORITY REPORT, *supra* note 70, at 5

⁸⁷ *Id.*

⁸⁸ This stylistic choice, we believe, suggests the hand of G.K. Taylor.

B. *The Constitutional Defense of the Alien and Sedition Acts*

Part Two, the constitutional defense of the Alien and Sedition Acts, is the longest and most carefully reasoned portion of the Minority Report. For both Acts, the author takes the same structural approach: First, he presents the constitutional policies that suggest why people should *want* to grant the federal government certain powers, and then he lays out a detailed reading of the Constitution's text indicating how they already *have* granted it. Throughout the Report, the author carefully avoids addressing whether Congress *should* have enacted the Alien and Sedition Acts, confining his arguments to whether Congress so exceeded its authority as to justify "proceedings which may sap the foundation of our union."⁸⁹

1. *The Alien Act*

The author begins by pointing out that the uniqueness of the Constitution lies in its division of power between federal and state governments.⁹⁰ The powers of treaty, war, and commerce would clearly fall to the federal government "because to that government we look for protection from enemies of every denomination."⁹¹ After canvassing the reasons in favor of federal control of national security issues, the author concludes that the power to protect the country from alien conspiracies should be "in the same hands with the force of the nation and the general power of protection from hostility of every kind."⁹²

Before addressing whether the Constitution follows the wise course and actually grants Congress power to pass the Alien Act, the author lays out what he believes are the appropriate rules of constitutional interpretation. He begins by stressing the unique nature of the document. Unlike a statute, "which is capable of descending to every minute detail," the text at issue in this case "must unavoidably be restricted in various points to general expressions."⁹³ As a result, a reader should not view the text as an ordinary law and restrict Congress only to those means expressly listed in the Constitution. Such a restricted reading of federal power would conflict with

⁸⁹ MINORITY REPORT, *supra* note 70, at 5. The second part of the Report, like the first, opens with a rationale for the Report stressing that, had the majority merely sought a repeal of the Acts, no Report would have been necessary. *Id.* The fact that both sections have an "opening," as well as strikingly different tones, suggests to us they may have been written by two different authors.

⁹⁰ *See id.* at 6.

⁹¹ *Id.*

⁹² *Id.* at 7.

⁹³ *Id.*

both the Necessary and Proper Clause⁹⁴ as well as with the intended meaning of the Tenth Amendment.⁹⁵ Here, the author reminds the reader that the framers copied the Tenth Amendment from the former Articles of Confederation, in which all powers not *expressly* delegated to the federal government were retained by the states. The framers “wisely omitted” the term “expressly” from the new amendment to indicate a greater degree of delegated federal power.⁹⁶ The result, concludes the author, is a rule of interpretation whereby delegated federal power must be “fairly, but liberally” construed.⁹⁷

Having established the proper rules of constitutional interpretation, the Minority Report considers specific enumerated powers, in particular, Congress’ power to grant letters of reprisal, to define and punish offenses against the law of nations, and to protect the states against invasion. Here, the author distinguishes between matters of constitutional interpretation and matters left to the discretion of Congress. Determining whether detention or removal is appropriate, for example, “is a question of particular discretion, and not of constitutional authority.”⁹⁸ In addition, the author points out that the enumerated power to *protect* against invasion, by definition, must include a power distinct from the separately enumerated power to *repel* invasions, namely, “the right of taking proper and necessary steps for its prevention.”⁹⁹ Once again, “the government possessed of the power must judge”¹⁰⁰ which step is necessary and proper, not the courts.

At no time does the Minority Report defend the *wisdom* of the Alien Act,¹⁰¹ but instead maintains that the means of protecting national security—such as removing dangerous aliens—is a matter for political resolution. The author limits the Report to establishing the existence of the necessary power

⁹⁴ U.S. CONST. art. I, § 8, cl. 18.

⁹⁵ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

⁹⁶ MINORITY REPORT, *supra* note 70, at 7.

⁹⁷ *Id.*

⁹⁸ *See id.*; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) (“[W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.”).

⁹⁹ *See* MINORITY REPORT, *supra* note 70, at 8.

¹⁰⁰ *Id.*

¹⁰¹ Compare, e.g., Alexander Addison, *Liberty of Speech, and of the Press, in A CHARGE TO THE GRAND JURIES OF THE COUNTY COURTS OF THE FIFTH CIRCUIT, OF THE STATE OF PENNSYLVANIA* 3, 13–14 (1799) (“On these grounds it appears evident to me, that this law is not only expedient, but necessary.”).

and then focuses on whether any other constitutional provision restricts or prohibits Congress from exercising its chosen means. Accordingly, in the remainder of his argument regarding the Alien Act, the author considers, and rejects, arguments that the Act violates the Importation Clause, separation of powers, or the right to trial by jury.¹⁰²

2. *The Sedition Act*

Repeating the argument structure of the previous section, the author next considers whether governments ought to have power to punish seditious libel, and, if so, whether the Constitution in fact grants Congress such power. He begins by declaring that the people have a right to prevent public discord and thus, “in all the nations of the earth, where presses are known, some corrective of their licentiousness has been deemed indispensable.”¹⁰³ To refute the claim that the power “has either never been confided to, or has been withdrawn from the legislature of the union,”¹⁰⁴ the author returns once again to the Necessary and Proper Clause.¹⁰⁵ Given that punishment of “actual resistance” to federal law was entirely necessary and proper, only a “strange,” “unreasonable and improvident construction” of the Clause would not allow the punishment of acts “which obviously lead to and prepare resistance.”¹⁰⁶ The author then reminds his readers of the role seditious publications played during the recent Whiskey Rebellion by inciting resistance to federal law.¹⁰⁷

Turning to the issue of federal jurisdiction, the author asserts that publications which injure the government in effect injure the people of the United States, all of whom “have a common interest in their government.”¹⁰⁸ The People “therefore have a right to the remedy for that injury,” and Article III opens federal courts to hear such common law claims as a case “arising under the Constitution.”¹⁰⁹ He concludes:

The judicial power of the United States, then, being extended to the punishment of libels against the government, as a common law offence, arising under the constitution which creates the government, [the Necessary

¹⁰² MINORITY REPORT, *supra* note 70, at 8–11.

¹⁰³ *Id.* at 11.

¹⁰⁴ *Id.*

¹⁰⁵ U.S. CONST. art. I, § 8, cl. 18.

¹⁰⁶ MINORITY REPORT, *supra* note 70, at 11.

¹⁰⁷ *Id.* at 11–12.

¹⁰⁸ *Id.* at 12.

¹⁰⁹ *Id.*

and Proper Clause] gives to the legislature of the union the right to make such laws as shall give that power effect.¹¹⁰

Finally, the author notes that the First Amendment itself suggests congressional power to prohibit seditious publications, for it would have been unnecessary to modify “the legislative powers of Congress concerning the press, if the power itself does not exist.”¹¹¹ Rejecting the Madisonian argument that the First Amendment was not an admission of pre-existent power,¹¹² the author uses the enumeration of this particular right to indicate pre-existent (and continuing) federal power to regulate the press.¹¹³

3. *The Restrictions of the First Amendment*

Having established Congress’ enumerated power to regulate seditious speech under the Constitution and Bill of Rights in general, the author now turns to whether the First Amendment specifically removed any pre-existent power to regulate speech. Here the author focuses on the text’s use of different restrictive terms in regard to religion and the press. Although Congress is to make no law “*respecting* an establishment of religion,” it need only avoid “*abridging* the freedom of speech or of the press.”¹¹⁴ Although the entire subject of religion is removed from congressional oversight, Congress may regulate the press so long as it avoids “abridging” freedom of the press.¹¹⁵

Under common law, freedom of the press meant no more than freedom from “previous restraint.”¹¹⁶ The only issue was whether the same common law principles that protected *state* magistrates from seditious libel also applied to libels leveled at *federal* magistrates. Since the people of each state participated in choosing both their state and federal officials, it made no sense to apply common law protections to one set of magistrates and not to the others: “That he is a magistrate, that he is clothed with the authority of the laws, that he is invested with power by the people, is a sufficient title to

¹¹⁰ *Id.* at 12.

¹¹¹ *Id.*

¹¹² See James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), reprinted in JAMES MADISON: WRITINGS 448–49 (Jack N. Rakove ed., 1999).

¹¹³ For an example of the same use of restrictions as evidence of otherwise broad federal power, see *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 407 (1819).

¹¹⁴ MINORITY REPORT, *supra* note 70, at 12 (emphasis added).

¹¹⁵ *Id.* at 12–13. For a discussion of this passage and its significance regarding the original understanding of the religion clauses, see Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069 (1998).

¹¹⁶ MINORITY REPORT, *supra* note 70, at 13.

the protection of the common law.”¹¹⁷ Thus, imposing criminal liability for libel directed at federal officials did not go beyond the scope of protection afforded to the press at common law, and so could not be said to *abridge* freedom of the press.

4. *The “First” Conclusion*

At this point, the Minority Report concludes its substantive arguments in support of the Alien and Sedition Acts. The author concedes that “[o]n points so extremely interesting, a difference of opinion will be entertained,” but stresses that all opinions ought to be made “with moderation and with decency”—an obvious criticism of the dangerously strident Virginia Resolutions.¹¹⁸ Rather than incite hatred of the people’s national government through Resolutions, opponents of the Acts should trust the courts to decide whether the Acts violate the Constitution. Virginia courts, the author pointed out, had not been shy about striking down unconstitutional legislation, and “[t]he judges of the United States are as independent as the judges of the state of Virginia, nor is there any reason to believe them less wise and less virtuous.”¹¹⁹ In words strikingly similar to those enshrined a few decades later in our constitutional history, the author declares: “It is their province and their duty to construe the constitution and the laws”¹²⁰ Finally, the author calls on the opponents of the Acts to seek reform through constitutional methods, not through the destabilizing declarations of the Virginia Resolutions.¹²¹ This conclusion brings the Report full circle: Both the opening of the Report and the closing of this section extol the will of the majority—the “first principle” of the federal Constitution. If any doubts remain about the Alien and Sedition Acts, the majoritarian tools of election or amendment are the proper avenues of reform. A reasonable difference of opinion can never justify acts inimical to the Constitution itself.

C. *The Addendum*

The Report does not end here. Instead, there follows a desultory discussion of additional policy concerns that have nothing to do with the Alien and Sedition Acts. Because both the style and subject matter differ substantially from the rest of the Report, we believe this section is the work

¹¹⁷ *Id.* at 13–14.

¹¹⁸ *Id.* at 14.

¹¹⁹ *Id.*

¹²⁰ *Id.*; see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

¹²¹ MINORITY REPORT, *supra* note 70, at 14.

of a different author, most likely Lee, who may have added it at the last minute. Again, we have posted the entire Report on our website and readers are encouraged to come to their own conclusions.¹²²

This additional section begins by repeating arguments made in the previous paragraph regarding the need to avoid stirring up hatred of the national government. Sarcasm appears for the first time in the Report when the author notes that substantial resistance to the acts of the federal government, even if for the purposes of seeking constitutional reform, might trigger foreign intervention.¹²³ The author then veers completely away from the subject at hand to address “[o]ne other fertile topic of complaint against the general government . . . its fiscal arrangements, and increasing expenses.”¹²⁴ What follows are a few short sentences in which the author explains the financial needs of the country and exhorts that: “At present, the defense of the United States claims money, and their defense cannot but swell considerably the public demands.—The stake is our all—and to save his all, who would begrudge a part?”¹²⁵

Nothing in this final section relates to the Alien and Sedition Acts or the Virginia Resolutions¹²⁶ although it could possibly be viewed as a response to one of the final lines in the Majority Address.¹²⁷ Its paragraphs are brief (sometimes a single sentence) and disjointed. As such, it stands as a weak ending to the Minority Report—and, not surprisingly, it has been omitted from edited versions of the Report.¹²⁸ This part’s shift in tone and departure from the subject of the Report, along with the fact that the Report prior to this section stands as a unified whole, leads us to conclude that it is the handiwork of another author, most likely as a last minute addition.

The Minority Report is an important historical document in its own right. To the best of our knowledge, no prior work of scholarship has discussed the actual contents of the Report. Our immediate purpose, however, is determining whether Marshall’s editors and biographers were justified in removing his name from the list of the Report’s potential authors. Having

¹²² See *supra* note 79.

¹²³ MINORITY REPORT, *supra* note 70, at 14 (“The result of which might be union with the invader, for the purpose of accomplishing a *delectable* reform.”) (emphasis in original).

¹²⁴ *Id.* at 15.

¹²⁵ *Id.*

¹²⁶ Some policy matters are an implicit part of the opening historical section. The addendum for the first time expressly focuses on a policy matter and one that is unrelated to the Alien and Sedition Acts.

¹²⁷ See *Address of the General Assembly to the People of the Commonwealth of Virginia*, THE HERALD OF LIBERTY, Feb. 11, 1799, at 1, 3; see also J. H.D. 1798, *supra* note 64 (Jan. 15, 1799).

¹²⁸ See, e.g., *Report of the Minority*, *supra* note 7, at 136–39.

familiarized ourselves with the content of the Report, we now are ready to investigate this question of authorship.

IV. THE SUSPECTS

A. Henry Lee

Marshall biographers such as Charles Hobson and Jean Edward Smith name Henry Lee as the likely author of the Minority Report.¹²⁹ Surprisingly, neither of these scholars (nor any of Lee's advocates) appears to have investigated the life and work of Henry Lee prior to placing his name ahead of Marshall's. Once explored, the case for Lee dissolves into a series of erroneous and unsupported assumptions.

In 1776, after graduating from the College of New Jersey at Princeton, Henry Lee joined the Revolutionary Army. His military daring and skills as a cavalryman earned him the nickname "Light-Horse Harry." After the war, Lee was elected to the largely ceremonial office of Governor of Virginia (1791–1793)¹³⁰ before serving as a member in the Virginia House of Delegates (1795–1799) and House of Representatives (1799–1801).¹³¹ His political career ended in 1800 when Jefferson's Democratic-Republicans replaced the Federalists as the dominant national party. After tottering on the brink of financial ruin practically all his public life,¹³² Lee eventually served time in debtor's prison¹³³ and died a pitiable death in 1818.¹³⁴ His sons thus had the burden of salvaging their father's reputation and refuting accusations that he was a cheat and "swindler."¹³⁵ Today, Lee is best known as the father

¹²⁹ See, e.g., SMITH, *DEFINER OF A NATION*, *supra* note 5, at 601. Although his biography of Marshall says nothing about the Minority Report, Charles Hobson has added an editorial note to the final volume of the *Marshall Papers* naming Lee as the more likely author of the Report. See Hobson, *Editorial Note*, *supra* note 16. Other historians have suggested Lee may have drafted, or helped draft, the Minority Report. See 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 347; 3 MARSHALL PAPERS, *supra* note 15, at 498–99; see also SIMON, *supra* note 54, at 175; STEPHEN G. KURTZ, *THE FEDERALISTS 176–77* (1972).

¹³⁰ See CHARLES ROYSTER, *LIGHT-HORSE HARRY LEE AND THE LEGACY OF THE AMERICAN REVOLUTION* 106 (1981).

¹³¹ See Entry for Henry Lee, *Biographical Directory of the United States Congress*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=L000195>.

¹³² See ROYSTER, *supra* note 130, at 112.

¹³³ Lee entered Westmoreland County Jail on April 24, 1809. See *id.* at 183.

¹³⁴ See Robert E. Lee, *A Biography of the Author in HENRY LEE, MEMOIRS OF THE WAR IN THE SOUTHERN DEPARTMENT OF THE UNITED STATES* 79 (1870) [hereinafter *Lee, Biography of the Author*]; see also CHARLES C. JONES, *REMINISCENCES OF THE LAST DAYS, DEATH AND BURIAL OF GENERAL HENRY LEE* 37 (1870).

¹³⁵ In 1812, *The American Watchman and Delaware Republican* referred to Lee as "the Swindling Harry Lee." See ROYSTER, *supra* note 130, at 171.

of Robert E. Lee and author of the famous lines, "first in war, first in peace, first in the hearts of his countrymen," for George Washington's eulogy. Besides this brief phrase, Lee's only confirmed writings are his gubernatorial proclamations and a military history of the American Revolution drafted during his time in prison.¹³⁶ Lee never claimed authorship of the Minority Report and neither his sons nor his contemporaries drew any connections between the two. Prior to 1981, none of Lee's biographers mentioned him in association with the Report.¹³⁷ In fact, the first time anyone referred to Lee with regard to the Minority Report was an unexplained notation by librarian Earl Swem in 1917.¹³⁸

Lee's advocates point out that, unlike Marshall, Lee was a member of the Federalist minority in the 1798–99 Virginia House of Delegates. Moreover, it fell to Lee to formally submit the Minority Report to the Assembly.¹³⁹ Lee also forwarded a copy of the Report to George Washington; an act which could suggest authorial pride. Second, tradition has long designated Lee as the author of *Plain Truth*, a series of essays published at the same time as the Minority Report.¹⁴⁰ Like the Report, *Plain Truth* also defends the Alien and Sedition Acts, but appears under the pseudonym, "a Citizen of Westmoreland County, (Virg.)."

If Lee authored *Plain Truth*, then this marks him as an active Federalist polemicist and suggests that he was at least capable of penning the Minority Report. Moreover, some historians claim to see similarities of style and language in *Plain Truth* and the Minority Report.¹⁴¹ However, as we will show, Lee's submission of the Report to the Virginia legislature is no evidence of authorship, and evidence of his life and work at the time clearly

¹³⁶ HENRY LEE, MEMOIRS OF THE WAR IN THE SOUTHERN DEPARTMENT OF THE UNITED STATES (1870). Lee has also been credited with writing a series of essays collectively known as *Plain Truth*. As this section will show, however, there is no evidence that Lee wrote these essays. See *infra* Part IV.A.4–A.6.

¹³⁷ See, e.g., CECIL B. HARTLEY, LIFE OF MAJOR GENERAL HENRY LEE, COMMANDER OF LEE'S LEGION IN THE REVOLUTIONARY WAR, AND SUBSEQUENTLY GOVERNOR OF VIRGINIA; TO WHICH IS ADDED THE LIFE OF GENERAL THOMAS SUMTER OF SOUTH CAROLINA (1859) (on file with author) (including no mention of Lee having any role in the Minority Report or *Plain Truth*). In 1981, Lee biographer Charles Royster attributed both *Plain Truth* and the Minority Report to Henry Lee without explanation or historical support. See ROYSTER, *supra* note 130, at 144.

¹³⁸ See Earl G. Swem, *A Bibliography of Virginia: Part 2*, 10 BULLETIN OF THE VIRGINIA STATE LIBRARY 83–84 (1917).

¹³⁹ The Report was not read aloud in the state legislature, but merely entered into the record. See J. H.D. 1798, *supra* note 64, at 89 (Jan. 22, 1799).

¹⁴⁰ *Plain Truth* was published in the *Virginia Gazette & Advertiser* on Feb. 5, 8, 12, 15, 19, 22, 26, Mar. 1, and 5, 1799.

¹⁴¹ See, e.g., Hobson, *Editorial Note*, *supra* note 16; SMITH, DEFINER OF A NATION, *supra* note 5, at 601 n.79.

cuts against his writing *Plain Truth*. Without this critical piece of evidence, much of the case for Lee authoring the Minority Report collapses.

