# AMERICA'S CONSTITUTION

*A Biography*

AKHIL REED AMAR

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*For Vinita, of course,*

*and for our children—Vik, Kara, and Sara.*

*May they and their generation continue to enjoy the blessings of liberty.*

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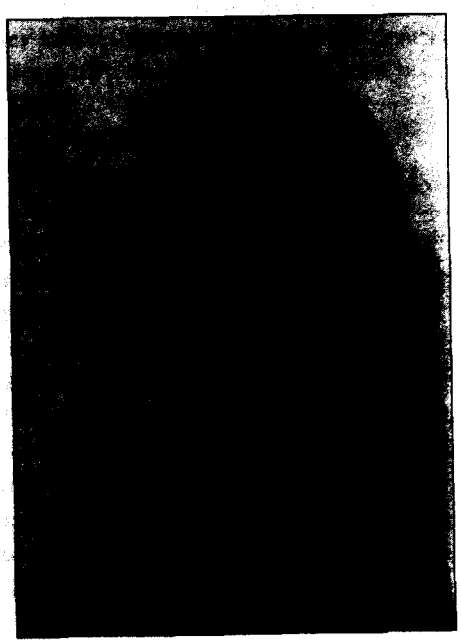
*Chapter 6*

# JUDGES AND JURIES



JOHN MARSHALL (1808).

***As chief justice from 1801 to 1835, Marshall reinvigorated the federal judiciary, which began as the Constitution's weakest branch. America's first chief justice, John Jay, had resigned in 1795 and declined reappointment in 1800 because, in Jay's words, the judiciary lacked "the energy, weight, and dignity which are essential to its affording due support to the national government."[1] In his storied tenure on the bench, Marshall began to change all that.***

MODERN CIVICS TEXTBOOKS portray America's Supreme Court as the ultimate interpreter of America's supreme law, first among the branches in the art of constitutional interpretation. The Constitution itself presents a more balanced picture, listing the judicial branch third, pronouncing the justices "supreme" over other judges but not over other branches, and installing juries alongside judges. The Founders surely hoped that the judiciary would do its part to protect the Constitution, but just as surely they knew that much of the document's success, democratically and geostrategically, would depend on men other than life-tenured judges.

## "one supreme Court, . . . and . . . inferior Courts"

When leading colonial lawmakers and soldiers spearheaded the drive for independence in 1775–76, few prominent colonial judges stood with them in the vanguard. Although elected patriot leaders did their best to influence the judicial-selection process in the mid-eighteenth century, imperial officials generally retained the right to appoint and remove American judges. In ten of the thirteen colonies, the sitting chief justice or his equivalent ultimately chose George III over George Washington.[2] Connecticut and Rhode Island, where colonists named their own judges, marked the main exceptions to this pattern. Putting aside continental congressmen from this pair of states, only three of the other fifty men who signed the Declaration of Independence had held notable positions on the colonial bench.[3]

In virtually every Revolutionary state constitution, the legislative and executive branches received more overall power and far more textual elaboration than the judiciary. Only in Massachusetts did the constitution feature three separate articles ("chapters") for the three main branches of government. Even this document treated the judiciary last and devoted to it only a fraction of the space spent embellishing the legislature and the executive. No state constitution explicitly authorized courts to disregard duly enacted statutes that the judges deemed unconstitutional.

By 1787, the American judiciary had begun to rise in repute. Patriots now peopled state courts everywhere. Six of the Constitution's thirty-nine signers had already served as prominent state or continental judges and

several others were obvious prospects for appointment to the new federal judiciary on the drawing board. As the new system actually took shape, Philadelphia framers received three of the six appointments that Washington made to the Supreme Court in 1789 and filled two of the five Court slots that opened up later in his administration. Washington also tapped two fellow Philadelphians to serve among the first thirteen district court judges in 1789.[4] (By comparison, Philadelphians made up eleven of the twenty-two senators elected in 1789, eight of the initial fifty-nine House members, and two of the first five cabinet officers.)[5]

The Constitution proposed by the drafters gave federal judges more power and independence than their state counterparts commonly enjoyed. Yet even this document listed the judiciary last among the branches. The textual order of the Constitution's first three articles made both conceptual and democratic sense. Laws would first be enacted by the legislature and then implemented by the executive. Only at that point might the judiciary appear, if the executive commenced civil or criminal prosecution or if a private party brought suit claiming some legal violation. Also, in the new Constitution's first months, the budding branches would need to materialize in precise sequence. First, the new Congress would meet to count the ballots cast by presidential electors. Only then could an executive be installed, after which the first two branches could begin structuring the third—deciding the size and shape of the Supreme Court, the contours of the lower federal judiciary, and so on. Once these general decisions were made, the president and Senate would begin appointing individual judges.

This specific 1789 sequence tracked a more general democratic logic in which the institutions mentioned earliest in the document rested on the broadest electoral base, with later-mentioned entities layered atop broader tiers of the democratic pyramid. First came the pyramid's immense foundation, an extraordinary act of constitutional ordainment by "the People" themselves via the Preamble. Then came the next broadest level of popular input, Article I, in which ordinary voters and state legislatures would select congressional public servants. At the next (Article II) tier, voters, state lawmakers, and Congress members would interact to choose the president. In the final stratum (Article III), voters and state legislatures would fade from view as the men they chose for the first two branches made the major choices. Democratically, Congress ranked first among equals, and the life-tenured judiciary—furthest removed from the people and the states—came last.

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Constitution in various places empowered legislators and executives to pick other legislators and executives. State lawmakers would elect federal senators; each congressional house would choose its own leaders; state legislatures could select presidential electors themselves or let the voters do so; Congress would break electoral-college deadlocks; state governors would tap men to fill temporary Senate vacancies; and presidents would name their cabinet subordinates—unilaterally in cases of temporary vacancies, and with the Senate's approval in other cases. The Constitution also empowered legislators and executives together to select judges, with Congress determining the number and type of judicial slots to be filled by the president and Senate.

Nowhere did the document symmetrically empower judges to name legislators or executives—or even other judges. State legislatures and state governors would help decide who would hold federal positions, but state judges would not. While representatives and senators would choose the House speaker and Senate leader, respectively, federal judges would have no say in the selection of the chief justice; nor would lower federal judges have formal input in selecting Supreme Court associate justices. The Constitution guaranteed the president's rights to hire and fire his cabinet subordinates but failed to guarantee any Supreme Court role in the appointment or removal of lower court judges. While each congressional house could cleanse itself by expelling members who misbehaved, neither the Supreme Court nor the judiciary as a whole enjoyed comparable inherent power to clean the judicial house.[6] Congress could impeach and remove judges, yet judges lacked counterbalancing authority to oust congressmen. In all these ways, implicating the essential power to fill up and empty out the branches, the judiciary was not just last but least.

True, Article III featured a "Court" that it called "supreme," but this adjective hardly meant that the judiciary outranked the legislature and executive. Rather, the word primarily addressed the hierarchy within the judiciary itself, placing America's highest court above any lower federal courts that might be created. Thus each of Article III's first two sentences juxtaposed the "supreme Court" against other "inferior" federal courts, as did earlier language in Article I empowering Congress to "constitute Tribunals inferior to the supreme Court." Yet even this "supreme Court" was given rather few constitutional tools to keep its underlings in line. Apart from its power to reverse or affirm lower court decisions via rulings that all inferior tribunals were honor-bound to follow, the Supreme Court had little inherent power to punish insubordinate deputies or reward loyal ones.[7] While a president typically had several practical ways of disciplin-

ing his executive inferiors, the Supreme Court had no automatic authority to change a lower court judge's work assignments, affect his pay, or modify his title. In some ways, Article III judges were almost as independent of one another as they were of other branches.

