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Gerald F. Leonard

Boston Univeristy School of Law

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JEFFERSON'S CONSTITUTIONS

Gerald Leonard

Written for Constitutions and the Classics: Patterns of Constitutional Thought from John Fortescue to Jeremy Bentham (D.J. Galligan ed.; Oxford University Press, 2014)

The story of the writing of the American Constitution is a familiar one. A little less familiar is the story of Thomas Jefferson's pivotal role in altering the operative meaning of the Constitution between 1787 and the Jacksonian ascendancy of the late 1820s and 1830s. To explain this aspect of Jefferson's career serves to explain many of Jefferson's constitutional convictions and the ways that they did and did not change with changing circumstances.

The drafters of the 1787 Constitution designed the new national government to gather more power to the center while resisting democracy and neutralizing parties and factions. Large districts for House members, long terms for Senators, an executive veto, and judicial review, among other structural devices, were designed to promote the election of eminent men, encourage deliberation, and frustrate attempts to organize a dominant party or faction. Enhanced powers at the center and new limitations on state powers would insulate governance from excessively direct control by the people and would limit the states' capacities to violate rights of property and the like.¹

¹ See, among many others, Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969); Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996); Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (1990).

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By the time of Jackson's presidency, enabled by the mastermind of the Democratic party, Martin Van Buren, much of this understanding had changed. Speaking for the ascendant Democratic party, Van Buren articulated a radically democratic theory of the Constitution in which the will of the people as expressed through the party became the authoritative word on both policy and constitutional meaning. He celebrated the "exclusive and towering supremacy"² that the party had achieved under Jefferson's leadership and made clear his expectation that the party would continue to be the organ of the people as a whole, not just one of two or more parties dividing the people. The only principle as important as the party's right to dictate to the officeholders—functionally overriding all the structural checks designed by the Framers—was the principle of states' rights.³ By the 1820s, the Democrats' radical states' rights positions were dominant, and Van Buren and the Democrats hoped that a firm states' rights position would help them solve the problem of slavery. Stipulating, in effect, that slave states were nevertheless republican states, they organized the democracy nationally on the basis that each state's domestic arrangements were off limits to the national government. Experience, however, would show, as Jefferson had always feared, that the challenge of slavery to the republican experiment could never be so easily finessed.

If the big story between the 1780s and the 1830s was the democratization of the Constitution, largely by the device of party organization, as well as the tugging of the Constitution in the direction of states' rights and the entrenchment of slavery, then Thomas Jefferson was at the center of the story in all these aspects. He was the most democratic of the prominent men of the founding generation, yet he stopped short of the

² Martin Van Buren, *The Autobiography of Martin Van Buren* (John C. Fitzpatrick, ed. 1973) 303.

³ On Van Buren and the Democratic party, see Gerald Leonard, *The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois* (2002).

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radical democracy that became dominant under Jackson and Van Buren. Instead, he insisted on the centrality of law to republican government and hesitated to assume that the people could always be trusted to respect the essential restraints of reason and legal tradition. He adhered to a radical states' rights position from the earliest days of his public life to the last. And, all his life, he struggled intellectually with the challenges that slavery presented to the states' allegedly republican experiments, never doubting the deep wrongness of the institution but always defending the autonomy of the states, even as that came to mean the ever-deeper entrenchment of slavery. Van Buren and Jackson would ultimately leave Jefferson behind in their embrace of party-based democracy, but, however inadvertently, Jefferson laid out much of the road to that destination, including its doomed method for dealing with slavery, over the course of his long public career.

This essay will elucidate Jefferson's constitutional thought across a half century of constitutional development. Given space constraints, it will be highly selective. It will first discuss his revolutionary tract, the *Summary View*, a foundational document of American federalism. Then, it will turn to his one book, his *Notes on the State of Virginia*, which, among other matters, explored the internal constitution of a republic (as opposed to the larger confederation of republics). Remarkably democratic for its time, it nevertheless elevated law and constitutional structures like the separation of powers above democracy and the "sovereign" people. The *Notes* also tried to face up to some of the powerfully antirepublican effects of slavery, but it offered no solutions. Finally, this essay will discuss some political events of the 1790s and 1800s that are particularly useful in illuminating Jefferson's reluctant movement—as well as the limits on that movement—in the direction of democracy and party organization. The essential themes,

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then, in this account of Jefferson's constitutional thought are democratization and its relation to the rule of law, the emergence of party, federalism (states' rights), and slavery.

Jefferson's *Summary View* and the Origins of American Federalism

Jefferson's commitment to federalism appeared even before the Revolution. As the imperial crisis reached a boil in the mid-1770s, Jefferson wrote *A Summary View of the Rights of British America*, which was published as a pamphlet to promote resistance to British pretensions. The essay does not lack for the vindications of natural rights that one might expect from a revolutionary pamphlet. For example, Jefferson identifies "a right which nature has given to all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies," as well as those "rights of human nature, deeply wounded by [the] infamous practice" of slavery.⁴

Nevertheless, as Peter Onuf argues, the pamphlet's essential argument is not a defense of a natural right to self-government alone. It is a defense of republican *federalism* as a theory of the British Empire. Written as a propaganda piece, it perhaps aimed less for descriptive, historical accuracy—few people before 1774 would have had the temerity to suggest that the British Empire was simply a league of equal states—than at integrating the colonists' emergent republicanism with their continued commitment (as of 1774) to the British Empire. But, as much as it was a creature of its moment, the *Summary View* adumbrated the essentials of the confederal structure that Jefferson would

⁴ [Jefferson], *A Summary View of the Rights of British America* (Williamsburg, Va., 1774)

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advocate for the rest of his life, not only reading them into the imperial structure of 1774 but finding them in the Constitution's embrace of federalism in 1787 as well.⁵

