

The Sound of Silence:

United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes

Gary D. Rowe

That in a Constitution, so new, and so complicated, there should be occasional difficulties & differences in the practical expositions of it, can surprize no one; and this must continue to be the case, as happens to new laws on complex subjects, until a course of practice of sufficient uniformity and duration to carry with it the public sanction shall settle doubtful or contested meanings.

-James Madison¹

Few major controversies have ended with as slight a whimper as the battle over federal common law crimes that raged in the first two decades of the American republic. In the 1812 case *United States v. Hudson & Goodwin*,² the Marshall Court dispensed in just eight paragraphs with what Thomas Jefferson had regarded thirteen years earlier as “the most formidable” of doctrines that had “ever been broached by the federal government.”³ Through a “course of reasoning” it boldly characterized as “simple, obvious, and admit[ting] of but little illustration,”⁴ the *Hudson* Court held that before one can suffer a federal conviction, the “legislative authority of the Union must first make an act a

1. Letter from James Madison to M.L. Hurlbert (May 1830), in 9 THE WRITINGS OF JAMES MADISON 372 (Gaillard Hunt ed., 1910) [hereinafter WRITINGS OF MADISON]. Original spelling, punctuation, and capitalization have been retained when possible.

2. 11 U.S. (7 Cranch) 32 (1812).

3. Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), in 9 THE WORKS OF THOMAS JEFFERSON 73 (Paul L. Ford ed., 1905) [hereinafter WORKS OF JEFFERSON]. Indeed, the Bank of the United States, Jay’s Treaty, and even the Alien and Sedition Acts were to Jefferson but “solitary, unsequential, timid things, in comparison with the audacious, barefaced and sweeping pretension to a system of law for the U S, without the adoption of their legislature, and so infinitely beyond their power to adopt.” *Id.* One modern commentator has similarly observed that “[c]ertainly no other issue of that period was more explosive.” R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 102 (1985). “At stake was republican government itself: the way it should make law.” *Id.*

4. 11 U.S. (7 Cranch) at 33.

crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."⁵

Hudson's apparent unwillingness to treat the issue of federal common law criminal jurisdiction as worthy of serious contemplation has led courts and commentators to assume erroneously that *Hudson* merely restated what had always been, that "[t]here were no common-law punishments in the federal system."⁶ Indeed, precisely because we take the *Hudson* doctrine as such a tired truth today—"Federal crimes, of course," the Supreme Court recently yawned, citing *Hudson*, "'are solely creatures of statute'"⁷—we often fail to see just what a considerable revision of the early republic's practice it represents. For without acknowledging it, the *Hudson* Court disapproved at least eight circuit court cases,⁸ brushed off the views of all but one Justice who sat on the Court prior to 1804,⁹ and departed from what was arguably the original understanding of those who framed the Constitution and penned the Judiciary

5. *Id.* at 34.

6. Harmelin v. Michigan, 111 S. Ct. 2680, 2691 (1991) (Scalia, J.); see also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 245 n.39 (1982) (asserting that "the United States has never had a federal common law of crime.").

7. Dowling v. United States, 473 U.S. 207, 213 (1985) (quoting Liparota v. United States, 471 U.S. 419, 424 (1985) (citing *Hudson*)).

8. United States v. Smith, 27 F. Cas. 1147 (C.C.D. Mass. 1792) (No. 16,323) (denying motion in arrest of judgment following conviction for counterfeiting U. S. bank notes, an offense not statutorily proscribed); Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360) (charging jury, in prosecution for breach of neutrality, that federal government possessed jurisdiction over all crimes at common law); United States v. Ravara, 27 F. Cas. 713 (C.C.D. Pa. 1793) (No. 16,122) (sustaining indictment at common law against foreign consul for writing threatening letters to British minister); United States v. Worrall, 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766) (denying motion in arrest of judgment after conviction for bribery of federal revenue commissioner); United States v. Meyer, 26 F. Cas. 1242 (C.C.D. Pa. 1799) (No. 15,761), described in FRANCIS WHARTON, PRECEDENTS OF INDICTMENTS AND PLEAS 562 & n.(d) (1849) (reprinting indictment, describing common law prosecution for libel of a U.S. circuit court in a German language newspaper, and observing that "ably defended" defendants chose not to challenge existence of federal common law criminal jurisdiction); Williams' Case, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708) (common law rule against expatriation used to convict American expatriate for engaging in hostilities against United States); United States v. Anonymous, 1 F. Cas. 1034 (C.C.D. Pa. 1804) (No. 475) (jury charge stating that indictments may be sustained by either statute or common law); United States v. McGill, 26 F. Cas. 1088 (C.C.D. Pa. 1806) (No. 15, 677) (opinion, in case of murder on the high seas, stating that federal courts have jurisdiction over common law crimes but that this case was not within the federal admiralty jurisdiction). Additional unreported federal common law prosecutions may well have taken place.

9. According to Justice Story, "[E]xcepting Judge Chase, every Judge that ever sat on the Supreme Court Bench, from the adoption of the Constitution until 1804, (as I have been very authoritatively informed,) held a like opinion." 1 LIFE AND LETTERS OF JOSEPH STORY 299 (Boston, Little & Brown, William W. Story ed., 1851) [hereinafter LETTERS OF STORY]. Representative James A. Bayard offered the same assessment on the floor of the House in 1800, noting that on the issue of federal common law crimes, "[A]ll the judges united in opinion with the exception of one." 10 ANNALS OF CONG. 411 (1800).

Kathryn Preyer has recently questioned just how avidly the pre-Marshall Court actually championed common law crimes. See Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223 (1986). As Maeva Marcus has observed, however, "[W]ith the exception of Samuel Chase, no federal judge in [the period before 1800] actually denied the existence of a general federal common law jurisdiction." 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800: THE JUSTICES ON CIRCUIT 1795-1800, at 322 (Maeva Marcus ed., 1990).

Act of 1789.¹⁰ Perhaps Francis Wharton, a leading criminal law scholar of the first half of the nineteenth century, set the issue that confronts us here in the starkest relief:

[A]lmost at the opening of the courts, we see the first Chief Justice of the United States [John Jay], with the pen hardly dry with which the great cotemporaneous commentary on the Constitution [*The Federalist Papers*] was partly written, hurrying to Richmond to declare to the first Federal grand jury that ever sat there, the doctrine, *afterwards so precipitately abandoned*, that, by the common law, the Federal courts have power to punish offences against the Federal sovereignty.¹¹

10. 1 Stat. 73. There is considerable scholarly debate concerning the original understanding of the Judiciary Act as it relates to the federal common law of crimes. Compare Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 77 (1923) (changes in early drafts of Judiciary Act indicate that drafters intended common law crimes) with JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 495-96 (1971) (claiming that no evidence supports Warren's claim that the drafters clearly intended common law crimes). It is certain, in any case, that the chief draftsman of the Act, future Chief Justice Oliver Ellsworth, believed strongly that the federal judiciary had jurisdiction over federal crimes at common law. See, e.g., *Williams' Case*, 29 F. Cas. 1330 (Ellsworth, J.) (charging jury that common law rule against expatriation applies in federal prosecution of expatriate for hostilities against United States).

Whether the Framers and ratifiers of the Constitution specifically intended the federal judiciary to have common law criminal jurisdiction is difficult to discern. The American revolutionary generation appealed to the common law as its "birthright and inheritance." See, e.g., 11 ANNALS OF CONG. 614 (1802) (remarks of Rep. Bayard); 8 ANNALS OF CONG 2146 (1798) (remarks of Rep. Otis); PETER S. DUPONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES, at ix (Phila., Abraham Small 1824); Judge Benjamin Tappan's Charge to the Grand Jury of Guenisey County, Ohio (1817), in JOHN MILTON GOODENOW, A REVIEW OF THE QUESTION WHETHER THE COMMON LAW OF ENGLAND RESPECTING CRIMES AND PUNISHMENTS IS IN FORCE IN THE STATE OF OHIO 6 (Butler & Lambdino 1817). The Framers also referred specifically to "trials at common law" in the Seventh Amendment. U.S. CONST. amend VII. These truisms, however, hardly answer the question of whether they intended to incorporate the *entire* common law system, including common law crimes, or merely selected aspects of the system, such as trial by jury. Indeed, the term "common law" had a notoriously slippery meaning in late 18th-century America. See Letter from James Madison to Peter S. DuPonceau (Aug. 1824), in 9 WRITINGS OF MADISON, *supra* note 1, at 200 ("If the common law has been called our birthright, it has been done with little regard to any precise meaning."); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 31 (1967) (identifying common law as but "a repository of experience in human dealings embodying the principles of justice, equity, . . . rights," and history).

One implicit purpose of this Note is to reveal an inherent difficulty with original understanding arguments. The Founders held, simultaneously, contradictory views at different levels of generality. As a matter of political theory, the Framers believed in the sovereignty of the people. As a matter of practice, however, many believed that any self-respecting government had the inherent power to protect itself and its sovereignty from criminality, even in the absence of a criminal statute. Which original understanding is to trump, the specific or the general? As I see it, the abolition of federal common law crimes reflects the way actual practice, stimulated by crisis, began to approach the requirements of constitutional theory. For a contrasting argument, asserting that the practices of the 1790's reveal the "supraconstitutional" principles underlying the Constitution and thus serve as a model of "objective" constitutional interpretation, see Stephen B. Presser, *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Constitutional Jurisprudence*, 84 NW. U. L. REV. 106 (1989). According to this view, the profound constitutional change that accompanied the Revolution of 1800, of which *Hudson* was the coda, constituted an "original misunderstanding." *Id.* at 108. It seems to me, by contrast, that the 1790's would be among the least useful decades from which to glean lessons about constitutional interpretation. As the battles discussed in this Note reveal, the implications of the Constitution's new structure had not fully challenged settled practice in the 1790's. See *infra* Part III.

11. FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 1 (Phila., Carey & Hart 1849) (emphasis added).

This Note seeks to explain how the federal common law of crimes was “so precipitately abandoned” and how the current verities about the nonexistence of federal common law crimes emerged. Along the way, it sheds light on an instance of significant constitutional-structural change in the federal government and observes the changing understanding of federalism, popular sovereignty, and the balance between courts and Congress in the first few decades of the American republic.

The Note also confronts a more general problem: that of jettisoning lived experience in light of fundamental, structural change. When, for example, the Jeffersonians¹² denounced the Sedition Act of 1798,¹³ which threatened their ability to mount an effective opposition campaign, one Federalist expressed “astonishment that gentlemen should raise such an outcry against a law so perfectly analogous to the laws and usages under which they had all been born and bred.”¹⁴ The abolition of common law crimes in 1812 represents a moment when the implications of the Constitution’s structure ultimately caught up with lived experience. It crystallized the realization—first suggested in 1798—that the Constitution and the common law could not coexist, that the American system of government had broken off from its English antecedents more sharply than anyone had quite realized.¹⁵ Peter S. DuPonceau, the author of perhaps the most sophisticated work on jurisdiction in the early republic, expressed this sentiment incisively in 1824:

The revolution has produced a different state of things in this country. Our political institutions no longer depend on uncertain traditions, but on the more solid foundation of express written compacts . . . *But old habits of thinking are not easily laid aside*; we might have gone on for many years longer confounding the English with the American common law, if cases had not been brought before the federal Courts, so serious in their nature, and apparently fraught with such dangerous

12. This Note uses the term “Jeffersonian” to describe a political party led by Thomas Jefferson and James Madison that formed in the mid 1790’s. The rival Federalist Party was led by John Adams and Alexander Hamilton. The Federalists held power from 1796 to 1800 and never regained it thereafter. By 1812, it was well on the road to extinction. Federalists (with the notable exception of Justice Samuel Chase) tended to support common law criminal jurisdiction and Jeffersonians to oppose it. On the nuances of Jeffersonian ideology, see generally LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* (1978).