An early draft from Philadelphia had proposed creating "*one or more* supreme tribunals."[8] Several colonies had structured separate judicial tracks for different types of legal proceedings, and some Revolutionary states continued this pattern. Thus, within a given state, maritime disputes, equity suits, and common-law cases did not always end up in a single common court of last resort.[9] By contrast, the final draft of Article III envisioned "one supreme Court" with simultaneous appellate authority over "Law," "Equity," and "admiralty."* Nevertheless, Congress under the necessary-and-proper clause had considerable power to decide just how unitary this "one . . . Court" would be as a practical matter—for example, whether and when the justices would be obliged to sit in specialized smaller panels, rather than as an en banc collective.

ONCE A CASE REACHED the Supreme Court, no further appeal would lie to any other judicial tribunal. In particular, the president's cabinet would have no right to judicially review and reverse the Court, nor would the House or the Senate. Here, the Constitution broke with prior English and American practice. In England, the House of Lords sat not only as the legislative upper house but also as a general supreme court formally authorized to review judgments of the regular courts of King's Bench, Common Pleas, Exchequer, and so on.[10] Similarly, many American colonies and, later, some states permitted the governor's council (which in some places doubled as the upper legislative chamber) to act as a court of ultimate review. The Articles of Confederation had made "the United States in Congress assembled" the "last resort on appeal" in disputes between states, via a cumbersome process in which the Confederation Congress named individual arbitrators case by case.

The new Constitution structured a stricter separation of powers. As a rule, Congress would wield only "legislative" and not "judicial" power.

*In England, common law, equity, and admiralty were three distinct modes of adjudication, each with its own set of precedents and procedures. Juries traditionally sat in common-law suits but not in equity or admiralty cases. England also had ecclesiastical tribunals, in which government-chosen religious officials adjudicated matters of religious law. America's Constitution pointedly made no provision for religious courts, just as it withheld power from Congress to create a national church and it gave the president no power to appoint bishops.





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Specific Article I language modified this general principle for a handful of high political matters beyond the ken of Article III courts—impeachments of federal officers, internal legislative disciplinary and expulsion proceedings, and certain controversies concerning contested legislative elections and qualifications. In these unusual situations involving an individual's right to serve as an officer or congressman—where routine interference by Article III courts risked inverting the document's grand democratic pyramid—the Constitution gave legislators power to "try" and "Judge" sundry issues of law and fact. Outside these few specially designated areas, federal adjudication would take place wholly within Article III courts and their state court counterparts.

Whenever a case involved an issue of federal law, the "supreme Court" would indeed stand supreme over state courts. Even if litigation began in a state tribunal, Article III mandated that "all" federal-law cases had to be appealable either to the Supreme Court itself or to one of its lieutenant tribunals among the "inferior" federal courts. As the central government's first line of defense against the excesses of individual states, the new Supreme Court would in a sense occupy an outpost once manned by England's Privy Council. Prior to 1776, the Council had the right to void colonial laws that it deemed contrary to fundamental rights or imperial policy. In all, it nullified over 450 laws in the century before independence.[11]

Yet England's Privy Council had no comparable right to void Parliament's enactments. Nor did regular eighteenth-century English judges claim any right to invalidate such acts. Under the emerging orthodoxy of parliamentary sovereignty, there was an ocean of difference between nullifying provincial laws and striking down parliamentary ones.

Under America's Constitution, founded on principles of popular sovereignty rather than legislative supremacy, the gulf between vertical review of state laws and horizontal review of congressional enactments would not seem quite so unbridgeable. America's judiciary would indeed have the authority to hear claims that Congress had exceeded the powers given to it by the sovereign citizenry. Nonetheless, the early Supreme Court would generally end up deferring to laws that had been approved by America's most distinguished statesmen in the House, Senate, and presidency. Between 1789 and 1850, although the Court would invalidate more than thirty state statutes, it would only once decline to carry out a provision of federal law—and even then the case (*Marbury v. Madison*) would involve a tiny sentence buried in a sprawling statute, a sentence regulating a technical issue of judicial procedure.[12]

State courts enforcing state constitutions in the years between 1776 and 1788 had likewise paid considerable deference to their respective legislatures. In only a handful of cases had any Revolutionary state judge openly refused to enforce a state statute on the grounds that it violated the state constitution, or even claimed the power of judicial review while upholding the state law in question. Spotty judicial reporting practices made it hard for ordinary citizens in the 1780s to know exactly what the judges in these few cases had decided and why.[13] Still, the idea of some sort of judicial review was in the air, even if not firmly on the ground, when the Philadelphia drafters met in the summer of 1787. Behind closed doors, several delegates declared that courts would have the right and even the duty to refuse to enforce congressional statutes that plainly violated the higher law of the Constitution itself. During the public ratification process that followed the secret drafting, Wilson, Publius, and other Federalists, especially in Virginia, explained that judges could and should refuse to enforce federal laws that were, in the words of *The Federalist* No. 78, "contrary to the manifest tenor of the Constitution."

BUT HOW "MANIFEST" did a constitutional impropriety have to be so as to justify judicial disregard of a duly enacted congressional statute? Would federal judges void a federal statute if the constitutional issues were fairly debatable, or would they act only if a case involved a particularly egregious violation or an issue that specially related to judicial procedure? Though nothing in Article III's text explicitly addressed this precise point, the Constitution's general structure hinted at a rather modest judicial role.

In tandem with the Article I necessary-and-proper clause, Article III left the Supreme Court's size and shape up to Congress (and the president, via the veto power). While Article I expressly empowered each congressional house to "determine the Rules of its [internal] Proceedings" and authorized the houses jointly to decide when and where to meet, Article III gave the judiciary no comparably broad grant of institutional autonomy. Thus, Congress, not the Court, would have the upper hand in deciding how, when, and where the justices would sit, what rules of procedure they would follow, and so on.[14] Although the Constitution shielded individual judges against politically motivated salary cuts or attempted removals, it left the Court as a whole open to political restructuring. For example, the political branches could detour around an obstinate Court majority by expanding the size of the Court and appointing new justices more likely to defer. Of course, such efforts to pack the Court could fail if American





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voters opposed the plan—either because of specific agreement with the Court's initial rulings or because the public favored a judiciary with more institutional independence than Article III guaranteed. But these potential political obstacles to Court packing hardly meant that the Constitution designed the Court to be "supreme" over Congress. Rather, these obstacles illustrated how the document made the people supreme over all branches.

Unlike Congress and the president, state governments would have no formal say in determining the Court's general contours or in making the specific decisions about whom to put on it or pull off it. A state whose laws were declared unconstitutional could detour around the existing justices only by convincing the other federal branches that its grievance had merit. The Constitution's structure thus emboldened the Court to vindicate national values against obstreperous states even as it cautioned the justices to avoid undue provocation of Congress.