1. *Lee's Role in the Virginia Debates over the Alien and Sedition Acts*

As did other Virginia Federalists, Lee defended the Alien and Sedition Acts during the debates in the Virginia Assembly.¹⁴² In fact, many of the arguments in Lee's speech are echoed in the Minority Report, including his arguments regarding an alien's right to a jury trial.¹⁴³ There are other similarities as well, such as Lee's position that federal courts were as capable as state courts in exercising judicial review and were the appropriate institutions for determining the constitutionality of the Acts.

In fact, the Minority Report contains a number of arguments presented by other Federalists, including those of George K. Taylor, the published jury charge of Alexander Addison, and earlier nationalist readings of the Constitution by men like Alexander Hamilton. This, of course, is no surprise. The Minority Report claims to represent the views of the fifty-eight members of the minority. Thus, it would be strange if we did *not* find echoes of Lee's and other Federalists' arguments in the Report. In terms of percentages, however, the Report shares far more similarities with the speeches of G.K. Taylor and the ideas and later writings of John Marshall than with the speeches of Lee. For this reason, the fact that the Minority Report incorporated some of Lee's arguments is weak evidence that he had the primary, or even a major, role in drafting the Report.

2. *Lee's Submission of the Report*

On January 22, 1799, the Journal for the House of Delegates simply copied the text of the Minority Report immediately after the Majority Address without a record of who submitted it. The Journal also states that the Report was not read aloud but merely entered into the official record. Later

¹⁴² See VIRGINIA REPORT, *supra* note 65, at 103–09 (Dec. 20, 1798) (statement of Henry Lee).

¹⁴³ Compare *id.* at 105 (“An alien would claim no right in this country, unless he could show a treaty for it; excepting his participation in the usual rights of citizens, which he held upon courtesy, and which courtesy could be withdrawn at the pleasure of the sovereign power.”) with MINORITY REPORT, *supra* note 70, at 6, 10 (“[T]heir right of residence is not unfrequently provided for in treaties, and treaties can only be formed or dissolved by the general government . . . [H]e enters and remains by the courtesy of the sovereign power, and that courtesy may at pleasure be withdrawn.”).

publications of the Report, however, added an introduction describing the historical background of the address and its submission.¹⁴⁴

That our fellow-citizens may be fully informed of the part taken by their public functionaries, in all the measures touching this subject, it is deemed fair and proper, to submit the following [counter] resolutions offered in the House of Delegates, by the Member from Prince George, as a substitute for [the Virginia Resolutions]. . . . The counter arguments are displayed in the following address submitted to the committee of the whole by the Member from Westmoreland.¹⁴⁵

This is just a small part of a much longer introduction. This later-added prologue does not name the author (or authors) of the Minority Report; it merely recounts the history behind the Report including the fact that Lee (the only Federalist member from Westmoreland) made the formal submission. This is not a claim of authorship, and no one at the time treated it as such. Nevertheless, the editors of the *Marshall Papers* place heavy emphasis on the introduction's acknowledgement of Lee's role.¹⁴⁶

Had we no other historical evidence, it might make sense to assume that the person who submitted an address also created the address. In this case, however, the assumption is unwarranted. When the Minority Report was written statesmen commonly ghostwrote resolutions and reports.¹⁴⁷ For instance, Madison drafted the Virginia Resolutions but J. Taylor submitted them to the state House of Delegates.¹⁴⁸ Similarly, Jefferson drafted the Kentucky Resolutions, but it was Breckinridge who submitted them to the Kentucky House of Representatives.¹⁴⁹ Like Marshall, neither Madison nor Jefferson served in the legislatures that adopted their Resolutions.¹⁵⁰ Less than a year after the Minority Report, Marshall submitted resolutions to Congress drafted by Lee.¹⁵¹ Given this historical practice, the fact that Lee

¹⁴⁴ The following publishers of the Minority Report included the introduction: Peter Edes (Augusta, Mn.), William Prentis (Petersburg, Va.), Augustine Davis (Richmond, Va.), Loring Andrews (Albany, NY), Thomas Nicolson (Richmond, Va.), *J. Russell's Gazette* (Boston, Mass.), and *The Virginia Gazette and General Advertiser* (Richmond, Va.).

¹⁴⁵ MINORITY REPORT, *supra* note 70, at 1.

¹⁴⁶ See Hobson, *Editorial Note*, *supra* note 16, text accompanying notes 13–18. Jean Smith also points to Lee's role in submitting the Report in support of his conclusion that Lee authored the Report. See SMITH: DEFINER OF A NATION, *supra* note 5.

¹⁴⁷ See Koch & Ammon, *supra* note 49.

¹⁴⁸ *Id.* at 159.

¹⁴⁹ *Id.* at 155–56.

¹⁵⁰ See *id.* at 147, 149.

¹⁵¹ See 2 ANNALS OF CONG. 433–35 (1799). The resolutions regarded the recent death of George Washington and included the famous phrase “first in war, first in peace,

submitted the Minority Report does not tell us whether he had any hand in its drafting.

Testimony by Lee's contemporaries further undermines any assumed connection between submitters and authors. In his *Prospect Before Us*, James Callender pointed out that the "counter address was presented by general Lee"¹⁵² but then reported that he and others considered *Marshall* one of the authors of the address.¹⁵³ As a fellow Virginian, Callender knew Marshall was not a member of the state legislature at the time. Theodore Sedgwick, William Vans Murray, and John Quincy Adams also wondered whether Marshall was the Report's author, despite their knowledge that he neither submitted the Report nor sat in the Assembly. Sedgwick and Vans Murray, both politically connected men, would be well aware that Marshall was not a member of the Virginia legislature, especially after his heroic return from France. Yet each of these men believed that Marshall had drafted the Report. Although John Quincy Adams ultimately rejected the idea that Marshall wrote the Report, he never inquired about who submitted the Report much less implied that such a person was the author.¹⁵⁴ Finally, even after the wide publication of the Report naming Lee as its submitter, not a single person inside or outside Virginia mentioned Lee as the possible author. The fact of submission was not relevant to anyone who discussed the issue.

Despite the available historical evidence suggesting the contrary, the editors of the *Marshall Papers* maintain that the fact that Lee submitted the Report makes him the presumptive author.¹⁵⁵ As we shall see, this is the *only*

and first in the hearts of his countrymen." *Id.* at 435. Marshall did not immediately reveal that these resolutions were drafted by Lee (who was, as usual, absent when the news about Washington's death was announced to the House), but years later noted Lee's authorship in his book *The Life of George Washington*. See 5 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 765 (1807); see also 2 BEVERIDGE, *supra* note 4, at 443–45.

¹⁵² JAMES CALLENDER, *THE PROSPECT BEFORE US* 91 (Richmond, Jones, Pleasants, & Lyon 1800). Callender generally refers to the "minority" as having authored the report, not any one particular person. *Id.* Marshall's, however, is the only name Callender specifically links to the Report. At one point, Callender states "Mr. George Keith Taylor is one of the counter addressers of the minority of Virginia." *Id.* at 126. Callender thus refers to Lee, G.K. Taylor and Marshall as members of the minority deserving criticism, but singles out Marshall as "one of the reputed authors." *Id.* at 127.

¹⁵³ *Id.*; see also 2 BEVERIDGE, *supra* note 4, at 405. Beveridge treats the "besotted" Callender as reliable in some matters, and untrustworthy in others. See *id.* at 405, 409. There is, however, no reason to doubt Callender's report that some people believed that Marshall had written the Minority Report—we *know* this is true. In any event, Callender clearly did not assume that Lee was the (or even *an*) author simply because he submitted the Report.

¹⁵⁴ See Letter from John Quincy Adams, Minister to Prussia, United States, to Williams Vans Murray, Minister to Netherlands, United States (Apr. 13, 1799) (on file with the Mass. Hist. Soc'y).

¹⁵⁵ See Hobson, *Editorial Note*, *supra* note 16, at 512.

piece of historical evidence linking Lee to the Report. No one at the time, however, thought this fact was relevant to the issue of authorship. There is no historical reason that we should think otherwise.

3. *Henry Lee's Letter to Washington*

In late January 1799, a few days before the publication of the Minority Report and the first essay of *Plain Truth* in the *Virginia Gazette and General Advertiser*, Lee wrote the following letter to George Washington (in its entirety):

In our late session the views of opposition to govt have been disclosed with more than usual frankness.

That you may possess an accurate copy of the address on the part of the minority I beg leave to forward to you the enclosed.

If the people will generally read the proceedings of the legislature I console myself with the hope that the disposition of Virga will change respecting congressional politics. I have the honor to be most respectfully Sir [your] real friend.¹⁵⁶

In their new editorial note, the editors of the *Marshall Papers* offer this letter as evidence that Lee “privately disclosed a proprietary interest” in the Report.¹⁵⁷ Although the editors make this assertion as historical fact, the claim is based on a chain of unsupported assumptions. First, it assumes that Lee published the Report and thus had a copy with the published introduction; secondly, it assumes that Lee sent Washington a copy with the introduction; and thirdly, it assumes that both Lee and Washington would understand that by mentioning his role as submitter, Lee was tacitly acknowledging authorship.

No doubt, Lee would have wanted to tell Washington of any role he had in fighting the good fight in the Virginia Assembly, if only to help salve their strained relationship. In his letter, however, Lee did not claim authorship of the Minority Report. Instead, Lee expressed the hope that people would read the *proceedings* of the House of Delegates—a self-serving reference to Lee’s participation in the debates.¹⁵⁸ For his part, Washington did not appear to have understood the letter or Report as suggesting Lee’s authorship. Even in his declining health, Washington continued his habit of thanking those who sent him their pro-Federalist essays, sometimes over the authors’ own

¹⁵⁶ Letter from Henry Lee to George Washington (Jan. 17, 1799), in 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 346–47 (spelling in original).

¹⁵⁷ Hobson, *Editorial Note*, *supra* note 16, at 516.

¹⁵⁸ See VIRGINIA REPORT, *supra* note 64, at 103–09 (statement of Henry Lee).

requests that he spare himself the trouble.¹⁵⁹ Washington wrote no such letter of thanks and encouragement to Lee, despite their regular correspondence.¹⁶⁰ Although the friendship between Lee and Washington suffered due to the ill-fated Dismal Swamp deal,¹⁶¹ it had not deteriorated to the point where Washington neglected to send a note of thanks to Lee whenever he deemed it appropriate.¹⁶² If Lee intended his letter as a claim of authorship, it was not treated as such by the most gracious George Washington.¹⁶³

The most critical problem with using Lee's letter as an assertion of authorship is the uncertainty surrounding *which* version of the Minority Report Lee sent to Washington.¹⁶⁴ According to Lee, he forwarded an "accurate copy" of the Report that he had submitted to the Virginia legislature a week before.¹⁶⁵ An "accurate" copy of *that* Report would have included only the address itself, and not the introduction that appeared in the

¹⁵⁹ A telling example of Washington's eagerness to acknowledge and thank the authors of pro-Federalist pamphlets occurs in his correspondence with Alexander Addison. On December 6, 1798, Washington wrote to Judge Addison, thanking him for sending his "Liberty of Speech and of the Press," and promising that he would "read it with the same pleasure, & marked approbation that I have done your other productions of a similar nature." See 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 244. On January 31, 1799, Addison sent Washington another pamphlet, but politely stressed that he did not expect any additional acknowledgment. *Id.* at 407 n.1. On March 4, 1799, Washington wrote Addison *again*, thanking him for his last enclosure and remarking, "I wish, sincerely, that your good example, in endeavoring to bring the People of these United States more acquainted with the Laws & principles of their Government, was followed." *Id.* at 407.

¹⁶⁰ See, e.g., *id.* at 484; Letter from Henry Lee to George Washington (Feb. 28–Mar. 3, 1799), in 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 399; Letter from George Washington to Henry Lee (Apr. 18, 1799) (on file with authors).

¹⁶¹ See Letter from Henry Lee to George Washington (Feb. 28–Mar. 3, 1799), in 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 400 ("Pecuniary loss I disregard, but there is another loss which I feel & shall for ever feel").

¹⁶² See, e.g., Letter from George Washington to Henry Lee (Apr. 18, 1799), *id.* at 484.

¹⁶³ There is one additional point to be made about Lee's January 29 letter to Washington. The first essay of *Plain Truth* was published February 5 in the *Virginia Gazette and General Advertiser*. If Lee was the author of *Plain Truth*, then by January 29 he either had a completed draft of the first *Plain Truth* essay or would have one within days. Yet, despite the fact that Lee clearly sought to increase his standing with George Washington by sending him a copy of the Minority Report, there is no record that Lee ever sent Washington a copy of *Plain Truth*. His failure to pass any *Plain Truth* essay along to Washington is yet another reason to doubt that Lee had anything to do with *Plain Truth*.

¹⁶⁴ The copy Lee sent to Washington is not in *The Papers of George Washington*.

¹⁶⁵ Letter from Henry Lee to George Washington (Jan. 17, 1799), in 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 346–47.

later published version.¹⁶⁶ Despite the complete lack of supporting evidence, the editors of the *Marshall Papers* nevertheless assert that “Lee oversaw [the] publication” of the Minority Report in the *Virginia Gazette*¹⁶⁷ and thus “publicly associated his name with the Minority Address.”¹⁶⁸ Stacking unsupported assumption on unsupported assumption, the editors next declare that Lee “undoubtedly” sent Washington “an advanced printing of the address” with the introduction that Lee “presumably” wrote.¹⁶⁹ Finally, the editors assert that, by sending his copy to Washington, Lee had thus “privately disclosed a proprietary interest in the address.”¹⁷⁰ The editors provide no citations to support their claim that Lee published the Report or sent an “advanced copy” to Washington. Nor could they—there is no historical evidence even hinting that either event took place. The claim is based on the assumption that Lee authored a series of essays entitled *Plain Truth*, and that Lee had the time and talent to draft and publish both works. A close look at his life calls into question both of these critical assumptions.

4. *The Unfortunate Life of Henry Lee*

In the early months of 1799, when newspaper editors began to circulate *Plain Truth* and the Minority Report, Lee’s finances lay in shambles and his reputation grew as being financially irresponsible.¹⁷¹ Despite early success as a military leader, Lee became an inveterate and poorly skilled land speculator, involved in so many get-rich-quick schemes that he probably had trouble keeping them straight himself. Lee’s biographers detail his many ill-fated land deals throughout the 1790s, and even his sons conceded their father’s unwarranted risk-taking when it came to the family purse.¹⁷² In fact, the dying request of Lee’s first wife was that he sign a promise not to touch

¹⁶⁶ VA. GAZETTE & GEN. ADVERTISER (Richmond), Feb. 1 & 5, 1799.

¹⁶⁷ Hobson, *Editorial Note*, *supra* note 16, at 516.

¹⁶⁸ *Id.* (emphasis added).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (emphasis added).

¹⁷¹ Both of Lee’s fathers-in-law drafted bequests that prevented him from controlling the inheritance. *See* ROYSTER, *supra* note 130, at 77. As early as 1792, Lee’s patron and hero George Washington referred to Lee as having “no economy.” *See id.*

¹⁷² Lee’s own son wrote of his father: “Gen. Lee entered into a course of sanguine and visionary speculations, endeavoring to acquire wealth, not by rational and productive industry, but by a combination of bargains which could scarcely benefit one party without injury to the other, and which were often mutually detrimental.” HENRY LEE, IV, OBSERVATIONS ON THE WRITINGS OF THOMAS JEFFERSON, WITH PARTICULAR REFERENCE TO THE ATTACK THEY CONTAIN ON THE MEMORY OF THE LATE GEN. HENRY LEE 179 (1839) [hereinafter LEE IV, OBSERVATIONS]; *see also* ROYSTER, *supra* note 130, at 82.

their sons' inheritance.¹⁷³ His second wife's father prepared a prenuptial agreement to ensure Lee could not squander *her* inheritance.¹⁷⁴ His irresponsibility in money matters not only affected his family, but also ensnared the friends he recruited to his multiple schemes, and proved a critical distraction in his own political and professional life.¹⁷⁵ For example, he arrived late for every opening session in the House of Delegates,¹⁷⁶ which meant he missed more than half of the debate on the Virginia Resolutions in the 1798 Session.¹⁷⁷ Even after his election to Congress in 1799, Lee enrolled more than a week after the start of the Term.¹⁷⁸

From Lee's perspective, the worst consequence of his rampant speculation came in the winter of 1798–99 when his ill-advised land schemes threatened to destroy his last true asset: his friendship with George Washington. After purchasing some land known as the "Dismal Swamp" from Washington in 1795,¹⁷⁹ Lee missed the first payment and then compounded his failure by sending Washington what amounted to a bad check.¹⁸⁰ By early 1799, Lee found himself in the embarrassing position of sending the former President repeated apologies while desperately trying to rearrange his financial affairs. Numerous letters went back and forth between Lee and Washington during this period on the subject of this dismal deal.¹⁸¹

¹⁷³ See GERSON, *supra* note 65, at 167; THOMAS BOYD, LIGHT-HORSE HARRY LEE 193 (1931).

¹⁷⁴ See ROYSTER, *supra* note 130, at 77.

¹⁷⁵ As recounted by Charles Royster, "[b]y December of 1797, Lee was desperate for money with which to satisfy 'those distressed individuals who are all about me now.' He wrote to his agent, 'they will be on me—shield me I pray.' The following week: 'If your expectations fail, I am gone.'" *Id.* at 174. As his financial crisis deepened, Lee relied on men like William Sullivan to collect debts owed to him, often with little success. See Letter from William Sullivan to John Hopkins (Feb. 7, 1798), in PAPERS OF WILLIAM SULLIVAN (on file with Huntington Research Library, code: mssHM 48660-48732).

¹⁷⁶ In 1795, the session started November 10, and Lee arrived November 30. See J. H.D. 1795, *supra* note 64, at 1, 53. In 1797, the session started December 4, and Lee arrived December 9. J. H.D. 1797, *supra* note 64, at 1, 12. Finally, in 1798, the session started December 3, and Lee arrived December 18. J. H.D. 1798, *supra* note 64, at 1, 27.

¹⁷⁷ In his speech on December 20, he apologized for having been "prevented from attending his duty in the House earlier in the session. He had thereby lost the opportunity of combating the pernicious system in operation at its commencement, as well as that of obtaining the information which previous discussion must have afforded." VIRGINIA REPORT, *supra* note 64, at 103.

¹⁷⁸ The House session began on December 2, 1799. Lee did not show up until December 11. See 2 ANNALS OF CONG. 429, 433 (1799).

¹⁷⁹ See 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 401 n.2.

¹⁸⁰ Lee supplied a note for \$1,000 that turned out to be uncollectable. See *id.*

¹⁸¹ Lee wrote to Washington: "No event of my life has given me more anguish." Letter from Henry Lee to George Washington (May 22, 1799) in 4 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 85; see also, Letter from Henry Lee to George

Sometime in February or March, perhaps due to the multiple stresses in his life, Lee fell ill. His indisposition was so severe that it prevented Lee from responding to increasingly effective political assaults and his campaign languished badly.

5. Lee's Indisposition

Two months before the election, on February 18, 1799, Hamilton, then second-in-command of the Provisional Army,¹⁸² enclosed a letter to Major General Lee when he wrote to Washington, who had left retirement to command the Provisional Army. In Lee's letter, Hamilton instructed him to make preliminary arrangements for recruitment in Virginia and to do so "without delay."¹⁸³ Lee was to divide "Virginia into four districts and Twenty sub-districts or company rendezvouses, designating a place in each for the head Quarters of the rendezvous."¹⁸⁴ By March 27, having received no acknowledgment from Lee, Hamilton wrote to Washington that he could not "now rely on the success of my resort to General Lee in any reasonable time," and asked his commander for advice.¹⁸⁵

On April 10, Lee's neighbor in Westmoreland, Bushrod Washington, mentioned Lee's illness in a letter to his famous uncle, informing him that the "[i]ndisposition has obstructed Genl Lee's exertions [in his congressional campaign] very much to his injury."¹⁸⁶ That same day, Washington advised Hamilton that "General Lee's absences from home, canvassing for the ensuing Election of Representatives to Congress, and an indisposition with which he has (as I have lately heard) been seised . . . has been, I presume, the

Washington (Feb. 28–Mar. 3, 1799), in 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 400 ("Pecuniary loss I disregard, but there is another loss which I feel & shall for ever feel.")