Jefferson's opening paragraph characterized the colonies not as George's "colonies" but as "these his states"⁶—this, two years before the colonies declared independence. Claiming that Britain had never assisted the American emigrants in the settlement of their new lands, he insisted that British Americans' continuing bond with Britain was strictly limited and a matter of choice: "settlements having been thus effected in the wilds of America, the emigrants thought proper to adopt that system of laws under which they had hitherto lived in the mother country, and to continue their union with her by submitting themselves to the same common sovereign, who was thereby made the central link connecting the several parts of the empire . . ."⁷

Americans voluntarily chose to hold onto the monarchy as the essential link in a federal system, in which each local legislature—Parliament included—rightly legislated only for its own domestic constituency. Jefferson did not hesitate to catalogue the alleged, *substantive injustices* of Parliament's American legislation, which purported to subordinate American interests and rights to British. But he emphasized that the American claim was *not* a claim to substantively fair treatment by Parliament but a constitutional claim to complete independence from Parliament:

[W]e do not point out to his majesty the injustice of these acts, with intent to rest on that principle the cause of their nullity; but to shew that experience confirms the propriety of those political principles which exempt us from the jurisdiction of the British parliament. The true ground on which we declare these acts void is, that the British parliament has no right to exercise authority over us.

⁵ Peter S. Onuf, "Thomas Jefferson, Federalist," in *The Mind of Thomas Jefferson* (2007).

⁶ *Summary View*, 5.

⁷ *Summary View*, 7.

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... Can any one reason be assigned why 160,000 electors in the island of Great Britain should give law to four millions in the states of America ... ?⁸

The British Empire was not a metropolitan empire with authority concentrated at the center but a network of equal and independent republics—a confederation--linked only by the monarchy.

And so the *Summary View* looked to the monarchy to rectify the wrongs attempted by Parliament. But why did Jefferson accept a constitutional role for the King at all in a rapidly republicanizing America? Because republicanism *required* federalism, and federalism required a federal head. Jefferson's theory of republicanism held that the freedom and prosperity of each political community depended on the existence of a central authority, empowered to preserve peace and commerce among otherwise independent states. Thus, "we do earnestly entreat his majesty, as yet the only mediatory power between the several states of the British empire, to recommend to his parliament of Great Britain the total revocation of these acts, which, however nugatory they be, may yet prove the cause of further discontents and jealousies among us,"⁹ and he endorsed the King's constitutional authority to employ the veto to prevent such unequal laws.

But, in fact, George had already exposed his unwillingness to serve as an impartial functionary of the empire. Jefferson argued that George had already abused the veto power in rejecting American laws "of the most salutary tendency."¹⁰ Moreover, these were not any old laws or ordinances but included vital efforts, so Jefferson claimed, to rid the colonies of slavery. That institution, he insisted, was already a burden in 1774

⁸ *Summary View*, 10-12.

⁹ *Summary View*, 16.

¹⁰ *Summary View*, 16.

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(and of course would become the ever more salient curse of the American experiment across the remaining decades of Jefferson's life): "The abolition of domestic slavery is the great object of desire in those colonies, . . . yet our repeated attempts to effect this by prohibitions, and by imposing duties which might amount to a prohibition, have been hitherto defeated by his majesty's negative." Thus had the King abdicated his responsibility to treat the empire's component states impartially, instead "preferring the immediate advantages of a few African corsairs to the lasting interests of the American states, and to the rights of human nature, deeply wounded by this infamous practice."¹¹ Further examples—the dissolving of American assemblies, the landing of troops in American states without local consent, etc.—filled out the indictment, even as Jefferson purported to plead with George to resume his proper role in a confederal empire: "Let no act be passed by any one legislature which may infringe on the rights and liberties of another. This is the important post in which fortune has placed you, holding the balance of a great, if a well poised empire."¹²

This embrace of an "empire" of equal states—insisting that a "great" empire should be a "balanced" and "well poised" empire—would continue to inform Jefferson's thought under the United States Constitution a generation later. Separation from the British Empire would not lead Jefferson to leave the notion of empire behind but instead to conceive of America as just the sort of empire outlined in the *Summary View*. In the new Constitution of 1787, he saw the blueprint of an "empire for liberty," in which the national government would hold the balance of an expanding empire of republics. But that national government would remain strictly limited to that role, never interfering in

¹¹ *Summary View*, 16-17.

¹² *Summary View*, 23.

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the internal affairs of the component republics and never engrossing any more power than what was granted to it by the states. As Peter Onuf describes Jefferson's later thought, Jefferson ultimately extended this model ever downward, imagining a pyramid of republics: "ward" republics at the foundation, county republics built on that base, republican states poised above, and the national government at the apex. But being higher in the pyramid entailed only those powers necessary to maintain peace and equal justice among the component "republics" just below. Such restrictions on power ultimately conduced to the preservation of individual liberties in the communities at the bottom.¹³

Note that in the *Summary View* Jefferson primarily developed the theory and practice of an empire of self-governing republics and had little occasion to develop ideas about the sort of constitution that might make a state republican in the first place. He was prepared to accept—or at least chose not to deny—that Britain with its "160,000 electors" was sufficiently republican to join with the "four millions in the states of America" in composing an empire of peace and mutual advantage. He addressed the scourge of slavery but said nothing about the relationship of that institution to the republican (or not) character of the states where it existed in large numbers. He eagerly vindicated self-government and the natural equality of all men, whether American or British, but he did not elaborate on the proper conditions of a republican constitution. Still, Jefferson's theory of federalism was essential to his theory of republican constitutionalism, because he believed that no single republic could long sustain itself without a larger federal structure.¹⁴

¹³ Peter S. Onuf, *Jefferson's Empire: The Language of American Nationhood* (2000) 117-121.

¹⁴ Onuf, *Jefferson's Empire*, 8, 120.