In fact, Congress had many weapons to wield or at least brandish against the justices, if it so chose. For instance, the legislature enjoyed vast discretion to grant or withhold judicial pay increases, to fund or deny judicial perks and support staff, to reshape the inferior federal judiciary, and even to strip the Court of jurisdiction in many cases. Though the Court might try to resist aggressive congressional tactics, the justices had fewer defensive weapons than did a president, whose fixed four-year salary shielded him against blatant legislative bribery and whose veto pen enabled him to parry any bill that diminished his domain. While judges could disregard a duly enacted law that weakened their branch only if they could with straight faces rule the law unconstitutional, a president could veto a duly presented bill that weakened his branch on that simple ground alone—or indeed for any other reason he saw fit to give.

Against the backdrop of frequent and highly visible gubernatorial vetoes in the colonial era, the Constitution carefully specified the procedures to be followed whenever the president sought to negative a congressional bill. Yet the document failed to specify comparable procedures to be followed when judges sought to void Congress's output—a small but telling sign that the Founders, with little actual experience with judicial review, did not anticipate that the judicial negative would one day surpass the executive negative as a check on Congress. For example, in the case of the veto, the Constitution specified that each presidential negative needed to be accompanied by the executive's "Objections," which would then be immediately entered on the journal of the originating house. The document further required that congressional override votes "shall be determined by yeas and Nays, and the Names of the Persons voting for and against the

Bill shall be entered on the Journal of each House," which had to be published on a regular and timely basis. By contrast, nowhere did the document require each individual justice to give his yea or nay on the constitutionality of a federal statute, or on any other issue. Under the Marshall Court, dissenting justices did indeed sometimes fail to publicly register their disagreement with the Court's ruling. Nor did the Constitution require immediate publication of judicial opinions setting congressional statutes at naught, or even the issuance of written opinions in such momentous cases. In the 1790s, justices routinely delivered oral opinions in the courtroom while offering up no written statement of reasons to the broader public. Timely publication of the justices' reasoning did not reliably occur until the late 1810s.

Even more telling was the Judicial Article's silence on issues of judicial apportionment. The precise apportionment rules for the House, Senate, and presidential electors appeared prominently in the Legislative and Executive Articles. These rules reflected weeks of intense debate and compromise at Philadelphia and generated extensive discussion during the ratification process. Yet the Judicial Article said absolutely nothing about how the large and small states, Northerners and Southerners, Easterners and Westerners, and so on, were to be balanced on the Supreme Court. This gaping silence suggests that the Founding generation envisioned the Court chiefly as an organ enforcing federal statutes and ensuring state compliance with federal norms. Just as it made sense to give the political branches wide discretion to shape the postal service, treasury department, or any other federal agency carrying out congressional policy, so, too, it made sense to allow Congress and the president to contour the federal judiciary as they saw fit. If, conversely, Americans in 1787 conceived of the Court not as a faithful servant of the House, Senate, and president but rather as a muscular overseer regularly striking down federal laws as a fourth chamber of federal lawmaking, then it is hard to explain why the document gave the first three chambers plenary power over the fourth's apportionment.

With no constitutional guidance or constraint, the political branches in antebellum America ultimately structured a Court that leaned south, just as Congress and the presidency themselves tilted in that direction thanks to the three-fifths clause. When not in the capital participating in Supreme Court cases, each justice would be responsible for hearing lower court cases within his assigned geographic "circuit." Antebellum Congresses drew the boundaries of these federal circuits with attention not merely to the underlying litigation population to be served and the caseload to be



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In its celebrated Judiciary Act of 1789, the First Congress created a six-man Supreme Court. From a modern perspective that views Court opinions as the unique last word on constitutional meaning—existing on a far higher plane than the constitutional views of congressmen, presidents, jurors, and voters—the number six might seem highly dysfunctional. After all, if the justices tied three to three, the country would lack definitive guidance from its anointed oracle. But at the Founding, an even number was not so odd. The eighteenth-century "supreme Court" was merely the highest judicial tribunal deciding individual cases. In the event of a tie, the status quo would continue. Thus, in an appeal, litigants would live with the result reached by the court below; and if the justices were instead sitting as a trial court, the plaintiff would simply lose his bid for judicial relief. In this eighteenth-century system, each justice would typically offer his own reasoning and speak only for himself, as judges customarily did in England and the states in 1787. No collective Court opinion would presume to be the last word. (Only under Marshall did the Court begin to speak with one voice, and not until the late twentieth century did the Court begin to describe itself as the "ultimate interpreter" of the Constitution.)[16]

Most of the constitutional controversies that flared up in the republic's first dozen years never came before the pre-Marshall Supreme Court. For example, did the president have the unilateral right to remove cabinet officers in whom he had lost confidence? Could the new federal government assume state Revolutionary War debts? Might it create a national bank? In apportioning Congress after a census, what sorts of mathematical rounding practices were permissible? If both the president and vice president died, could Congress name a legislative leader to take over? How and by whom should the Constitution's rules concerning fugitive slaves be enforced? Did the president have unilateral authority to decide whether and when to recognize a given foreign government? Did he have the right to proclaim America's neutrality in a European war? Must the president consult the Senate during the process of negotiating treaties? What part should the House play in assessing and implementing ratified treaties? To what extent could Congress properly interfere with property

rights (in particular, preexisting slaveholding) in federal territory south of the Ohio River? Were members of Congress subject to impeachment? Did Congress have proper authority to punish political critics? How should the knotty presidential election of 1800–01 be untied?

Some of these early constitutional controversies presented "political questions" well outside the purview of eighteenth-century federal courts. Others involved lawsuits over which the Supreme Court lacked statutory appellate jurisdiction. Thus, in prosecutions under the Sedition Act of 1798, judiciary acts gave inferior federal courts the last judicial word. Not until the 1890s would Congress give the Supreme Court general appellate power to review federal criminal-law cases tried by lower federal courts. Apart from a few questions involving laws directly regulating judges and their jurisdiction, perhaps the biggest issue to reach the early Court concerned the scope of Congress's power to impose a tax on carriages. In their individual opinions on the matter, the justices unanimously agreed to uphold the constitutional consensus that had been reached by the political branches on this topic.[17]

OVER THE NEXT TWO CENTURIES, several factors would conspire to exalt the Court's absolute and relative positions. In the system's first hundred years, as new states entered the union and Congress periodically redrew circuit lines, the Court's size fluctuated from five to ten members, a fluidity that made Court packing easier to accomplish or at least threaten. But eventually the American frontier closed, circuit riding ended, and the Court's size stabilized at nine. Inertia took hold and certain political levers began to rust up. Even a popular Franklin Roosevelt in the afterglow of a triumphant reelection encountered stiff opposition to his 1937 plan to change the Court's basic size and shape (and thereby pack it with his own appointees).