¹⁸² Letter from George Washington to Alexander Hamilton (July 14, 1798), in 22 HAMILTON PAPERS, *supra* note 11, at 417–21 (discussing Washington's ranking of officers within the army).

¹⁸³ Letter from Alexander Hamilton to Henry Lee (Feb. 18, 1799), in 22 HAMILTON PAPERS, *supra* note 11, at 486–87; *see also* Letter from Alexander Hamilton to George Washington (Feb. 18, 1799), in 22 HAMILTON PAPERS, *supra* note 11, at 487.

¹⁸⁴ Letter from Alexander Hamilton to George Washington (Mar. 27, 1799), in 22 HAMILTON PAPERS, *supra* note 11, at 589.

¹⁸⁵ *Id.* at 589–90.

¹⁸⁶ Letter from Bushrod Washington to George Washington (Apr. 10, 1799), in 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 479. The "indisposition" mentioned by Bushrod Washington probably refers to an illness of some kind, though other meanings are possible (including a veiled reference to Lee's frantic efforts to shore up his crumbling financial situation).

cause of your not having received an answer to your letter”¹⁸⁷ Assuming Lee truly fell ill during this critical period (and the younger Washington was not merely making excuses for the irresponsible Lee), this would have indeed left Lee at a major disadvantage in his public life.

In spring of 1799, Lee’s “indisposition” and his already shaky reputation greatly interfered with his ability to run an effective campaign. The election of 1799 was especially poisonous,¹⁸⁸ and he was subject to “the most scandalous and unfounded aspersions upon his private character.”¹⁸⁹ Responding to these attacks became a full-time occupation.¹⁹⁰ Eventually, Lee managed some success at “removing many prejudices”¹⁹¹ against him, but it was clear that his faltering campaign required additional aid. This burden fell to Bushrod Washington, newly appointed to the Supreme Court, who traveled around Lee’s district defending the actions of the Federalist Party. Lee also traveled his district in an attempt to salvage his reputation. In a remarkable political “assist,” Bushrod Washington sought out areas affected by Republican propaganda and visited “every house in that neighborhood, and endeavored to expose the many ridiculous and scandalous misrepresentations which had been made of the Government.”¹⁹²

¹⁸⁷ Letter from George Washington to Alexander Hamilton (Apr. 10, 1799), in 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 473–74.

¹⁸⁸ See GERSON, *supra* note 65, at 206–07; see also 2 BEVERIDGE, *supra* note 4, at 379–80.

¹⁸⁹ Letter from Bushrod Washington to George Washington (Apr. 10, 1799), in 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 479.

¹⁹⁰ GERSON, *supra* note 65, at 207–08:

Harry waged his campaign with the same ferocity he had demonstrated in his fight against the British. He was tireless, refused to let himself become discouraged and struck two blows for every one aimed at him. Between early February and Election Day, April 24, he spent no more than five or six nights under his own roof at Stratford.

Id. Gerson does not cite to historical sources to back up his claim about Lee’s activity, but it is supported by accounts from Lee’s neighbor, Bushrod Washington, and Lee’s patron, George Washington. See *supra* note 186 and accompanying text; see also BOYD, *supra* note 173, at 251 (“Backed by General Washington’s influence, he began early in the winter of 1799, to canvass the freeholders of Westmoreland, King George, Northumberland and Richmond Counties.”).

¹⁹¹ Letter from Bushrod Washington to George Washington (Apr. 10, 1799), in 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 479.

¹⁹² *Id.*

6. Lee's Legacy

None of the historians who name Lee as the author of the Minority Report say a word about Lee's life, character, skills, or "indispositions" (financial or otherwise) during that critical period in 1798 and 1799.¹⁹³ Nevertheless, they claim that during these few months, he managed to write and publish *both* the constitutionally sophisticated Minority Report and the ten separate essays comprising *Plain Truth* (published separately on a schedule of about one every four days) while simultaneously fighting scandal, dealing with financial ruin, making constant trips away from home, and recovering from an "indisposition" sometime in February or March. This is not to say it would be impossible for Lee (perhaps his illness was from exhaustion!). However, a double publication of this magnitude within this timeframe would have been a remarkable achievement for any individual. It would be extraordinary given Lee's political and financial situation as well as his lack of legal training. If all this actually occurred, one would expect such an incredible achievement to be celebrated by other Federalists at the time and recounted by Lee's heirs. There are no such stories; no contemporary ever said a word about such an achievement by Lee. Only in the last few decades have historians mentioned Lee in connection with either defense,¹⁹⁴ though without any hard evidence of authorship.¹⁹⁵

In 1832, Lee's son published an extended defense of his father's life and character, tellingly entitled *Observations on the Writings of Thomas Jefferson, with Particular Reference to the Attack They Contain on the Memory of the Late Gen. Henry Lee*.¹⁹⁶ In his book, the younger Lee extolls

¹⁹³ To be fair, one presumes these historians believe that Lee's skills are established through his assumed publication of *Plain Truth*.

¹⁹⁴ See Swem, *supra* note 138, at 84-85; 12 CHARLES EVANS, AMERICAN BIBLIOGRAPHY 345 (1934) (citing Lee as author of *Plain Truth*); 13 *id.* at 66 (1934) (attributing the Minority Report to Lee).

¹⁹⁵ Correspondence from Jeffrey M. Flannery, Manuscript Reference Specialist, Manuscript Division, Library of Congress, to Author (on file with author). Neither *Plain Truth* nor any version of the Minority Report is among the Lee family papers held by the Library of Congress. We have searched other collections of the Lee family papers held by the Huntington Library and come up empty-handed. The Lee family correspondence (so not only Henry Lee's papers) are primarily in the Huntington Library (150 items), Library of Congress (8 microfilm reels), University of Michigan at Ann Arbor (119 items), and University of Virginia (50 items).

¹⁹⁶ LEE IV, OBSERVATIONS, *supra* note 172. In a letter to Washington, Jefferson calls Lee a slanderer and an intriguer, and a "miserable tergiversator, who ought indeed either to have been of more truth, or less trusted by his country." Letter from Thomas Jefferson to George Washington, President, United States (June 19, 1796), in 8 THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES, FEDERAL EDITION 247 (Paul Leicester Ford ed., 1904).

his father's role in the Virginia Assembly debates, but says nothing about his father drafting the Minority Report.¹⁹⁷ Similarly, the son says nothing about Lee drafting or publishing the ten essays of *Plain Truth* despite a detailed account of the Alien and Sedition Act controversy. Every other episode in his father's life receives its due, from Lee's role in the Virginia debates to his eulogy of Washington and his infamous vote for Aaron Burr instead of Jefferson.¹⁹⁸ If Lee was in fact the author of the Minority Report and *Plain Truth*, it is inexplicable why his son would leave out these remarkable and (from the son's perspective) praiseworthy accomplishments.¹⁹⁹

A second son, the famous Robert E. Lee, also wrote a biography of his father as part of an introduction to a new edition of his father's *Memoirs of the War in the Southern Department* (written while in debtors' prison).²⁰⁰ In this biography, he mentions every known writing by his father including Lee's tribute to Washington, a poem published in a newspaper, and an off-the-cuff remark scribbled on a scrap of paper.²⁰¹ Consequently, neither son ever refers to the Minority Report or *Plain Truth* in spite of their obvious incentive to mention anything that would help salvage the tarnished reputation of their father.

The person in the best position to know about the doings of Lee at the time was Bushrod Washington.²⁰² He closely followed Lee's efforts that spring and kept his famous uncle informed about Lee's campaign. The younger Washington described Lee's efforts to counter the politically motivated attacks on his character, but said nothing about an effort by Lee to defend the Alien and Sedition Acts. In fact, Bushrod Washington credits

¹⁹⁷ LEE IV, OBSERVATIONS, *supra* note 172:

With regard to the sedition law, . . . Mr. Madison demonstrated by a chain of fine and admirable reasoning, that it involved the exercise of a power which was not fairly deducible from the Constitution. Gen. Lee took a different view of the subject, and supported it, I have understood, in a strain of captivating eloquence, by clear and forcible arguments. His opinions, though rejected by a majority of the assembly to which they were submitted, and since discountenanced by a majority of the people, had the concurrence of the Congress of the United States, of the federal judiciary, and of the Legislatures of several of the States.

Id.

¹⁹⁸ *Id.*

¹⁹⁹ The authors have contacted the Library of Congress and the Swem Library of William and Mary School of Law, both of which have substantial collections of the Lee family papers. Neither located a copy of either the Minority Report or *Plain Truth*.

²⁰⁰ *See Lee, supra* note 134.

²⁰¹ *Id.* at 51–52.

²⁰² Letter from George Washington to Alexander Hamilton (Feb. 26, 1799), in 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 387 n.1 (indicating that Bushrod Washington was a neighbor of Henry Lee).

himself with defending the actions of the federal government. If Lee had participated in writing or publishing a multi-essay defense of the federal government, Bushrod Washington certainly would have known about and reported the heroic effort, since there was no reason to keep such an achievement secret. Unlike Marshall, Lee would pay no political price for admitting his authorship of a pro-Federalist defense, since he had already supported the Alien and Sedition Acts in the Virginia House of Delegates.

When one considers the life of Lee, particularly in 1798 and 1799, he seemed to lack the time, expertise, and (most of all) discipline to write either *Plain Truth* or the Minority Report. It seems unlikely that the Virginia minority would have turned to a man who had no experience in such matters and who had missed practically all of the preceding debate.²⁰³ No evidence points to Lee's selection for this critical task. The evidence we do have about Lee in 1799 is entirely consistent with what one would expect from a man with three years of formal education, in dire financial straits, and facing the political challenge of his life. Desperate and distracted, Lee managed to overcome the handicap of a crumbling reputation and win his final election due as much to the efforts of Bushrod and George Washington as his own.

7. *The Notations of Assistant Librarian Earl Swem*

So how then did Lee become associated with *Plain Truth* and the Minority Report? Prior to the twentieth century, no historian had linked Lee with either publication. In 1917, however, then-assistant librarian Earl Swem attributed both documents to Lee in his bibliography of Virginia historical documents.²⁰⁴ The bibliography ultimately contained hundreds of entries, including notations on several published versions of the Minority Report and one copy of the essays of *Plain Truth*.²⁰⁵ In the second listed publication of the Minority Report, Swem added the note "attributed to Henry Lee."²⁰⁶ A few listings later, Swem similarly attributed *Plain Truth* to Lee.²⁰⁷ Unlike some other notations by Swem, these listings did not refer to a separate

²⁰³ Federalist leaders like George Keith Taylor were well aware of Lee's financial troubles. See Letter from William Sullivan to George Keith Taylor, Jan. 4, 1798 (on file with the Huntington Research Library, HM 48725, A.L.S. 3p. fol.) ("I presume you are informed of everything that I know on the subject of the contract by our friend the General [Lee] . . . We can do nothing with the dismal swamp now.").

²⁰⁴ Swem, *supra* note 138, at 84–85.

²⁰⁵ *Id.* at 83–85.

²⁰⁶ *Id.* at 84.

²⁰⁷ *Id.* at 85.

source in support of the attribution,²⁰⁸ which apparently means they reflected Swem's own surmises.

We cannot know why Swem named Lee, but we can make some informed guesses. First, it is almost certain that Swem based his conclusion about *Plain Truth* on his prior conclusion about the Minority Report. *Plain Truth* only identifies its author as "a citizen of Westmoreland County." Since any number of Federalists in Westmoreland County could have written *Plain Truth*,²⁰⁹ historians hesitated to name an author for over a hundred years. The case was different for the Minority Report. Swem had personally seen two of the three versions of the Report, including one with the introduction referencing "the member from Westmoreland." This had to be Henry Lee since he was the only member of the minority from that county in the Virginia House of Delegates. Swem apparently concluded that Lee had not only submitted, but also had *authored* the Report.

Having determined that the "member from Westmoreland" authored the Minority Report, Swem next considered *Plain Truth* and its pseudonymous author, "a citizen from Westmoreland County." The similarity of "a citizen from Westmoreland County" to "the member from Westmoreland" along with the parallel publications and similar subject matter must have convinced Swem that the same Westmoreland resident wrote both documents. There is no reason to think that Swem investigated Lee's life, nor had he seen Beveridge's second volume of *The Life of John Marshall*, which named Marshall as the likely author of the Minority Report.²¹⁰ Swem was therefore unaware of Lee's life and the evidence Beveridge presented in support of Marshall.

In 1934, Charles Evans published a far more complete bibliography of early American documents.²¹¹ By that time, Evans would have seen Beveridge's evidence regarding Marshall and the Minority Report (Beveridge had received a Pulitzer Prize for his biography of John Marshall).

²⁰⁸ For example, Swem includes the following notation for Charles Lee's defense of the Alien and Sedition Acts: "For authority for author's name see A. P. C. Griffin's Catalogue of the Washington collection in the Boston athenaeum, p. 122." *Id.* at 85.

²⁰⁹ Such as Bushrod Washington whom we discuss below.

²¹⁰ Although Earl Swem must have known about Albert Beveridge's biography, see Elizabeth Donnan & Leo F. Stock, *Senator Beveridge, J. Franklin Jameson, and John Marshall*, 35 MISS. VALLEY HIST. REV. 463-92, 480 (1948) (reproducing letters to Beveridge encouraging him to take certain inquiries to "Mr. . . . Swem"), it is unlikely that Swem was aware that one of Beveridge's recently published volumes included evidence that John Marshall authored the Minority Report. Had he known, he would have followed the example of later bibliographers and listed Marshall as at least a *possible* author (Beveridge, not Swem, after all had researched the issue). Instead, Swem made his best guess and linked the Minority Report to Henry Lee, the sole minority "member from Westmoreland" in the 1799 Virginia Assembly.

²¹¹ 12 EVANS, *supra* note 194.

No evidence, however, had emerged which called into question Swem's earlier conclusion about Lee's authorship of *Plain Truth*. Accordingly, in his listing of documents by Henry Lee, Evans included *Plain Truth*, but not the Minority Report.²¹²

Today, it is common to find *both* Marshall and Lee cited as potential authors of the Minority Report.²¹³ Swem's original attribution of *Plain Truth* to Lee, however, has gone unchallenged—and unexplored.²¹⁴ Instead, modern historians often use Lee's assumed authorship of *Plain Truth* in support of their claim that he wrote the Minority Report, unaware of the circularity of their argument. For it was Swem's original guess about the Minority Report that likely led him to make his guess about *Plain Truth*. This is, of course, all surmise. Swem cited no historical source to support his guesses. In the end, however, it little matters. It turns out that there is no historical evidence that Lee wrote *either Plain Truth or the Minority Report*.

8. *The Other Citizen of Westmoreland*

Had Earl Swem investigated the matter, he would have discovered there was more than one "Citizen of Westmoreland" capable of writing the *Plain Truth* essays. In 1799, there was another resident of Westmoreland County besides Lee who took it upon himself to defend the Federalist Party (and whom Washington chose in 1798 to support the Federalist cause). The man George Washington called "my nephew from *Westmoreland*": Bushrod Washington.

Not only was Bushrod Washington a Federalist resident of Westmoreland County, he would have had the opportunity to exercise his renowned legal writing skills during this critical period.²¹⁵ In August 1798, George Washington persuaded his nephew to join the struggle for Congress alongside Marshall in the 1799 elections.²¹⁶ However, Bushrod Washington

²¹² *Id.* at 345. Evans managed to complete his listings for A–L before he died. Later editors who completed Evans' bibliography attributed the Minority Report to Lee. See 13 EVANS, *supra* note 194, at 66.

²¹³ See, e.g., Entry for "Address of the minority in the Virginia legislature," Huntington Research Library Catalogue, available at <http://catalog.huntington.org> ("Attributed by some authorities to Henry Lee and by others to John Marshall. Cf. Swem, E.G. Bibl. of Virginia, pt. 2, p. 84; Beveridge, A.J. Life of J. Marshall, v. 2, p. 402–406.").

²¹⁴ See, e.g., Entry for "Plain Truth," Huntington Research Library Catalogue, available at <http://catalog.huntington.org> ("Attributed to Henry Lee by Evans").

²¹⁵ To this day, law students study Justice Bushrod Washington's circuit court opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), as a seminal judicial opinion on the meaning of Article IV's Privileges and Immunities Clause.

²¹⁶ See BAKER, *supra* note 22, at 299.

ceased his campaign after September 29, 1798, when President Adams recess-appointed him as associate Justice to the Supreme Court after the death of his mentor, James Wilson.²¹⁷ Bushrod Washington was officially nominated on December 20, 1798, and confirmed a day later.²¹⁸ According to letters between nephew and uncle, the new Justice returned to Virginia from his mandatory Circuit Court rounds by December 31, 1798²¹⁹ and took the oath of office on February 4, 1799.²²⁰ During the two months in between, the Supreme Court had a light load,²²¹ which would have allowed Bushrod Washington plenty of time to write *Plain Truth*.²²²

We know from his correspondence with George Washington that Marshall forwarded published defenses of the Alien and Sedition Act to Bushrod Washington in the month prior to the publication of *Plain Truth*. At the time of *Plain Truth*'s publication, Bushrod Washington was living in Westmoreland County and devoting his energies to defending the actions of the federal government.²²³ This, of course, was the central purpose of *Plain Truth*. In addition, Bushrod Washington expressly defended the constitutionality of the Sedition Act from his position as a federal judge.²²⁴ Unlike Lee, the young Washington also had his health, financial stability,

²¹⁷ See SMITH, DEFINER OF A NATION, *supra* note 5, at 245, 600 n.62.

²¹⁸ Judges of the United States Courts, Federal Judicial Center, <http://www.fjc.gov/public/home.nsf/hisj> (follow "W" hyperlink; then follow "Washington, Bushrod" hyperlink) (last visited Mar. 2, 2007).

²¹⁹ See Letter from George Washington to Bushrod Washington (Dec. 31, 1798), in 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 302–03. According to the editors of *The Papers of George Washington*, Bushrod Washington visited Mount Vernon on February 26, 1799. *Id.* at 480.

²²⁰ Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Mar. 2, 2007).

²²¹ See 3 U.S. (3 Dall.) 409–66 (1799). The Court was presented with five cases in January and February 1799. It rejected one case for lack of jurisdiction, denied certiorari for one case, gave a brief *ex parte* opinion, and handed down two brief opinions in late February written by Chief Justice Ellsworth. *Id.*

²²² It has long been known that during this period, Marshall and Bushrod Washington were circulating among themselves published defenses of the federal government. Exactly why they were doing so remains a mystery. See *supra* notes 223–28 and accompanying text.

²²³ See *supra* notes 191–92 and accompanying text. According to George Haskins and Herbert Johnson, Bushrod Washington also campaigned on behalf of C.C. Pinckney, another Federalist, in 1800. HASKINS & JOHNSON, *supra* note 1, at 223.