13. 1 Stat. 596. The Sedition Act played a large part in shaping the Jeffersonian party’s ideology, see BANNING, *supra* note 12, at 248-302, as well as in defining the party’s response to the problem of common law crimes. The Act is discussed extensively in Part III, *infra*.

14. 8 ANNALS OF CONG. 2149 (1798) (remarks of Rep. Otis).

15. As Albert Gallatin queried during one of the Sedition Act debates: “Thus the [Federalist] gentleman creates two Constitutions, that of the United States, and that of the common law?” 10 ANNALS OF CONG. 421 (1800). St. George Tucker, in his celebrated American edition of Blackstone, wrote similarly in Appendix E: “And as two strait lines, which diverge from each other at the same point, can never after meet, or become parallel, so the institutions of two countries, founded upon such a discordant principles, could never after be assimilated to each other.” 1 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* 391 app. E (Birch & Small 1803).

consequences, that hesitation was produced, and the public attention was at last drawn to this important subject.¹⁶

This Note thus uses the case of Messrs. Hudson and Goodwin to explore the considerable tension between common law and Constitution ingrained in the very fabric of American law. The Constitution was not written on a *tabula rasa*; while it created a wholly new theory and structure of government, it was written by men who derived their erudition from common law concepts. Could the Constitution be read in a vacuum? Was it even coherent in the absence of the common law? Would reading the document in light of the common law betray the principles of the American Revolution, or sustain them? Just how were common law and Constitution to be synthesized?¹⁷ The controversy that culminated in *Hudson* speaks, in my reading, to precisely this problem. This Note consequently seeks to decipher and render lucid this important yet cryptic opinion.

Part I begins by asking how the broad sweep of *Hudson's* holding can be reconciled with the opinion's brevity and breeziness. Part II discusses alternative ways the Court could have resolved *Hudson* and examines the principal arguments supporting common law criminal jurisdiction. Part III looks back at the late 1790's in order to demonstrate that those arguments had been decisively rejected in the political and constitutional struggle known as the Jeffersonian "Revolution of 1800".¹⁸ *Hudson* simply outlined some of the basic principles of this victorious Jeffersonian constitutional vision. Rather than being doctrinally innovative or politically venturesome, then, *Hudson* performed a "codifying" function,¹⁹ writing into constitutional law that which the political branches of government and the political public had already decided.²⁰ By holding that the federal courts lacked inherent common law powers, the Court gave formal definition to the notion that the common law would operate only within the interstices of the Constitution's structure.

16. DUPONCEAU, *supra* note 10, at x-xi (emphasis added).

17. In using the term "synthesis," I borrow from BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 86-103, 113-30, 140-62 (1991). Note, however, that Ackerman concerns himself with the difficulties of *intergenerational* synthesis and thus views the problem as one that did not arise until the Constitution was transformed by the Reconstruction Amendments. "[T]he early Federalist Justices," he writes, "could locate [the Constitution] against the background of a relatively concrete political culture . . ." *Id.* at 88. This Note suggests, in contrast, that the problem of synthesis touched even the first generation of Americans.

18. The term "Revolution of 1800" refers to the transfer of power from the Federalists to the Jeffersonians. Thomas Jefferson later observed that "the revolution of 1800 . . . was as real a revolution in the principles of our government as that of 1776 was in its form." Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 12 *WORKS OF JEFFERSON*, *supra* note 3, at 136.

19. My use of the term "codification" again draws on ACKERMAN, *supra* note 17, at 288-90.

20. *Cf.* *United States v. Darby*, 312 U.S. 100, 123-24 (1941) (dismissing 10th Amendment, in two paragraphs and without substantial argumentation, as "but a truism"). *Darby*, it can be argued, did for the New Deal what *Hudson* did for the Jeffersonian revolution, altering *sub silentio* the constitutional landscape, based upon a recently arrived at constitutional consensus.

I. HUDSON'S PROBLEMATIC CHARACTER

Hudson involved the prosecution of the publishers of a Hartford newspaper, *The Connecticut Courant*, for seditious libel. Barzillai Hudson and George Goodwin had reprinted an article from *The Utica Patriot* accusing Congress of secretly appropriating two million dollars, at the request of President Jefferson, as a bribe to Napoleon. Upon a division of the trial judges over whether the circuit court had jurisdiction, the case was certified to the Supreme Court.²¹ Justice William Johnson²² wrote the opinion of the Court, over no recorded dissent.²³

A. *The Paradox of the Opinion*

A reading of *Hudson* immediately presents a paradox: the opinion's reasoning is as loose and brief as its holding is broad. It cites no precedent, yet it seems unwilling to accept the possibility that there could be a view to the contrary.

A ready solution to the paradox would view the case as mere politics—as a “bald assertion,”²⁴ a successful partisan attempt to obscure the complex controversy concerning common law crimes.²⁵ *Hudson*, according to this view, represents the fruit of a “peculiar . . . partisan disturbance,” growing out of “fear [of] a scheme . . . to install a consolidated national government.”²⁶ As such, *Hudson* cannot offer a “‘principled’ explanation”²⁷ for the abolition of federal common law crimes. Rather, *Hudson*'s holding—forged amid “analytic confusion” and plagued by the “awkward fit of older ideas”—“lacked in

21. Under § 4 of the Judiciary Act of 1802, 2 Stat. 156, 157-58, circuit courts consisted of a district court judge and a traveling Supreme Court Justice. The circuit courts served as trial courts in cases of serious federal crimes. Judiciary Act of 1789, § 11, 1 Stat. 73, 78-79. Appeal to the Supreme Court was largely precluded in criminal cases. The Supreme Court would review a criminal conviction only in the event of a division among the judges of the circuit court, Judiciary Act of 1802, § 6, 2 Stat. 156, 159-61, or on an application for a writ of habeas corpus. Judiciary Act of 1789, § 14, 1 Stat. 73, 81-82.

22. Appointed by President Jefferson in 1804, Justice William Johnson of South Carolina was the first Jeffersonian named to the Court.

23. For a deeply researched narrative (with a strong, almost conspiratorial anti-Jeffersonian bias) of the facts and politics of the case, see 2 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 767-84 (1953).

24. STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 97-98 (1991). Professor Presser's new book, which came to my attention as this Note approached the press, touches on several of the themes developed here, particularly on the importance of public opinion in resolving the common law crimes controversy. This Note, however, ultimately finds public opinion a more satisfactory device for resolving the question than does Presser, and it also finds the Jeffersonian argument more persuasive.

25. See Edwin D. Dickinson, *The Law of Nations as a Part of the National Law of the United States*, II, 101 U. PA. L. REV. 792, 794 (1953) (referring to *Hudson* as “a brief, loosely reasoned and completely unfortified opinion” constituting a “somewhat extraordinary process of constitutional development by default”); Stewart Jay, *Origins of Federal Common Law* (pts. 1 & 2), 133 U. PA. L. REV. 1003, 1231 (1985).

26. Jay, *supra* note 25, at 1323.

27. *Id.*

ultimate coherency.²⁸ This view insists that Justice Johnson simply found the appropriate occasion to gloss over from the bench a vexing, unresolved question. Whatever meaning the case had in its time, it is almost completely inaccessible to us now.

This reading of *Hudson*, however, falters when it attempts to explain the ease with which Johnson's audacious coup ultimately triumphed. It finds itself in the strange position of having to dismiss an important opinion that altered the constitutional landscape, issued without dissent by a politically mixed bench, as a mere political charade of little lasting significance.²⁹ I suggest, by contrast, that we regard *Hudson's* broad sweep and its summary nature as entirely complementary, rather than at odds. By 1812, common law criminal jurisdiction was effectively dead. The Court consequently needed only to elaborate the new understanding of the separation of powers and federalism that had already triumphed with the Jeffersonian ascendancy. Reading *Hudson* as a constitutional declaration of this sort accounts for both its brevity and its breadth, and finds in it lasting meaning without anachronism.

B. *The Quiet in the Courtroom*

The most striking feature of the opinion is the basis of its holding. The question *Hudson* presented, according to the Court, had "been long since settled in public opinion,"³⁰ and Justice Johnson apparently saw little need to offer any deeper justification. His reliance on the "general acquiescence of legal men,"³¹ rather than on argument and precedent, suggests that by 1812 the real debate had already come to an end. Those who opposed common law crimes were not only in the majority, but had also neutralized their critics. Strong reasoning, on this theory, was unnecessary; the opinion needed only to define

28. Jay, *supra* note 25, at 1012.

29. Professor Jay's analysis also analytically misidentifies the significance of the *Hudson* opinion. It treats *Hudson* as a confused, conclusory case about jurisdictional theory, rather than as the resolution of a deeper question about the relationship between the common law and the structural principles embodied in the 1787 Constitution. It is entirely correct to suggest, as Jay does, that *Hudson* can tell us nothing about modern federal common law. That, however, is because federal common law, as we now understand it, was not at issue in the case. The current version of federal common law ("new" federal common law, *see* Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964)) involves filling gaps in otherwise comprehensive congressional statutory schemes. *Hudson*, however, explicitly refused to address that problem, observing that "[i]t is not necessary to inquire whether the general Government, in any and what extent, possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act. . . ." *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812). Indeed, the question presented in *Hudson* was an entirely different one: could the common law of crimes, a distinct body of law forged over the centuries, be invoked in federal criminal proceedings *without* statutory authorization?

30. *Hudson*, 11 U.S. (7 Cranch) at 32.

31. *Id.* The full passage from the opinion reads:

Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition.

the contours of an existing constitutional consensus. This consensus was sufficiently strong to still the courtroom: disagreement was articulated neither at the bar nor on the bench.