At the other end of the judicial hierarchy, the mushrooming number of federal statutes on the books has required an ever-increasing number of lower court federal judges to manage all the resulting issues arising under federal law. This vastly broader base of lower court judges has in turn given the high Court that many more "inferior" federal officers to order around, officers who by both constitutional command and professional training have generally seen themselves as the Court's lieutenants. In its earliest judiciary acts, in 1789 and 1790, Congress created fifteen district court judgeships—one for every seven (post-1792) representatives.[18] Today, there are nearly a thousand lower court federal judges, two for every



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House member. Thus the ratio of Article III judges to Article I representatives has increased roughly fifteenfold. Each judge today customarily radiates authority over a circle of local intimates—magistrates, masters, law clerks, and so on—through whom the judiciary's informal influence seeps into every corner of the country. For example, top students graduating from elite law schools are far more apt to apprentice by clerking for a federal judge than by interning for a representative or senator. A large federal judicial corps has thus blunted two of the major advantages enjoyed by federal legislators at the Founding: sheer numerousness and personal connectedness to ordinary citizens.[19]

Improved reporting practices have enabled the Court to get its message out, and quickly. Nowadays, in any given case a majority of justices ordinarily sign on to a single "Opinion of the Court," an opinion widely viewed as the last word on the Constitution's meaning. Meanwhile, a partisan and crumbly Congress has often found it hard to speak with one voice, and presidents have come to be seen as party politicians rather than impartial magistrates.

As the Court has asserted more power for itself, the other branches and the citizenry have frequently yielded. At the turn of the twentieth century, Congress gave the Court sweeping power to review lower federal court rulings and greater bureaucratic control over the judiciary as a whole; today, there are no important pockets of federal law over which inferior courts can rule without being subject to direct reversal by the Supreme Court.[20] At the Founding, the prestige-and-power gap between the six Supreme Court justices and the fifteen federal district court judges was much smaller than the gulf that now separates nine justices from the thousand-odd lower federal court judges. For instance, justices no longer routinely sit alongside district judges from their home region. Thus, even as the third branch has risen vis-à-vis the first two, so has the Supreme Court risen vis-à-vis the lower federal bench.[21]

Also, Congress in the early twentieth century gave the Supreme Court vast discretion over its own appellate docket.[22] Today's Court thus has near-plenary authority to define its own agenda, a luxury once possessed only by the political branches. Decades of divided government at the close of both the nineteenth and twentieth centuries have pitted presidents against Congress, enabling the Court to draw more power to itself at minimal risk of political reprisal. After Vietnam and Watergate, much of the public has come to view the judiciary as more honest and competent than the politicians in other branches. Modern presidents and congressmen are far less likely to assert their own constitutional visions than were their an-

tebellum predecessors. For example, in dramatic contrast to the pattern set in the eighteenth and nineteenth centuries, only a handful of twentieth- and twenty-first-century Inaugural Addresses have explicitly meditated upon the Constitution itself, and only a small percentage of recent veto messages have articulated objections based on the president's independent constitutional judgment.[23]

Finally, at the highest level of American lawmaking, the nation has approved one constitutional amendment after another with the increasing expectation that litigants may come to court to define and enforce their constitutional rights, even against Congress. Thus Article III's small-s "supreme Court" has become modern America's capital-S "Supreme Court."

## "good Behaviour"

Combining various elements of English law and Revolutionary state practice into a unique pattern, the federal Constitution structured a novel and notable system of judicial selection and tenure.

The new system began with a collaborative judicial appointment process, a process first sketched out by the paper Constitution and then fleshed out by actual practice under George Washington and his successors. As with virtually all other important officers of the United States, federal judges were generally to be nominated by the president and confirmed by the Senate.[24]

This collaborative process aimed to produce judges who embodied republican excellence. During the colonial era, kings had unilaterally named judges in England, and unelected governors had done the same in America. Even when such executives had chosen to honor men of acknowledged merit (perhaps after broad informal consultation), the process nevertheless failed to guarantee the people's elected representatives sufficient input. Whether or not these traditional systems resulted in judicial excellence, they surely were unrepublican. After independence, state legislatures and councils often began to pick judges collectively, with no single leader being obliged to accept responsibility for any given appointment. Similarly, the Articles of Confederation allowed a hydra-headed Congress to choose continental arbitrators and adjudicators. Though tolerably republican, these Revolutionary appointment systems seemed ill suited to maximize judicial excellence. By contrast, each Article III judge would be a man whom the president had personally endorsed, presumably after careful investigation. After all, the nominator's reputation as



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All Article III judgeships would be formally open to all (free) men of merit. While England barred nonnatives from serving as judges, America would welcome naturalized citizens. In fact, three of the first ten men to sit on the Supreme Court and two of the first twenty-five federal district judges were immigrants. At least two early justices, James Wilson and William Paterson, had risen from middling origins. Yet several others—John Jay, John Blair, Jr., William Cushing, James Iredell, Oliver Ellsworth, and Bushrod Washington—were close kin of prominent judges and politicians. Most early justices came from relatively privileged backgrounds, as did the majority of the district judges appointed in 1789.[25]

The Constitution allowed the president and the Senate to consider political and ideological factors in selecting Supreme Court justices and lower court judges, and such variables did in fact figure prominently in early appointments. Every one of the eight men to sit on the Supreme Court before 1796 had been a highly visible Federalist in 1787–88. The first former Anti-Federalist whom Washington named to the Court, Samuel Chase, did not win the president's favor until Chase had shown himself to be a strong post-ratification supporter of the president's administration.[26] Of Washington's sixteen initial nominees to the district bench —all of whom the Senate confirmed but three of whom declined to serve—nine had publicly supported the Constitution in their respective ratifying conventions, and several others had demonstrated their commitment to the Federalist cause in other ways. Conversely, none had voted against the Constitution in state convention.*[27]

*Washington's sole Anti-Federalist appointee to the district bench in 1789 was Kentucky's Harry Innes, who had expressed opposition to the proposed Constitution several months before the Virginia ratifying convention met. It is unclear whether Washington knew of this opposition, but he did know that Innes had the strong backing of John Brown, the congressman from Virginia's Kentucky district who himself had vigorously supported ratification. Washington also knew that Innes's younger brother James had delivered a key Federalist speech at the Virginia convention, where young Innes stood out as one of only three (out of fourteen) Kentucky-district delegates to vote yes. (In fact, Washington offered to nominate James as U.S. attorney general, but young Innes declined for personal reasons.)

A note on my terminology in this section and elsewhere in this book: During the Constitution's first decade, political alignments shifted as the great debate between Federalists and Anti-Federalists in 1787–88 gave way to a new competition between Federalists and Republicans in the late 1790s. The "Federalists" of 1787–88 should not be automatically equated with the "Federalists" of 1796 and thereafter. For example, the 1787 Federalist James Madison became a leading Republican in the 1790s; conversely, as mentioned in the text, the old Anti-Federalist Samuel Chase morphed into a prominent Federalist.

