

# SARAH PALIN'S CONSTITUTION:

## SARAH AND THE OLD VIRGINIANS

Our summery evening echoes to the sound of arriving hoofbeats.

“She’s bringing smoked salmon,” I inform the Master of Monticello, “of Turnagain-Turnagain provenance.”

The former President attends to his dumbwaiter. “Chilled Montrachet, 1813, ‘TJ’ labeled and bottled, of course.”

Our guest settles in and powers up her twinn’d netbooks with extra batteries.

“I hope your bandwidth holds out.” The Governor surveys the Blue Ridge mountains. “What kind of coverage can you get up here?”

“It’s 1819,” I reply. “So it’s a bit iffy.”

“What do you have for us?” Jefferson asks his guest, while supplying a generous pour.

“It’s from the debates at the Virginia ratifying convention,” she turns one of her netbooks my way.

The Governor reads her screen. “[C]ontemporary exposition of the constitution, by its authors, and by those who supported its adoption, was wholly repugnant to that now contended for by the attorneys for the Bank of the United States,” she concludes in paraphrase. “*McCulloch v. Maryland*, 4 Wheat. 316, 372 (1819),” she adds.

“Do the amendments launched by federalists to supply reassurance to their opponents following the ratification debates count for anything?” I ask.

“Is that how you would pose the issues?” the former Governor of Alaska turns to her host.

“Ah, *McCulloch*,” Jefferson muses. “Luther Martin defies John Marshall by quoting Marshall’s fatal remarks back to the Chief Justice. Isn’t that the dream of every appellate advocate?”

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"Beats the heck outa me," I mumble.

"Does this passage really trash the Tenth Amendment?" the Governor studies her screen. "One former Governor to another. Having the power antecedent to the adoption of the government, and not being divested of it, by any grant or restriction in the constitution," the Governor recites, "the states must necessarily be as fully possessed of such a power as ever they had been."

"It would seem to encapsulate the mystery of these amendments precisely," Jefferson muses. "June 25, 1788, Marshall is answering Patrick Henry, arch-opponent of the federal constitution."

"Background us, Professor," Jefferson turns to me.

"1819 was a remarkable year, Governors. The times featured a remarkable burst of interest in American history, and especially in our constitutional history."

"Congress ordered the journals of the constitutional convention published in 1818," the Governor remarks.

"At the time of the *McCulloch* decision," I continue, "Secretary of State John Q. Adams was still editing the journals. They would not be printed until December."

"Jimmy Madison," Jefferson adds, "didn't get his copy until June, 1820."

"So the ratifying debates – from 1787 to 1788 – were the only 'game in town'," the Governor muses. "If you wanted to quote a Founder. By happenstance, the Virginia debates were published first."

"And became notorious for the remarks made by Marshall," I add.

"It's amazing what you can find on line," she explains. "All that's required is persistence and a good sense of American history."

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"Speaking of which," Jefferson agrees, "that brings us to John Marshall's assignment of history to the national side of the ledger."

"You do take the position," I lapse into cross-ex, addressing the Governor, "that constitutional text is dead."

"As does with Justice Scalia," the Governor nods.

"All events that might be taken to elaborate constitutional text are events that, from September 17, 1787 are in the future. That is assignable to a future measured *of that date*."

"From that point forward," she agrees, "and therefore irrelevant to constitutional reasoning."

"So it is important to know," I lead the witness, "what powers states exercised before 1787."

"Which is the point that Marshall made," the Governor takes the floor. "States possess the powers, from that time forward, that they possessed at that time. And that's what the constitution, as amended, guarantees. Nothing more. Nothing less."

"Since states chartered banks and taxed their notes prior to 1787, Luther Martin argued to the court in 1819," I go on, "they could not be divested of this power by the constitution."

"Of course, it was obvious that self-preservation is its own higher power; the states could not tax a federally-organized interstate bank out of existence."

"Old hat, counselor," Jefferson agrees and shakes a fresh batch.

"Best pimento north of Sacramento," I advertise Corning olives.

"But," the Governor turns to her colleague, "you are aware that after Martin finished, Marshall turned to Justice Story and said: 'That did not turn out as badly as I thought it would'."

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"So once again," Jefferson sighs, "another attempt to trap Marshall in his own words goes awry. He's the Wile E. Coyote of Chief Justices."