1. *No Argument*

Both Attorney General William Pinkney and defense counsel Samuel Dana declined to argue the case. Their refusal supports the idea that *Hudson* merely declared previously agreed upon constitutional principles. Indeed, Pinkney did not present an argument despite the fact that he actually supported federal common law criminal jurisdiction. Supreme Court reporter Henry Wheaton stated: "I am told that Mr. Pinkney had formed, and frequently expressed, a very decided opinion that the courts of the Union possessed a common law jurisdiction"³² Apparently Wheaton was accurately informed, because on July 5, 1812, Pinkney forwarded to President Madison a letter Justice Story had written, lamenting the state of the "criminal code of the U.S." and urging the President to promote legislation granting "the Courts of the U.S. a common law jurisdiction as to crimes."³³ By choosing not to argue the case, Pinkney appears to have recognized that his position was outside the new constitutional consensus that had emerged by the time *Hudson* reached the Supreme Court. In an 1813 circuit court opinion, Justice Johnson corroborated this conclusion. "It is true," he wrote, that *Hudson* "was not argued, but the true reason was, the universal conviction prevailing at the bar, that opinion had, in every department, settled down against" federal common law criminal jurisdiction.³⁴

2. *No Dissent*

On the bench, Justice Story, as vigorous a proponent of federal common law criminal jurisdiction as there ever was, encountered the same force of consensus as had Pinkney. Shortly after *Hudson*, Story began to propose legislation that would have granted the judiciary the power to hear criminal cases as at common law.³⁵ Why then did neither he nor the nationalistic Chief Justice, John Marshall, utter a peep here? According to the standard explana-

32. HENRY WHEATON, SOME ACCOUNT OF THE LIFE, WRITINGS, AND SPEECHES OF WILLIAM PINKNEY 114 (1826), *quoted in* Jay, *supra* note 25, at 1015 n.42.

33. Letter from Joseph Story to William Pinkney (June 26, 1812), *in* Madison Papers (Library of Congress, Presidential Papers Series, microfilm edition, series 2, reel 26). The letter was enclosed in a letter from William Pinkney to James Madison dated July 5, 1812.

34. The Trial of William Butler for Piracy 12 (1813). A copy is available in the Beinecke Library, Yale University. Handwriting on the cover page of the Yale copy identifies William Johnson as the opinion's author and President Madison as the intended recipient.

35. Story first suggested such a bill to Attorney General Pinkney in June 1812, just three months after *Hudson*. See *supra* note 33 and accompanying text. He also drafted bills and speeches on the subject in 1816 and 1818. One section of each of these bills would have granted the federal judiciary criminal common law jurisdiction. See NEWMYER, *supra* note 3, at 103 & n.103; 1 LETTERS OF STORY, *supra* note 9, at 296-303.

tion, Story actually did dissent, although not in print.³⁶ *Hudson*, in this view, was a four-to-three decision, with Justices Story, Marshall, and Washington silently disagreeing. That the opinion merely declares itself to be “of the majority of this Court” corroborates this view.³⁷ The weight of the evidence, however, ultimately suggests that the opinion was indeed unanimous.

An unreported opinion written by Justice Johnson while on circuit at Charleston in 1813 explicitly rejects the notion of a four-to-three split and stresses instead the lack of disagreement in *Hudson*.³⁸ The case involved the prosecution of an alleged pirate whose particular crime, the court concluded, fell outside the scope of the federal penal statutes. The prosecutor consequently attempted to support the indictment at common law, but the court, citing *Hudson*, rejected his argument. Emphasizing the “solemn” nature of the *Hudson* precedent, Justice Johnson explained what the Court had meant when it claimed that the opinion was that of the majority: “It has been said of this Case [*Hudson*], that it was only decided by a majority; but I am confident that Judge Washington alone, if any one, at that time dissented from the opinion.”³⁹ From this comment in Justice Johnson’s circuit opinion, then, there is little reason to think that Marshall and Story dissented from the *Hudson* opinion.

Additional evidence corroborates Justice Johnson’s remarks. Kathryn Preyer has shown persuasively that the Chief Justice had all but disapproved of common law criminal jurisdiction in two previous opinions.⁴⁰ Justice Story’s failure to dissent, while initially more difficult to understand, can also be explained.⁴¹ It must be noted, first, that Story had joined the Court just weeks before *Hudson* and may have been apprehensive about dissenting so early in his judicial career. A more compelling explanation, however, is that when

36. See, e.g., 2 CROSSKEY, *supra* note 23, at 782-83 (1953); Jay, *supra* note 25, at 1016.

37. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812).

38. *The Trial of William Butler for Piracy*, *supra* note 34, at 12.

39. *Id.* Other evidence strongly supports Johnson’s statement. We know that Justice Bushrod Washington believed in common law crimes as late as 1806. *United States v. McGill*, 26 F. Cas. 1088 (C.C.D. Pa. 1806) (No. 15,677) (“I have often decided, that the federal Courts have a common law jurisdiction in criminal cases . . .”). However, a treatise writer of the 1820’s pointed out that by 1822, Washington instructed grand juries that United States courts lacked cognizance of offenses punishable at common law in the absence of a statute. See THOMAS SERGEANT, CONSTITUTIONAL LAW 274 n.(g) (Nicklin & Johnson, Phila. 2d ed. 1830) (citing grand jury charge Washington delivered in Philadelphia in October 1822).

Why, then, did Justice Washington not issue a written dissent in *Hudson*? And why was Johnson less than certain about Washington’s position? The syllabus to the *Hudson* opinion reveals the answer: Washington was absent when the case was decided. *Hudson*, 11 U.S. (7 Cranch) at 32. The *Hudson* opinion was therefore likely considered that of a majority of the Court because only a majority took part in the decision. This explanation is corroborated by the reporter’s note that appears at 11 U.S. (7 Cranch) 46 n.*: “Justice Washington was prevented by indisposition, from attending on the 13th, 14th, 17th, and 18th of February.” *Hudson* was supposed to be argued on February 13, 1812, and was handed down on the last day of the February 1812 Term, which was March 13, 1812.

40. Preyer, *supra* note 9, at 246-47. Preyer relies on *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (courts cannot transcend jurisdiction vested by written law), and an unreported case, *United States v. William Smith* (C.C.D. Va. 1809) (refusing to allow indictment at common law when a statute already attached civil penalty).

41. Professor Preyer’s analysis again provides the most fruitful starting point. See Preyer, *supra* note 9, at 248, 253.

Hudson was handed down, Story's nationalism had not yet reached its zenith. While he had previously complained about the sketchiness of the federal criminal code,⁴² it was not until the War of 1812, which began three months later, that he considered common law criminal jurisdiction an absolute necessity.⁴³

Story clearly harbored hopes for a *legislative* solution at this point, believing that *Hudson* did not affect Congress' power to incorporate the common law by reference in its criminal code. Thus he presumed that there could be no "doubt as to the right of Congress to delegate authority in general terms over crimes. It is not assuming a general common law jurisdiction, but only applying the common law definition of crimes to the limited powers delegated by the Constitution to the United States."⁴⁴ This passage suggests that Story might not have objected to—or at least at this point could live with—*Hudson*, because *Hudson* merely prevented the federal courts from exercising inherent criminal powers. He could therefore envision realizing his goal of a vigorous national penal authority without disturbing the understanding of limited government, federalism, and the separation of powers embodied in *Hudson*. Only after the War of 1812 progressed—and Congress failed to enact a more comprehensive criminal code—did he attempt to chip away at *Hudson* from the bench.⁴⁵

Another defect in the four-to-three split theory is that it ultimately misplaces its emphasis. When a case as substantively momentous as *Hudson* dismisses a matter as "obvious"⁴⁶ and capable of being resolved by simple resort to "public opinion,"⁴⁷ those who disagree are likely to complain vocally. Even if some members of the Court objected to *Hudson*, the significant fact is that they nonetheless held their peace.

42. See 19 ANNALS OF CONG. 909 (1808) (Congressman Story introducing resolution calling for committee on how to fortify federal criminal code).

43. See Preyer, *supra* note 9, at 248 (war had impact on Story that was "hard to overestimate").

44. 1 LETTERS OF STORY, *supra* note 9, at 298. Shortly after *Hudson*, Story drafted a bill to bolster the criminal code. Section 11 of Story's proposal would have delegated broad powers to punish conduct not expressly prohibited in federal criminal statutes to the federal circuit courts. See *supra* note 35. When Story showed his Court colleagues his proposal, only Justice Johnson expressed reservations, which Story indicated concerned the wisdom, not the constitutionality, of the proposal. See 1 LETTERS OF STORY, *supra* note 9, at 300. "I think I am at liberty to say," Story wrote, "that it will be satisfactory to the court, if it is passed." *Id.*

45. See discussion *infra* Part II.B.

Not only does the evidence suggest, then, that *Hudson* really was unanimous, but it also suggests that this was so because the Court held only that federal courts lack an inherent common law criminal jurisdiction. In other words, because the opinion did *not* go on to restrict Congress' power to delegate broad criminal powers to the courts, unanimity was that much easier to achieve. Indeed, had Johnson's opinion limited Congress's ability to vest the federal judiciary with the power to define crimes, he might well have encountered dissent from Story and Marshall. In fact, five of the six other members of the Court told Justice Story, only a year after *Hudson*, that they thought a bill to vest federal courts with common law-like criminal powers would be clearly constitutional. See *supra* note 44. Thus, if Justice Johnson's opinion had disparaged "new" federal common law—if it had, in other words, gone on to restrict the Court's ability to elaborate upon a sketchy congressional statutory scheme or delegation—Johnson might not have mustered even a majority.

46. *Hudson*, 11 U.S. (7 Cranch) at 33.

47. *Id.* at 32.

Story, like Marshall, had an institutional, as well as a substantive, agenda for the Supreme Court. Before John Marshall became Chief Justice, opinions were handed down seriatim. Marshall, who wished to see the Court speak as an institution with a single voice, discontinued the practice and discouraged Justices from writing separately.⁴⁸ Critics of the Court such as Thomas Jefferson, however, hoped to prevent the Court from gaining the institutional strength that the abolition of seriatim opinions would entail.⁴⁹ For with separate opinions, precedents would be difficult to discern, and the law as expounded by the Court would be restricted to those points on which the majority of individual opinions overlapped. Jefferson and Marshall were thus involved in a struggle over institutional strength as well as over substantive holdings.

Had Marshall and Story dissented in *Hudson*, then, they would have lost to Jefferson not only on the substantive front, but also on the institutional side. For it was none other than Justice William Johnson who Jefferson hoped would break the Court's unanimity by writing frequent concurring and dissenting opinions.⁵⁰ If Marshall and Story dissented here, in a case so important to Johnson, it would become all the more difficult to control Johnson's pen subsequently. Especially in the case of common law crimes, a dissenting opinion was unlikely to alter the constitutional consensus underlying Johnson's opinion. Far better to give up what was untenable and instead seek further institutional strength.

Such a strategy meshed well with the balance the Jeffersonians and the more nationalistic Court were beginning to strike. The Jeffersonians could, as in this case, alter the constitutional understanding that the Court would apply—restricting the *substantive* powers open to the federal judiciary—while at the same time ceding to Marshall the *institutional* vigor that the Supreme Court lacked even during the heyday of Federalism under President John Adams. *Hudson*, which sharply diminished the substantive power of the circuit courts,⁵¹ could therefore exist peaceably with a case such as *Martin v.*

48. See Donald M. Roper, *Judicial Unanimity and the Marshall Court—A Road to Reappraisal*, 9 AM. J. LEGAL HIST. 118, 119 (1965) (regarding unanimity as a basic tenet of Marshall's jurisprudence, along with nationalism and preservation of property rights). An 1818 letter indicates that Story actively supported Marshall's quest to stamp out dissent. Story wrote to Supreme Court reporter Henry Wheaton, asking him to keep confidential a dissenting opinion he had written but not published in *United States v. Bevens*, 16 U.S. (4 Wheat) 336 (1818). Although Story strongly disagreed with the Court's reasoning in the case, finding it lacking in "precision and accuracy," a "delicacy in respect to the Chief Justice" convinced him to remain silent. Letter from Joseph Story to Henry Wheaton (Apr. 10, 1818), in 1 LETTERS OF STORY, *supra* note 9, at 305. Story's silence here was especially poignant because the case involved yet another rejection of federal common law criminal jurisdiction and also chipped away at Story's beloved admiralty jurisdiction.