After Washington's departure, openly partisan competition heated up in federal legislative and executive races and also in federal judicial politics. John Adams sought to stuff the bench with fellow Federalists; Jefferson, with fellow Republicans. In 1810, ex-president Jefferson counseled his incumbent friend, James Madison, not to appoint Joseph Story to the Court because Story was, in Jefferson's view, "unquestionably a tory" who as a congressman had "deserted" Jefferson on the administration's embargo policies. In the end (after three failed attempts to appoint other men) Madison named Story, who described himself as "a decided member of what was called the republican party, and of course a supporter of the administration of Mr. Jefferson and Mr. Madison," albeit a republican of "independent judgment" and not a "mere slave to the opinions of either [president]."[28] Not until Republican Abraham Lincoln named Democrat Stephen Field would a president openly reach across party lines in a Supreme Court nomination—and when Lincoln did so in 1863, the deepest ideological divide ran not between Republicans and Democrats but between Unionists and Secessionists. (In 1864, Lincoln would run under a "Union Party" banner alongside a War Democrat, Andrew Johnson.)[29]

From its earliest days, the Senate in its confirmation process felt free to consider the same broad range of factors that a president might permissibly consider in his nomination decisions. For example, senators in 1795 voted down John Rutledge for the chief justiceship largely because they doubted his political judgment. The Judicial Article thus provided for an openly political and ideological process of initial appointment. Presidents and senators could not properly extract promises from a judicial nominee but were free to indulge in predictions about how that nominee might rule and to factor such predictions into their appointments calculus.[30]

Once a judicial nominee had successfully run the appointment gauntlet, the Judicial Article promised that he would enjoy an undiminishable salary and tenure during "good Behaviour." These interlocking guarantees counterbalanced the need to shield judges from inflation against the need to shield them from Congress. In the case of a president serving a fixed four-year term, Article II required Congress to cement the executive salary at the outset, with adjustments permitted only for future presidential terms. This rigid Article II system risked unfairness if prices jumped unexpectedly within a single term, but every four years, corrections could be made. Article III required a different approach. Judicial tenure during "good Behaviour" meant indefinite stints stretching out over decades, per-





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haps. To do justice to the men charged with doing justice, Congress needed authority to increase judicial salaries whenever unforeseeable inflation arose.[31] Yet such authority left the judiciary partially vulnerable to the legislative power of the purse. The power to grant an increase involved the power to withhold an increase, and also the power to dangle an increase.

Nevertheless, Article III gave individual judges more security than was typical in England and America. In Tudor and Stuart times, the monarch could unseat any judge who displeased him. Not for nothing was one prominent English court known as the "King's Bench," for the judiciary largely took shape as an extension of the Crown's authority to do justice to its subjects. After the Glorious Revolution, the 1701 Act of Settlement promised English judges tenure *"quamdiu se bene gesserint"* (Latin for "during good behavior") and further provided that judges should have salaries "ascertained and established"—that is, subject to legislative increase, but not diminution. Yet these words meant somewhat less than met the eye. In the emerging system of parliamentary sovereignty, the monarch could no longer remove judges at will, but Parliament itself could do so when both houses issued an "address" calling for a judicial unseating. Monarchs also retained considerable power to grant, withhold, or dangle judicial pensions and other perks.

Whatever comfort the 1701 Act gave to judges in England, it offered none to judges in America, who continued to be subject to removal at the whim of the executive. At the outset of George III's reign, several colonies tried to insulate judges from unilateral executive removal, but imperial officials vetoed these efforts.[32] Seeking other ways to counterbalance the judiciary's dependence on the executive, many colonial legislatures denied judges fixed salaries. Thus if a colonial judge leaned too far in one direction he could be fired (by the executive) and if he leaned too far in the other direction he could be starved (by the legislature). When England proposed to tip this balance of terror in the early 1770s by giving provincial judges fixed salaries, patriots were outraged. Though judges should be independent of unelected executives, it hardly followed that judges should be equally independent of elected legislatures.

Much as the Glorious Revolution had shifted power over the judiciary from the executive to the legislature, so the American Revolution repeated this shift almost a century later. In 1776, the Declaration of Independence scathed George III for endeavoring to make "judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Turning from negation to affirmation, Americans in their initial

state constitutions commonly promised judges tenure during "good behaviour."[33] As in England, there was a catch: Most state constitutions with "good behaviour" clauses made clear that legislators could vote to remove judges by "address" even in the absence of adjudicated wrongdoing.[34] Only half the states explicitly guaranteed "fixed" or "permanent" judicial salaries (which legislators might raise but not lower), and none coupled this guarantee with all the other basic features of Article III, namely, executive appointment, life tenure, and the absence of legislative "address."[35]

Article III thus offered the federal judiciary a uniquely protective package. "Good Behaviour" now meant what it said: A federal judge could be ousted from office only if he misbehaved, with adjudication of misbehavior taking place in a judicial forum. Pointedly withholding from Congress any general power to remove a judge by legislative "address," the framers instead told Congress to *adjudicate* a judge's alleged misbehavior while sitting in a judicialized impeachment process. Thus, the House, acting as a grand jury, could impeach any judicial officer—or any executive officer, for that matter—who committed a high crime or misdemeanor, and the Senate, sitting as a court, would proceed to render judgment.

In effect, "good *Behaviour*" and "high . . . *Misdemeanor*[]" defined two sides of the same linguistic coin. The precise wording of Article III confirmed that "Misdemeanor" in Article II was best read to mean misbehavior in a general sense as opposed to a certain kind of technical criminality. In the early republic, the House in fact impeached two federal judges for egregious, but noncriminal, misbehavior. In 1804, the Senate convicted New Hampshire District Judge John Pickering for drunkenness and profanity on the bench; the following year, a majority of senators voted to convict Associate Justice Samuel Chase of judicial impropriety and abusiveness but failed to muster the two-thirds vote required by the Constitution. This supermajority rule, too, offered judges more protection than did England and most states, where simple majorities of impeachment courts sufficed to convict.[36]

Above and beyond impeachment, ordinary criminal courts could entertain prosecutions brought against federal judges, and Congress by law could provide for automatic removal from office upon due conviction. For example, Congress might decide that accepting a bribe was disqualifying misbehavior per se and provide by a generally applicable law that any federal judge convicted of bribery in a criminal court must immediately forfeit his judgeship. In fact, the First Congress did just that in a 1790 bribery statute. This enactment built on foundations laid by several states whose constitutions and/or statutes made clear that "conviction in a court of law"



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could result in automatic forfeiture of judicial office.[37] Thus, the federal Constitution provided for two distinct removal tracks, one via ordinary criminal conviction and the other via the extraordinary politico-judicial process of impeachment.[38]

In the charged atmosphere following the election of 1800–01, Congress tried to add a third removal track and got away with it. In 1801, a lame-duck (and electorally repudiated) Federalist Congress created a row of new federal judgeships, which President Adams proceeded to pack with Federalists in the closing hours of his administration. Unamused, President Jefferson and his Republican allies in Congress took action in 1802 to oust these judges en masse by simply repealing the 1801 law that had created the judgeships. None of these ousted judges had been adjudged guilty of any misbehavior; and a simple legislative majority had sufficed to enact the repealing statute. In effect, if not in name, this was removal by address. Nevertheless, when the issue reached the Supreme Court in *Stuart v. Laird,* an 1803 companion case to *Marbury v. Madison,* the Court yielded to the new Congress's force majeure and fait accompli.[39]

In this early judicial capitulation, we glimpse yet again the weakness of the early judiciary when confronting a united legislature and executive. Nowadays, *Marbury* is customarily the first case assigned in a law-school course on the Constitution. Most lawyers—indeed, many law professors—have never heard of *Stuart v. Laird.* But in the early nineteenth century, the trivial statutory section that the Court struck down in *Marbury* paled in significance to the prominent provisions that the Court felt obliged to uphold in *Stuart.* For all *Marbury*'s bold notes, John Marshall was sounding his judicial trumpet in retreat.[40]

In a variety of ways, then, judicial tenure during "good Behaviour" did not wholly remove judges from the ebb and flow of larger political currents. Indeed, the very open-endedness of this form of tenure may well have inclined many an early federal judge to think politically about his judicial exit strategy—that is, about a possible political career after his time on the bench and about the optimal political timing of his eventual judicial resignation. For example, neither of America's first two chief justices served for life or anything close to it. Instead, John Jay left the bench after six years to become governor of New York, and Oliver Ellsworth quit after four and a half years, timing his resignation in a manner that guaranteed that fellow Federalist John Adams would name his replacement. Together these two chiefs spent only ten years on the Court and lived for some forty years thereafter. In 1791, Associate Justice John Rutledge left the Court for a government job in his home state, and Associate Justice

William Cushing would likely have followed suit in 1794 had he bested Sam Adams in the contest for the governorship of Massachusetts. In the republic's earliest years, judicial tenure during "good Behaviour" often simply meant "until resignation."