²²⁴ Justice Bushrod Washington presided over the prosecution of Charles Holt, editor of the *New London Bee*, for violation of the law. See CONN. J. (New Haven), Apr. 24, 1800, at 3 ("Judge Washington in his charge to the jury, (which was given in an unrivalled manner) established the act to be constitutional, by a train of reasoning too powerful to be resisted . . .").

and both legal and publishing skills.²²⁵ Bushrod Washington also had good reason to downplay his involvement in the publication of a Federalist tract. After the elections of 1800, Republicans actively sought excuses to impeach Federalist judges, and a published defense of the Sedition Acts by a sitting Supreme Court Justice may have drawn their attention.²²⁶ Nor would this political risk have diminished in later years because, as the youngest Justice on the Court,²²⁷ Bushrod Washington had a long and influential career ahead of him. Particularly compared to Lee, Bushrod Washington had a much greater incentive to keep a controversial publication to himself.

If Marshall forwarded published defenses of the Alien and Sedition Acts to Bushrod Washington knowing that the latter intended to publish a defense of the Acts, we might reasonably expect some evidence of this knowledge in their correspondence. The two men were close friends and engaged in similar political campaigns pressed on them by the venerated elder Washington. However, both men had strong motivations to keep their efforts secret. In fact, no correspondence between Marshall and Bushrod Washington during this period survives today—a phenomenon so unlikely to have occurred by accident that historians have concluded that either they or their families intentionally destroyed their communications.²²⁸

Between the two residents from Westmoreland, Bushrod Washington is a much more likely candidate than Lee to have written *Plain Truth*. The younger Washington (unlike Lee) was well-versed in writing legal arguments, but (also unlike Lee) had the necessary incentive to keep his authorship anonymous. Bushrod Washington also had the time and the

²²⁵ In addition to his work as a justice, Bushrod Washington arranged the publication of Marshall's *Life of Washington*. See Custer, *supra* note 1, at 43.

²²⁶ Alexander Addison learned this when he was impeached and removed from office in Pennsylvania on account of his published defense of the Alien and Sedition Acts. See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 164–65 (1971).

²²⁷ Custer, *supra* note 1, at 42 (stating that Bushrod Washington was thirty six when he was appointed to the Court).

²²⁸ See HASKINS & JOHNSON, *supra* note 1, at 99–100:

It is one of the curious facts of history that few letters of importance exchanged by such close friends and associates as were Washington and Marshall appear to have survived, although numerous letters relating to personal and judicial matters were exchanged between Marshall and Story and Story and Washington. In the face of facts now known it must be supposed, as had Mr. Custer, "that important letters were destroyed by Washington and Marshall during their lives or by other persons after their deaths."

Id. (quoting Custer, *supra* note 1, at 46). Similarly, Thomas Jefferson and James Madison, although they were in constant communication as they prepared their Virginia and Kentucky Resolutions, exchanged not a single letter during this period, so distrustful were they of the United States mail. See Koch & Ammon, *supra* note 49, at 155.

discipline to write ten extensive essays. Finally, and perhaps most significantly, Bushrod Washington had connections in the publishing community. In later years, he would arrange for the publication of Marshall's *Life of Washington*, as well as Marshall's anonymous defense of *McCulloch v. Maryland*.²²⁹ When placed alongside the absence of any historical evidence that Lee wrote *Plain Truth* (and significant evidence that it would have been difficult for him to do so), the evidence in favor of Washington's nephew from Westmoreland seems compelling. At the very least, it calls into serious doubt the previously unquestioned attribution to Lee.²³⁰

9. *A Remaining Possibility: Lee's Addendum*

We believe that the evidence outlined above critically undermines the attempt to replace Marshall's name with Lee's as a significant role-player in the drafting and publication of the Minority Report. Nevertheless, in light of what we know about historical practice and Lee's life at the time, he could have added the last few paragraphs of the Report before submitting the address to the Virginia House of Delegates. While the evidence is not conclusive, we believe the possibility should be acknowledged.

There is historical precedent for last-minute editorial changes by men who submitted reports that they themselves had not authored. For example, both John Taylor and John Breckinridge made considerable changes to the Virginia and Kentucky Resolutions prior to their presentation.²³¹ Moreover, the subject matter of the Minority Report's addendum, while irrelevant to the defense of the Alien and Sedition Acts, addresses an issue confronting Lee in his campaign. Four years before Washington chose Lee to campaign for Congress, he commissioned him to lead federal troops to western

²²⁹ Gerald Gunther, *John Marshall, "A Friend of the Constitution": In Defense and Elaboration of McCulloch v. Maryland*, 21 STAN. L. REV. 449, 450–51 (1969) (describing all of the correspondence between Bushrod Washington and Marshall during the publication of the *McCulloch* essays).

²³⁰ It is possible, of course, that Bushrod Washington also authored the Minority Report. However, there is nothing to link the Minority Report to Washington beyond his common interest in defending federalist policies. The textual and substantive reasoning links between the Report and John Marshall (and George K. Taylor), however, are many and compelling. Nevertheless, one cannot exclude the bare possibility that Washington authored, or helped to author, the Report.

²³¹ Presenters had the opportunity to alter the text at the last minute without necessarily consulting the drafter. Madison's draft of the Virginia Resolutions was much less radical while Jefferson's draft of the Kentucky Resolutions was much more so in their advocacy of states' rights than the drafts actually presented and adopted by the two legislatures. Historians assume that Taylor and Breckinridge altered the drafts at the last minute. See Koch & Ammon, *supra* note 49, at 156–60.

Pennsylvania against the Whisky Rebellion.²³² Although committing an act of “political suicide,”²³³ Lee left his post as Governor of Virginia to enforce the collection of the deeply begrudged federal excise tax.²³⁴ As a former military hero, Lee resented the stony silence that met him and his troops in the various Virginia townships.²³⁵ When he ran for federal office in 1799, federal taxes were still a controversial issue, and he likely faced and felt some lingering bitterness over the Whiskey Rebellion. Thus, the addendum seems more than coincidental because it addresses the legitimate power of the federal government to raise and collect taxes for the good of the country.²³⁶ Its arguments are pure policy with no constitutional implications for the Alien and Sedition Acts, but they had significant meaning for Lee in his campaign. Finally, if Lee supplemented the Minority Report (which he did not draft) with an addendum (which he did), it would explain his anxiousness to ensure that Washington had an “accurate copy” of the Address.²³⁷ If Lee was not responsible for publishing the Report, there was a chance that his “addition” would be left on the cutting room floor.²³⁸

In any event, there is little reason to believe that Lee had the time and ability to craft the sophisticated arguments in the Minority Report and lengthy essays of *Plain Truth*. On the other hand, the addendum is a short (and trite) policy argument that he could have added prior to his submission of the Report to the Assembly. Because it seems written by a different hand than the rest of the Report, and because it addresses an issue important to Lee, we believe that Lee may have authored the addendum. Nothing in our analysis of Marshall’s role, however, turns on whether Lee played this small part.

²³² See 2 BEVERIDGE, *supra* note 4, at 88–89.

²³³ See GERSON, *supra* note 65, at 191.

²³⁴ See generally BOYD, *supra* note 173, at 222–35.

²³⁵ GERSON, *supra* note 65, at 196 (“On the long march through Virginia [in early January 1795] at the head of the state’s contingent of troops, he had been dismayed to find that the citizens of the state were either apathetic to him—or openly hostile. In every village and town people had lined the roads to watch the militia march through, and everywhere the regiments had been greeted by that most devastating of welcomes, silence. Not one cheer had been raised for General Lee, and even the tavernkeepers at whose inns he had slept had treated him with indifference.”).

²³⁶ See MINORITY REPORT, *supra* note 70, at 15.

²³⁷ Letter from Henry Lee to George Washington (Jan. 29, 1799), in 3 WASHINGTON: RETIREMENT SERIES, *supra* note 51, at 346–47.

²³⁸ In fact, later reproductions of the Report have left out this final section. See *Report of the Minority*, *supra* note 7, at 139.

B. *A More Likely Suspect: George K. Taylor*

In their effort to remove John Marshall as the author of the Minority Report and replace him with the most unlikely Henry Lee, it appears that Marshall biographers have largely passed over another Virginia Federalist who deserves more serious consideration as a potential collaborator in the drafting of the Minority Report: George Keith Taylor.²³⁹ Like most of the fifty-eight delegates in the minority, he quickly faded into relative obscurity. However, G.K. Taylor escaped total abstraction due to his leading role in the debate on the Resolutions,²⁴⁰ and his frequent association with Lee and Marshall.²⁴¹ Consequently, while existing knowledge on G.K. Taylor pales in comparison to the volumes of facts known about Marshall and Lee, it nevertheless reveals a man with a broad understanding of the law, a gift for speaking, and high standing among Virginia Federalists at the time.²⁴² Given his active involvement in the House of Delegates²⁴³ and formidable

²³⁹ William Stinchcombe and Charles Cullen, editors of the third volume of *The Papers of John Marshall*, at least mention G.K. Taylor in connection with the Report, but then disregard him in order to discuss the two more conspicuous suspects. See 3 MARSHALL PAPERS, *supra* note 15, at 498–99.

²⁴⁰ See Letter from J. Franklin Jameson, Director of Historical Research, Carnegie Foundation of Washington, to Albert Beveridge, Sen., United States (May 25, 1916) in Donnan & Stock, *supra* note 210, at 480 (stating that G.K. Taylor was a “chief leader of the Virginia Federalists” and that his signature is the first ascribed to the Minority Report).

²⁴¹ HENRY HOWE, HISTORICAL COLLECTIONS OF VIRGINIA; CONTAINING A COLLECTION OF THE MOST INTERESTING FACTS, TRADITIONS, BIOGRAPHICAL SKETCHES, ANECDOTES, &C., RELATING TO ITS HISTORY AND ANTIQUITIES, TOGETHER WITH GEOGRAPHICAL AND STATISTICAL DESCRIPTIONS TO WHICH IS APPENDED AN HISTORICAL AND DESCRIPTIVE SKETCH OF THE DISTRICT OF COLUMBIA 440 (1969) [hereinafter HISTORICAL COLLECTIONS OF VIRGINIA] (noting that G.K. Taylor was a “conspicuous part” of the “famous discussion of the alien and sedition laws,” and “a confederate of John Marshall”). G.K. Taylor also gained historical notice through his advocacy for state penal reform in 1796, and appointment as a federal “midnight judge” in 1801. Edward A. Wyatt, *George Keith Taylor, 1769–1815, Virginia Federalist and Humanitarian*, 16 WM. & MARY Q. 1, 1 (1936); see also JOHN P. LITTLE, HISTORY OF RICHMOND 97 (1933).

²⁴² FRANCIS WALKER GILMER, SKETCHES, ESSAYS, AND TRANSLATIONS 47 (1828); *Genealogical Notes and Queries*, 10 WM. & MARY Q. 344, 349–50 (1930); HENRY H. SIMMS, LIFE OF JOHN TAYLOR: THE STORY OF A BRILLIANT LEADER IN THE EARLY VIRGINIA STATE RIGHTS SCHOOL 77 (1932) (referring to G.K. Taylor as a “Federalist, brilliant, with keen powers of logic, and with that inimitable gift of language which was characteristic of so many political leaders of the old South”).

²⁴³ See generally J. H.D. 1792; J. H.D. 1793; J. H.D. 1795; J. H.D. 1796; J. H.D. 1797; J. H.D. 1798; J. H.D. 1799, *supra* note 64. G.K. Taylor always held a position on the Committee of Propositions and Grievances, the Committee for the Courts of Justice, and numerous ad hoc committees to draft legislation. He also sat on the Committee of Claims during his first term, and the Committee of Privileges and Elections in his last six

arguments in defense of the Alien and Sedition Acts,²⁴⁴ we believe that G.K. Taylor likely collaborated in drafting portions of the Minority Report.

1. *The Eloquent G.K. Taylor*

According to his sole biographer, G.K. Taylor was “the most thoroughly informed man in the [Virginia] house on questions of law; an acute, profound and eloquent lawyer and politician.”²⁴⁵ In law, he gained knowledge and repute²⁴⁶ as a protégé of George Wythe at the College of William and Mary.²⁴⁷ Thereafter, he headed the Petersburg bar and became “a shining member of a constellation of legal minds” in Richmond.²⁴⁸ When G.K. Taylor entered the House of Delegates at the age of twenty-three,²⁴⁹ his oratorical prowess earned him additional acclaim and a leadership role in the Federalist minority.²⁵⁰ Even after half a century, Senator R.M.T. Hunter declared that G.K. Taylor remained virtually unsurpassed in his powers of speech.²⁵¹

In addition to his rhetorical skills, G.K. Taylor had considerable experience drafting and championing important legislation. In his seven terms, as “the gentleman from Prince George,”²⁵² the Virginia House of Delegates frequently called on him to serve on standing committees and

terms. His absence from the House of Delegates in 1794 was probably due to his military service as Lee’s aide-de-camp in the United States’ suppression of the Whiskey Rebellion in western Pennsylvania. BOYD, *supra* note 173, at 226.

²⁴⁴ See VIRGINIA REPORT, *supra* note 64, at 29–38, 122–43 (statement of G.K. Taylor) (Dec. 14 and 21, 1798).

²⁴⁵ LITTLE, *supra* note 241, at 97 (1933).

²⁴⁶ GILMER, *supra* note 242, at 47 (describing G.K. Taylor as “one of the most eminent lawyers of his state”).

²⁴⁷ *Id.* (noting that Wythe had “the honourable distinction to have discovered and patronised” G.K. Taylor). Wythe, Chancellor of William and Mary and a former Speaker of the Virginia House of Delegates, also taught St. George Tucker, Thomas Jefferson, and John Marshall. Marshall, however, only studied four months at William and Mary College before leaving to start his practice in 1780. See SMITH, *DEFINER OF A NATION*, *supra* note 5, at 75, 82 (stating that Marshall entered William and Mary on May 1, 1780, and was admitted to the bar on August 28, 1780).

²⁴⁸ Wyatt, *supra* note 241, at 5–6 (stating that G.K. Taylor distinguished himself as an advocate in criminal law and representative in several real estate transactions).

²⁴⁹ *Id.* at 2, 7 (stating that G.K. Taylor was born March 16, 1769, and elected as a delegate from Prince George County in April 1792).

²⁵⁰ *Id.* at 1; see also *supra* note 243.

²⁵¹ *Genealogical Notes and Queries*, *supra* note 242, at 349 (quoting a memorial address for Henry Clay by Sen. R.M.T. Hunter of Virginia in July 1857 in which “he ranked George Keith Taylor as second only to Patrick Henry as an orator”).

²⁵² See VIRGINIA REPORT, *supra* note 64, at 38, 40.

committees appointed to frame or amend state laws.²⁵³ He also delivered at least one spontaneous floor address.²⁵⁴ In December 1796, his eloquent appeal to drastically revise the state criminal code not only drew tears from his associates,²⁵⁵ but also earned G.K. Taylor the title of “father of penal reform.”²⁵⁶ Once the amendments became law, the House commissioned him to publish a transcript of his address to help win over the public to his “great and radical change.”²⁵⁷ G.K. Taylor’s address increased his reputation for rhetorical flair that survived even during the Alien and Sedition Acts debate, when a Republican delegate caustically complimented his “talent in moving the passions.”²⁵⁸

G.K. Taylor made effective use of his talent once again in December 1798 when he led the minority in responding to the “extravagant and pernicious”²⁵⁹ measures against the Alien and Sedition Acts. When John Taylor introduced the Virginia Resolutions on December 10, 1798,²⁶⁰ G.K. Taylor prepared another set of resolutions within a week that defended federal policies as “wise and liberal.”²⁶¹ He followed each of J. Taylor’s lofty

²⁵³ See, e.g., J. H.D. 1793, *supra* note 64, at 4, 5, 80 (showing that in a single month, G.K. Taylor was assigned to four drafting committees in addition to his appointment to four standing committees).

²⁵⁴ Wyatt, *supra* note 241, at 8.

²⁵⁵ *Id.* at 9.

²⁵⁶ *Id.* at 1; George Keith Taylor, Substance of a Speech Delivered in the House of Delegates of Virginia, on the Bill to Amend the Penal Laws of this Commonwealth (Samuel Pleasants 1796).

²⁵⁷ Taylor, *supra* note 256. This is one of the only published works unquestionably authored by G.K. Taylor along with his two debate speeches in the *Virginia Report* and his two counter-resolves to the Virginia Resolutions in the *Journal of the House of Delegates*. See VIRGINIA REPORT, *supra* note 64, at 29–38, 122–43; J. H.D. 1798, *supra* note 64, at 58–59 (Jan. 4, 1799).

²⁵⁸ VIRGINIA REPORT, *supra* note 64, at 51 (statement of John Pope) (“He then complimented Mr. George K. Taylor upon his talent in moving the passions. He had exercised that talent so effectually a session or two before . . .”).

²⁵⁹ *Id.* at 122 (statement of G.K. Taylor) (Dec. 21, 1798).

²⁶⁰ Koch & Ammon, *supra* note 49, at 160.

²⁶¹ *Proposed by Mr. George Keith Taylor*, N.J. J., Jan. 1, 1799, at 1; see also VIRGINIA REPORT, *supra* note 64, at 82 (statement of John Pope) (“He then proceeded to read the resolutions offered by the other side (meaning those offered by Mr. George K. Taylor), and to comment on the language of them.”). In fact, G.K. Taylor drafted two sets of counter-resolutions during the controversy over the Virginia Resolutions. See *Proposed by Mr. George Keith Taylor*, N.J. J., Jan. 1, 1799, at 1 (publishing the text of G.K. Taylor’s resolutions against the Virginia Resolutions, which were likely presented to the state legislature between December 10 and 19, 1798); J. H.D. 1798, *supra* note 64, at 58–59 (Jan. 4, 1799) (reporting G.K. Taylor’s motion to replace resolutions critical of President Adams’ foreign policy with his own). The latter set of counter-resolutions was

speeches in favor of the Resolutions²⁶² with his own elaborate arguments on the constitutionality of and need for the Acts.²⁶³ When J. Taylor submitted the *Address of the General Assembly* after the adoption of his Resolutions,²⁶⁴ Federalists in the House might have looked to G.K. Taylor to lead their response as he had all along. As time ran out in the session to oppose the Resolutions,²⁶⁵ there is no reason to think the minority would have looked to the habitually late Lee.

While G.K. Taylor's reputation favored his compelling discourse and legal skills, as opposed to constitutional expertise, he also had ready access to Marshall. The two Virginia leaders had met prior to the state legislature in 1794 during a standoff over a privateer ship. G.K. Taylor, then a major in the Virginia militia, had attempted to seize the ship at port for violation of George Washington's Neutrality Proclamation before French sympathizers outnumbered and outgunned him. General Marshall successfully extracted G.K. Taylor and later remarked on his "great and proper exertions" under fire.²⁶⁶ The two met again in the House of Delegates, where they served together on a number of committees, including the committee to amend the state penal code.²⁶⁷

At the time of the Minority Report, Marshall, a recent American hero and local congressional candidate, had been recognized several times over for his constitutional genius and impressive history of defending Federalist policies to the American public. His correspondence reveals that G.K. Taylor frequented the Marshall household in late 1798 or early 1799, and secretly

attached to the publications of the Minority Report in almost all its publications. See *supra* note 70.

²⁶² VIRGINIA REPORT, *supra* note 64, at 24, 111 (statement of John Taylor) (Dec. 13 and 20, 1798).

²⁶³ See *id.* at 29, 122 (statement of G.K. Taylor) (Dec. 14 and 21, 1798).