49. See Donald Morgan, *The Origin of the Supreme Court Dissent*, 10 WM. & MARY Q. 361 (1953).

50. See *id.*

51. Under § 11 of the Judiciary Act of 1789, circuit courts had exclusive jurisdiction over all serious federal crimes. 1 Stat. 73, 78-79.

Hunter's Lessee,⁵² which like unanimous opinions, strengthened the institution of the Supreme Court.⁵³

II. THE ROADS NOT TAKEN

A. Justice Johnson's Narrow Alternative

Perhaps the most striking feature of *Hudson* is the way Justice Johnson expanded the question presented well beyond the scope of the case at bar. The question certified to the Supreme Court was "whether the Circuit Court of the United States had a common law jurisdiction in cases of libel?"⁵⁴ Johnson, however, chose *sua sponte* to address the far broader question of "whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases?"⁵⁵ He self-consciously justified his rather audacious expansion of the issue, writing: "We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those Courts by statute."⁵⁶

Yet the Court need not have treated the specific crime of common law libel as indistinguishable from all other common law crimes. It seems entirely plausible, after all, to oppose the doctrine of criminal libel (on First Amendment grounds, perhaps), yet still wish to punish other nonpolitical crimes that Congress had failed to enumerate, such as bribery of a federal officer.⁵⁷ Why then did Johnson wish to broaden the question?

The answer lies in an examination of the argument in favor of common law crimes, as elaborated by Justice Story in 1813. For his argument reveals that the idea underlying seditious libel—that the national government possessed the inherent power to protect itself against activities that would damage its sovereignty—applied just as strongly to any other common law crime. Only by

52. 14 U.S. (1 Wheat.) 304 (1816). *Martin* upheld the constitutionality of § 25 of the Judiciary Act of 1789, which permitted the U.S. Supreme Court to issue writs of error to the highest court of a state.

53. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Supreme Court, by diminishing its own jurisdiction, vastly strengthened its institutional power).

54. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

55. *Id.*

56. *Id.*

57. In *United States v. Worrall*, 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766), for example, the defendant was convicted of attempting to bribe a commissioner of the revenue, despite the absence of a statute criminalizing such conduct. District Judge Peters insisted that the act was punishable at common law because the power of a government to preserve itself is "a necessary, and an inseparable, concomitant" to its establishment. *Id.* at 779. Justice Chase, sitting with Peters at trial, disagreed and held the offense unpunishable because it was not statutory. *Id.* at 778-79. Unfortunately for historians, the defendant refused to take the judges' disagreement to the Supreme Court for resolution—thereby depriving us of the opportunity to see how the Court would have resolved the question in 1798. According to the reporter, the two judges resolved their disagreement and upheld Worrall's conviction after a "short consultation." "The most rational interpretation," Francis Wharton observed, is that during the consultation, Chase acquainted himself with the views of his brethren and, in the interest of consistency, acceded to Peter's position. See WHARTON, *supra* note 11, at 199. In any case, the *Worrall* precedent (among others) was available to Johnson, who could have used it to differentiate seditious libel from nonpolitical common law crimes.

treating all common law crimes as a unit could Johnson reach and destroy the fundamental presupposition upon which seditious libel law rested.

B. *Justice Story's Case for Federal Common Law Crimes*

Three months after *Hudson*, war between the United States and Great Britain broke out, and the inadequacy of the nation's criminal code became painfully apparent. Maritime offenses were especially poorly drafted, and even Justice Johnson worried that the most wanton of pirates would be able to escape punishment altogether.⁵⁸ Yet the situation in Justice Johnson's South Carolina Circuit paled when compared to that in the Northeast, and few became more fearful than Justice Joseph Story, who rode circuit in New England. Story witnessed the attempts of frustrated Federalists to obstruct the war effort and observed how impotent the extant criminal law was to do anything about it.⁵⁹ Nonetheless, as Circuit Justice, Story accepted and followed *Hudson* throughout 1812,⁶⁰ attempting all the while to persuade Congress to fortify the penal code.⁶¹ His lobbying efforts, however, failed miserably, so in late 1813 he attempted to undermine from the bench the precedent *Hudson* had established. Once again he failed, but his failure usefully illuminates the nature and scope of the seemingly empty *Hudson* decision.

The case, *United States v. Coolidge*,⁶² involved the forcible rescue of a prize ship at admiralty.⁶³ Although Congress had passed no law against forcible rescues, Story insisted that such disgraceful activity should be punished and, indeed, was punishable at common law.

Story decided to use *Coolidge* as a vehicle to undermine *Hudson*. The case provided him with a splendid opportunity to take issue with the *Hudson* rule: first, *Coolidge* involved a crime akin to piracy, something no one would want to go unpunished;⁶⁴ second, sitting as circuit judge, Story could lambaste *Hudson* without chipping away at the Supreme Court's institutional standing. Perhaps he could persuade the Court, through an extremely strong and convincing opinion, that the rule prohibiting federal common law crimes was not as "obvious" as *Hudson* had indicated. Perhaps—given the desperate situation in which the threatened nation found itself in 1812—Story could force a reconsid-

58. Johnson had his opinion in *The Trial of William Butler for Piracy*, *supra* note 34, which acquitted a robber on the high seas, privately printed, hoping that it would alert Congress to the grave inadequacies of the federal criminal code. "Perhaps these pages," the editor wrote in the preface, "may find their way into the hands of some of the members of Congress, and impress on them the necessity of passing some amendatory Act on the subject of Robbery on the high Seas." *Id.* at 4.

59. See 1 LETTERS OF STORY, *supra* note 9, at 243, 247.

60. See NEWMYER, *supra* note 3, at 103 (Story's 1812 grand jury charges indicate that he followed *Hudson* on circuit).

61. See *supra* note 35 (discussing Story's legislative activity).

62. 25 F. Cas. 619 (C.C.D. Mass. 1813) (No. 14,857), *rev'd*, 14 U.S. (1 Wheat.) 415 (1816).

63. A forcible rescue occurred when the owners of a vessel that had been lawfully captured attempted to repossess it by force, rather than waiting for the capture to be adjudicated in a prize court.

64. See, e.g., *supra* note 58.

eration of the issue. He wrote an elaborate and scholarly opinion that stood in sharp contrast to the casual argumentation of *Hudson*. Yet it did nothing whatsoever to aid his cause.

When the case was appealed to the Supreme Court, Attorney General Richard Rush, who succeeded Pinkney, followed his predecessor's example and refused to argue it. Rush considered the issue adequately decided in *Hudson*.⁶⁵ The Court reaffirmed its previous holding. And so *Hudson*'s seemingly strange reference to "public opinion" had content after all. Justice Johnson's observation that "the true reason" the case was not argued "was, the universal conviction prevailing at the bar, that opinion had, in every department, settled down against it" appears most apt.⁶⁶

Both Story in *Coolidge* and Johnson in *Hudson* saw more at stake in their respective cases than the immediate questions presented. Since the alleged crime in *Coolidge* took place at sea, Story could have distinguished the case from *Hudson* by deciding it on narrow admiralty grounds. Not satisfied with confining federal nonstatutory criminal power to admiralty, however, Story chose to raise the stakes instead.⁶⁷

Story thus expanded the question, asking, as Johnson had in *Hudson*, whether circuit courts had the power to punish nonstatutory offenses against the United States. Two hurdles stood between Story and his answer: he first had to establish that the circuit court had jurisdiction; he then needed to show that the common law provided the appropriate rule of decision. For jurisdiction, Story chose to rely upon the eleventh section of the Judiciary Act of 1789, which stated that, except where otherwise provided, the circuit courts "shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States."⁶⁸ The language of section eleven is almost

65. See *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816). In 1814, Rush indicated his vehement objections to crimes at common law. The common law was, he wrote, "[A] dark catalogue of crimes and punishments . . . imprinting more of human blood upon the gibbet than is known to the same extent of population in any other portion of Europe." 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 439 (1926). As time progressed and the movement for penal reform gained momentum, Rush's particular objection to common law crimes attained greater prominence. In 1825, Congressman Edward Livingston commented, "Some learned jurists . . . contended that the common law was in full vigor. . . . But, if so, it introduced a dreadful list of capital offenses, and such a one as [I] hope[] never to see recognized in this country." 1 CONG. DEB. 349 (1825). Such objections to the substance of the criminal common law may help explain why Congress never enacted a broad delegation of criminal powers, as Story had desired. See *supra* notes 35, 44.

66. *The Trial of William Butler for Piracy*, *supra* note 34, at 12.

67. Although the last fifth of the *Coolidge* opinion attempted to distinguish the case from *Hudson* by claiming admiralty jurisdiction, it is overshadowed by the bulk of the opinion, which challenged *Hudson* almost directly. Peter S. DuPonceau, a believer in nonstatutory crimes in admiralty only, regretted that Story "thought it necessary to travel out of his straight path, and to abandon an impregnable fortress [i.e., admiralty] to seek battle in the open field." DUPONCEAU, *supra* note 10, at 10.

68. 1 Stat. 73, 78-79 (1789). Section 9 of the Act gave district courts "cognizance" of all crimes "upon the high seas" and of all other federal crimes "where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." *Id.* at 76-77. Section 11 essentially gave the circuit courts jurisdiction over crimes not covered in § 9.

perfectly circular: the statute grandly declares that the circuit courts have jurisdiction over all crimes falling within the federal jurisdiction. What it does not say, however, is whether nonstatutory crimes fall within this jurisdiction. The question-begging language of section eleven rendered it necessary, therefore, to resort to prior constitutional principles and presuppositions in order to decide jurisdiction.⁶⁹

Story himself did precisely that, noting before he even mentioned section eleven that "it can hardly be doubted, that the constitution and laws of the United States are predicated upon the existence of the common law."⁷⁰ Without the common law, in Story's view, the Constitution would be but an empty shell, essentially unintelligible.⁷¹ The common law thus served as an essential ingredient in the "construction and interpretation of its powers."⁷² Story then turned to the statute, reading the language "all crimes cognizable under the authority of the United States" as vesting in the circuit courts the entire amount of criminal law power permitted under the Constitution. And since, as we have just seen, it was axiomatic to Story that the Constitution presupposed the common law, it followed that the judiciary had jurisdiction to try any common law crime against the United States, whether or not enumerated in a statute. Put slightly differently, Story's argument, while technically statutory, was premised entirely on the assumption that common law powers were necessarily vested in the federal judiciary.⁷³

69. As I read it, the language of § 11 does not vest the federal court system with jurisdiction, but rather merely apports already-existing jurisdiction between district and circuit courts. For a contrary view, see Warren, *supra* note 10, at 73. According to my reading, the statute would vest the circuit courts with jurisdiction over common law offenses only if the Constitution presupposed or incorporated the common law and thus rendered such offenses "cognizable under the authority of the United States." Thus, as much as Story wanted to rely on § 11 (which Hudson considered only obliquely, *see infra* note 148) it cannot be the statute alone that does the work in his Coolidge opinion. Rather, the statute served simply as a convenient device for him to "bootstrap" common law jurisdiction.