In 1787, this was the only model of judicial independence familiar to most Americans, a model that prevailed in eighteenth-century England and in most of the newly independent states. Only New York had hit upon an alternative approach to judicial independence, featuring a long term with a fixed end date—in New York's case, tenure during good behavior until age sixty.

Today, however, some version of this alternative model prevails in almost every American state and in most other advanced democratic nations.[41] Judges in these regimes typically serve for relatively long fixed stints and/or up to a mandatory retirement age. This alternative model arguably does a superior job of insulating sitting judges from partisan politics. By giving each judge a fixed target date of departure, this model facilitates the emergence of informal norms whereby each judge is expected to either serve out his defined term or give some nonpartisan reason (for example, personal health) for leaving early. By contrast, in a regime of life tenure, unless there exists a strong norm that each judge will in fact serve until death, there is no obvious target date of departure, no fixed and focal baseline against which to measure an "early" resignation. Thus each judge remains freer to design his own individual exit strategy with a finger in the political wind and an eye on the political calendar. Well into the modern era, sitting justices have left the Court for political pastures or have strongly considered doing so.[42] It remains common for a justice to time his resignation so as to advantage the political party that named him to the bench.

Nevertheless, modern judicial exit strategies have been less openly political than one might have predicted based on the early trajectory traced by Rutledge, Cushing, Jay, and Ellsworth. After these men came John Marshall, who profoundly changed the Court simply by staying put, serving for more than three decades, until his death in 1835. (After Jefferson's inauguration, Marshall also avoided open participation in partisan politics of the sort that Jay and Cushing had dabbled in and that Chase had pursued with such clumsy zeal as to provoke impeachment and near-removal.) Just as Washington's unprecedented example helped gloss the phrase "four Years," so Marshall's extraordinary tenure helped redefine the words "good Behaviour." In the Executive Article, "four Years" eventually came to mean no more than eight years, while in the Judicial Arti-





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cle, "good Behaviour" generally came to mean far more than eight years. The combined legacy of the early republic's dominant trendsetters—Washington, Jefferson, Madison, Monroe, and Marshall (Virginians all, interestingly enough)—was that presidents would renounce a norm of de facto life tenure, while judges would embrace it.

## "all Cases"

Article III's first section began by vesting all federal courts with "the judicial Power of the United States." Article III's second (and penultimate) section began with complementary language listing nine categories of "Cases" and "Controversies" over which this "judicial Power" would extend. First on the list were "all Cases, in Law and Equity, arising under" federal law; a little later came lawsuits dealing with admiralty and maritime issues, followed by an assortment of suits involving state law—most important, controversies between citizens of different states.

In form and feel—and placement, too—this roster of lawsuits suitable for federal court adjudication resembled the Constitution's earlier rosters describing congressional and presidential powers. Yet these two earlier lists (which appeared in the penultimate sections of Articles I and II) differed in one key way: Article I comprehensively enumerated Congress's legislative powers, whereas Article II merely exemplified and clarified certain aspects of the president's executive power without exhaustively enumerating all its component elements.

In this respect, the judicial-power list resembled the legislative-power list,[43] and for good reason. Federal legislative and judicial power could be exhaustively itemized without grave risk to the republic. When enumerated grants of federal authority ran out, state legislatures with plenary police powers could fill the gaps of federal statutes, and state courts of general jurisdiction could hear any lawsuits that lay beyond the reach of federal courts. By contrast, thirteen state executives—with no international standing, zero diplomatic experience, few if any professional soldiers or warships, and only modest capacity to coordinate among themselves across the miles that separated them—could not always be relied on to save the nation in an hour of crisis. Hence the special need to vest America's president with a residuum of executive power to preserve the Constitution whenever fortune or foes might imperil its very existence.

In another respect, however, the judicial roster resembled its executive counterpart by identifying certain powers that Congress could not take away or give to any other body. Just as the powers vested in the presi-

dent were his, not Congress's, so the powers vested in the federal judiciary belonged to the third branch, not the first. Congress had no right to snatch the president's pardon pen and hand it to state governors; nor could Congress transfer the final word in federal-law cases from federal courts to state judges. The interlocking language of Article III, sections 1 and 2 demanded that federal judicial power "*shall* be vested" in federal courts and "*shall* extend to *all*" cases arising under federal law.

True, state courts of general jurisdiction could entertain a wide range of federal-law cases—whether the federal issue arose in the plaintiff's complaint, the defendant's answer, or still later in the back-and-forth of litigation. Nevertheless, these state courts could not properly pronounce the last judicial word on federal law. That job was part of "the judicial Power *of the United States*" vested solely in federal courts, and rightly so. No state judge would have been named by the president or confirmed by the Senate; nor would any state judge enjoy federal-constitutional tenure and salary guarantees; nor would a state judge be subject to congressional impeachment in the event of gross misbehavior, or automatic removal from office upon conviction of a federal offense.[44]

While state courts had to be reviewable by some federal tribunal whenever a case hinged on a claim of federal right, that federal tribunal did not need to be the Supreme Court. All other federal courts were also clothed with the judicial power of the United States, and therefore could serve as courts of last resort, with no automatic requirement that their decisions be appealable to the Supreme Court. The Constitution gave Congress broad power to allocate cases within the federal judicial system. For example, Congress was free to decide that in most run-of-the-mill cases, state court decisions should be reviewed by some nearby inferior federal court, and that not every federal case needed to be dragged across a continent for further review by a single Supreme Court. Inferior federal courts could be trusted with the last judicial word because these courts would be staffed by judges selected in the same way, guaranteed the same tenure, and accountable for misconduct in the same manner as Supreme Court justices. Congress's power to shift a given case, or a wide swath of cases, from the Supreme Court to some inferior federal court resembled the power of the political branches to pack the Court or otherwise restructure it. In all these situations, the political branches would decide *which* federal judges would be decisive.

The Constitution did not require Congress to create inferior federal courts. Nevertheless, Congress has always chosen to rely on such courts, and in the new nation's early years these courts played a particularly large





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role within the federal judiciary. Under the landmark Judiciary Act of 1789, lower federal courts heard and finally resolved virtually all federal criminal cases; no general right of direct appeal to the Supreme Court existed in such cases. On the civil side, early statutes limited the Supreme Court's review over lower federal court judges to cases in which those judges were themselves divided or where great sums of money were involved.