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Jefferson's *Notes on the State of Virginia* and the Ingredients of a Republican Constitution

First drafted during the continuance of the Revolution (1781, with substantial revisions through 1784), *Notes on the State of Virginia* had little to say about federalism and much more to say, although somewhat haphazardly, about the internal constitution of a republic and specifically the republic of Virginia. For his time and his generation—and his social position as a planter and large slaveholder—Jefferson took surprisingly democratic and emancipationist positions. For an icon of democratic revolution and the natural right to liberty and equality, however, he proved notably stuck in his slaveholding, pre-democratic time and place. While *Notes* was hardly a constitutional tract—it was something of a miscellaneous commentary on Virginia—it contained much material pertinent to Virginia's constitution. In particular, Jefferson devoted substantial space to considerations of the character that must be fostered in a sovereign people, of the nature of leadership in a republic, of the challenge of slavery to republicanism, and of the preeminence of law—even over the will of the people—in rendering a society republican. Moreover, the ideas developed here remained largely stable over the course of Jefferson's life, although some significant development will be discussed in the next section.

If the people were to be sovereign and their will always to be obeyed, Jefferson nevertheless implied that that will must be just to be truly republican and that, to be just, that will must emanate from a people whose character had been properly fostered. He claimed, first, that only husbandry cultivated the sort of virtue necessary to maintenance of a republican constitution:

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Those who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue. . . . [L]et our workshops remain in Europe. . . . It is the manners and spirit of a people which preserve a republic in vigour. A degeneracy in these is a canker which soon eats to the heart of its laws and constitution.¹⁵

Once a sufficient portion of the people had abandoned husbandry and adopted habits of “subservience and venality”—the natural habits of those who labored for others or who depended on customers for their living--the way would open for those with “designs of ambition” to extinguish republican government.

But mere engagement in husbandry, it turns out, was not the whole story. Rather, Jefferson sought wide education with the goal of “rendering the people the safe, as they are the ultimate, guardians of their own liberty.” The people must be educated to spy “corruption and degeneracy” in government from afar because “Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe their minds must be improved to a certain degree.”¹⁶

Moreover, even an educated population of husbandmen might not be enough, thanks to slavery. In the *Notes*, Jefferson did not directly confront but implicitly acknowledged the tension between his celebration of the husbandman’s virtue and his description of the effects of slavery, not to mention the latter’s manifest injustice. He described Virginia slavery as a statewide training ground for despotism and indolence on the part of White Virginians and subservience on the part of Black Virginians, hardly consistent with the popular character he had deemed essential to republicanism and

¹⁵ Thomas Jefferson, *Notes on the State of Virginia*, ed. William Peden (1955) 165.

¹⁶ *Notes*, 148.

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likely, in fact, to lead eventually to full-scale insurrection:

There must doubtless be an unhappy influence on the manners of our people produced by the existence of slavery among us. The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. . . . The man must be a prodigy who can retain his manners and morals undepraved by such circumstances. . . . With the morals of the people, their industry also is destroyed. For in a warm climate, no man will labour for himself who can make another labour for him. . . . [We can only hope somehow] for a total emancipation, and that this is disposed, in the order of events, to be with the consent of the masters, rather than by their extirpation.¹⁷

Jefferson's hopes were bolstered somewhat by Virginia's ban on slave importation, a first step to undermining "this great political and moral evil, while the minds of our citizens may be ripening for a complete emancipation of human nature."¹⁸ But he always insisted that emancipation be gradual and accompanied by colonization because of his deeply racist conviction that free blacks and free whites could not live together without entering into a war that would end in the "extermination of the one or the other race."¹⁹

In sum, the Jefferson of the 1780s wrote frankly about the already visible and dire threats to the republican revolution. Jefferson seemed to acknowledge that all depended on the rooting out of slavery and ignorance. On the question of slavery, he joined many in the founding generation, many of them slaveholders themselves, who looked forward to abolition. Yet forty years later, as slavery became more entrenched and as the dream of emancipation faded from view, Jefferson would find himself travelling the same road as his state: he still personally possessed something like 175 slaves; he supported the entry of new slave states into the Union; and he stoutly defended the principle of state

¹⁷ *Notes*, 162-63.

¹⁸ *Notes*, 87.

¹⁹ *Notes*, 138.

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equality that was by then the principal defense of the slave states. Yet he never retracted his early characterization of slavery as productive of just the sort of “degeneracy” that would “eat[] to the heart of [a republic’s] laws and constitution.”²⁰

As he pressed past the challenges of slavery, Jefferson took remarkably democratic positions in the *Notes*. He made very clear that sovereignty lay in the people as a whole, that the moral virtue of the people was an essential element of defense against anti-republican usurpations, and that much wider suffrage than commonly obtained in the colonies ought to be guaranteed. Still, he neglected to provide any careful analysis of the role the people would actually play in a republican constitution. Almost thirty years later, he would develop the notion of “ward republics,” small geographical units in which each White man would play an active role in governance.²¹ But the *Notes* failed to offer any detail about the role of the people in republican governance, indicating that this original animator of American democracy remained significantly less democratic in his thinking than is sometimes supposed.

Jefferson’s discussion of education suggests the same point. Jefferson advocated a constitutional mandate for a program of public education, and the particular scheme that he advocated had clearly constitutional goals on two dimensions. I have already noted his claim that wide education would equip the people to identify the seeds of tyranny before they grew. But, just as importantly, he sought to identify the most talented young Virginians—the state’s natural aristocracy if properly cultivated—thus hoping “to avail the state of those talents which nature has sown as liberally among the poor as the rich . .

²⁰ *Notes*, 165.

²¹ See the discussions in Richard K. Matthews, *The Radical Politics of Thomas Jefferson: A Revisionist View* (1984); and Garrett Ward Sheldon, *The Political Philosophy of Thomas Jefferson* (1991).