70. *United States v. Coolidge*, 25 F. Cas. 619, 619 (C.C.D. Mass. 1813) (No. 14,857), *rev'd*, 14 U.S. (1 Wheat.) 415 (1816).

71. *See id.* ("law," "equity," "habeas corpus," and jury trial given meaning by common law).

72. *Id.*

73. Story justified his reading of the statute by noting that it granted jurisdiction over "all crimes and offences 'cognizable under the authority of the United States'" rather than merely over "all crimes and offences specially created and defined by statute." *Id.* His distinction assumed, however, that the common law served as the baseline for congressional criminal legislation. It was equally possible, however, that Congress did not begin with the assumption that common law crimes existed. The statute, in short, simply does not tell us anything in this regard. *See also* The Trial of William Butler for Piracy, *supra* note 34, at 29 (using same technique of construction to argue that the Judiciary Act's phrase "'all crimes and offences committed against the United States'" does not mean "'to every individual Act which if committed in Great Britain would by the Common Law be deemed an offence against the Crown'").

Story's use of § 11, while perhaps more circumspect, nonetheless closely resembles that of Judge Richard Peters in *United States v. Worrall*, 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766). (The case, about bribery of a federal officer, is discussed more extensively in note 57, *infra*). There Peters insisted:

Whenever an offence aims at the subversion of any federal institution . . . it is an offence against the well-being of the United States; *from its very nature*, it is cognizable under their authority; and, consequently, it is within the jurisdiction of this court, by the 11th section of the judiciary act."

28 F. Cas. at 779-80 (emphasis added).

The common law had, essentially of its own force, provided jurisdiction; now it would provide a rule of decision and determine the substantive law the court would apply. "In my judgment, nothing is more clear," Story wrote, "than that the . . . exercise of the vested jurisdiction of the courts of the United States must, in the absence of positive law, be governed exclusively by the common law."⁷⁴ Indeed, he argued that *without* the common law, judges would possess unlimited discretion.⁷⁵ Further, since the common law was used routinely to delineate the elements of crimes Congress had named but not precisely defined, it followed to Story that the common law could be used to punish crimes Congress had neglected to proscribe entirely.⁷⁶ For the common law served as the background for nearly all legislation; indeed, in many cases "the legislative will cannot be effectuated, unless by the adoption of the common law."⁷⁷ To Story, then, the common law alone rendered congressional governance coherent.⁷⁸ A general federal common law played an essential role in preventing representative government from fatally faltering.

Story went on to elaborate the types of crimes subsumed under the common law. In so doing, he betrayed the expansiveness of his common law vision. "I will venture to assert generally," Story wrote, "that all offences against the sovereignty, the public rights, the public justice, the public peace, the public trade and the public police of the United States, are crimes and offences against the United States."⁷⁹ It would have been at least as terrifying to read this intrepid line in 1813, in the wake of the Sedition Act, as it is to read it today.

Story's seemingly modest desire to give the fragile United States government power to protect itself against malefactors contained illimitable implications. Indeed, in another circuit opinion about common law crimes in admiralty, written shortly prior to Story's *Coolidge* opinion, Justice Johnson deduced the precise list of offenses Story soon offered; Johnson deployed his list, however, in a *reductio ad absurdum* argument, as a parade of horrors. The contrast between Story's and Johnson's tones approaches comedy. Johnson wrote:

If you ask a common lawyer, what crimes the assumption of this Common Law jurisdiction would bring to these Courts[,] he would turn

74. *United States v. Coolidge*, 25 F. Cas. 619, 620 (C.C.D. Mass. 1813) (No. 14,857), *rev'd*, 14 U.S. (1 Wheat.) 415 (1816).

75. *Id.* "Whatever may be the dread of the common law, I presume[] that such a despotic power could hardly be deemed more desirable," Story continued. *Id.*

76. *See id.* (principles of common law interact with those of Constitution to define "offences against the United States," just as common law interacts with statutes to aid in interpretation).

77. *Id.*

78. On Story's view of the legislative process, see generally 1 LETTERS OF STORY, *supra* note 9, at 242-48 (expressing highly pessimistic view of Congress' ability to solve nation's problems expressed in extremely colorful language). Congress, Story believed, exhausts itself "in mere political discussions, and remain[s] so unjustifiably negligent of the great concerns of the public." *Id.* at 244; *see also* NEWMYER, *supra* note 3, at 75-114 (noting Story's distaste for Congress and vision of judges as "vital center of republican government").

79. *Coolidge*, 25 F. Cas. at 620.

to his Blackstone and Hawkins, and without attempting to enumerate them give them to us in gross, under the *idea of offenses, against the sovereignty, the public rights, the public justice, the public peace, public trade, public police, &c. &c.* to an extent to which judicial gravity forbids me to pursue it.⁸⁰

If the Constitution gave the government the inherent right to protect itself against such a wide range of offenses, Johnson further insisted, either the most draconian elements of the common law would apply in federal courts, or judges would assume vast discretion and "erect themselves into legislators in the selection."⁸¹ Neither choice pleased him.

In short, in attributing to the courts criminal power greater than that actually exercised by Congress, Story vested the national government with an infeasible sovereignty. It was precisely to combat this conception of sovereignty that Justice Johnson expanded the question in *Hudson* from libel to common law crimes generally. Johnson recognized that the exercise of an unwritten criminal law, "in its nature very indefinite—applicable to a great variety of subjects,"⁸² would be incompatible with a Constitution that established a government no greater than the sum of its parts.

III. THE JEFFERSONIAN BACKGROUND TO *HUDSON*

Unfortunately for Story, his argument for federal common law crimes fundamentally contradicted the constitutional principles that the Jeffersonians had been expounding for more than fifteen years. Inspired by the War of 1812, Story saw common law criminal jurisdiction as necessary to protect the national government's integrity. His logic, however powerful, clashed fundamentally with the historical experience of the Jeffersonian party in battling the Sedition Act of 1798.⁸³ Both Story's conclusion in *Coolidge* (that all offenses against the sovereignty of the United States are punishable, whether or not Congress has enumerated them) and his premise (that a federal common law serves as a necessary background to legislation in criminal matters, as well as to the Constitution itself) were precisely what the Jeffersonian ascendancy had repudiated decisively. *Hudson* formally incorporated this Jeffersonian understanding into constitutional law so that, although the opinion was short and sketchy, it was built on bedrock.

80. The Trial of William Butler for Piracy, *supra* note 34, at 19 (emphasis added).

81. *Id.* at 21. Professor Horwitz has argued that this fear of judicial discretion was symptomatic of a movement away from natural law and toward positivism. He views the debate over common law crimes exclusively through this lens. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, at 9-30 (1977).

82. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812).

83. 1 Stat. 596 (1798).

A. *The Sedition Act Crisis*

The Federalist-sponsored Sedition Act of 1798 made it a crime to “write, print, utter or publish . . . any false, scandalous and malicious” words regarding either the President or Congress; it expired automatically on inauguration day, 1801.⁸⁴ A glance through the *Annals of Congress* reveals just how deep a scar the notorious Act left upon the body politic, as well as the role the response to the Act played in shaping the subsequent era’s constitutional understanding. In 1809, for example—a full eight years after the Act’s repeal—the House of Representatives was still debating resolutions and entertaining speeches about “Sufferers under the Sedition Act.”⁸⁵ One Sedition Act victim, Congressman Matthew Lyon, spoke of his “ignominious imprisonment of four months in a loathsome dungeon—the common receptacle of felons, runaway negroes, or the vilest malefactors.”⁸⁶ The Jeffersonian understanding of the Constitution, which Justice Johnson summarily articulated in *Hudson*, was forged in the furnace of the Sedition Act.

In assessing just what was so wrong with the Sedition Act, the Jeffersonians faced a profound ideological difficulty: the Federalists seemed to have an impenetrable argument. As the Federalists gloated while at the height of power, the much-maligned Act “enlarged” rather than “abridg[ed]” the “liberty of the press.”⁸⁷ In the early republic, the First Amendment was regarded as guaranteeing nothing more than the common law definition of freedom of the press: the freedom to publish without prior restraint.⁸⁸ Even men as radical as Tom Paine saw the criminal liability of the writer and printer for slandering the government as necessary to prevent liberty from degenerating into license. A notorious seditionist pamphleteer himself, Paine nonetheless believed that liberty of the press “refers to the fact of printing *free from prior restraint*, and not at all to the matter printed, whether good or bad. The public at large—or in case

84. *Id.* The Federalists controlled the White House and both Houses of Congress in 1798.

85. 20 ANNALS OF CONG. 119-34 (1809). In 1811, the House of Representatives discussed the possibility of offering compensation to the Sedition Act’s victims. *See* 23 ANNALS OF CONG. 345-48 (1811).

86. 20 ANNALS OF CONG. 122 (1809).

87. H.R. REP. NO. 110, 5th Cong., 3d Sess., in 20 AMERICAN STATE PAPERS 181, 183, and 9 ANNALS OF CONG. 2989 (1799).

88. *See* LEONARD W. LEVY, THE EMERGENCE OF A FREE PRESS 220-349 (1985). At common law, seditious libel was vaguely defined, but it generally covered the act of defaming the government or bringing it into disrepute. *See id.* at 8-11. The defendant, further, could not plead the truth of his remarks as a defense, *id.* at 12, and the jury could only return a special verdict indicating whether or not the defendant had actually printed or written the material the court found seditious. *Id.* at 11. American Attorney General Charles Lee expressed the typical, common law view of freedom of speech in 1797 when he observed that “Lord Mansfield has said ‘that the liberty of the press consists in printing without any previous license, subject to the consequence of the law;’ and in this definition I concur with the learned judge.” 1 Op. Att’y Gen. 41-42 (1797). Americans at this time had by and large not questioned the traditional, British view of free speech and press. *See* LEVY, *supra*, at xii-xiii.

of prosecution, a jury of the country—will be judges of the matter.”⁸⁹ To Paine and his generation, the First Amendment was premised on majoritarian, rather than libertarian, concerns.⁹⁰ It was intimately bound up with the central institutional actor of the period: the jury.

In sharp contrast to the common law, the Sedition Act permitted the accused to offer truth as an affirmative defense. Indeed, one of the Act’s objects, as Congressman Robert Harper explained, was “to mitigate the undue rigor of the common law, and to give opportunity for the person charged to clear himself by proving the truth of his assertion.”⁹¹ Thus Federalist representatives, effectively mocking Jeffersonian opposition to the Act, asked the House to extend it after Jefferson’s election to the Presidency, claiming that the Federalists would be able to criticize the new Administration more freely with the Sedition Act than without it.⁹² In a 1799 committee report answering petitions of disaffected countrymen, Federalist congressmen similarly demolished the Republican challenges. “[T]he act in question cannot be unconstitutional,” the report argued, “because it makes nothing penal that was not penal before, and gives no new powers to the court, but is merely declaratory of the common law, and useful for rendering that law more generally known and more easily understood.”⁹³ Except for making the defense of truth admissible in court and limiting the fine and imprisonment that followed conviction, the Sedition Act made no innovation in the law.