²⁶⁴ See MD. HERALD & ELIZABETH-TOWN ADVERTISER, Feb. 7, 1799, at 3 ("An Address to the people of Virginia, was proposed in the House of Representatives of that State, on Tuesday, the 15th ult. by John Taylor, Esqr. This address which is elegantly, ingeniously, and eloquently written, is designed to accompany the resolutions respecting the Alien and Sedition laws . . ."); see also 17 THE PAPERS OF JAMES MADISON 201 (David B. Mattern ed., 1991).

²⁶⁵ The 1798–99 session of the Virginia House of Delegates ended on January 26, 1799. See J. H.D. 1798, *supra* note 64, at 103–04 (Jan. 26, 1799) (ordering the House adjourned until March 31, 1799).

²⁶⁶ Wyatt, *supra* note 241, at 4.

²⁶⁷ See J. H.D. 1795, *supra* note 64, at 14 (Nov. 26, 1795) (reporting that, besides G.K. Taylor and Marshall, the penal reform committee included John Taylor, who later presented the Virginia Resolutions, and Thomas Evans, who later published the Minority Report).

pursued Marshall's youngest sister, Jane.²⁶⁸ Courtship, however, was not the overt reason for G.K. Taylor's visits since Marshall only suspected the couple's attachment in April of 1799.²⁶⁹ G.K. Taylor must have pursued some other objective that required his regular presence at Marshall's home. Thus, at a time when the actions of the House of Delegates presented the central threat to the Federalist's party and principles, the two leaders of the Virginia faction met together at the opportune time to work on the minority's reply to the Majority Address. The significance and extent of these meetings created such a rapport between the two men that, despite the clandestine romance with his sister, Marshall declared his future brother-in-law "a young gentleman of talents & integrity for whom I profess & feel a real friendship. . . . I have a sincere & real affection & esteem for Major Taylor . . ."²⁷⁰ This newfound respect and fraternal bond would also lead Marshall to assist in G.K. Taylor's nomination to a federal judgeship two years later.

2. *Taylor's Speeches and the Minority Report: A Textual Comparison*

When Beveridge published his conclusions on Marshall's authorship of the Minority Report, he noticed that the Report's "overabundance of verbiage" and "over-elaborate" style differed from the usual "force and clearness" of the future Chief Justice.²⁷¹ We agree with Beveridge that portions of the Report contain flourishes not usually present in the "lean prose"²⁷² of Marshall's later judicial opinions, although Marshall did on occasion exhibit his own ability to engage in gilded rhetoric.²⁷³ However, the emotional language appears concentrated in the first part of the Report, including the opening statement and defense of the armed forces.²⁷⁴ The constitutional arguments, on the other hand, are highly structured, concise, and almost completely dispassionate. For these reasons, we believe that G.K. Taylor possibly wrote (or influenced the writing of) the initial portions of the Minority Report.

²⁶⁸ Letter from John Marshall to James Markham Marshall (Apr. 3, 1799) in 4 MARSHALL PAPERS, *supra* note 6, at 9, 11.

²⁶⁹ *Id.* ("I understand that my sister Jane while here was addressed by Major Taylor & that his addresses were encouraged by her. I am not by any means certain of the fact nor did I suspect it until we had separated the night preceding her departure . . .").

²⁷⁰ *Id.*

²⁷¹ 2 BEVERIDGE, *supra* note 4, at 405.

²⁷² SMITH, DEFINER OF A NATION, *supra* note 5, at 601 n.79.

²⁷³ See e.g., John Marshall, To Citizens of Richmond (Aug. 14, 1798), reprinted in 3 MARSHALL PAPERS, *supra* note 15, at 482–84.

²⁷⁴ See MINORITY REPORT, *supra* note 70, at 2–5.

G.K. Taylor's likely participation in drafting the Report gains further support from a textual comparison of his speeches and the Report itself. Like the Minority Report, G.K. Taylor's debate speeches present an array of arguments in favor of the Alien and Sedition Acts based on the Constitution, common law, state statutes, and the threat of international hostilities.²⁷⁵ Similar arguments are repeated in the Report, though generally with more organized analyses and less melodramatic flairs. It is possible that G.K. Taylor used the month between the debate and the introduction of the Minority Report to refine his arguments and, with steady collaboration with Marshall, draft a superior vindication. On the other hand, if Marshall was the actual draftsman, G.K. Taylor also had time to transcribe his debate speeches for Marshall, as he did for the House of Delegates two years before.²⁷⁶ Whatever the case, there are striking similarities between the language and reasoning of G.K. Taylor's debate speeches and certain passages in the Minority Report.

In his debate speech, for example, G.K. Taylor appealed to the people's abiding love for Washington to support the creation of a professional army and defuse the fear of a mercenary force: "Of whom was that army composed? Of our fathers and our brethren. Of whom will the present army be composed? Of our brethren and our sons. Who led that army to battle and to conquest? WASHINGTON. Who will conduct this? The same great and good WASHINGTON."²⁷⁷

A month later, the Minority Report's own brief defense of the army closely paralleled Taylor's appeal, including its fiery prose and pointed interrogatories: "Can that army be called mercenary, which is composed of our brothers and our sons, levied by law, paid by law, and embodied to defend their and our common rights? Would your Washington lead a mercenary army? Is he not again your general?"²⁷⁸

Like the Minority Report, G.K. Taylor's vindication of the Alien and Sedition Acts had some arguments in common with other Federalist defenses at the time.²⁷⁹ In taking a broad approach to the construction of federal

²⁷⁵ See VIRGINIA REPORT, *supra* note 64, at 29–38, 122–43 (statement of G.K. Taylor) (Dec. 14 and 21, 1798).

²⁷⁶ See *supra* note 257 and accompanying text.

²⁷⁷ VIRGINIA REPORT, *supra* note 64, at 129 (statement of G.K. Taylor) (Dec. 21, 1798) (emphasis in original).

²⁷⁸ See MINORITY REPORT, *supra* note 70, at 5.

²⁷⁹ For example, both an anonymous address by a Virginia citizen and Judge Alexander Addison's grand jury charge declared that removing dangerous aliens was a necessary preventative measure to protect the states. See AN ADDRESS TO THE PEOPLE OF VIRGINIA, RESPECTING THE ALIEN & SEDITION LAWS, BY A CITIZEN OF THE STATE (Augustine Davis ed., 1798); ALEXANDER ADDISON, ON THE ALIEN ACT: A CHARGE TO THE GRAND JURIES OF THE COUNTY COURTS OF THE FIFTH CIRCUIT OF THE STATE OF

power, he expressed arguments going back to Hamilton's original defense of the National Bank.²⁸⁰ Occasionally, however, G.K. Taylor's speeches and the Minority Report are so similar that it raises a substantial likelihood that Taylor either authored portions of the Report, or provided the drafter with his speeches. For example, on the last day of debate in the House of Delegates, G.K. Taylor argued that under Article I, § 8, Congress had power to punish acts tending to incite insurrection:

[The Necessary and Proper Clause] authorizes the government to punish acts of resistance to its measures. *Would it not be strange*, if, when it authorizes them to punish acts of resistance, it should prevent them from punishing acts tending to introduce resistance? *That the government must look on tame and passive while the mischief is preparing, and be incapable of action until that mischief has ripened into effect, when its actions and operations may perhaps be unavailing. That it shall be fully able to suppress and punish actual insurrection, but shall be incapable of preventing it. This would surely be absurd.*²⁸¹

The Minority Report, while varying the internal order of the arguments, strikingly resembles G.K. Taylor's language and analysis:

If [the clause] authorizes the punishment of actual resistance, does it not also authorize the punishment of those acts which are criminal in themselves, and which obviously lead to and prepare resistance? *Would it not be strange*, if . . . a clause like that which has been cited should be so construed as to permit the passage of laws punishing open resistance, and yet to forbid the passage of laws punishing acts which constitute the germ from which resistance springs? *That the government must look on*, and see preparations for resistance which it shall be unable to control, until they shall break out in open force? This would be an unreasonable and improvident construction of the article under consideration.²⁸²

Similarly, G.K. Taylor and the Minority Report both stress the same specific wording of the First Amendment to prove that Congress maintained some degree of control over freedom of speech. Here is Taylor's argument:

PENNSYLVANIA (John Colerick ed., 1799). Charles Evans, a modern scholar, attributed the anonymous address to Thomas Evans, a Congressman from Virginia at the time. See 12 EVANS, *supra* note 194, at 65.

²⁸⁰ See Alexander Hamilton, *Opinion on the Constitutionality of the Bank* (Feb. 23, 1791), reprinted in 3 THE FOUNDERS' CONSTITUTION, *supra* note 7, at 247–50.

²⁸¹ VIRGINIA REPORT, *supra* note 64, at 134 (statement of G.K. Taylor) (Dec. 21, 1798) (emphasis added).

²⁸² MINORITY REPORT, *supra* note 70, at 11 (emphasis added).

The difference of the terms used in this amendment, Mr. *Taylor* said, was remarkable. "Congress shall make no law *respecting* an establishment of religion, or prohibiting the free exercise thereof." . . . But further, they "shall make no law *abridging* the freedom of speech, or of the press," not "*respecting* the freedom of speech, or of the press." When religion is concerned, Congress shall make no law *respecting* the subject: when the freedom of the press is concerned, Congress shall make no law *abridging* its freedom; but they may make any laws on the subject which do not abridge its freedom.²⁸³

Compare this with the corresponding argument in the Minority Report:

A remarkable diversity of expression is not used, unless it be designed to manifest a difference of intention. Congress is prohibited from making any law *respecting* a religious establishment, but not from making any law *respecting* the press. When the power of Congress relative to the press is to be limited, the word *respecting* is dropt, and Congress is only restrained from passing any law *abridging* its liberty

All *abridgment* of the freedom of the press is forbidden, but it is only an *abridgment* of that freedom which is forbidden.²⁸⁴

These are remarkably close renditions, even considering other Federalist works also employing this argument to defend the Acts.²⁸⁵ Presumably, the author of the Report would have obtained many of these resources at hand, so it is inevitable that passages from prior speeches and pamphlets appear in the Minority Report. For that reason, we do not rely solely on linguistic similarities to establish authorship. Nevertheless, the closeness of these passages (among others) suggests that G.K. Taylor's speeches, at the very least, influenced the final content of the Report and that G.K. Taylor may have collaborated with whoever wrote the Report.

A few inconsistencies, however, call into doubt the likelihood of G.K. Taylor's sole authorship of the Minority Report. For example, Taylor had no reason to submit the Report anonymously, given his prominent role in the debates.²⁸⁶ Virginia Federalists also had no reason to conceal this contribution, while Republicans like Callender would have gladly smeared him along with other defenders of Federalist policies. There also is a question

²⁸³ VIRGINIA REPORT, *supra* note 64, at 136 (statement of G.K. Taylor) (Dec. 21, 1798) (emphasis in the original).

²⁸⁴ MINORITY REPORT, *supra* note 70, at 12–13 (emphasis added)

²⁸⁵ See CHARLES LEE, DEFENSE OF THE ALIEN AND SEDITION LAWS 25 (1798) (stressing the limited term "abridging" in the First Amendment).

²⁸⁶ On the other hand, if he merely collaborated with Marshall, then he would have reason to keep the entire project a secret in order to protect his brother-in-law.

of expertise: given that Taylor's reputation involved public speaking, not constitutional argument, it seems to us unlikely that he would have proceeded without the help of Marshall. Indeed, it seems most unlikely that G.K. Taylor would have failed to consult with Marshall, his close friend and renowned constitutional expert, on this significant threat to the union and party beliefs. The fact that we know G.K. Taylor regularly visited Marshall at around this time makes a solo effort by Taylor even more unlikely. Finally, although whoever wrote the Report could have accessed all previously published speeches and pamphlets, they would not have had access to the mind of Marshall. And it is because the Report reflects much that is uniquely associated with the great Chief Justice, that we conclude that Taylor was a likely collaborator and not the sole author of the Minority Report.

C. *The Case for John Marshall*

"It is their province, and their duty [as judges of the United States] to construe the constitution and the law."~ Minority Report (1799)

"It is emphatically the province and duty of the judicial department to say what the law is."~ Marbury v. Madison (1803)

When he first read the Minority Report from his office in Berlin, American Minister John Quincy Adams seriously considered attributing it to Marshall despite a personal bias against the moderate Virginia Federalist.²⁸⁷ At the Hague, the same thought struck fellow minister William Vans Murray at almost the exact same time and without any prompting.²⁸⁸ In Philadelphia, Theodore Sedgwick reported to Hamilton before the close of the Senate session that rumors named Marshall as author of the Report.²⁸⁹ A month later, he wrote to Rufus King in London from his home in Boston that he was *convinced* Marshall had penned it.²⁹⁰ Finally, in Virginia, the Republican

²⁸⁷ See Letter from John Quincy Adams, Minister to Prussia, United States, to Williams Vans Murray, Minister to Netherlands, United States (Apr. 13, 1799) (on file with the Mass. Hist. Soc'y).

²⁸⁸ See Letter from Williams Vans Murray, Minister to Netherlands, United States, to John Quincy Adams, Minister to Prussia, United States (Apr. 5, 1799), in Letters of William Vans Murray to John Quincy Adams, 1797–1803, ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1912, at 535–36 (Worthington C. Ford ed., 1913).

²⁸⁹ See Letter from Theodore Sedgwick, Sen., United States, to Alexander Hamilton (Feb. 7, 1799), in 22 HAMILTON PAPERS, *supra* note 11, at 470.

²⁹⁰ See Letter from Theodore Sedgwick, Sen., United States, to Rufus King, Minister to Britain, United States (Mar. 20, 1799), in 2 THE LIFE AND CORRESPONDENCE OF RUFUS KING 581 (Charles R. King ed., 1895).

firebrand James Callender expressed his own accord with the people who recognized Marshall's distinctive hand in the Report.²⁹¹

Despite their knowledge that he was not even a member of the Virginia Assembly, Marshall and no one else came to mind when they considered the likely author of the Report. Only J.Q. Adams decided against Marshall's authorship, but he also admitted that his dislike of the moderate Federalist affected his conclusion.²⁹² Ongoing discovery of private papers and diaries has uncovered no break in this uniform attribution: no name other than Marshall's is linked to the Minority Report.

In this section, we consider whether the historical evidence supports or contradicts the testimony of Sedgwick, Vans Murray, and Callender. First, we address whether Marshall had the motive, opportunity, and ability to draft the Minority Report in almost complete anonymity. Second, we examine whether the substance of the Report comports or conflicts with Marshall's known views. In the end, we agree that the evidence strongly supports Beveridge's original conclusion. Marshall had close connections with the leaders of the minority, and a well-known history of defending federal power. His friendship with Washington revealed a mutual concern over the divisive rhetoric of the Republicans, and the majority's attempts to ruin his congressional campaign gave him a personal incentive to respond to their address. The constitutional arguments in the Report do not conflict with any known writing by Marshall, and instead echo his known views on freedom of speech, the common law, and proper construction of federal power. Although Marshall never claimed authorship, he had good reason to keep his role secret. We also have compelling evidence that Marshall and his life-long publisher, Bushrod Washington—the man Marshall would have relied upon to publish the Minority Report—purposefully destroyed their correspondence. Finally, the very words in portions of the Report stand as a compelling link to John Marshall. Although some of the arguments in the Report repeat those made by a number of Federalists, others are unique and bear a remarkable resemblance to the later judicial opinions of the great Chief Justice. In sum, even if not conclusive, the evidence strongly supports

²⁹¹ See JAMES CALLENDER, *THE PROSPECT BEFORE US* 127 (1800) (“[Marshall] is one of the reputed authors of the counter address; and the hypocritical canting that so strongly marks it, corresponds very well with the dispatches of X.Y. & Z.”).

²⁹² See Letter from John Quincy Adams, Minister to Prussia, United States, to Williams Vans Murray, Minister to Netherlands, United States (Apr. 13, 1799) (on file with the Mass. Hist. Soc'y) (“I also confess I had rather the paper should have been the work of another than of him. For though I have a very high opinion of his talents, since his declaration against the two Laws in question, I must set him down as a man, who will *flinch* at the moment of danger, & indeed, my Dear friend, the men we want, are such as will not flinch.”).

retaining John Marshall's name as at least a potential author of the Minority Report.

1. *Marshall's Motives and Opportunity*

In January 1799, Marshall lived in Richmond, Virginia, with his family and visiting sister, Jane. At the time, he was a veteran of the state House of Delegates, having served a number of terms in the House of Delegates, often with his close friends and current delegates, George Keith Taylor and Henry Lee. Marshall had also distinguished himself nationally through his constitutional defenses of the Neutrality Proclamation and Jay Treaty.²⁹³ His reputation finally reached American hero status in 1798 for his well-publicized defense of the country's honor as an envoy extraordinary to France. Consequently, Virginia Federalists of the 1799 Assembly had in their midst a man practically revered for his persuasive writing and constitutional defenses of federal power.²⁹⁴ Given the fellowship between Marshall and the

²⁹³ According to Beveridge, "[t]he defense of the constitutional power of the President and Senate to make treaties was placed solely on Marshall's shoulders." 2 BEVERIDGE, *supra* note 4, at 134. Marshall's persuasive constitutional defense of the Treaty won over a skeptical assembly and won Marshall acclaim beyond the borders of Virginia. Newspapers carried accounts of Marshall's speech and, when he traveled to Philadelphia to argue *Ware v. Hyton*, Federalists greeted him "with marked attention and favour." HOBSON, THE GREAT CHIEF JUSTICE, *supra* note 5, at 6 (quoting JOHN MARSHALL, AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL 19 (John Stokes Adams ed., 1937)). Within days of joining Congress in December of 1799, Marshall was chosen to draft a report representing the answer of the House to an address by President Adams. See 2 BEVERIDGE, *supra* note 4, at 433. The next year, Marshall was called upon to defend Adams' decision to extradite an American to Great Britain in compliance with the Jay Treaty. 4 MARSHALL PAPERS, *supra* note 6, at 82-109 (Mar. 7, 1800). The result was what his biographer Charles Hobson calls "the greatest speech (apart from his judicial opinions) of his career." HOBSON, THE GREAT CHIEF JUSTICE, *supra* note 5, at 7. In sum, both before and after January of 1799, Federalists knew who could be counted on to provide a convincing constitutional argument in favor of federal power. That January, in Richmond, Virginia, no other Federalist came close to equaling Marshall's reputation and experience in such matters. Given that the member of the Virginia assembly who had taken the lead in defending the Acts was visiting the Marshall household regularly that winter, it is unlikely that Marshall failed to offer his assistance, or that the offer was declined.

²⁹⁴ According to Marshall in his autobiographical sketch regarding his role in defending the constitutionality of the Jay Treaty: "I was fully prepared not only on the words of the constitution and the universal practice of nations, but to show . . . that Mr. Jefferson and the whole delegation from Virginia in Congress . . . had manifested unequivocally the opinion that a commercial treaty was constitutional." SMITH, DEFINER OF A NATION, *supra* note 5, at 180. By the end, as Marshall reports, "[t]here was scarcely an intelligent man in the house who did not yield his opinion on the constitutional question." *Id.* at 181 (quoting John Marshall, To Citizens of Richmond (Aug. 14, 1798),

two leaders of the Federalist minority, G.K. Taylor and Henry Lee, and G.K. Taylor's frequent visits to his house, Marshall may not have been able to escape lending a hand with the Minority Report. Nor would he have wanted to.