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. .”²² Sovereignty and a kind of watchdog suffrage—extending as far as a right of revolution--lay in the people, but he intimated that the people could not expect to play any more active role than that. He had no thought of competitive elections turning on issues of public policy, nor of popular parties instructing their representatives, nor of candidates chosen for their fealty to popular opinion rather than their manifest talents. In the words of Gordon Wood, Jefferson “was not a modern democrat, assuming as he did that a natural aristocracy would lead the country, [but] he had a confidence in the capacity and virtue of the people to elect that aristocracy that was unmatched by any of the other founders.”²³

If this most democratic of American Founders harbored such elements of elitism, he also seemed to consider established principles of law more important than the will of the people. Jefferson’s reverence for law is manifest in his discussion of the defects in the first Virginia Constitution. Here, he emphasized that the constitution must not simply guarantee the supremacy of popular will but must supply a mechanism by which law would hem in the legislature and by which law would guide and structure the people’s will.

In particular, he objected to the constitution’s failure adequately to separate powers and thus to equip each branch of government to enforce the legal limits on the other branches’ authority: “All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government.” Without proper, functional separation, the government was not limited by law: “An *elective despotism* was not the government we

²² *Notes*, 148.

²³ Gordon S. Wood, *Revolutionary Characters: What Made the Founders Different* (2006) 107.

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fought for; but one . . . in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked by the others.”²⁴ In fact, Jefferson noted that Virginia’s “ordinance of government”—he was not willing to call it a “constitution”—nominally adopted just such a separation of powers but left executive and judicial salaries and tenure in the hands of the legislature. It thus undermined the other branches’ capacities to defend the law against legislative incursions.

He thought the constitution a mere “ordinance” not only because it failed to impose legal limits on government but because of its method of adoption. Jefferson claimed that the provisional, ad hoc legislature elected in April 1776, which produced the ordinance/constitution, was never elected for the special purpose of forming a constitution. At the time of the election, no voter contemplated such a thing because Virginia’s independence had not yet been declared nor decided upon in the public mind. For Jefferson, the absence of specific authorization from the voters to form a constitution deprived that body’s emergency enactment of the legal status of a constitution, notwithstanding its being “entitled a Constitution or Form of Government.”²⁵ Instead, every newly elected legislature had power to alter the constitution, and sometimes had done so, rather than feeling itself constrained by a constitution imposed from without.

I am not much concerned with whether Jefferson got his history right on this question, but his argument nicely demonstrates his view of how a constitution might accrue authority. Something of a law-and-society scholar, he implied that sociological and historical evidence of popular acceptance would be enough to authorize a document

²⁴ *Notes*, 120.

²⁵ *Notes*, 122.

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or practice to place legal limits on government actors and especially legislatures. Thus the employment of a constitutional convention rather than a legislature might be enough, even though each body derived its power from the same electorate, since the people's purposes were presumably different in the two cases. Neither such a convention nor popular ratification was essential, but some such evidence of wide acceptance was indispensable. Thus, in trying to delegitimize the Virginia Constitution of 1776, Jefferson chose to attack the evidence of popular acceptance offered by defenders of the constitution rather than assert that some formal legal procedure had been skipped. In the event, the law of prevailing practice went against Jefferson, and Virginia's 1776 Constitution remained in place and fully functioning until the constitutional revision of 1830.

Had Jefferson been a real democrat of the Jacksonian sort, he would have proposed constitutional reforms for giving the people at large an ever more active and close control over their officeholders. But, for Jefferson, problems with the content of the constitution and its mode of adoption demonstrated not inadequate popular control but an inadequate *legal structure* to bind the government: "Our situation is indeed perilous, and I hope my countrymen . . . will apply, at a proper season, the proper remedy; which is a convention to fix the constitution, to amend its defects, to bind up the several branches of government by certain laws, which when they transgress their acts shall become nullities; to render unnecessary an appeal to the people, or in other words, a rebellion, on every infraction of their rights" ²⁶ In this very pre-Jacksonian quotation, he seeks to avoid appeals to the people, which he equates with "rebellion," and looks instead to the discipline of clear law.

²⁶ *Notes*, 129.

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This preoccupation with law, of course, necessarily implied a concern with enforcement mechanisms. In the quotation just above, Jefferson seemed implicitly to look to the judiciary to render legislative transgressions “nullities.” In principle, he referred to the obligation of each branch to control the other two where it could. But the most salient mechanism would be the specifically judicial refusal to implement unconstitutional statutes, a power that he again embraced just a few years later when advocating the inclusion of a bill of rights in the federal constitution.

Concomitantly, he revealed a skepticism that the people at large could or would (or should) do much to roll back usurpations by this or that branch of government. They might be roused to demand a constitutional convention and might (rarely) rebel against a long train of oppressions, but they wouldn’t be much good at resisting the slow accumulation of unconstitutional power in the government.²⁷ For that, reliance had to be placed on well-designed legal mechanisms—“bind[ing] up the several branches of government by certain laws”--that would empower each branch to defend its own prerogatives.

I will not discuss Jefferson’s passionate defenses of freedom of religion, but it was at the end of one such defense in the *Notes* that he eloquently summed up the practical relationship between the people’s severely limited constitutional capacities and those of the constitution itself as a specifically legal document:

It can never be too often repeated, that the time for fixing every essential right on a legal basis is while our rulers are honest, and ourselves united. From the conclusion of this war we shall be going down hill. It will not then be necessary to resort every moment to the people for support. They will be forgotten, therefore, and their rights disregarded. They will forget

²⁷ A similar argument was made about the same time by soon-to-be Supreme Court Justice James Iredell. See Gerald Leonard, “Iredell Reclaimed: Farewell to Snowiss’s History of Judicial Review,” 81 *Chicago-Kent Law Review* 867, 874-76 (2006).

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themselves, but in the sole faculty of making money, and will never think of uniting to effect a due respect for their rights. The shackles, therefore, which shall not be knocked off at the conclusion of this war will remain on us long, will be made heavier and heavier, till our rights shall revive or expire in a convulsion.²⁸

In short, the people might be sovereign, but only clear foundational law—not the suffrage and not a right of rebellion—would ensure an adequate regard for their rights.