And so the Jeffersonians discovered that the ground upon which they trod daily had become an abyss. The law as they had always known it was now stunningly ill-adapted to political reality. This was their dilemma: although it challenged their very existence as an opposition party, the Sedition Act nonetheless was, as the historian Leonard Levy cleverly put it, “[T]he true embodiment of everything excellent. It was, that is, the very epitome of libertarian thought”⁹⁴ Simple libertarian arguments against the Act were consequently particularly unlikely to succeed.

89. Tom Paine, *On the Term “Liberty of the Press,”* N.Y. AM. CITIZEN, Oct. 20, 1806, at 2. This quote also appears in LEVY, *supra* note 88, at 348. It is worth noting that, restrictive as it may have been, Paine’s view of criminal libel was far more generous than that of the British. Paine believed that there was a difference between “error and licentiousness” and that it was the job of the jury to distinguish between the two. Paine, *supra*. Truth therefore served as a defense of sorts in Paine’s view: while truth was not necessarily of legal significance, it was proper for the jury to consider truth in reaching a general verdict. In England, by contrast, juries could not take the truth of a publication into account at all. For a highly sophisticated discussion of the differences between American and British juries and of how these differences shaped the future development of American institutions, see SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW* 10-66 (1990).

90. For a discussion of the majoritarian aspects of the First Amendment in the early republic, and its connection to the jury system, see Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1147-52 (1991).

91. 10 ANNALS OF CONG. 415 (1800).

92. See 20 ANNALS OF CONG. 75 (1809); 10 ANNALS OF CONG. 917 (1801).

93. H.R. REP. NO. 110, *supra* note 87.

94. LEVY, *supra* note 88, at 297 (paraphrasing Gilbert & Sullivan).

It is, in fact, less than clear which side had the better libertarian argument available to it at the time. The position supporting the Jeffersonians, that the unimpeded exchange of ideas furthers democracy, has an obvious appeal today. Yet such an argument may well have been a bit ahead of its time. The Federalists, on the other hand, could claim that the Sedition Act was exceptionally well tailored to the needs of republican society. Although opinion and debate serve as the lifeblood of popular government, “[t]o mislead or corrupt public opinion,” as one Federalist put it, “is to sap the pillars which support the Government, and produce its ruin.”⁹⁵ The Sedition Act could consequently be said to serve liberty in two ways. By making truth a defense, it encouraged the exchange of ideas. Yet by punishing for falsehood, it prevented that resulting cacophony from misleading, instead of informing, the public. The Act thus at once preserved the liberty of the press and prevented that liberty from degenerating into license. One might even venture to say, tongue touching cheek perhaps, that the Sedition Act embodied “the very essence of a scheme of ordered liberty.”⁹⁶

What the Jeffersonians needed to break the Federalists was not, then, simply a civil liberties argument, but a structural one. For at the core of the often rancorous debates that ensued between the Jeffersonians and the Federalists lay the brooding question of whether a federal common law operated in the United States. The Federalists insisted that the common law served as the necessary backdrop and adjunct to the Constitution.⁹⁷ Under the common law, the United States as a sovereign power possessed, “from the nature of things,”⁹⁸ the inherent “right to preserve and defend itself against injuries and outrages that endanger its existence.”⁹⁹ The common law gave meaning to the concept of national sovereignty by defining the scope of the government’s inherent powers.¹⁰⁰ Not only, then, could the Federalists derive from the idea of a federal common law the claim that the Sedition Act did nothing more than ameliorate an already existing power; they could also argue, in more textual

95. 10 ANNALS OF CONG. 946 (1801) (remarks of Rep. Bayard). Another congressman made the popular sovereignty justification of the Act even more explicit: “In Governments like ours, where all political power is derived from the people, and whose foundation is laid in public opinion, it is essential that the people be truly informed of the proceedings, the motives, and views of their constituted authorities.” 10 ANNALS OF CONG. 931 (1801) (remarks of Rep. Rutledge). In this view, the Sedition Act was virtually obligatory. The congressman continued: “It is the duty of the latter to keep in a state of purity the channels of public information.” *Id.*

96. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

97. Without the common law, Federalist Representative James A. Bayard insisted, “the Constitution becomes . . . a dead letter.” 11 ANNALS OF CONG. 614 (1802).

98. 8 ANNALS OF CONG. 2146 (1798) (remarks of Rep. Otis).

99. *Id.*

100. Congressman Bayard fleshed out the argument on the floor of the House:

If courts are not bound by the common law, they must be governed by their own arbitrary will.

If the common law is not binding, there is no law and gentlemen surely cannot dream of liberty without law The existence of the common law is of immense importance: without it, the

Constitution would be a mere skeleton, devoid of sinews and nerves, and incapable of motion.

10 ANNALS OF CONG. 949 (1801) (remarks of Rep. Bayard).

terms, that the common law broadened the ends that the Constitution permitted Congress to seek through legislation. Thus the Sedition Act was constitutional because it was necessary and proper for Congress to pass a law that both had precedent in the common law and was designed to secure the safety of the government. Just as laws against “stealing public records, perjury, [and] obstructing the officers of justice” were necessary to “carry other [constitutionally permitted] laws into effect,”¹⁰¹ so too the Sedition Act was necessary to preserve and continue the Constitution. Behind the Federalist argument, in short, lurked the idea that the United States, infused with the common law, was a State vested from its inception with indefeasible sovereignty.¹⁰² The Jeffersonians thus found themselves in need of nothing less than a way to reconceptualize constitutional government—a way that viewed Constitution and common law as incompatible, and federal authority as strictly limited to specific grants of power.

B. *The Jeffersonian Counterattack, 1798-1800*

During the course of the Sedition Act crisis, the Jeffersonians developed such a rejoinder, striking at the root of the Federalist conception of the Constitution. In 1798, they took their appeal outside of the capital. The Virginia and Kentucky legislatures led the movement, passing resolutions Jefferson and Madison drafted that described the Sedition Act as unconstitutional and the common law as having no force in the United States.¹⁰³ Back in Washington, one congressman noted that “there might be found court after court who could give opinions in favor of [the common law’s] existence and force, but . . . public opinion must finally make [the Federalists] abandon the doctrine.”¹⁰⁴ The developing Jeffersonian argument had become the centerpiece of a political appeal to the electorate.

In January 1800, the Virginia legislature issued a report, written by James Madison, that brought the Jeffersonian argument to maturity. Madison skillfully brought out the implications of the Constitution, arguing that it changed the practice of American government not just interstitially, but fundamentally. The report attacked the Sedition Act by undermining the claim that the common law was a part of federal law.¹⁰⁵ The Constitution, Madison argued, could not have incorporated the common law, because the two were logically incompati-

101. 8 ANNALS OF CONG. 2147 (1798) (remarks of Rep. Otis).

102. It followed from the Federalists’ premises that the First Amendment also had to be read in light of the common law view of freedom of the press. The First Amendment was consequently seen as simply incorporating the English idea of no prior restraints. See 8 ANNALS OF CONG. 2147-51 (1798) (remarks of Rep. Otis). If one were to reject the Federalist belief that the Constitution incorporated the common law, however, the First Amendment could assume a more robust meaning.

103. See THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 359-62 (Marvin Meyers ed., rev. ed. 1981) [hereinafter MIND OF THE FOUNDER].

104. 10 ANNALS OF CONG. 420 (1800) (remarks of Rep. Nicholas).

105. MIND OF THE FOUNDER, *supra* note 103, at 247-57.

ble. To give to the federal government powers as “vast and multifarious” as those in the common law would invariably “overspread the entire field of legislation” and “sap the foundation of the Constitution as a system of limited and specified powers.”¹⁰⁶

From the fact that American institutions were fundamentally different from their British equivalents, it followed that English legal concepts and constructs could not be blindly incorporated into the American system of government. In the United States, Madison noted, “The people, not the government, possess the absolute sovereignty,”¹⁰⁷ and rights are secured “not by laws paramount to prerogative, but by constitutions paramount to laws.”¹⁰⁸ If the common law were truly a part of the American Constitution, then, that unwritten law was unalterable by ordinary statute; any law passed in derogation of the common law (including the Sedition Act, “which boasts of being a melioration of the common law”¹⁰⁹) was unconstitutional and void.¹¹⁰ Were one to reject this strong interpretation of the relationship between common law and Constitution, Madison held out another, equally unpalatable possibility. If the common law were to form a part of the Constitution in a weaker sense, then the legislature could always codify or modify it. Thus, the report explained, the very existence of a federal common law would give Congress powers “coëxtensive” with it.¹¹¹ A general federal common law would, therefore, enable Congress to evade Article I’s limitations on its power. The national legislature would be “authorized to legislate,” Madison wrote in perhaps the most haunting language available to him, “in all cases whatsoever.”¹¹² If, on the other hand, the

106. *Id.* at 253.

107. *Id.* at 257.

108. *Id.* This distinction, while explicitly used in the context of Madison’s discussion of the First Amendment, grounded Madison’s analysis throughout the report. Not only did it enable him to reject the Federalist’s restricted reading of the First Amendment, *see supra* notes 88, 102, but it also allowed him to argue that the Sedition Act struck at the root of representative government by inhibiting the people’s right “of electing the members of the government.” MIND OF THE FOUNDER, *supra* note 103, at 266.

109. *Id.* at 250.

110. It followed that the entire common law, “with all its incongruities, barbarisms, and bloody maxims, would be inviolably saddled on the good people of the United States.” *Id.* at 251. For similar objections to the substance of the criminal common law, *see supra* note 65.

111. MIND OF THE FOUNDER, *supra* note 103, at 251. In an appendix to his American edition of Blackstone’s *Commentaries*, St. George Tucker wrote at length, in what amounted to an extended defense of Madison’s report, about whether the common law was in force in the federal courts. He began his (considerably less eloquent) analysis by noting:

The question is of very great importance, not only as it regards the limits of the jurisdiction of the *federal courts*; but also, as it relates to the extent of the powers vested in the *federal government*. For, if it be true that the common law of England, has been adopted by the United States in their national, or federal capacity, the jurisdiction of the *federal courts* must be coextensive with it; or, in other words, *unlimited*: so also, must be the jurisdiction and authority of the *other branches* of the federal government; that is to say, their powers respectively must be, *unlimited*.