Marshall had both personal and political reasons for doing all he could to assist the fifty-eight delegates in the state legislature. In September 1798, George Washington convinced Marshall to enter the race for the United States House of Representatives.²⁹⁵ Despite his personal reservations, Marshall shared Washington's growing fear that the rhetoric of the Republicans threatened the union itself.²⁹⁶ The Republican assaults on the constitutionality of the Alien and Sedition Acts were a special concern since they threatened to stir up animosity towards the national government just as the country seemed on the verge of war with France. Marshall had felt compelled to defend the national government in the past against allegations of unconstitutional behavior, and the events in the winter of 1798–99 convinced him that similar efforts were once again needed.

On December 30, 1798, Washington sent Marshall a widely published jury charge by Judge Alexander Addison.²⁹⁷ Addison's charge contained an elaborate defense of the constitutionality of the Acts, which Washington believed was worth passing along even if it did not state any new arguments. Marshall wrote back a week later, praising Addison's arguments, and promising to forward the charge to Bushrod Washington with the hope that it "as well as some other publications on the same subject could be more generally read."²⁹⁸ To Marshall, the problem with the Acts was not their unconstitutionality, but the opportunity they provided to the opposition, for "an act operating on the press in any manner, affords to its opposers

supra note 273). According to Justice James Iredell, who witnessed the debates "there were few members [of the House] who were not convinced by Mr. Marshall's argument as to [the Treaty] being constitutional, which few members thought it was before the debate began." GRIFFITH J. MCREE, 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 456 (Peter Smith 1949) (1857)). According to Marshall, his triumphant constitutional defense of the Executive became well known and he was "greeted by an outpouring of enthusiasm by Federalists in Congress" when he traveled to Philadelphia to argue *Ware v. Hylton*. SMITH, DEFINER OF A NATION, *supra* note 5, at 181.

²⁹⁵ SIMON, *supra* note 54, at 68.

²⁹⁶ Letter from John Marshall to George Washington (Jan. 8, 1799), *reprinted in* 4 MARSHALL PAPERS, *supra* note 6, at 3.

²⁹⁷ See Letter from George Washington to John Marshall (Dec. 30, 1798) *reprinted in* 3 MARSHALL PAPERS, *supra* note 15, at 530–31. Alexander Addison was a Pennsylvania Judge, and his jury charge was published as a pamphlet. Addison, *supra* note 101. The Republican-dominated Pennsylvania legislature later impeached Addison for his role in defending the Federalist national government.

²⁹⁸ Letter from John Marshall to George Washington (Jan. 8, 1799), *reprinted in* 4 MARSHALL PAPERS, *supra* note 6, at 3–4.

arguments which so captivate the public ear, which so mislead the public mind that the efforts of reason to correct false impressions will often fail of success.”²⁹⁹

In this one short passage, Marshall expressed support for a constitutional defense of the Alien and Sedition Acts, and clarified that his own objections involved the Sedition Act’s inevitable generation of *false* accusations. Marshall further informed Washington that his close scrutiny of the debate in the House of Delegates convinced him that “[i]t is more than ever essential to make great exertions at the next election, & I am persuaded that by making [them] we obtain a legislature if not [federal], so divided as to be moderate.”³⁰⁰

A week after Marshall’s letter, the Virginia majority submitted their address to promote the newly adopted Virginia Resolutions. In an obvious political move during a close congressional election, the Majority Address quoted Marshall’s defense of free speech from his memorial to Talleyrand. In order to ensure readers got the point, Marshall’s quote was presented in special type.³⁰¹

This move was particularly effective given Marshall’s published letter to “A Freeholder” in which he expressed personal opposition to the policy of the Alien and Sedition Acts, but declined to remark on their constitutionality.³⁰² His attempt to straddle middle ground earned the ridicule of Republicans³⁰³ and the scorn of New England High Federalists, who viewed even modest criticism as political betrayal.³⁰⁴ Marshall, of course, could not concern himself with Northern reactions to his public letter since he sought to secure the swing votes of moderate Virginians. But because Marshall left the constitutional question unaddressed, Virginia Republicans could exploit his memorial to Talleyrand in their own defense of the Virginia Resolutions, while simultaneously implying that Marshall was a coward and a hypocrite. Not surprisingly, the Republicans published and circulated their

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 4.

³⁰¹ See 5 THE FOUNDERS’ CONSTITUTION, *supra* note 7, at 140.

³⁰² BAKER, *supra* note 22, at 307.

³⁰³ See *id.* (“I defy all the powers of your mind, I defy the collected wisdom . . . to justify your conduct in concealing your opinions upon a momentous constitutional question. Your silence is a confession of guilt . . .”) (quoting JOHN J. THOMSON, THE LETTERS OF CURTIUS (1804)).

³⁰⁴ See Letter from Fisher Ames to Christopher Gore (Dec. 18, 1798), in 2 WORKS OF FISHER AMES 1301, 1302–03 (W.B. Allen ed., 1983) (1854) (“[Marshall’s] character is done for . . . [he is] the meanest of cowards, the falsest of hypocrites.”); see also 2 BEVERIDGE, *supra* note 4, at 391 (stating that Marshall “had ‘degraded himself by a mean & paltry electioneering trick’”) (quoting Letter from Theodore Sedgwick to Timothy Pickering (Oct. 23, 1798)).

Majority Address (with Marshall's quote) as a campaign platform in 1798.³⁰⁵ Thus, in the early weeks of January 1799, Marshall's patriotic desire to counter dangerous Republican rhetoric suddenly dovetailed with a need to respond to a personal attack: If the Alien and Sedition Acts violated freedom of speech, why then had Marshall declined to say so in his letter to Freeholder? On the other hand, if Marshall believed the Acts were constitutional, how could this be squared with his famous celebration of freedom of speech in his Letter to Talleyrand?

For his part, Marshall believed the Acts constitutional, but needlessly controversial. Defending the Acts as consistent with the First Amendment, however, would doom his chances for election in a state decidedly critical of the Acts. Nor would falling on his sword and openly defending the Acts be an honorable choice. Washington himself had pleaded with Marshall to run for office *and win* for the good of the country. In his letters to Washington, it is clear that Marshall shared Washington's views of what was at stake and the need for a "Federal Congress."³⁰⁶

There was, however, another option besides a public defense. A persuasive constitutional defense of the Alien and Sedition Acts would counter Republican accusations of Marshall's hypocrisy, and, if the defense could not be traced to the hand of Marshall, he would avoid the otherwise inevitable punishment at the polls. Marshall had already embraced anonymous constitutional defenses of the federal government on prior occasions³⁰⁷ and would do so again in later decades.³⁰⁸ Thus, writing the Minority Report would not only fit Marshall's *modus operandi*, but also accomplish compelling personal and patriotic goals.

Marshall also had the opportunity to draft the Minority Report. His home in Richmond allowed him to remain in close contact with both the leaders of the Virginia minority and local publishers, particularly Augustine Davis who

³⁰⁵ See 2 BEVERIDGE, *supra* note 4, at 400–01.

³⁰⁶ Virginian Federalists, if they knew about Marshall's authorship, would have remained circumspect, knowing Marshall's delicate political situation. They certainly would not have mentioned Marshall's role in the notoriously non-private mail. It was only outside Virginia, particularly in New England, where firebrand Federalists had a tin-ear for Virginia politics (or simply did not care), that Federalists openly speculated about Marshall's role. Virginian *Republicans*, of course, had no compunction about linking Marshall with the Report, and men like James Callender did so with gusto. See *infra* note 374 and accompanying text. Whether Republicans like Madison and Jefferson speculated about Marshall's role at the time, we will never know—they refused to write letters discussing politics at this time due to the "infidelities of the mail." See *infra* note 394 and accompanying text.

³⁰⁷ See *supra* note 51 and accompanying text.

³⁰⁸ See GERALD GUNTHER, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (1969) (reproducing Marshall's anonymous essays defending his opinion).

had published Marshall's anonymous works in the past.³⁰⁹ To the extent that publishing the Report required logistical assistance, Marshall could turn to Bushrod Washington, who would later arrange the publication of Marshall's *Life of Washington* in 1804 and the anonymous publication of Marshall's essays defending *McCulloch v. Maryland* in 1819.³¹⁰ Marshall's letters indicate, unsurprisingly, that he took occasional trips out of town that winter, but we do not know when he left or how long he was absent.³¹¹ No evidence, for example, suggests that his campaign responsibilities would have prevented his drafting a defense of the Alien and Sedition Acts, particularly if Marshall and Bushrod Washington worked on such a defense for months as Washington's letters seem to indicate.

In sum, we know that Marshall had more skill and experience in framing a persuasive constitutional defense of federal power than any other Virginia

³⁰⁹ Augustine Davis, editor of the *Virginia Gazette, and General Advertiser* in Richmond, published Marshall's earlier Aristides and Grachus essays. See, e.g., 2 THE PAPERS OF JOHN MARSHALL 201, 221 (Charles Cullen & Herbert Johnson eds., 1977).

³¹⁰ Custer, *supra* note 1, at 43.

³¹¹ Charles Hobson, the editor of *The Papers of John Marshall*, argues that Marshall was out of town "at least part of the time" when the Report was being drafted. See Hobson, *Editorial Note, supra* note 16, at 521. In fact, the record appears to prove just the opposite. On January 8, 1799, weeks before Henry Lee submitted the Minority Report, Marshall wrote to George Washington from Richmond. See 4 MARSHALL PAPERS, *supra* note 6, at 3. The next letter we know about from Marshall was to Thomas Posey on January 30, 1799, where he tells Posey:

I have to apologize for not having given an earlier answer to your letter by Mr. Dandridge. The truth is that its delivery was postponed for a considerable time first by my absence & afterwards by his attendance on a dying & now a dead brother. Since it was delivered I have been so occupied as to let two or three posts slip me.

Id. at 5 (spelling in original). In his new editorial note, Charles Hobson assumes Dandridge attempted to deliver Posey's letter after January 8, and Marshall was thus absent between then and January 30—the period when the Minority Report was being drafted. See Hobson, *Editorial Note, supra* note 16, at 521. Putting aside the possibility that Marshall was working on a defense of the Sedition Act before January 8, facts regarding postal delivery at the time make it more likely that Marshall had received the letter by January 8, and was occupied with his campaign and the Minority Report. In the 1790s, with few exceptions (Richmond not among them) the mail was delivered on a monthly, bi-monthly, or weekly basis, depending on the route. See Robert D. Harris, Jr., *The Three Postal Networks of the United States in the 1830s*, 2 BUS. & ECON. HIST. ONLINE (2004), available at <http://www.thebhc.org/publications/BEHonline/2004/Harris.pdf>. Even assuming the Richmond mail was carried once a week, this would mean that Marshall was in Richmond for two to three weeks before responding to Posey's letter on January 30. If Marshall was drafting the Minority Report in the middle weeks of January and then arranging for its wider publication in early February, it makes perfect sense for him to say, on January 30, "I have been so occupied as to let two or three posts slip me." 4 MARSHALL PAPERS, *supra* note 6, at 5.

statesman. We also know that he had strong personal and political reasons to respond to the Majority Address. Although Marshall never claimed authorship, he had compelling reasons to keep his involvement secret. Finally, he had immediate access to the leaders of the Federalist minority and local publishers and he was no more (and almost certainly much less) distracted by campaign duties than Henry Lee. We have thus established motive and opportunity. Can we find Marshall's fingerprints on the key piece of evidence?

2. *Comparing the Views of John Marshall and the Minority Report*

A comparison of the substance of the Report and the views of Marshall reveal a correlation so close as to, in some cases, border on quotation. Although we do not believe the similarities necessarily reveal a common author,³¹² they do show that Marshall's later work echoed the form and substance of the Minority Report. It is possible that some of Marshall's most celebrated opinions were borrowed from an earlier unsung hero. However, that unsung hero could have been Marshall himself.

a. *Constitutional Construction*

Readers with even a passing familiarity with cases like *McCulloch v. Maryland* and *Gibbons v. Ogden* will have already recognized similarities between the ideas of the Minority Report and the later judicial opinions of Chief Justice Marshall. In particular, the Report's liberal approach to constitutional interpretation and its broad reading of federal power under the Necessary and Proper Clause closely track his views articulated in *McCulloch* and *Gibbons*. Scholars have long noticed the similarities we briefly sketch below.

The first great debate over constitutional interpretation involved whether an undifferentiated national people brought the document into being or separate and independent gatherings of the people in the several states. This distinction was crucial to establish the ground rules of interpretation. If the Constitution was adopted as a compact between the several peoples of the states, then it must be interpreted in a manner preserving the independent sovereignty of those people, because they could not be presumed to have

³¹² We do not, for example, claim that even the most striking similarities between the Minority Report and Marshall's later opinions establish a presumption of authorship. We do believe, however, that such similarities more than adequately refute any contention that there is any conflict between the Report and the opinions of John Marshall. Instead, they establish an exceedingly close agreement.

bargained away their own existence.³¹³ On the other hand, if a single national people who just happened to live in several states created the Constitution, then the document must be interpreted in a manner best serving the needs of that national people regardless of the impact on the states.³¹⁴

Both the Minority Report and the later opinions of Chief Justice Marshall declare that the Constitution originated from a single people.³¹⁵ Nationalists like Alexander Hamilton had argued that, because the Constitution was adopted by the people of the United States, it should be broadly interpreted for the benefit of the nation as a whole. Marshall, however, linked his theory of interpretation to the very *nature* of a constitution:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code . . . Its nature, therefore, requires, that only its great outlines should be marked . . . In considering this question, then, we must never forget that it is *a constitution* we are expounding.³¹⁶

The author of the Minority Report likewise links his theory of interpretation to the nature of the document: “It is necessary, in pursuing this inquiry, 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 a subject, and not a law which is capable of descending to every minute detail.”³¹⁷

The Report contains a number of nationalist arguments common to Federalists at the time, and reflected in later Marshall opinions.³¹⁸ However, unlike other Federalists who simply called for liberal construction of the Necessary and Proper Clause, the author of the Minority Report argued that the text and structure of the Constitution *itself* suggests that federal power requires broad construction. The methods employed by the author are unique among other nationalist arguments, and uniquely associated with the later

³¹³ For a discussion of compact theory and its role in contemporary constitutional debate, see G. EDWARD WHITE, 3–4, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 488 (Paul A. Freund & Stanley N. Katz eds., 1988).

³¹⁴ For a detailed discussion on this distinction, see 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 307–73 (Melville M. Bigelow ed., William S. Hein & Co., Inc. 1994) (1891).

³¹⁵ See *MINORITY REPORT*, *supra* note 70, at 6; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

³¹⁶ *McCulloch*, 17 U.S. (4 Wheat.) at 407.

³¹⁷ *MINORITY REPORT*, *supra* note 70, at 7.

³¹⁸ An obvious example, the broad interpretation of the Necessary and Proper Clause, can be found in the speeches of Alexander Hamilton, George Keith Taylor, and Marshall’s opinion in *McCulloch v. Maryland*.

opinions of Marshall. Consider the author's treatment of the Tenth Amendment:

It would be difficult too to assign a reason for omitting, in the 1[0]th amendment to our constitution, which is evidently copied from the [second] article of the ancient confederation, the very material word *expressly*. That article of the ancient confederation, and the amendment of our constitution, were designed as a plain and explicit admission of the principle, that the powers not delegated are retained. In the confederation all powers not *expressly* delegated, are retained; but in the amendment this very operative word is wisely omitted.³¹⁹

This audacious argument flips the Tenth Amendment from a provision preserving the reserved powers of the states to one calling for a broad construction of federal power. It was a move Marshall would famously use in *McCulloch*:

Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments.³²⁰

³¹⁹ MINORITY REPORT, *supra* note 70, at 7. The original text follows an early convention and refers to the Tenth as the "12th" Amendment.

³²⁰ *McCulloch*, 17 U.S. (4 Wheat.) at 406–07. The connection between these two passages is further strengthened by comparing the arguments raised by counsel in *McCulloch*. William Pinckney specifically mentioned the Tenth Amendment, but stressed the fact that proposals which include the word "expressly" had been rejected. *See id.* at 384 (*Pinckney*, for the plaintiff in error).

The reservation in the Tenth amendment to the Constitution, of "powers not delegated to the United States," is not confined to powers not *expressly* delegated. Such an amendment was indeed proposed; but it was perceived that it would strip the government of some of its most essential powers, and it was rejected.

In his opinion, Marshall ignores Pinckney's point about proposed amendments and uses, instead, the argument from the Minority Report which stresses the alteration from the Articles of Confederation. It is surprising that scholars have missed the obvious similarities between these two passages from *McCulloch* and the Minority Report. This may be due to the fact that the most accessible collection of materials which contain the Minority Report, *The Founders' Constitution*, contains an abridged version that leaves

In a similar “turnabout” fashion, the author of the Minority Report uses *restrictions* on federal power as themselves indicating the *prior existence* of federal power. The First Amendment thus becomes an argument in favor of federal power over the press:

The [First] amendment, which declares that Congress shall make no law abridging the liberty of the press, is a general construction made by all America on the original instrument, admitting its application to the subject: It would have been certainly unnecessary thus to have modified the legislative powers of Congress concerning the press, if the power itself does not exist.³²¹

James Madison had warned that adding a Bill of Rights might be read to infer otherwise broad federal power, and hoped the Ninth Amendment would prevent such a construction.³²² The author of the Minority Report ignores the Ninth, however, as would Chief Justice Marshall in *McCulloch*. There, Marshall cited the rights listed in Article I, Section 9 as implying otherwise broad (and unlimited) delegations of federal power:

" [The Constitution's] nature, therefore, requires, that only . . . its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced?³²³

As far as we know, in the period following the adoption of the Bill of Rights,³²⁴ the only place you can find the argument that “enumerated rights infer otherwise unlimited federal power” is in the Minority Report and the opinions of Chief Justice John Marshall.³²⁵

out this particular passage regarding the Tenth Amendment. See *Report of the Minority*, *supra* note 7, at 136.

³²¹ MINORITY REPORT, *supra* note 70, at 12.

³²² See Madison, *supra* note 112.

³²³ *McCulloch*, 17 U.S. (4 Wheat.) at 407.

³²⁴ The Founders actually intended the Bill of Rights to foreclose such an argument. See Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004).

³²⁵ See *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Brown v. Maryland*, 25 U.S. 419 (1827).

b. *The Constitutionality of the Alien and Sedition Acts*

Despite the obvious similarities between the Report and the work of John Marshall, some Marshall biographers suggest that various aspects of the Minority Report are inconsistent with Marshall's views on the Alien and Sedition Acts, particularly regarding freedom of speech and press, and the common law.

i. *Marshall's Criticism of the Acts*

Marshall's only public statement regarding the Alien and Sedition Acts is contained in a letter he published in the *Virginia Herald* entitled "To a Freeholder."³²⁶ His letter purported to respond to a previously published letter by an anonymous citizen, which posed a series of questions to the congressional candidate.³²⁷ In fact, both letters were almost certainly a political setup. The initial letter by "Freeholder" consisted of softball questions conveniently drafted in a manner that allowed Marshall to avoid difficult issues while maximizing his political strengths. Historians have concluded that Marshall probably drafted the Freeholder Letter himself,³²⁸ as did some of Marshall's contemporaries.³²⁹

In his letter, "Freeholder" asked Marshall whether he was "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?"³³⁰ Because the question avoided the issue of the Acts' constitutionality, Marshall was able to answer in a manner that staked out a moderate position between the High Federalists (who believed the Acts were both constitutional and politically wise) and Republicans (who condemned the Acts as illegal). In his reply, Marshall stated that he "[did] not think them fraught with all those mischiefs which many gentlemen ascribe to them."³³¹ Nevertheless, Marshall was "not an

³²⁶ See 3 MARSHALL PAPERS, *supra* note 15, at 503. In private, Marshall had previously written to Pickering: "[T]hese two laws, especially the sedition bill, are [viewed] by a great many well meaning men, as unwarranted by the constitution." *Id.* at 485 (quoting Letter from Marshall to Timothy Pickering (Aug. 11, 1798)).