"Think of the implications," the Governor declares, "of Marshall's remarks as highlighted at oral argument in *McCulloch*." She studies the relevant text. "Here are some of the service missions not spelled out in Article I, Sec. 8. For example, you don't see a nuclear arsenal in there."

"No," Jefferson concedes.

"You don't see the air force or the coast guard in there."

"True."

"Ditto world-wide military establishment and intelligence services," she adds. "Neither interstate highways nor national parks are mentioned."

"Nope."

"No railroads, airports and air traffic control. Nothing about clean water or clean air."

"Indeed," he concedes.

"Ditto social security, Medicare or Medicaid."

"Quite true," Jefferson concedes.

"Nor do you see environmental protection or toy safety."

"None of these service missions," I sum matters up, "were supplied by the states prior to 1787."

"But Martin Luther, quoting Marshall back to Marshall," the Governor continues, "believed he was reminding the American people of this principle: that all powers unknown (as of 1787) were reserved as responsibilities to be fulfilled by the states, for the well-being of their respective populations. However, in that quote," the Governor concludes,

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"Marshall supplied the underlying premise for national service missions being fulfilled by the national government."

"When conversing with Marshall," Jefferson declares, "I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone."

"If asked to concede," I cannot resist the temptation, "if it is broad daylight at noon, Jefferson would reply, 'I will take your word for it, sir'."

"Did you really say that?" the Governor asks. "About John Marshall's logic?"

"Rutherford B. Hayes said that Justice Story said I said it," Jefferson confesses, "so I may as well own up to it."

"No wonder, by another of Story's anecdotes, Marshall winked at Story after Martin fumed and fussed over the Richmond debates. Which brings us back to theoretical physics," the Governor muses. "Does the future really have to belong to somebody?"

"My bad," Jefferson raises his hand.

"Don't forget," I wave off penance most presidential, "Marshall was on the wrong side of the suability issue in *Chisholm v. Georgia*."

"I've got the quote here. 'No gentleman will think that a state will be called at the bar of the federal court. It is not rational to suppose that the sovereign power should be dragged before a court'," the Governor cites us to Elliot's Debates 555 (1836).

"Now that was unfortunate," Jefferson sighs. "John Marshall assures the convention in Richmond that Article III, Section 1 would never authorize federal courts to hear a suit by an unpaid creditor against a state which has merely failed to pay its bills. And less than five years later the Supreme Court turns creditors loose on states, and –"

"Federal marshals are cued to liquidate claims from the state treasury," a smile creeps over the Governor's face. "When Marshall's

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assurances put the constitution over the top by ten votes," she recites from her Elliot's – 'the intent is, to enable states to recover claims of individuals residing in other states' – "he bamboozled the constitutional history of America back into –"

"Go ahead," Jefferson nods.

"A universe where only Marshall could take its measurements," I mind my cue.

"But Marshall's false assurance – if it is less than Luther's accusation of outright fraud – was promptly corrected by an 'explanatory' [AIR QUOTES] constitutional amendment," Jefferson sniffs.

"1803," the Governor offers her sympathy, "was not a good year."

"Napoleon Bonaparte made me an offer I couldn't refuse. So I didn't. It's really all my fault."

"Bar Rag 23, Jan-Mar 2010?" the Governor raises an eyebrow in my direction. "Right?"

"After the treaty arrived, Jefferson proposed a constitutional amendment to empower Congress to acquire and settle the Louisiana Territory. Not a single person of any political stripe said," I summarize constitutional history from a year Green Bay did not win the Super Bowl: " 'Let's not buy it because the federal government lacks the power to buy it' ."

"So that's how the future became federal," the Governor concludes.

"There was a moment when Monroe said, 'no internal improvements without an amendment'," Jefferson goes on. "But then we all founded the University of Virginia –"

"Madison, Monroe & Jefferson," I interlude. "And everyone forgot about amending the constitution. They even forgot about taking Mrs. Patterson's title away from her."

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"The Duchess of Baltimore, if I recall," the Governor adds. "It was a lovely title, and her son was entitled to the noble name of Bonaparte thanks to the grace of Napoleon the Third."

And then Congress voted to subsidize telegraph companies and railroads – "I get us back on track. "That's forty plus years without an amendment while the industry revolution transforms the world."

"So what's the answer here?" the Governor asks. "Is the Tenth Amendment a shill game, federalists hoaxing rural rubes? That was Luther Martin's defiance to Chief Justice Marshall, right?"