1 TUCKER, *supra* note 15, at 380.

112. MIND OF THE FOUNDER, *supra* note 103, at 251. Madison’s choice of words here resonates because the hated British Declaratory Act of 1765 asserted the power of Parliament to legislate for the colonies “in all cases whatsoever.” The Act was a vital ingredient in the American Revolution. *See BAILY*, *supra* note 10, at 202 (“How to qualify, undermine, or reinterpret this tenet of English political theory was the central

common law were not the law of the land, congressional legislation would be limited to specific Article I ends. And the control of sedition was, of course, not among them.¹¹³

C. *The Argument Against Common Law Crimes, 1809*

Shortly after the “revolutionary” election of 1800 that placed the Jeffersonians in office,¹¹⁴ Representative John Randolph of Virginia basked in his party’s victory over the Federalists. A “higher tribunal,” with a “voice . . . more powerful than that of [the] courts and [Federalist President John Adams],” he said, had finally spoken.¹¹⁵ “[B]y a very great body of the American people, as I understand,” he elaborated in telling language over eight years later, “a verdict has been given that Congress do not possess the right of passing any act on this subject [seditious libel] whatever”¹¹⁶ The Jeffersonian ascendancy, Randolph believed, had left a nearly indelible mark on the Constitution. In 1809, when he learned of the Hudson and Goodwin prosecutions, he was dumbfounded. He had “no conception that a court of the United States would ever,” after the ouster of the Federalists and the expiration of their Alien and Sedition Acts in 1801, “entertain a prosecution for libel at common law.”¹¹⁷ He simply had assumed that upon Jefferson’s ascension to power “there would be an end . . . of these prosecutions at common law, as much as of the sedition law.”¹¹⁸ To Randolph, common law libel and the Sedition Act shared the same difficulty.

Randolph consequently introduced a resolution calling for the appointment of a committee to investigate the Connecticut libel prosecutions.¹¹⁹ His remarks in defending his motion before the House are most revealing because, in denouncing the libel prosecutions (even while frequently referring to the First Amendment), he did not make a libertarian claim. Instead, nine years after the election of 1800, he elaborated upon the same structural understanding of American government that the Jeffersonians had reached in denouncing the Sedition Act. “It cannot be denied,” he told his colleagues, “that if we are to have a federal law of libel, that which permits the truth to be given in evidence

intellectual problem that confronted the leaders of the American cause”). By invoking the memory and meaning of the American Revolution, Madison emphasized the pressing need to jettison lived experience in favor of the more abstract demands of the American Constitution and highlighted the difficulties of blind incorporation.

113. Madison also indicated that common law jurisdiction would “present an immense field for judicial discretion.” *Id.* at 252.

114. *See supra* note 18.

115. 10 ANNALS OF CONG. 920 (1801).

116. 20 ANNALS OF CONG. 75 (1809). Ever a Jeffersonian ideologue, Randolph became estranged from the Jefferson Administration in 1806 over, ironically, a secret appropriation of two million dollars to France. *See* MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* 816-23 (1970).

117. 20 ANNALS OF CONG. 78 (1809).

118. *Id.* at 80.

119. *Id.* at 78.

is as good as any."¹²⁰ The substance of the Sedition Act, then, was not the problem. "It was not to the nature of the law that we objected," he continued, "but to the having a federal law of libel at all"¹²¹ As a matter of structure, the Sedition Act violated what had become first principles of American government.

By reminding Congress of the Sedition Act's problems, Randolph believed he would expose the error in applying the common law as well. The common law of libel, he said, was worse than the Sedition Act: partly because it forbade a plea of truth, but more fundamentally because it "established the whole system of penal laws in the British books which might be found in relation to the subject."¹²² However proper such a situation "might be in a single integral government," Randolph indicated, it was utterly inconsistent with a "Federal Government, exercising only certain specified powers, and having an aspect principally to foreign affairs."¹²³ As Madison had done in 1800, Randolph argued that common law, being an inextricable part of a unitary government, could not coexist with the constitutional scheme of federalism, separation of powers, and popular sovereignty. Prosecutions under the common law placed the penal power beyond the reach and will of the people.¹²⁴ Simultaneously, they threatened federalism by rendering any limits on congressional power "nugatory."¹²⁵ In such a situation, the common law—developed in "a monarchy, founded upon an hereditary nobility, and a great hierarchy, unsuited to the genius of a republican Government¹²⁶—rather than the voice of the people, would wind up prescribing the limits of both congressional and judicial power.

With Randolph's final salvo, the Jeffersonians demolished the Federalist claim that the Sedition Act "cannot be unconstitutional, because it makes nothing penal that was not penal before"¹²⁷ and erected in its place a model of government centered around explicit constitutional limitations on judicial common law and congressional legislative power. Near the end of his remarks, Randolph effectively summarized the new structural understanding of federal governmental power:

To what purpose does the Constitution declare that Congress shall make no law abridging the freedom of the press, if Congress can make laws, such as the sedition law [because more onerous restrictions on speech are enforceable at common law], or, if the courts can entertain prosecutions at common law for libels? That there should be power on this subject . . . is one thing; but that the General Government should

120. *Id.* at 77.

121. *Id.*

122. *Id.* at 76.

123. *Id.* at 86.

124. *Id.* at 76.

125. *Id.* at 77.

126. *Id.* at 76.

127. H.R. REP. NO. 110, *supra* note 87.

possess that power, which, however inherent in an integral government, is denied to that government by the Constitution, is another thing.¹²⁸

While Randolph here invoked the First Amendment, he did so for structural rather than libertarian purposes. He did not deny that some authority needed to control the ravages of free speech, but he vehemently disputed the notion that the federal government could do so. The American Revolution, the new Constitution, and the memory of the Sedition Act crisis had made changes in national governance so profound that the literal incorporation of English ideas no longer made sense.

Attacking the Sedition Act or the specific common law crime of seditious libel alone could not have accomplished the conceptual remodeling of governmental power that culminated in Randolph's remarks. Rather, Jeffersonians had to target the common law of crimes as a category and identify it as the source of both a judicial and a congressional discretion that rendered federal power unlimited. That Randolph's resolution calling for a committee to investigate the Hudson and Goodwin prosecutions passed unanimously¹²⁹ speaks eloquently of the extent to which originally heretical Jeffersonian ideas, hatched in the throes of opposition, had virtually become political gospel.¹³⁰

D. *The Jeffersonian Subtext: The Decline of the Jury*

Despite the remarkable degree of consensus in the House, not everyone who voted for Randolph's resolution concurred in all of the outspoken Virginian's sentiments. During the course of the debate, two Federalists, while outraged at the prosecution of Federalist newspaper editors Hudson and Goodwin, nonetheless expressed continued allegiance to some of their party's old principles. Their thoughts, however, quickly proved nostalgic, and it became apparent that they lacked a viable alternative to the model of American government Randolph posed.

Congressman Dana defied Randolph's characterization of the common law as a monarchical instrument, insisting instead that it was "conformable to the principles of moral rectitude" and "civil liberty."¹³¹ He asked the House not for an end to federal seditious libel prosecutions, as Randolph would have had it, but rather for just "one privilege; that, when [people] are prosecuted for libels, they may have the liberty to prove the truth of what they publish

128. 20 ANNALS OF CONG. 86-87 (1809).

129. *Id.* at 89 (1809).

130. In urging support for Randolph's resolution, Jeffersonian Representative Bacon of Massachusetts noted that he was "very happy this resolution [was] brought forward." He hoped that, "as we succeeded in getting rid of the sedition law, we shall get rid of all the political heresies of former times, and shall succeed in rooting out this obnoxious weed from the territory of Connecticut." *Id.* at 80.

131. *Id.* at 83-84.

. . . ."¹³² Representative Livermore similarly insisted that, for all its opprobrium, the Sedition Act "had one excellent feature in it": it permitted a defense of truth.¹³³ "If a citizen were allowed to give the truth in evidence," Livermore continued, "he could suffer no injury from an impartial jury of his country."¹³⁴

An impartial jury; that, indeed, lay at the core of the Federalist vision of ordered liberty.¹³⁵ At the nation's founding, even conservatives such as Alexander Hamilton recognized, as Shannon Stimson recently observed, "the need for juries in criminal trials—particularly in 'political' trials for seditious libel—to protect liberty by controlling the arbitrary application of otherwise legitimate authority."¹³⁶ Yet by the time of Randolph's resolution, the Federalist vision was no longer tenable. "[T]he permission to give truth in evidence," Randolph fumed during the debate, "is but an idle mockery"¹³⁷ Later that day he elaborated: "I am perfectly convinced sir, that in all cases of libel, in all cases where, politics and not law or justice preside, it is idle to expect impartiality of trial."¹³⁸ The criminal jury no longer operated effectively in its most paradigmatic role; instead of neutralizing the excessively political behavior of the executive, the jury now only exacerbated it.

What had happened to the jury between 1788 and the time of the Sedition Act? Why, as one Federalist asked wistfully in 1798, were "juries, in whose hands the fortunes, the lives, and the reputations of the citizens had been safely deposited by our laws and Constitutions, no longer to be trusted"?¹³⁹ In *The Federalist No. 83*, Hamilton had prophetically recognized that juries might serve as less a bulwark against the national government than their ardent supporters contended.¹⁴⁰ Since an executive official often summoned a jury, the ultimate fairness of a trial depended upon that officer's good faith. With

132. *Id.* at 83.

133. *Id.* at 82.

134. *Id.* at 83.

135. Thus, during the end of the Sedition Act controversy, Federalists responded to Jeffersonian complaints by emphasizing the protection the jury would provide. Dana himself commented in 1801 that "every case is submitted to a jury of twelve honest men What better barrier to the liberty of an individual can be presented than this?" 10 ANNALS OF CONG. 925 (1801).

136. STIMSON, *supra* note 89, at 108.

137. 20 ANNALS OF CONG. 77 (1809).

138. *Id.* at 81.

139. 8 ANNALS OF CONG. 2166 (1798) (remarks of Rep. Harper).

140. "The sheriff," Hamilton wrote, "who is the summoner of ordinary juries, and the clerks of courts who have the nomination of special juries, are themselves standing officers, and acting individually, may be supposed more accessible to the touch of corruption than the judges, who are a collective body." THE FEDERALIST NO. 83, at 564 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In the same essay, Hamilton also subtly hinted that the celebrated jural role might be better suited to a monarchy than to an extended republic. He wrote:

[I]t would be altogether superfluous to examine to what extent [the criminal jury] deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government."

Id. at 562.

the development of national political parties, the ability of these presidentially-appointed agents to manipulate juries increased dramatically. Indeed, federal marshals, whom Jeffersonians derided throughout the Sedition Act controversy as the "creature[s] of the executive,"¹⁴¹ frequently rounded up jurors of the same party for political trials, and these packed juries were all but guaranteed to indict or convict. No wonder, then, that Randolph could dismiss the protection provided by the jury as a sham, since "the officer, whose duty it is to provide an impartial jury, is but the breath of the nostrils of the prosecutor."¹⁴²

The days of John Peter Zenger had passed. If American juries had once represented the natural reason of the community,¹⁴³ by 1800 they had become mere extensions of the party in power.¹⁴⁴ The emergence of national political parties rendered the jury-centered model of governance, on which the Federalists continued to rely,¹⁴⁵ largely outdated.¹⁴⁶ When viewed in conjunction with the virtually unrestricted penal authority the Federalists claimed for the judiciary, the increasing amounts of executive power over juries endowed Randolph's argument that the common law and the Constitution were incompatible with a penetrating poignancy. If American government were indeed

141. 8 ANNALS OF CONG. 2164 (1798) (remarks of Rep. Gallatin). The remark resonates with Revolutionary language of executive corruption, suggesting the extent to which the Jeffersonians viewed the jury problem through the lens of Revolutionary ideology.