³²⁷ See John Marshall, *Marshall's Answers to Freeholder's Questions* (1798), reprinted in ROCHE, *supra* note 11, at 32.

³²⁸ See 2 BEVERIDGE, *supra* note 4, at 387 n.1 (stating that Marshall either "wrote or suggested [the questions of 'Freeholder'] himself").

³²⁹ See *id.* at 391 (quoting Letter from Theodore Sedgwick to Timothy Pickering (Oct. 23, 1798)).

³³⁰ Letter from a Freeholder to John Marshall (Sept. 19, 1798), reprinted in 3 MARSHALL PAPERS, *supra* note 15, at 503.

³³¹ Letter from John Marshall to a Freeholder (Sept. 20, 1798), reprinted in 3 MARSHALL PAPERS, *supra* note 15, at 505.

advocate for the alien and sedition bills” because they were “useless” and “calculated to create, unnecessarily, discontents and jealousies at a time when our very existence, as a nation, may depend on our union.”³³² He would not have supported them originally and, if elected, he would not vote in favor of their renewal.³³³

Marshall’s careful response outraged High Federalists like John Quincy Adams who ignored Marshall’s precarious political situation and viewed his policy-based objection to the Acts as an act of political betrayal.³³⁴ Virginia Republicans, on the other hand, ridiculed Marshall for failing to address the most prominent issue of the day: whether the Acts were unconstitutional and therefore ought to be treated as “null and void” by the states. His silence in this critical matter left him open to attack as being “vain and two-faced in his ‘feeble’ criticism of the Alien and Sedition Laws.”³³⁵ Marshall, of course, was focused on winning the vote of Virginia moderates; taking any stronger position either for or against the Acts would have doomed his candidacy.

Even if a calculated act of political theater, there is no reason to think that Marshall was being insincere.³³⁶ Although assailed for avoiding the constitutional question, Marshall’s concerns were policy based and they were limited to the Sedition Act. In December of 1798, George Washington sent Marshall a copy of a jury charge by Pennsylvania Judge Alexander Addison in which Addison strongly defended the Alien and Sedition Acts.³³⁷ In his reply, Marshall praised Addison’s defense, calling it “well calculated” to “make some impression on the mass of the people” and wishing that it “as well as some other publications on the same subject could be more generally read.”³³⁸ Marshall then singled out the Sedition Act as the object of his criticism:

However I may regret the passage of one of the acts complained of, I am firmly persuaded that the tempest has not been raised by them. Its cause lies much deeper & is not easily to be removed. Had they never pass’d, other

³³² *Id.*

³³³ *Id.* at 505–06.

³³⁴ See 2 BEVERIDGE, *supra* note 4, at 390–91.

³³⁵ See *Editorial Note*, 3 MARSHALL PAPERS, *supra* note 15, at 497.

³³⁶ As his friend Pickering wrote to Theodore Sedgwick, “I am sorry that [Marshall’s answer to Freeholder] should be imagined to be an ‘electioneering trick’ . . . General Marshall is incapable of doing a dishonorable act.” 2 BEVERIDGE, *supra* note 4, at 394 (quoting Letter from Timothy Pickering, Sec’y of State, United States, to Theodore Sedgwick, Sen., United States (Nov. 6, 1798) (on file with Mass. Hist. Soc’y.)).

³³⁷ See Addison, *supra* note 101. The charge was printed as a pamphlet and widely distributed. For his trouble, Addison later was impeached by Republican partisans.

³³⁸ Letter from John Marshall to George Washington (Jan. 8, 1799), *reprinted in* 4 MARSHALL PAPERS, *supra* note 6, at 3.

measures would have been selected which would have been attacked with equal virulence. The misfortune is that an act operating on the press in any manner, affords to its opposers arguments which so captivate the public ear, which so mislead the public mind that the efforts of reason to correct false impressions will often fail of success.³³⁹

Here, Marshall clarifies that his criticism is with only “one of the acts complained of”: the Sedition Act.³⁴⁰ The problem was not the Act’s constitutionality, but by “operating on the press in any manner,” the Sedition Act gave its opponents an opportunity to “mislead the public mind” and create “false impressions” not easily corrected.³⁴¹ If Marshall believed the Sedition Act was unconstitutional, then the claims of the Republicans would not be false and misleading. Instead, Marshall praises Addison’s constitutional defense of the Acts and hopes for more publications just like it. Marshall’s letter thus follows the thrust of his Letter to Freeholder: It was not that the Acts were unconstitutional, but that one of the Acts was needlessly divisive.

In his letter, Marshall also informed Washington about the progress of the debates in the Virginia legislature and reported his growing concerns over the dangerous path chosen by the Republican delegates:

To me 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. . . . It is more than ever essential to make great exertions at the next election I feel with increased force the obligations of duty to make sacrifices & exertions for the preservation of American union & independence, as I am more convinc’d of the reality of the danger which threatens them.³⁴²

Marshall’s letter tells us that he had grown deeply alarmed at Republican attacks on the national government, believed the needlessly divisive Sedition Act fueled these attacks, and thought more constitutional defenses of the Acts like those of Judge Addison would help defuse the national outcry. The Minority Report thus provides precisely the kind of defense Marshall desired as it supports the policy of the Alien Act and defends the constitutionality of the Sedition Act.

In November of 1800, St. George Tucker wrote to Marshall and asked him to use his influence and convince President Adams to pardon James

³³⁹ *Id.* (spelling in original).

³⁴⁰ *Id.* (emphasis added).

³⁴¹ *Id.*

³⁴² *Id.* at 4 (spelling in original).

Callender, who had been convicted under the Sedition Act—an “unconstitutional punishment” according to Tucker.³⁴³ Marshall replied:

The unconstitutionality of the law, cannot be urged to the President because he does not think it so. . . . [His] opinion is confirmed by the judgement of the courts & is supported by as wise & virtuous men as any in the Union. Of consequence whatever doubts some of us may entertain, he who entertains none, would not be & ought not to be influenced by that argument.³⁴⁴

It is unclear whether the doubts Marshall refers to are his own or those carried by men like Tucker. As he did in his letter to “Freeholder,” Marshall managed to escape a definitive statement on the Act’s constitutionality. On the other hand, as far as Callender’s predicament was concerned:

With respect to Mr. Callendar I am mistaken if you & all the world, so far as the circumstances of the case are known, do not concur in the opinion, that nothing can render him an improper object for the punishment of the law but his being below its resentment.³⁴⁵

Here, Marshall expressly states that his own private opinion is that *the only* grounds for mercy would be that Callender was not worth the effort. Marshall obviously does not share Tucker’s assessment that Callender’s prosecution was unconstitutional.³⁴⁶

ii. *Marshall’s Views on Freedom of Speech*

Had Marshall viewed the Sedition Act as unconstitutional, it would have been due either to its unduly broad reading of the Necessary and Proper Clause, or its conflict with the restrictions of the First Amendment. In light of Marshall’s famously expansive view of federal power under the Necessary and Proper Clause, the former is implausible. But what about Marshall’s views regarding freedom of speech? Indeed, Marshall was famous for his ringing defense of American freedom of speech in his Letter to Talleyrand.³⁴⁷ When Marshall failed to declare the Sedition Act

³⁴³ See Letter from St. George Tucker to John Marshall (Nov. 6, 1800), in 6 THE PAPERS OF JOHN MARSHALL, 1800–1807, at 4–5 (Charles Hobson ed., 1990) [hereinafter 6 MARSHALL PAPERS].

³⁴⁴ *Id.* at 15 (quoting Letter from John Marshall to St. George Tucker (Nov. 18, 1800)) (spelling in original).

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ Letter from John Marshall to Charles Maurice de Talleyrand-Perigord (Apr. 3, 1798), reprinted in 3 MARSHALL PAPERS, *supra* note 15, at 447.

unconstitutional in his letter to Freeholder, Republicans made the most of this by quoting Marshall's own words in their remonstrance against the Sedition Act.³⁴⁸

The Minority Report rejects this effort to paint the Sedition Act as a violation of the First Amendment. In doing so, the Report relies on the specific text of the Speech Clause and adopts what modern law would refer to as a "bad tendency" approach to freedom of speech. First, the Report compares the text of the Speech Clause with that of the Establishment Clause. Where the Establishment Clause forbids any law *respecting* an establishment of religion, the Speech Clause forbids only those laws that *abridge* freedom of speech. This, according to the author, suggests that Congress has the power to regulate speech as long as it avoids "abridging" that freedom. Punishing seditious speech due to its tendency to stir up resistance to the government was both necessary and proper, and provided more protection for speech than otherwise existed at common law. Accordingly, the Act could not reasonably be viewed as an "abridgment" of free speech.

This argument harmonizes the Sedition Act with the memorial to Talleyrand.³⁴⁹ In that letter, Marshall declared that freedom of speech meant freedom from general government control of the press.³⁵⁰ The Report, however, explains why punishing *seditious* speech falls within the "necessary and proper" powers of government, citing recent American experience:

That continued calumnies against the government have this tendency, is demonstrated by uninterrupted experience. They will, if unrestrained, produce in any society, convulsions which, if not totally destructive of, will yet be very injurious to its prosperity and welfare. It is not to be believed that the people of the western parts of Pennsylvania could have been deluded into that unprovoked and wanton insurrection, which called forth the militia of the neighbouring states, if they had not been at the same time irritated and seduced, by calumnies with which certain presses incessantly teemed, into the opinion that the people of America, instead of supporting

³⁴⁸ See Address of the Majority, in 5 THE FOUNDERS' CONSTITUTION, *supra* note 7, at 140.

³⁴⁹ The same argument can be found in a speech by George Keith Taylor. See *supra* note 281 and accompanying text. We cite the argument here to show that the arguments in the Report are easily reconciled with those in Marshall's letter to Talleyrand. Whomever wrote the Report, of course, would have had access to the major Federalist speeches and pamphlets defending the Acts.

³⁵⁰ See *supra* notes 39, 41-42 and accompanying text. Marshall refuted Talleyrand's claim that the government could (or should) impose prior restraints on the press, and pointed out that parties injured by "calumnies" instead could seek redress after the fact in a court of law. This tracks the analysis of other scholars who have viewed the contemporary understanding of freedom of press as lying in a prohibition on prior restraints. See, e.g., LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

their government and their laws, would join in their subversion. Those calumnies then, tended to prevent the execution of the laws of the union, and such seems to be their obvious and necessary tendency.³⁵¹

This “bad tendency of seditious speech” argument is out of step with today’s doctrine,³⁵² but it held sway until late into the twentieth century, and we know that it was expressly embraced by Marshall himself. In his *Life of Washington*, Marshall writes:

They also made similar excursions into the contiguous counties of Pennsylvania, lying east of the Alleghany [sic] mountains [western Pennsylvania], where numbers were ready to join them. These *deluded* men, giving too much faith to the publications of democratic societies, and to the furious sentiments of general hostility to the administration, and particularly to the internal taxes, with which the papers in the opposition abounded, seem to have entertained the opinion, that the great body of the people were ready to take up arms against their government, and that the resistance commenced by them would spread throughout the union, and terminate in a revolution.

. . . .

In the intemperate abuse which was cast on the principal measures of the government, and on those who supported them; in the violence with which the discontents of the opponents to those measures were expressed; and especially in the denunciations which were uttered against them by the democratic societies; *the friends of the administration searched for the causes of that criminal attempt* which had been made in the western parts of Pennsylvania, to oppose the will of the nation by force of arms. Had those misguided men believed that this opposition was to be confined within their own narrow limits, they could not have been so mad, or so weak as to have engaged in it.³⁵³

Both the Minority Report and Marshall’s *Life of Washington* speak of the “deluded men” from the “western parts of Pennsylvania” who never would have engaged in their insurrection had they not been misled by a seditious press into believing others would join them. Both speak of seditious publications being the *cause* of insurrection against legitimate federal laws. The *Life of Washington* was published only a few years after the Minority Report, and clearly seeks to vindicate the Federalist Party’s opposition to

³⁵¹ MINORITY REPORT, *supra* note 70, at 11.

³⁵² See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

³⁵³ 5 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 180, 187–88 (1925) (emphasis added).

sedition libel. Marshall does so, moreover, by using the *same event* as the Minority Report in the same way.³⁵⁴

iii. *The Common Law*

During the debate in the Virginia House of Delegates over the Virginia Resolutions, the different arguments involving the common law reflected an ongoing partisan dispute. Republicans viewed the embrace of the common law as a slippery slope towards British monarchy, and Federalists held to the idea of the common law "as a palladium of liberty."³⁵⁵ Republicans, of course, viewed any Federalist invocation of the common law in the worst possible light, which drew a reasonable objection by Federalists that their words were being misconstrued for party advantage.³⁵⁶ The issue implicated the scope of both judicial and legislative federal power. Federalists claimed that the jurisdiction of the federal judiciary was equal to that of the legislature. Republicans flipped this around to suggest that, if the courts had jurisdiction over the breadth of the common law, then the federal legislature has "jurisdiction" to address the same subjects, and thereby obliterate the autonomy of the states.³⁵⁷

In terms of the Sedition Act, Federalists argued that reference to the common law was necessary and appropriate in determining whether

³⁵⁴ In his student note, Gregg Costa accepts that Marshall wrote the Minority Report, but believes that the Report's arguments are inconsistent with respect to Marshall's true beliefs about freedom of speech. Costa's argument is based on a broad reading of Marshall's views on freedom of speech and press in his memorial to Talleyrand. Costa apparently was unaware of Marshall's embrace of the bad tendency rationale in his *Life of Washington*. Costa also misreads the Report's (and Marshall's) views on the common law:

The *Minority Report* accepted the notion of common-law powers for federal courts in arguing that the Sedition Act was not unconstitutional because Congress did not restrict speech any more (in fact, it restricted speech less because the Sedition Act allowed truth as a defense and provided for trial by jury) than federal judges already could under common-law seditious libel prosecutions.

Costa, *supra* note 14, at 1042.

³⁵⁵ See Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1237 (1985).

³⁵⁶ *Id.*; see also 6 MARSHALL PAPERS, *supra* note 343 (citing Letter from John Marshall to St. George Tucker).

³⁵⁷ Jay, *supra* note 355, at 1243. G. Edward White also has written about this "concurrent power" doctrine and its role in the dispute over the common law. See G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*, in 3-4 THE OLIVER WENDELL HOLMES DEVISE: THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 538-41 (Paul A. Freund & Stanley N. Katz eds., 1988).

“freedom of speech” included the right to publish seditious essays.³⁵⁸ The Act did not abridge liberty of the press because “liberty,” as understood at common law, only involved freedom from prior restraints.³⁵⁹ More, the Sedition Act improved upon this freedom by allowing the defendant the opportunity to prove the truth of his allegation against the government. This argument made the Republicans all the more suspicious that the Federalists were seeking an expansion of federal power through an embrace of the common law—an effort that would lead to the consolidation of the states.³⁶⁰ In what came to be known as his “Celebrated Report of 1800,” Madison claimed that Federalist reliance on the common law threatened to destroy the concept of limited enumerated power.³⁶¹

Marshall believed that Madison had mischaracterized the Federalists’ argument. Responding to a letter from St. George Tucker in which Tucker had argued against reading the Constitution as embracing English common law, Marshall wrote:

[Y]ou will perhaps be surprizd at my saying that I do not suppose we should essentially disagree.

In political controversy it often happens that the precise opinion of the adversary is not understood, & that we are at much labor to disprove propositions which have never been maintaind. A stronger evidence of this cannot I think be given than the manner in which the references to the common law have been treated.³⁶²

Marshall denied that anyone was arguing in favor of such a broad incorporation of the common law. “I do not believe one man can be found who maintains the affirmative of this proposition,” wrote Marshall, “[and] I never suspected that an attempt would be made to represent this as a serious opinion entertaind by respectable men, until I saw the argument containd in the report of a committee of the house of Delegates in Virginia.”³⁶³ Marshall complained that Madison’s Report “has gratuitously attributed to certain gentlemen an opinion never entertaind & has then very gravely demonstrated that the opinion is founded in error.”³⁶⁴ Marshall then laid out his approach to the common law:

³⁵⁸ 9 ANNALS OF CONG. 2988–90 (1799).

³⁵⁹ *Id.* at 2989–90. The report noted that “[i]n the several States the liberty of the press has always been understood in this manner.” *Id.* at 2989.

³⁶⁰ See Jay, *supra* note 355, at 1250.

³⁶¹ See Madison, 1800 Report, *supra* note 9, at 143.

³⁶² Letter from John Marshall to St. George Tucker (Nov. 27, 1800), in 6 MARSHALL PAPERS, *supra* note 343, at 23 (spelling in original).

³⁶³ *Id.* (spelling in original).

³⁶⁴ *Id.* (spelling in original).

My own opinion is that our ancestors brought with them the laws of England both statute & common law as existing at the settlement of each colony, so far as they were applicable to our situation. That on our revolution the preexisting law of each state remained so far as it was not changed either expressly or necessarily by the nature of the governments which we adopted.

That on adopting the existing constitution of the United States the common & statute law of each state remained as before & that the principles of the common law of the state would apply themselves to magistrates of the *general* as well as to magistrates of the *particular* government.³⁶⁵

This is a condensed version of the same argument that appears in the Minority Report:

[A] people passing from one form of government to another, retain in full force all their municipal institutions, not necessarily changed by the change of government. If this be true, then the common law continued to be the law of the land after the revolution, and was of complete obligation even before the act of our assembly for its adoption. Whether similar acts have been passed by the legislatures of other states or not, it is certain that in every state the common law is admitted to be in full force, except as it may have been altered by the statute law. The only question is, whether the doctrines of the common law are applicable to libels against the government of the United States, as well as to libels against the governments of the *particular* states. For such a distinction there seems to be no sufficient reason. It is not to a magistrate of this or that description that the rules of the common law apply. That he is a magistrate, that he is clothed with the authority of the laws, that he is invested with power by the people, is a sufficient title to the protection of the common law. . . . [N]o satisfactory reason has been heretofore assigned why a general rule common to all, and punishing generally the malicious calumniators of magistrates, should not be as applicable to *magistrates chosen for the whole, as to those chosen for its different parts*.³⁶⁶

Whether the Minority Report can be read as embracing a decidedly broader vision of federal common law than that described in Marshall's letter is an open question. Marshall, however, identified himself with those who defended the Acts and claimed that both his and the Federalists' position on the issue had been mischaracterized. Indeed, Marshall believed "that in the general definition of the principle [of common law] sensible men of the two parties would not disagree very materially. In the application of principles

³⁶⁵ *Id.* at 24 (emphasis added) (spelling in original).

³⁶⁶ MINORITY REPORT, *supra* note 70, at 13–14 (emphasis added).

there would perhaps be more difference than in their definition."³⁶⁷ Marshall thus found common ground with the Virginia minority on the issue of the common law.³⁶⁸ When Marshall later voted against recognizing seditious libel as "punishable as at common law,"³⁶⁹ his vote was consistent with both the Minority Report and his own views about enumerated federal power.