* * *

The essential themes established by a look at Jefferson's early work, then, are these: Notwithstanding his belief that only the people at large could and should be entrusted with the ultimate defense of their liberties, he expected his state and the nation to be ruled in the normal course less by the people than by a natural aristocracy, an elite of talents and merit, he hoped, rather than one of hereditary right or demagogic skills. He recognized, however, the unlikelihood that virtue would always characterize the republic's leadership. So he emphasized the necessity of clear foundational law to discipline the rulers of the moment, by way of the separation of powers, equipping some officeholders (e.g., judges) to resist the transgressions of others. But clear constitutional law would also supply the people with clear criteria for identifying the approach of tyranny. Jefferson did not seem to expect regular activity from the people, but he deemed indispensable both broad suffrage and the popular right to rebel on the basis of clear law. Still, Jefferson's failure to imagine any actual mechanisms by which the suffrage would be effectively deployed against usurpers—he had little concept of party or political organization short of rebellion--suggests again that he expected little of the people until a long series of abuses might bring them to the point of rebellion. After all, his own

²⁸ *Notes*, 161.

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experience with popular resistance to misrule came in the American Revolution; the alternative of peaceful resistance to usurpation through the ballot box was little more than an imagined abstraction in this pre-party and anti-party era.

Although Jefferson anticipated only limited popular action, he nevertheless emphasized the centrality of the character of the people. Republican character required that husbandry remain the dominant economic pursuit of the people. Otherwise, the ceaseless efforts of the ambitious to render the people dependent must eventually triumph. At the same time, he recognized the profound threat of slavery to the character of the people and to the spirit of law, and he never tired of making futile pronouncements as to the necessity of emancipation.

Finally, as I turn to Jefferson's experience under the federal Constitution, it is important to reemphasize Jefferson's federalism. He believed that the durability of republican government required that each republic lie within a confederation even as it retained its own sovereignty on all internal matters. The central, linking authority of the confederal structure—once the King of England but later the “general government” of the U.S.—would limit the constituent republics' independence only so far as necessary to preserve peaceful interstate and international relations.

Jefferson and the Democratization of the Federal Constitution

From the moment of the nation's rebirth under a new national constitution in 1787-1789, Jefferson played a major role in the constitutional development of the United States. As an officeholder, politician, and central figure in most of the constitutional controversies of the nation's first twenty years, he held consistently to most of the

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positions outlined above. But he also found himself advancing both the democratization of the Constitution and the injection of party into the Constitution in unexpected and sometimes unintended ways.

When the Constitutional Convention met in the summer of 1787, Jefferson resided in Paris, serving as the American minister to France. He returned to the States only in late 1789 and took up the position of Secretary of State under the new Constitution. In the meantime, his role in the Founding was limited mostly to an exchange of letters with his close friend, James Madison.

These letters seem to confirm that Jefferson was less concerned with ensuring the democratic quality of the Constitution than ensuring adequate legal checks on the exercise of power. First, in spite of his wariness of centralized power, he readily supported this effort to strengthen the national government within its limited sphere. Despite some reservations,²⁹ he did not go in with the Antifederalists, a motley but nearly victorious group of oppositionists who generally shared his confederal principles.³⁰ Rather, he firmly supported a Constitution that his friend Madison and the other delegates had designed as a mechanism not for enhancing popular power but for maximizing the chances that public-spirited gentlemen would be placed in power and, once there, that they would be suitably policed by other officeholders and by structural checks.³¹

As readily as he endorsed this not so democratic Constitution, he did express

²⁹ David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (1994) 95-99, describes Jefferson's hesitations but mainly his full-fledged endorsement of the Constitution on virtually all counts but the omission of a bill of rights.

³⁰ Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (1999).

³¹ On the designs of Madison and the Framers to blunt popular will and empower those with supposedly clearer access to principles of public good, see Nedelsky, *Private Property*, ch. 2 on Madison, and Rakove, *Original Meanings*, ch. 8 on representation in the Constitution. Also, see Madison's famous argument in *The Federalist* No. 10 as to the importance of a constitutional mechanism for ensuring that federal representatives would be statesmen of enlarged views rather than mere delegates from an inevitably factious people.

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some limited objections. Most importantly, he joined with the Antifederalist opponents of the Constitution in pressing for a bill of rights. Madison was skeptical. Madison considered the Constitution less a source of law than a machine, an institutional arrangement that might frustrate faction while empowering statesmanship. Like Jefferson, he recognized that a declaration of rights might establish explicit principles against which the people and the state governments could test exertions of national power and on which they might found a resistance when necessary. But he doubted that the “parchment barriers” of a bill of rights would really make much difference.³² Jefferson disagreed, however, famously educating his friend on the importance of judicial review, a legal mechanism of constitutional enforcement that Madison had neglected: “In the arguments in favor of a declaration of rights, you omit one which has great weight with me; the legal check which it puts into the hands of the judiciary.”³³ Celebrating the “learning and integrity” that he thought would characterize any independent judiciary, he easily imagined the judges regularly and effectively standing in the way of usurpation, something he could not easily imagine of the people themselves. But to do that in the normal course, the judges (like the state legislatures) needed clear legal texts in the form of a written constitution and bill of rights.

With Madison ultimately on board, the amendments that we now call the Bill of Rights were soon added to the Constitution, but I want to emphasize that they were not seen simply as guarantees of individual rights. They were just as much understood as protections for the states against overreaching by the national government. As Gordon

³² See Mayer, *Constitutional Thought*, 150-53, on Madison. And see Madison to Jefferson, October 17, 1788. Note that all quotations from the Madison-Jefferson correspondence are taken from James Morton Smith, ed., *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776-1826* (1995).

³³ Jefferson to Madison, March 15, 1789.

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Wood has argued, “the Antifederalists in their demand for amendments and a bill of rights had actually been more concerned with weakening the power of the federal government in its relation to the states in matters such as taxation than with protecting ‘personal liberty alone’ . . . ”³⁴ Once the government actually went into operation, the same could be said of the Jeffersonian opposition to Alexander Hamilton and his centralizing Federalists.