ALTHOUGH THE FIRST JUDICIARY ACT—and indeed all later congressional statutes regulating the judiciary—gave federal courts the last judicial word over all cases arising under federal law,[45] Congress from the beginning pursued a different course concerning other sorts of lawsuits described in Article III. Consider for example what lawyers refer to as "diversity" suits—that is, lawsuits arising between citizens of diverse states. Under the 1789 Act (and all subsequent statutes for that matter), if a citizen of state A were to sue a citizen of state B, alleging small damages in a controversy revolving solely around state-law issues, no federal court could entertain the matter. Yet such a lawsuit surely fell within the federal judicial roster: "The judicial Power shall extend to . . . Controversies . . . between Citizens of different States." Why, then, did the First Congress allow state courts to have the last judicial word over many of these controversies?

Perhaps the answer lay coiled tightly in the intricate and intriguing language of Article III. (For those who wish to solve the textual puzzle for themselves, the key passage is reprinted at the bottom of this page.*) As drafted, the judicial roster contained two textually distinct tiers. In the roster's opening words—the top tier—federal jurisdiction extended to *"all"* cases arising under federal law, to *"all"* cases involving foreign ambassadors and consuls, and to *"all"* admiralty cases. In this top tier, the word "all" popped up again and again. Yet lower down on the roster—the bottom tier—the word "all" suddenly dropped away.

*"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const., art. III, sec. 2, para 1.

Why did the Constitution use the word "all" repeatedly but selectively? What meaning, if any, should be attributed to this pattern? On the most straightforward reading, "all" meant just what it said: Federal courts had to be the last word in "all" top-tier cases, but not necessarily all bottom-tier lawsuits. In the bottom tier (including diversity "Controversies . . . between Citizens of different States"), Congress was free to decide, thanks to the necessary-and-proper clause, whether federal courts should hear all of these lawsuits, or some of them, or none of them.[46]

This close textual reading made good structural sense in 1789 and continues to make good sense today. Aside from a handful of cases involving foreign ambassadors (lawsuits whose exceptional international delicacy warranted trials in the Supreme Court itself), the basic difference between the two tiers involved the source of law at issue. Top-tier cases inherently involved matters of federal law. Lower-tier cases did not.

In the top tier, Article III encompassed all claims of federal right—whether the claim derived from the Constitution itself,[47] federal statutes, or federal treaties; and whether the suit sounded in "Law," "Equity," or "admiralty."[48] *Federal* laws would thus be enacted by a *federal* legislature, enforced by a *federal* executive, and ultimately adjudicated by a *federal* judiciary. As Hamilton/Publius explained in *The Federalist* No. 80, "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number."[49]

Bottom-tier controversies were intrinsically different. These disputes might turn solely on state-law issues over which state courts were traditionally seen as authoritative. Federal jurisdiction was nevertheless permissible in bottom-tier situations because some state courts, in applying state law, might betray bias against nonresidents. Thus, in various lawsuits potentially pitting a home-state litigant against an outsider—say, a citizen of a sister state—Congress could choose to open up some federal court whose job would be to apply state substantive law impartially. But Congress could also choose to let state courts decide these state-law cases free from federal judicial oversight. As the new nation began to knit closer together economically and socially, bias against nonresidents might well subside and state courts might prove that they could be trusted to hold the scales of justice evenly between in-staters and outsiders.

Of course, a given lawsuit might simultaneously fall in both the first and second tiers. For instance, a case might pivot on a point of federal law while also arising between citizens of different states. In such situations, federal courts would need to be involved. "All Cases" meant *all* cases.





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While drafting records of the Philadelphia Convention confirm that Article III's framers did indeed intend a two-tiered system,[50] none of these secret records were available to the American people when they were asked to ratify the Constitution in 1787–88. Instead, the ratifying generation confronted the bare text of the Article III roster itself—a section bristling with technical legal language that invited a close reading attentive to overarching principles of constitutional structure. Even without the aid of the secret drafting documents, the First Congress designed the 1789 Judiciary Act in a manner that fit snugly within the Judicial Article's basic two-tiered framework.* It probably didn't hurt that this Congress included eight representatives and eleven senators who had served as delegates at Philadelphia.

When questions about the 1789 Act eventually reached the Supreme Court, the justices, in a series of landmark opinions authored by John Marshall and Joseph Story, highlighted the Judicial Article's two-tiered structure. As Story—himself a former congressman, as was Marshall—explained, "congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction" between the two tiers, a distinction which the Court's opinion "brought into view in deference to the legislative opinion, which has so long acted upon, and enforced" it.[51]

Here, too, we see the early judiciary—led by two ex-congressmen—following Congress's cue rather than imperiously dictating to the first branch.

## "supreme Court . . . original Jurisdiction"

The most celebrated constitutional-law case ever decided pivoted on one of the Constitution's most recondite provisions. According to John Marshall's opinion for the Court in *Marbury v. Madison*, part of Congress's 1789 Judiciary Act attempted to do what the Judicial Article did not permit—namely, expand the Court's original jurisdiction. Marshall's Court famously proceeded to disregard this part of the act, thereby exercising a

*The Act left state courts with exclusive jurisdiction over a huge number of bottom-tier lawsuits—most dramatically, state-law disputes between citizens of different states involving less than $500—but gave federal courts the last judicial word over all claims of federal right. Lower federal courts were left unreviewable over a wide assortment of federal-law cases, but state courts were not; even if a federal-law case in a state tribunal involved the most trifling sum of money, any party claiming a federal right could appeal from state to federal court. Later jurisdictional statutes have followed this 1789 pattern, giving federal courts jurisdiction over all top-tier cases, but nothing close to plenary jurisdiction over lower-tier suits.

power that later Americans would call judicial review. Most constitutional-law casebooks begin with *Marbury* and lavish attention on the topic of judicial review. Few casebooks devote more than a paragraph to the precipitating issue of original jurisdiction.

In listing the cases that federal courts could hear, the judicial roster did nothing to allocate these cases within the federal judiciary, between the Supreme Court and inferior federal courts. Nor did the roster define when the Supreme Court would preside over trials and when it would instead act as an appellate tribunal. Hence the need for Article III's next paragraph, which outlined the Court's original and appellate jurisdiction as follows:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned [in the roster], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

This terse paragraph teemed with technical complexities, many of which need not detain us now.[52] But it is worth pondering why the Constitution placed certain *bottom*-tier state-law suits between states and nonresidents in the Court's *original* (trial) jurisdiction. After all, such cases were so insignificant that Congress could have removed them altogether from the federal judiciary as a whole. Why, then, did Article III provide that *if* such lower-tier suits were to be heard by federal courts, they could be brought to the Supreme Court itself for trial?

To answer this question, let's recall that Article III allowed Congress to give federal courts jurisdiction in suits between states and nonresidents because state courts might be biased against outsiders. Yet federal judicial intervention might raise bias problems of its own. Imagine a suit between the state of Massachusetts and a Georgia merchant—involving, say, a business deal gone bad. If the lawsuit involved no issue of federal law, Congress could allow state courts to decide the matter. But if Congress instead opted for federal jurisdiction, just where should the federal trial take place? An inferior federal court sitting in either Massachusetts or Georgia, featuring a local jury and a federal judge who likely came from the forum state, might be seen, especially in the other state, as reflecting federal bias in what was supposed to be an evenhanded venue.

Trial in the Supreme Court itself promised stricter federal impartiality.