Marshall's biographers have stumbled badly on this issue. Jean Edward Smith, for example, claims that in his letter to Tucker, Marshall "explicitly dissociated himself from the [Minority] address" and that Marshall accused the Federalist minority as having embraced a "strange and absurd doctrine."³⁷⁰ Marshall in fact denied that anyone supported an absurdly broad incorporation of the common law.³⁷¹ Rather, Marshall's point was that Republicans had falsely painted the Federalists as having adopted an unreasonable position on the common law.³⁷² Worse, biographer Smith misses entirely Marshall's explicitly associating himself with those who had been "mischaracterized."³⁷³

c. *Summation*

Nothing in the Minority Report conflicts with the known views of Marshall. Although his letter to "Freeholder" criticizes the Acts on policy grounds, his criticism was limited to the Sedition Act, and the Minority Report defends that Act on constitutional not policy grounds. Marshall saw no conflict between his views and the Report on the issue of the common law, and he echoed the Report's view of the dangers of seditious libel only a few years after its publication. Finally, the text of the Report bears the unmistakable hallmarks of Marshall's approach to constitutional interpretation. More than simply parroting the commonly expressed defenses of federal power, the Minority Report presents carefully crafted textual and structural arguments that are found nowhere else besides the judicial opinions of Chief Justice Marshall. To the extent that the Report repeats the arguments of G.K. Taylor (among others), Marshall could easily have gained

³⁶⁷ Letter from John Marshall to St. George Tucker (Nov. 27, 1800), in 6 MARSHALL PAPERS, *supra* note 343, at 23 (spelling in original).

³⁶⁸ For a fine discussion reconciling the Minority Report and Marshall's views on the common law, see Jay, *supra* note 355, at 1329–33.

³⁶⁹ See 10 ANNALS OF CONG. 404 (1800).

³⁷⁰ SMITH, DEFINER OF A NATION, *supra* note 5, at 601 n.79.

³⁷¹ See Letter from John Marshall to St. George Tucker (Nov. 27, 1800), in 6 MARSHALL PAPERS, *supra* note 343, at 23.

³⁷² See *id.*

³⁷³ Thus, after receiving Tucker's criticism of the Federalists, Marshall tells Tucker that he may be "surprizd" to learn that he and Marshall are not in substantial disagreement. *Id.* (spelling in original).

access to them from the orator himself while drafting the Report. No one else, however, would have had access to the celebrated mind of John Marshall.

3. *The Testimony*

The effects of this strange production [the Majority Address] were, in some degree, counteracted by the address of the minority, a masterly performance, for which we are indebted to the pen of General Marshall, who has, by it, in some measure atoned for his pitiful electioneering epistle.

~Theodore Sedgwick to Rufus King, (Mar. 20, 1799)

In light of the evidence explored above, it is not surprising that men like Sedgwick, Vans Murray, and Callender saw the hand of Marshall in the Minority Report. Even without their testimony, the evidence suggests that it is quite premature to remove Marshall's name from the Report. Still, when weighing the evidence for and against Marshall's authorship, their opinions count in Marshall's favor. Even J.Q. Adams, who concluded Marshall had not authored the Report, inadvertently provides evidence that undermines the arguments used to justify the erasure of Marshall's name today.

In Virginia, Callender devoted a significant portion of *The Prospect Before Us* to his criticism of the Minority Report. At the end of an extended discussion of the Report, Callender declared that "[Marshall] is one of the reputed authors of the counter address; and the hypocritical canting that so strongly marks it, corresponds very well with the dispatches of X.Y. & Z."³⁷⁴ Given Callender's animosity towards all things Federalist, he may have linked Marshall to the Report more from partisan bias than from reason. But notice that Callender first reported that *others* had credited Marshall with the Report, and that he agreed (if only sarcastically) due to the similarity between the Report and the previous envoy letters. As pointed out earlier, Callender knew that Lee submitted the Report,³⁷⁵ but nevertheless named Marshall as an author.

But even if we dismiss Callender as unreliable due to bias, we should also dismiss the doubts of J.Q. Adams. Adams described the Report as "an excellent address . . . [a] sober, temperate and unanswerable argument, signed by fifty-eight members, which proves that good sense and honesty have not wholly abandoned the Ancient Dominion, however they may be out

³⁷⁴ See CALLENDER, *supra* note 152, at 127. The "dispatches of X.Y. & Z." refer to Marshall's letters to President Adams (later published) while acting as envoy extraordinary to France, particularly those describing the bribe attempts and diplomatic threats of three pseudonymous French agents. See *supra* note 43.

³⁷⁵ CALLENDER, *supra* note 152, at 91.

of favor.”³⁷⁶ In response to Vans Murray’s opinion that Marshall had written this “excellent address,”³⁷⁷ J.Q. Adams admitted that “[t]he question had occurred likewise to my mind whether J. Marshall did write the address.”³⁷⁸ Adams nevertheless decided that Marshall had not written the Report, because its style was unlike that of Marshall’s memorials to Talleyrand and because:

I was unwilling to believe that 58 delegates, of sense enough to adopt such an address, & of Spirit, under the circumstances of the time & place, to sign it, should need or would accept the aid of a person, not one of themselves, to draw up such a paper.³⁷⁹

Putting aside J.Q. Adams’ idiosyncratic belief that the style of the Report is significantly different from the style of the Talleyrand memorials,³⁸⁰ his second reason, if applied across the board would have led him to conclude neither Madison nor Jefferson were involved in the Virginia and Kentucky Resolutions. In hindsight, his argument is rather humorous. So low was Adams’ opinion of Marshall that he could not imagine the Federalist minority (including two of Marshall’s closest acquaintances) even *accepting* the help of the man renowned for his legal mind both at the time and ever after.³⁸¹ In fact, Adams himself admits his conclusion is tainted by bias against Marshall:

³⁷⁶ Letter from John Quincy Adams, Minister to Prussia, United States, to William Vans Murray, Minister to the Netherlands, United States (Apr. 9, 1799) (on file with Mass. Hist. Soc’y).

³⁷⁷ Vans Murray had written to Adams:

I should think that John Marshall wrote the address against the resolutions [of V[irginia]]. He may have been weak enough to declare *against* those laws that *might* be against *policy* or necessity, etc., etc., yet sustain their constitutionality . . . I *hope* that J. Marshall did write the address.

Letter from William Vans Murray, Minister to Netherlands, United States, to John Quincy Adams, Minister to Prussia, United States (Apr. 5, 1799), in ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1912, at 536.

³⁷⁸ Letter from John Quincy Adams, Minister to Prussia, United States, to William Vans Murray, Minister to Netherlands, United States (Apr. 13, 1799) (on file with the Mass. Historical Soc’y).

³⁷⁹ *Id.*

³⁸⁰ To our knowledge, no one else has ever made such a claim.

³⁸¹ Remarkably, in their effort to distance Marshall from the Report, the editors of the *Marshall Papers* agree with J.Q. Adams’ dismissive suggestion that the members of the Virginia Minority were just as capable as Marshall in crafting a constitutional defense of the Acts. See Hobson, *Editorial Note*, *supra* note 16, at 514–15.

I also confess I had rather the paper should have been the work of another than of him. For though I have a very high opinion of his talents, since his declaration against the two Laws in question, I must set him down as a man, who will *flinch* at the moment of danger, & indeed, my Dear friend, the men we want, are such as will not flinch.³⁸²

According to J.Q. Adams, the good men of the Virginia minority never would have accepted Marshall's help because he had shown himself a political coward who would betray his country to win an election.³⁸³ If Callender was biased because Marshall was a Federalist, J.Q. Adams was equally so because Marshall was not Federalist enough! In the end, neither partisan claimed to know in fact whether Marshall wrote the Report. Neither did Vans Murray, who believed that Marshall wrote the Report, but also confessed his own bias in favor of Marshall.³⁸⁴

Sedgwick, on the other hand, claimed to *know* that Marshall wrote the Report. On February 7, 1799, he could share only what he had heard from his congressional seat in Philadelphia:

You have seen, I presume, the address of the minority of the house of Representatives of Virga to their constituents. It is said to have been drawn by Marshall. It is able, & elegant, and eloquent, but the eloquence is of a kind not to make a deep impression on the gross materials to which it is addressed. It shews that its authors beleive their situation critical & the danger iminent. It was, perhaps incompatible with the relation of the addressers, as a minority, to employ the instrument of denunciation, and yet, I am persuaded, no procedure of this kind can be effectual without it.³⁸⁵

Written two days after Philadelphia journals had published the Report,³⁸⁶ Sedgwick's letter is restrained and vaguely unimpressed with only second-hand knowledge of authorship. The next month, however, he wrote Rufus

³⁸² *Id.* at 514.

³⁸³ *Id.*

³⁸⁴ Letter from William Vans Murray, Minister to Netherlands, United States, to John Quincy Adams, Minister to Prussia, United States (Apr. 5, 1799), in ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1912, at 535-36 (Worthington C. Ford ed., 1913). Even if stating only their opinions, none of these men considered the fact that Marshall did not submit the Report to be relevant in any way to their conclusion.

³⁸⁵ Letter from Theodore Sedgwick, Sen., United States, to Alexander Hamilton (Feb. 7, 1799), in 22 HAMILTON PAPERS, *supra* note 11, at 470 (spelling in original).

³⁸⁶ *See id.* at 472 n.2. The Minority Report was published on February 5, 1799 in the *Gazette of the United States*, and *Philadelphia Daily Advertiser*.

King from Stockbridge, Massachusetts.³⁸⁷ In this letter, Sedgwick's conclusions about the Minority Report and Marshall's role are decidedly more positive and more certain:

The effects of this strange production [the Majority Address] were, in some degree, counteracted by the address of the minority, a masterly performance, for which we are indebted to the pen of General Marshall, who has, by it, in some measure, atoned for his pitiful electioneering epistle.³⁸⁸

The Report is now "a masterly performance" and Marshall affirmatively credited with its authorship.³⁸⁹ Between Sedgwick's two letters, something happened which deepened his appreciation for the Report and convinced him of its provenance.³⁹⁰ This makes Sedgwick's testimony the strongest contemporary link between Marshall and the Minority Report. Those seeking to distance Marshall from the Report dismiss Sedgwick's letter as mere "wishful thinking" that Marshall had "recanted" his earlier objectionable letter to "Freeholder."³⁹¹ However, there is no evidence that Sedgwick was indulging in mere whimsy. Indeed, he appears to have made a statement against his own interest, which should carry particular weight in evaluating the evidentiary value of his claim.

The High Federalists of New England were outraged by Marshall's earlier letter to "Freeholder." Fisher Ames castigated Marshall as "the meanest of cowards, the falsest of hypocrites."³⁹² Federalist J.Q. Adams dismissed him as a "political coward." Initially, Sedgwick was no different. As Albert Beveridge recounts: "Theodore Sedgwick declared that Marshall's

³⁸⁷ Letter from Theodore Sedgwick, Sen., United States, to Rufus King, Minister to Britain, United States (Mar. 20, 1799), in 2 *THE LIFE AND CORRESPONDENCE OF RUFUS KING*, *supra* note 73, at 579.

³⁸⁸ *Id.* at 581.

³⁸⁹ In Boston, *J. Russell's Gazette* published the Minority Address with the introduction (Feb. 14 and 20), so Sedgwick would have had access to the information that Lee had submitted the Report. Nevertheless, he still credited Marshall as the author. We cannot know, of course, whether he actually saw the Boston version, but we can presume he interacted with those who had.

³⁹⁰ Here Sedgwick adopts the language from the introduction to the Report printed in Philadelphia newspapers. See *GAZETTE OF THE UNITED STATES, & PHILADELPHIA DAILY ADVERTISER* (Feb. 5, 1799) (Introduction by "Alpha"). Had Sedgwick's first letter used this language, we would have concluded he was merely parroting "Alpha." Instead, despite obviously having read Alpha's introduction, Sedgwick's first letter was decidedly tepid. For this reason, we conclude something else occurred after that to change Sedgwick's views about the Report and its possible author.

³⁹¹ See SMITH, *DEFINER OF A NATION*, *supra* note 5, at 601 n.79.

³⁹² Letter from Fisher Ames to Christopher Gore (Dec. 18, 1798), in 2 *WORKS OF FISHER AMES* 1301, 1302-03 (W.B. Allen ed., 1983) (1854)

'mysterious & unpardonable' conduct aided 'french villainy' and that he had 'degraded himself by a mean & paltry electioneering trick.'³⁹³ Sedgwick's bias against Marshall may help explain his first letter's tepid response to the Minority Report. By the time of his second letter, however, Sedgwick was now prepared to give grudging credit where credit was due: Marshall had "in *some* measure, atoned for his *pitiful* electioneering epistle." Sedgwick obviously continued to judge Marshall critically, but nevertheless believed that drafting the Report had done some good. As much as Marshall's biographers prefer to believe otherwise, this is not wishful thinking. If anything, Sedgwick's bias against Marshall would have inclined him to share J.Q. Adams' doubts—refusing to credit Marshall with the strong defense of the Minority Report. Sedgwick's praise thus suggests that he firmly and sincerely believed that Marshall had authored a politically helpful Report.

We will probably never know what finally persuaded Sedgwick of Marshall's authorship, or whether Callender and Vans Murray founded their opinions on fact or rumor. In the end, these testimonials form but a part of a larger evidentiary whole. However, in weighing whether testimonial evidence points towards or away from Marshall, the evidence points to Marshall and no one else.

4. *A Note on Silence*

One cannot come away from this discussion without noting how little we have by way of express testimony. There are a number of possible explanations. The subject may have been of such little importance that few bothered to remark on it (including the author). Or, perhaps the author was so obvious, the matter literally "went without saying" (including by the author). Finally, it is possible that someone went to a great deal of effort to cover his tracks. We believe the last is the most likely.

We know that Marshall had good reason to remain anonymous. Likewise, any Virginia Federalist who knew of Marshall's involvement would have kept that information to himself. If Marshall was the author, it is no surprise, then, that George Washington did not mention Marshall drafting the Report in his letters and the correspondence between Marshall and Bushrod Washington was purposefully destroyed. Only outside Virginia did Marshall's critics openly discuss his potential involvement. Virginia Republicans, of course, had no reason to obscure Marshall's role, and Callender attacked Marshall with glee. On the other hand, speculation regarding Marshall and the Minority Report is conspicuously absent from the contemporary letters of Republicans like James Madison and Thomas Jefferson. These two, however, may have kept their political correspondence

³⁹³ 2 BEVERIDGE, *supra* note 4, at 391.

clandestine, fearing that their own role in the Virginia and Kentucky Resolutions would become public.³⁹⁴

As time went on, Marshall's desire to keep his role a secret would only have grown. The election of 1800 became viewed as a referendum on the nationalist tendencies of the Adams administration.³⁹⁵ Republican partisans in Pennsylvania impeached Judge Addison in retaliation for his widely published defense of the Alien and Sedition Acts.³⁹⁶ In Congress, Republicans targeted and removed the vulnerable federal judge, John Pickering, and then turned their sights on Justice Chase—who narrowly escaped impeachment and removal from the Supreme Court.³⁹⁷ In retrospect, historians view this as the last serious attempt to impeach a Supreme Court Justice. At the time, however, there was no reason to think the Supreme Court would forever-after remain immune from impeachment.

Over time, the Virginia and Kentucky Resolutions and, in particular, Madison's Report on the Virginia Resolutions, became canonical documents of proper constitutional interpretation.³⁹⁸ Marshall's controversial decision in *McCulloch v. Maryland*, repeating many of the same arguments in the Minority Report triggered accusations that the hated nationalism which had generated the Alien and Sedition Acts had returned—and ought to be similarly resisted by the states.³⁹⁹ The escalating rhetoric so worried Marshall that he published a series of anonymous essays defending his decision. Had it become known that Marshall authored both *McCulloch* and

³⁹⁴ See Letter from Thomas Jefferson, Vice President, United States, to James Madison (Apr. 5, 1798), available at http://memory.loc.gov/ammem/collections/jefferson_papers/. Jefferson makes similar statements about the mail in a number of letters. See, e.g., Letter from Thomas Jefferson to Edmund Randolph (June 27, 1797) (on file with authors) ("The interruption of letters is becoming so notorious, that I am forming a resolution of declining correspondence with my friends through the channels of the post altogether."); Letter from Thomas Jefferson, Vice President, United States, to Archibald H. Rowan (Sept. 26, 1798) (on file with authors); Letter from Thomas Jefferson, Vice President, United States, to John Page (Jan. 24, 1799) (on file with authors); Letter from Thomas Jefferson, Vice President, United States, to Archibald Stuart (Feb. 13, 1799) (on file with authors).

³⁹⁵ See Lash, *Madison's Celebrated Report*, *supra* note 9, at 180–82.

³⁹⁶ See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 164–65* (1971).

³⁹⁷ See generally BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005).

³⁹⁸ See Lash, *Madison's Celebrated Report*, *supra* note 9, at 182–86.

³⁹⁹ See *Amphicton*, in GERALD GUNTHER, *JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND* 59 (1969); see also, HOBSON, *THE GREAT CHIEF JUSTICE*, *supra* note 5, at 10 (1996) (describing the critical reactions to decisions like *McCulloch* and *Cohens*).

the Minority Report, this would only have fueled the controversy.⁴⁰⁰ Marshall's protégé in the Court, Joseph Story (assuming he knew about Marshall's secret role), also would have chosen not to reveal this historical fact as the country lurched towards the realistic possibility of a Civil War.⁴⁰¹

On the other hand, no reason adequately explains why Lee or G.K. Taylor (or their heirs) would keep their involvement a secret. Lee and, in particular, his heirs, would have trumpeted his role from the rooftops. Only Marshall and his supporters had good reason to keep his identity under wraps until the day he died and beyond. In this particular case, the silence is eloquent.

V. CONCLUSION

We have not written to end an argument, but to preserve one. Although we believe the evidence strongly supports the idea that John Marshall authored at least part of the Minority Report, the document may well have been a collaborative effort. Given the new evidence that Bushrod Washington probably wrote *Plain Truth*, and the circumstances of Henry Lee's life in 1799, we can no longer consider Lee as a serious candidate for either author or collaborator. On the other hand, our evidence does suggest the need to take a closer look at George Keith Taylor. Although we believe his involvement was likely limited to the opening policy sections, one nevertheless can find hints of G.K. Taylor's influence throughout the Report. The uniquely structured and reasoned constitutional section, however, almost certainly came from the mind of Marshall. This does not make for a simple argument, but we do not believe the evidence allows for a simple conclusion.

In fact, the richness of the historical evidence and its relatively unexplored nature leads us to object to the premature efforts to end the debate. The efforts to remove Marshall's name from the Minority Report *preceded* serious historical investigation. Given the interest all Americans have in preserving the intellectual roots of the most famous Supreme Court Justice in United States history, it seems to us that the priorities ought to be reversed. Prior to the articulation of a compelling and scrutinized historical argument, those entrusted with the preservation of history ought to err on the side of continued discussion.

⁴⁰⁰ And even if one thinks Marshall over-reacted, the only issue is whether Marshall believed a crisis loomed, and he clearly did.

⁴⁰¹ JOSEPH STORY, 12 COMMENTARIES ON THE CONSTITUTION §§ 1288-89, § 1886 (denying strongly that the Alien and Sedition Acts were obviously unconstitutional, despite public opinion). Story does not mention the Minority Report, but does mention Addison's charge, and the fact that the Acts were adjudged inexpedient, not unconstitutional. He declines to take a position on the Acts, but only after strongly supporting the right of a government to punish seditious libel.