In the 1790s, Hamilton’s economic program of a national bank, national assumption of state debts, and the national imposition of excise taxes directly on the people provoked heated resistance from defenders of state autonomy. Jefferson and Madison organized newspaper campaigns against the Bank and other Hamiltonian policies. Scattered Democratic-Republican Societies, precursors of Jeffersonian party organization, emerged briefly to organize opposition to the pro-British Jay Treaty among other things, disappearing rapidly under the onslaught of condemnations for party activity. Rebels in western Pennsylvania resisted the Federalist excise tax on whiskey by resort to violence and threats before being scattered by a show of federal force.

Finally, in an episode I want to develop more fully, Jefferson and Madison turned to the state legislatures themselves to resist the Alien and Sedition Acts of 1798. The Federalist judiciary was not an option for enforcing the legal rights of the states against a Federalist Congress, as things had turned out. And, for all his apparently partisan activity in the 1790s, Jefferson had not yet imagined a resort to organized, popular resistance—mass party activity rather than rebellion—as a proper course. That left the state legislatures as the principal remaining institutions that the pair had originally imagined as enforcers of constitutional limits. Jefferson’s resolutions of 1798, drafted for the

³⁴ Wood, *Creation*, 543.

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Kentucky legislature, and Madison's resolutions for the Virginia legislature sought to test the capacity of the state legislatures to fulfill this role.

Among the most controversial aspects of the Alien and Sedition Acts was the provision that federalized the common law offense of seditious libel. Although the federal statute embraced doctrines that were actually more liberal than the established common law offense, Jefferson objected that the Constitution nowhere authorized the national government—as opposed to the state governments—to criminalize speech. In other words, he claimed that direct regulation of speech was a matter that belonged exclusively to the individual state republics, not the sort of interstate matter that belonged to the federal government. Thus the Constitution had granted the national government no power over speech, and the First Amendment had made explicit that the national government was not to have this power. Jefferson's resolutions on behalf of Kentucky made his case in a distinctly legalistic way that was reminiscent of a court's exercise of judicial review. Citing the First and Tenth Amendments as well as the general theory of the Constitution, he declared the seditious libel provisions “altogether void and of no force,” and he found that “the power to create, define, & punish such other crimes is reserved, and of right appertains solely and exclusively to the respective States, each within it's own territory.”³⁵ The Sedition Act was an unconstitutional assertion of Federalist consolidationism and a demonstration of the close linkage between states' rights and individual liberties.³⁶ The Kentucky legislature adopted most of Jefferson's draft intact, including his legal argument for the voidness of the federal law as well as clear affirmations of the compact theory of the Union. But the ultimate question of

³⁵ “Jefferson's Draft,” *The Papers of Thomas Jefferson* (ed. Barbara B. Oberg; 2003) 30: 536.

³⁶ Cornell, *Other Founders*, 240-42, 230-45; Onuf, *Jefferson's Empire*, 93-98.

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enforcement remained: could a state legislature simply declare a federal statute unconstitutional?

Mimicking the confederalism of the *Summary View*, Jefferson's draft defended this state power. He declared it obvious that the Constitution was a "compact" among the sovereign, independent states, which created "a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government."³⁷ The draft inferred from this premise a state right to nullify certain federal laws. While Jefferson's opponents denied that any state could unilaterally nullify a federal act, Jefferson insisted that the general government was a mere "creature"³⁸ of a compact among the states, such that its alleged usurpations could be judged only by the parties to the compact, the states themselves. He oddly accepted that an "*abuse* of the delegated powers" (emphasis added) would call only for a judgment by the people at the next election: "a change by the people would be the constitutional remedy."³⁹ But an assumption of altogether undelegated powers justified resort to nullification: "where powers are assumed which have not been delegated a nullification of the act is the rightful remedy: that every state has a natural right, in cases not within the compact . . . to nullify of their own authority all assumptions of power by others within their limits: that without this right, they would be under the dominion, absolute and unlimited, of whosoever might exercise this right of judgment for them."⁴⁰ Moreover, he expected that, "the costates . . . will concur in declaring these acts void & of no force & will each take measures of it's own for providing that . . . these acts, . . .

³⁷ "Jefferson's Draft," *The Papers of Thomas Jefferson* (ed. Barbara B. Oberg; 2003) 30: 536.

³⁸ *Id.*, 539.

³⁹ *Id.*, 539.

⁴⁰ *Id.*, 539.

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shall [not] be exercised within their respective territories.”⁴¹

Jefferson thus eagerly followed the logic of sovereignty from the *Summary View* to its natural conclusion. Still, enchanting as his logic was, Jefferson could see that it might lead all the way to disunion and ultimately pulled back from the precipice.

Loosening his grip on rigid confederalist principle, he called for the prudent, though not legally required, step of consultation among the “parties to the compact” to produce a collective remedy for federal illegalities.⁴²

In some ways, these resolutions fell stillborn. Kentucky, for its part, adopted Jefferson’s legal logic but excised the argument for nullification, merely requesting that Congress repeal the statute and calling on the states to correspond on the issue. Worse, no other legislature joined Kentucky and Virginia in any of their resolutions. The “co-states,” the “parties to the compact,” seemed to have forgotten the *Summary View*.

Yet, in other ways, the resolutions proved of major importance. They turned out to be a critical step in the development of American constitutional dynamics. They did not establish the constitutional authority of state legislatures nor a doctrine of nullification (although that doctrine would make a notorious, slavery-defending comeback in the 1830s). But they did play an important role, largely unintended though it was, in advancing democratic politics and party organization. In the words of Koch and Ammon, “As political propaganda, . . . the Resolutions were tremendously effective, frightening the Federalist ranks, and uniting, as Hamilton feared they might, the Republicans into a determined party with ‘body and solidity.’”⁴³ Jefferson and Madison

⁴¹ Id., 541.

⁴² Id., 539.