142. 20 ANNALS OF CONG. 77 (1809).

143. See, e.g., Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 297 (1990) ("The jury could be seen as the arbiter of a higher constitution, an unwritten and unamendable natural constitution which stands supreme to the federal constitution as the federal stands to the state.").

144. Senator Pinkney put the point most dramatically in 1800, emphasizing all the while the centrality of the jury centered model of governance at the time:

This power in a marshall, is a more complete and severe check on the press, and the right of the people to remark on public affairs, than ten thousand sedition laws, because here the power to select and by that means govern the opinion of juries, is continual, always increasing, and in a great degree subject on every trial to the wishes and directions of a President. In times of party, when opinions run high, and contending factions oppose each other with violence, it is then truly dreadful.

10 ANNALS OF CONG. 40 (1800) (remarks of Sen. Pinkney). Pinkney's offered his speech in defense of a bill that would have required all federal jurors to be selected by lot.

145. Representative Dana's comments in 1801 suggest the extent to which belief in the jury as a protection against oppressive governmental action was outdated. If juries presented a problem in the case of the Sedition Act, then the problem applied "to all laws, and to the general principles upon which juries were selected." Yet Dana could "scarcely conceive that men of character, under the solemnity of their oath, could act so unprincipled." 10 ANNALS OF CONG. 925 (1801). Neither remark responded to the Jeffersonian criticisms very well, but both indicate the extent to which Dana could not envision abandoning the understanding of the structure of government with which he had been raised.

146. In the House in 1801, Albert Gallatin effectively observed that, even without biased marshals packing juries, a jury at the turn of the century was nonetheless incapable of performing as a check on government. He did not "suppose [jurors] intentionally doing wrong." 10 ANNALS OF CONG. 951 (1801). Yet it was certain "that the jury must be composed of one or the other party, and is, therefore, incompetent to decide upon opinions." *Id.* Political parties, which cut across disparate localities, had simply destroyed the mindframe necessary for jurors to render effective service in political trials. Precommitted to a partisan political philosophy, jurors were less likely to be guided by reason, reflection, and community norms. See also William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 925-932 (1978) (supporting the idea that national party conflict party undermined the localism and consensus that distinguished the jury system before the mid-1790's).

different from that of “corrupt” England, it would be necessary to supplant reliance on the jury alone with a new vision of republican governance—one emphasizing rigorously divided power that stemmed solely from textually-derived delegations of authority.

Randolph’s argument thus drew for support not only on the structure of the Constitution, but on political-social conditions as well.¹⁴⁷ And necessarily so. For the one thing that united the Jeffersonians and Federalists in the House behind Randolph’s resolution was the fact that the grand jury that indicted Barzillai Hudson and George Goodwin had been packed.

E. Constitutional “Codification,” 1812

Justice Johnson’s tightly compressed argument in *Hudson* resonated with themes that Madison and Randolph had elaborated earlier.¹⁴⁸ Like Randolph’s argument, Johnson’s was almost purely structural. It declined the invitation to discuss freedom of the press that the appeal presented and chose instead to position itself on the familiar territory of federalism and separation of powers. Johnson recognized that once the federal government possesses “an implied power to preserve its own existence and promote the end and object of its creation,”¹⁴⁹ the implication will swallow all limitations on the exercise of governmental power. Like Madison and Randolph, Johnson consequently saw that Constitution and common law were fundamentally incompatible; to derive criminal jurisdiction from the common law would render the very idea of a

147. Shortly after introducing his main resolution calling for an investigation of the *Hudson* case, Randolph introduced a second resolution to “secure the right of an impartial jury.” 20 ANNALS OF CONG. 81 (1809). When his first resolution passed, however, he tabled his second one. The juxtaposition of these two resolutions suggests that his desire to reform the jury was a second-best solution upon which he did not seriously intend to rely. Rather, he wished to use it to bolster support for his main project of reorienting the understanding of popular sovereignty, federalism, and the separation of powers. His rhetorical strategy reveals the same pattern. In one passage, he indicated that the entire concept of truth as a defense was irrelevant; there was no room for federal libel prosecutions at all under the Constitution. He then interrupted his structural argument, however, to observe what an “idle mockery” the idea of truth was given the fact that juries were packed. *Id.* at 77. By bringing in the jury through this aside, Randolph could employ it in aid of his larger project.

148. With one important addition. The opinion added a cryptic statutory argument, suggesting that Congress had not vested the federal courts with jurisdiction over common law crimes. It is often contended that *Hudson* did not bother to deal with § 11 of the Judiciary Act, on which Story later relied for jurisdiction in *Coolidge*. In the final clause in a very long sentence, however, Johnson objected to common law jurisdiction because it offered “no definite criterion of distribution between the district and Circuit Courts of the same district.” *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812). I read this objection as a statutory argument that, expanded and paraphrased, runs like this: neither § 9 nor § 11 (see *supra* note 68 for a fuller description) specifically vested either the district or circuit courts with jurisdiction over common law crimes. So in exactly which court could they be heard? Sections 9 and 11 of the Judiciary Act apportioned the jurisdiction of the district and circuit courts according to severity of punishment. In the case of a common law crime, however, the punishment that attaches is often not known in advance. Consequently, it is insufficiently clear from the structure of the statute in which court trials for common law crimes were to be heard. Given the way the Judiciary Act divided power between district and circuit courts, Congress would have to “affix a punishment . . . and declare the court that shall have jurisdiction of the offence,” *Hudson*, 11 U.S. (7 Cranch) at 34, in order to solve this statutory dilemma.

149. *Hudson*, 11 U.S. (7 Cranch) at 33.

written constitution nugatory.¹⁵⁰ For the Constitution created a structure of government qualitatively different from that of Britain or any other unitary state, and it would be “in error,” as Johnson put it a year later, to “plac[e] the [federal] government . . . on the ordinary footing of an independent sovereignty.”¹⁵¹ There existed in America no such brooding entity called the State; the federal government possessed neither indefeasible sovereignty nor inherent authority that flowed “from its very nature.”¹⁵² Indeed, the federal government was nothing more than the creation of the people, who ceded limited powers from their respective states—a fact that left no room for a preconstitutional common law to color the Constitution’s text. The national government consequently derived its authority solely from constitutionally enumerated grants of power.

Judicial power was therefore, in Johnson’s view, at its broadest coextensive with congressional power: courts could act only when Congress positively vested them with jurisdiction—and only then when Congress itself acted within its limited, constitutionally derived sphere of power.¹⁵³ Indeed, with the exception of the contempt power and the Supreme Court’s original jurisdiction, Johnson elaborated, “Courts created by the General Government possess no jurisdiction but what is given them” by Congress, and further “can be vested with none but what the power ceded to the General Government [in Article I, Section 8] will authorize them to confer.” Federalism and the separation of powers acted in tandem to safeguard popular sovereignty. The trouble in *Hudson* was that Congress had not conferred on the circuit courts anything resembling common law powers in cases of seditious libel. And while the opinion did not necessarily rule out the permissibility of Congress delegating broad criminal powers to the courts, it did make clear that such a delegation would have to fall within the bounds of Article I, Section 8.¹⁵⁴

150. In fact, in Johnson’s opinion the American exceptionalism is even more pronounced. The idea that the federal government possesses “implied power to preserve its own existence,” is treated as “a principle by no means peculiar to the common law.” *Id.* at 33. The idea instead belongs to a system of “universal law”—which the Court then proceeds to reject summarily. *Id.* at 34. The American experiment, in the Court’s view, thus breaks not only with its English antecedents, but with all past governmental structures as well.

151. The Trial of William Butler for Piracy, *supra* note 34, at 26.

152. The phrase comes from Judge Richard Peters’ opinion in *United States v. Worrall*, 28 F. Cas. 774, 778-79 (C.C.D. Pa. 1798) (No. 16,766), discussed *supra* at notes 57, 73.

153. The Court wrote:

The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions—that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union.

Hudson, 11 U.S. (7 Cranch) at 33.

154. There is some debate as to whether *Hudson* would permit Congress to vest the federal courts with common law criminal powers. Professor Jay believes that the *Hudson* opinion precludes such a delegation. See Jay, *supra* note 25, at 1293 & n.312. I find Jay’s argument unpersuasive. First, the opinion itself seems to leave the question of congressional delegation unresolved, see *supra* note 29, even though, given its scope, it could have easily gone the further step. Second, on circuit a year after *Hudson*, Justice Johnson observed

All this *Hudson* declared, relying for support not on careful argument and judicial precedent, but instead on “public opinion”¹⁵⁵—on the overwhelming “verdict” of the people, as revealed through continued Jeffersonian electoral sweeps.

IV. CONCLUSION

The problem of federal common law crimes was as “simple” and “obvious” by 1812 as it was “formidable” in the 1790’s.¹⁵⁶ And so we have come full circle and again meet our initial paradox. Now, however, that we have identified *Hudson* as the denouement in a schism that ultimately implicated sovereignty, federalism, and the separation of powers, it should be possible to solve the paradox. Precisely because the debate over common law crimes was so rancorous, fundamental cleavages developed, core issues were quickly reached and debated, and a clear choice was presented to the people for resolution. Public opinion, consequently, could resolve the struggle decisively. After successive elections, a clear answer to what had once been a hopelessly vexed question was woven into the constitutional fabric. *Hudson*’s simplicity was precisely a function of the fundamental nature of the controversy it put to rest.

To regard the decision as mere judicial politics, then, is to reach a perverse conclusion. For in the broadest sense, *Hudson* set onto tablets the principles that guided the Jeffersonians during their wanderings in the desert. Today we piously view these tablets as a declaration of immemorial principle, more or less unaware of the particular constitutional struggle that prompted their promulgation.

that:

We do not deny, nor do we suppose it was ever denied—that, if this doctrine of implication could be maintained, and Congress had by Law vested in this Court jurisdiction over all cases to which the punishing power of the United States might under this implication be extended, it would rest with this Court to decide (wild and devious as the track assigned them would be) to what cases that jurisdiction extended. It is in the exercise of this very right, that we are at this moment pursuing this enquiry.

The Trial of William Butler for Piracy, *supra* note 34, at 35. While the passage would seem to permit a congressional delegation of common law power to the courts, Jay believes the words “if this doctrine of implication could be maintained” blunt the rest of the passage’s thrust. Even if Johnson’s circuit opinion precluded congressional delegation, however, it does not follow that *Hudson* did similarly. For *Hudson* was the opinion not just of Justice Johnson, but of the entire Court. Indeed, comments by Justice Story indicate that *Hudson* did not restrict congressional power to the extent Jay suggests. *See supra* notes 44-45 and accompanying text. Finally, it would have been odd for the Marshall Court to restrict congressional power here, given its general refusal to do so. *See, e.g.,* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

155. *Hudson*, 11 U.S. (7 Cranch) at 32.

156. *See supra* notes 3-4 and accompanying text.