"A case could be made to that effect," Jefferson refills our glasses. "The debates have to be worth something; Jimmy said that the constitution was " 'nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions'."

"April 6, 1796, Annals 774 at 780," I provide the cite.

"But there were games being played," the Governor points out. "If you are advocating the adoption of the constitution and you assure delegates that the national government will return to the people for additional authority, when that is neither possible nor desirable, then –"

"That is a more sophisticated take on Martin's argument. 'It was then maintained, by the enemies of the constitution, that it contained a vast variety of powers, lurking under the generality of its phraseology, which would prove highly dangerous to the liberties of the people, and the rights of the states, unless controlled by some declaratory amendment, which should negative their existence. This apprehension was treated as a dream of distempered jealousy,'" I supply the quote.

" 'The danger was denied to exist; but to provide an assurance against the possibility of its occurrence, the Tenth Amendment was added to the constitution' ," the Governor concludes.

"You're looking to us for answers?" Jefferson asks.

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"Your choice," one Governor puts it to another. "A strict constitution or shill construction."

"We have been giving it some thought," Jefferson confesses. "The professor and me. But we're kind of stuck. Aschenbrenner, pick up the thread here."

"Start with the innumerable references in any constitutional debate, at random, from Philadelphia to the proposed Eleventh Amendment in 1793-94, that the constitution operated only on individuals not states. So states could not be coerced by Congress.

"If Congressional responsibilities intersect with the fate of every American," the Governor reasons, "that's just another way of saying that Congress takes the risk that individual needs will require national solutions."

"That more," Jefferson ponders this point, "states insisted that they took no risk that the world would change, the more that Congress was left with America's future."

"The future," I am left to recycle the obvious, "had to belong to somebody."

"But there may be a way out," Jefferson suggests. "That is, a way to make the Tenth worth something. Take Obamacare. As I understand it, individuals will be compelled to buy health insurance on the private market, which is a subsidy to the health insurance carriers."

"It's government intrusion," I object, "into our domestic lives."

The Governor waves me into a state of repose.

"Were states regulating private insurance markets before 1787?" she asks.

"Not really," I mumble.

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"So I guess that responsibility wasn't 'reserved to the states ...'."

"Probably not," I gulp.

"Go ahead," the Governor drills me. "Write a constitutional amendment that authorizes the federal government to deploy new technology to solve problems or directs the government to respond to threats foreign and domestic. Look, if you don't believe me, sit down and write, in thirty words or less, an amendment that addresses any of the topics listed above, which amendment will also be 9-11 compliant."

"Excuse me?" I gasp.

"Compliant with the Ninth, Tenth and Eleventh Amendments," she answers.

"Perhaps an argument could be made," Jefferson suggests, "that federal oversight of poor lifestyle choices is unconstitutional."

"For instance," the Governor picks up the ball, "unhealthy food, substance-abuse, and the passion for motorized sports are choices with price-tags attached. The federal government has the price-gun."

"Sounds like a Fifth Amendment argument to me," Jefferson studies his laptop. "Take a look at *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)."

"Let me read the passage at 1029. What could be more private than the right to do nothing? I mean, there you are sitting on your duff – not making a nuisance of yourself — and the government orders you to get up and do something for your country. Like buy insurance. And not," I hasten to add, "to drive a car either."

"Are you making fun of *our* state, Professor? Risky behavior is a purely a private matter. I mean, a lot of people in Alaska ride snowmachines into trees or rocks or through avalanche country. Without helmets. Or insurance."

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"Is it time?" Jefferson asks me.

"Look, Governor," I ask, minding my cue. "What's with the trademark of your name?"

"Doesn't that make you the Governor formerly known as \_\_\_\_ ?" Jefferson asks.

"It stops people from using my name without my permission," the Governor explains. "Hence, protecting my franchise."

"But how would you be damaged if your name were used," Jefferson blurts his question, "for example, in this recreation of a sprightly dialogue, vintage 1819?"

"Isn't it obvious, Mr. President?" she asks. "And here is the proof. My points are well-reasoned, thoroughly researched and insightful. Indeed, am I not instantly recognizable, without a name tag, from the quality of my repartee if not also, as in this case, my historical reportage?"

"You betcha," the former Governor of Virginia agrees.

*Apparatus*

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