⁴³ Adrienne Koch and Harry Ammon, “The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Civil Liberties,” *The William and Mary Quarterly*, Third Series, Vol. 5, No. 2

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may have completely failed in their predictions of 1788-89, anticipating a partyless future in which the state governments would defend the limits on the federal government. Further, they may have completely failed in their efforts of 1798-99 to vindicate the constitutional prerogatives of the state legislatures. But within two years, party organization would succeed where the state legislatures had failed—and with Jefferson, of all people, leading the way.

In 1800, the idea of popular sovereignty became real and active in an unprecedented way. For the first time, a majority of the electorate seized on the tools of party organization to peacefully defy and turn out those in possession of the national government. Jeffersonian newspapers sprang up. Campaign committees were formed. A party ticket of Jefferson and Aaron Burr was nominated by the Republican congressional caucus. In politically advanced areas like New York City, the Republicans under Burr even conducted a comprehensive get out the vote operation.⁴⁴

Jeffersonian squeamishness about party was assuaged not only by the failure of all other methods of opposition but also by the knowledge that traditional antipartyism did seem to make room for an exception. Just as the people might organize to effect their right of revolution (as they did in 1776), they might organize a temporary party of the Constitution to attempt salvation by peaceful, political means when the Constitution was in danger of usurpation. Such a party would not count as a deviation from traditional antiparty values as long as it limited itself to an ad hoc defense of a fundamental

(Apr., 1948), pp. 145-176, 147. See also Stanley Elkins and Eric McKittrick, *The Age of Federalism* (1993) 721-726, which neatly describes the centrality of this episode in the Republicans' transition from loosely joined, party-wary oppositionists to an organized party of "principle."

⁴⁴ Susan Dunn, *Jefferson's Second Revolution* (2004) 179-80.

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constitutional principle, here the reserved rights of the states.⁴⁵

A committed antipartyist,⁴⁶ Jefferson learned in the campaign of 1800 to appreciate the necessity of party and the effectiveness of the sophisticated techniques of campaign organization at work in some parts of the United States. While keeping himself out of any public role in the campaign, he nevertheless served in effect as a national party leader in the election that he came to refer to as the “Revolution of 1800.” We often now look back on this election as a founding moment of the American two-party system, legitimating organized opposition to the government and peaceful transitions between equally legitimate parties. But that is not how Jefferson saw it. He accepted party organization, mobilization of the people at large, only in emergency conditions and as a peaceful alternative to the right of revolution. In ordinary times, he expected that party would melt away, its disciplinary function to be served simply by the quiet operations of the law.

Jefferson’s abiding antipartyism, moreover, was vindicated in the vexing denouement of the campaign. Because of the quirks of a Constitution that was not made to accommodate party tickets, the election results nearly led to civil violence. When Jefferson and his running mate, Burr, received the same number of electoral votes from an overly disciplined collection of Republican electors, the breaking of the tie fell, in effect, to Federalist members of the lame-duck Congress. Believing Jefferson a genuine revolutionary and lacking all experience with regularized party competition, the Federalists in Congress could not in good conscience give up any tool that might keep

⁴⁵ Ralph Ketcham, *Presidents Above Party: The First American Presidency 1789-1829* (1984) 100-113; Richard Hofstadter, *The Idea of a Party System* (1969) 123-128.

⁴⁶ Hofstadter, *Idea*, 122-28; Peter S. Onuf, *Jefferson’s Empire: The Language of American Nationhood* (2000) 85-88.

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Jefferson out of office. Predictably enough, this shameless disregard for the will of the people only cemented the Jeffersonian view of the Federalists as monarchists and aristocrats. In this crisis, the prospect of a resort to arms was a real one until a small crack in the ranks of the Federalists opened the door to Jefferson's peaceful installation.⁴⁷

The following passage from Jefferson's first inaugural address reflects both the severity of the political contest and Jefferson's determination to overcome rather than institutionalize the party conflict. It nicely summarizes his desire for unity rather than party division, his principled deference to popular will, but also his commitment to law as perhaps the only thing more fundamental to republican government than was the authority of the people:

During the contest of opinion through which we have past, the animation of discussions and of exertions has sometimes worn an aspect which might impose on strangers unused to think freely, and to speak and to write what they think; but this being now decided by the voice of the nation, announced according to the rules of the constitution, all will of course arrange themselves under the will of the law, and unite in common efforts for the common good.

All too will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate would be oppression. . . . And let us reflect that having banished from our land that religious intolerance under which mankind so long bled and suffered, we have yet gained little if we countenance a political intolerance, as despotic, as wicked, and capable of as bitter and bloody persecutions.⁴⁸

Jefferson never accepted the idea that party organization might be a permanent feature of republican government. Rather, he hoped to overcome party division and cement a mode of governance in which all recognized that, as he continued in his First

⁴⁷ Bruce Ackerman, *The Failure of the Founding Fathers* (2005) 89-92.

⁴⁸ See <http://www.princeton.edu/~tjpapers/inaugural/infinal.html>, which reprints Jefferson's First Inaugural as it appears in *The Papers of Thomas Jefferson, Volume 33: 17 February to 30 April 1801* (Princeton University Press, 2006), 148-52.

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Inaugural, “We are all republicans: we are all federalists”; that is, that virtually all Americans shared the republican principle of representative government and the federalist principle of states’ rights within a strong union. For him, the Constitution was sufficiently clear about these principles that there could be no room for ongoing party conflict if all would simply demonstrate a due regard for law.

During his presidency, moreover, he again manifested a special regard for clear constitutional law as essential to a republican constitution. Again in his First Inaugural, he not only emphasized the necessity of “equal laws” as a condition on the raw power of majority will, but he also pointed to a popular regard for law as the quality that made the American government “the strongest Government on earth. I believe it the only one, where every man, at the call of the law, would fly to the standard of the law, and would meet invasions of the public order as his own personal concern.” Further, Jefferson emphasized that public law must be clear and readily enforceable so that it might genuinely discipline officeholders rather than just providing occasions for sophistical interpretation. This attitude can be seen in Jefferson’s most important act as President, the acquisition of the Louisiana Territory. While few doubted the constitutional power of the President and Senate to add territory to the nation by way of treaty, Jefferson could not satisfy himself that anything in the Constitution actually authorized the acquisition with sufficient clarity. Jefferson insisted that,

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When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe & precise. I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.⁴⁹

In the end, he allowed himself to be convinced that the acquisition was so important to the future of republican government that he should put aside his scruples. But those scruples nicely demonstrate that he deemed law at least as fundamental as popular sovereignty.

I cannot conclude this account of Jefferson's constitutional thought without returning to the question of slavery. As indicated above, Jefferson understood from the beginning that slavery would be the curse of the American experiment in republican government. If he recognized the moral indefensibility of slaveowning and at least made gestures towards a program of emancipation in his early years, he ultimately did precious little even to ameliorate the conditions of the enslaved, let alone to advance emancipation. Rather, he pressed forward, mostly ignoring the issue as he led the cheers for the alleged triumph of liberty and self-government in America. In his old age, the Missouri crisis of 1819-21 forced the issue to his attention once more and compelled him to articulate the choice he had made over the course of decades. As northern politicians resisted the addition to the Union of another slave state, offering the nation a chance to confine slavery geographically and move it that little bit toward eventual abolition, Jefferson remained securely on the southern train to self-destruction. Over time, he had more and more clearly elevated his foundational principle of state sovereignty over the equal principle of antislavery, sometimes for the very purpose of protecting slave-state

⁴⁹ Jefferson to Wilson Carey Nicholas, September 7, 1803, quoted in Bailey, *Thomas Jefferson and Executive Power* (2007) 182.

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prerogatives. So in the Missouri Crisis he attacked the Northern politicians for betraying the Revolution, blaming them for what he took to be the near prospect of secession and thus the failure of the American experiment in self-government: “If they would but dispassionately weigh the blessings they will throw away against an abstract principle [anti-slavery] more likely to be effected by union than by scission, they would pause before they would perpetrate this act of suicide on themselves and of treason against the hopes of the world.”⁵⁰ This argument, premised on the fantasy that “diffusion” of slavery would advance the prospects of emancipation and that state autonomy regarding slavery was an essential and fixed doctrine of the Constitution, had a certain logic in the abstract. But in reality it only served to defer a reckoning with America’s fatal contradiction and entrench slavery ever deeper, causing the Democrats of the next two generations to extend and extend Jefferson’s futile approach until a bloodbath--akin to that feared by Jefferson all along--finally began the necessary work.

Conclusion

Unlike Jefferson himself, the new generation of Republicans that came of age in 1800 betrayed much less concern for law than for popular sovereignty and states’ rights. Chief among these young Republicans was the 18-year-old Martin Van Buren, eventually to be the eighth President, destined to convert his worship of Jefferson into a life devoted to the construction and maintenance of the Democratic party. He and his kind concluded that party organization must be a permanent feature of republican constitutionalism because aristocracy (under the name of Federalism or otherwise) would remain a permanent threat. Thus, the Democratic party—often known as “the democracy” to

⁵⁰ Jefferson to John Holmes, April 22, 1820, quoted in R.B. Bernstein, *Thomas Jefferson* (2003) 186.

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distinguish itself from “the aristocracy”—had to be more than a kind of political militia, reserved for rare constitutional emergencies. Instead, it had to become the chief governing agency of the nation, even more fundamental and constitutional than the particular government institutions mandated by the constitutional text itself. The party, as the immediate tool of the people, would be the source of nominees for public office as well as the source of policy positions and instructions for ensuring that officeholders did precisely the will of the people. In this vision, there was no room for Madison’s filtration and refinement of popular opinion and enabling of statesmen, nor for Jefferson’s similar ideal of rule by a natural aristocracy, even one chosen directly by the people. Rather, the people were themselves to rule as directly as possible. Officeholders were to be chosen for their fidelity to the party and rotated out of office regularly, vindicating the postulate that ability was less important than was close identification with the desires of the people.⁵¹

Jefferson, in contrast, for all his sincere declarations of the supremacy of the people’s will, had had no thought of creating an institution that might allow the people to articulate their will with regularity and clarity. Only in 1810 did he begin to imagine an extension of his pyramid of republics down to the ward level, contemplating the active involvement of every White man in governance.⁵² This extension added a bit more democracy to his federalist pyramid--a national government, resting on state governments, resting on county governments. But it was Van Buren, not Jefferson, who adapted this model for democratic party organization (in which ward meetings would

⁵¹ See generally Leonard, *Invention of Party Politics*.

⁵² See Matthews, *Radical Politics*, 81-89, and Sheldon, *Political Philosophy*, 67-72, 143-45, both of which suggest that Jefferson embraced this notion of ward democracy and an actively self-governing people from his earliest days in public life but who cite evidence only beginning in 1810.

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instruct county conventions which would instruct state conventions which would instruct national conventions). Where Van Buren used that model to show how every White man might exercise his equal share of control over every action of his representatives, Jefferson used it only to show that every White man might participate in governance at a level of government appropriate to his abilities.

Jefferson was probably the most democratic figure among the eminent men of his generation, but his inherited opposition to party and his lawyerly preoccupation with clear and equal law proved especially salient principles of his republicanism. And these principles conditioned his democratic inclinations in ways that separated him from his radical successors. He was also the greatest champion of states' rights in his generation and a pretty radical champion at that, never really giving up on the confederal model built in the *Summary View*. Unfortunately, his commitment to states' rights came to have its most dramatic effect in preserving slavery. In the slave states, even avowed opponents of slavery like Jefferson mostly proved incapable of turning against their own self-interest to eliminate it. Meanwhile, the doctrines born from the *Summary View*, proved decisive for as many northerners as southerners, blunting all anti-slavery efforts from outside the South and leaving another generation to bear the awful cost of beginning the republican experiment anew.