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Litigation would begin and end in a neutral capital city outside the affected states—a venue metaphorically if not literally equidistant between the states while presumably convenient for all of them. Every state government would have agents in the national seat—most obviously, its senators—who could monitor litigation on the state's behalf, and perhaps argue the state's case themselves. In the early 1780s, Confederation congressmen had appeared as lawyers in each of the three state-versus-state cases that had come before the ad hoc continental tribunals provided for by the Articles of Confederation. A similar litigation pattern would prevail under the new Constitution. For most of the nineteenth century, the Court would meet in the Capitol itself, and congressmen would frequently appear as advocates. Daniel Webster would argue more Court cases (about 170) than any other counsel in history, save one.[53]

Similar considerations of geographic impartiality and convenience help explain why Article III also gave the Supreme Court original jurisdiction over all cases affecting foreign ambassadors, who would customarily live in the national capital. Even in cases involving lesser foreign officials who might reside elsewhere, the Supreme Court's proximity to the president and the State Department made it an apt venue. The justices could easily keep abreast of the executive branch's position on any fast-breaking international development that might bear on such litigation. Trial in America's highest court would also symbolize America's supreme respect for foreign dignitaries.

BUT COULD CONGRESS EXTEND the Supreme Court's original jurisdiction to any cases other than those involving states or foreign dignitaries? This was the technical constitutional question to which the Marshall Court answered a resounding no in *Marbury v. Madison.* Marshall's opinion for the Court treated the Article III issue as self-evident. The original-jurisdiction clause, he suggested, would be meaningless unless read as a cap. Yet modern critics have floated facially plausible alternative readings of Article III—arguing, for example, that perhaps the original-jurisdiction clause merely marked a starting point, defining a presumptive amount of Supreme Court trial jurisdiction that Congress might properly augment.[54]

The best reading of Article III supports *Marbury.* While Article III pointedly said that Congress could make "Exceptions" to the Supreme Court's appellate jurisdiction, nowhere did it say that Congress might likewise make "augmentations" to the Court's original jurisdiction. During the ratification debates, several leading Federalists strongly antici-

pated *Marbury* when they insisted that Article III defined the outer limits of Supreme Court original jurisdiction. Hamilton/Publius repeatedly reassured his readers that the Court's original jurisdiction would "be confined to two classes of causes, and those of a nature rarely to occur." "All other cases" in the roster could be tried by other federal courts but not the Supreme Court, whose original jurisdiction extended "only" to state-party and foreign-diplomat cases, said Publius. In Virginia, ratification-convention president Edmund Pendleton declared that the Constitution "excludes [Supreme Court] original jurisdiction in all other cases" and that "the legislature cannot extend its original jurisdiction, which is limited to these cases only." Later, both Chief Justice Jay and Associate Justice Chase said much the same thing in private correspondence, and no leading figure said otherwise in public. After *Marbury*, none of the critics of John Marshall's opinion—and there were many—challenged his reading of Article III's original-jurisdiction clause.[55]

Why, we might wonder, were early Americans so emphatic and nearly unanimous on the point? Why would *Supreme Court* original jurisdiction differ so decisively from *inferior federal court* original jurisdiction? Or to ask the question a different way, why would Supreme Court *original* jurisdiction be so different from Supreme Court *appellate* jurisdiction?

Once again, the answer was geography. Inferior federal courts would be located in the several states. Trials in these courts would not require all the parties and witnesses to be dragged hundreds of miles to the national capital. Issues of fact and credibility in common-law cases could be decided by jurors who came from the locality where the underlying events had occurred. After trials had taken place in these proper venues, appeals to a faraway Supreme Court could be made without comparable inconvenience. Appeals would enable the high court to review the legal issues involved but would not typically require that all the parties, witnesses, physical evidence, et cetera, be carted to the national seat of government.

All of which leaves us with a final puzzle: Why did the First Congress try to expand the Supreme Court's original jurisdiction, contrary to Article III's letter and spirit? The short answer is that Congress in fact did no such thing. The statutory sentence that the *Marbury* Court flamboyantly refused to enforce did not say what the Court accused it of saying. Rather than adding to the Court's original jurisdiction, the sentence simply provided that if and when the Court already had jurisdiction (whether original or appellate), the justices would be empowered to issue certain technical writs—in particular, writs of prohibition and mandamus.[56]

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## "Trial . . . by Jury"

While Article III's cap on Supreme Court original jurisdiction implicitly safeguarded the role of local juries, the next paragraph of Article III did so more explicitly: "The Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."

These words failed to satisfy Anti-Federalists. Why, these men asked, did Article III guarantee juries in criminal cases but not civil ones? By negative implication, did Article III abolish civil juries in federal court?[58] Whenever a local jury in a state court civil case resolved a certain matter of fact, would a faraway Supreme Court claim a general right to disregard this factual finding on appeal? If not, why did the preceding paragraph of Article III ominously vest the distant Court with "appellate Jurisdiction, both as to Law *and Fact*"?[59] As for federal *criminal* trials, where Article III did indeed promise juries in "all" cases, why did the text say merely that the trial would be held somewhere in the crime-scene *state* without promising that the jury would be drawn from the precise locality—the common-law *vicinage*—where blood had been spilled?[60] And what about the need to provide for grand juries in criminal cases?[61]

These Anti-Federalist questions and criticisms had bite because late-eighteenth-century America placed great faith in her juries, civil and criminal, grand and petit. Before 1776, colonial jurors had stood shoulder to shoulder with colonial assemblymen to defend American self-governance against a formidable alliance of unrepresentative imperial officers and institutions—King George, his ministry, the English Privy Council and its Board of Trade, Parliament, colonial governors, and colonial judiciaries. Few Americans had ever voted for any of these imperial officers or served in any of these imperial institutions. But ordinary colonists could and did vote for colonial assemblies and vote in colonial juries. In the 1760s and 1770s, Americans used these republican strongholds to assail imperial policies and shield patriot practices. In response, British authorities tried to divert as much judicial business as possible away from American juries—toward colonial vice admiralty courts for customs cases and English courts for certain crimes committed by the king's officers in America.

Revolted, Americans revolted. High on their list of reasons, according to the Declaration of Independence, was that the king and Parliament had

aimed to "depriv[e] us, in many Cases, of the Benefits of Trial by Jury"; had claimed a right to "transport[] us beyond Seas to be tried for pretended Offences"; and had sought to shield British murderers who shed blood on American soil via a regime of "mock Trial" far from the scene of the crime. Every state constitution after independence contained multiple guarantees of jury trial. These documents also democratized other parts of state government whose colonial precursors had been largely or wholly unrepresentative: governorships, executive councils, and judiciaries. Henceforth, all branches of government would represent the people themselves more or less directly. But jurors would continue to represent the people more rather than less directly—with lower property qualifications than for most other forms of government service and no informal requirements of legal training or professional attainment. Juries were, in a sense, the people themselves, tried-and-true embodiments of late-eighteenth-century republican ideology.

Thus, when Anti-Federalists accused the Federalists of undermining the good old jury, this was a charge that mattered, and Federalists loudly proclaimed their innocence before the American people. Nothing in the Constitution, Federalists insisted, affirmatively abolished civil juries in federal courts.[62] On the contrary, Federalists predicted—promised, really—that the First Congress would doubtless provide for civil juries in some fashion.[63] Yet Federalists publicly defended the Philadelphia delegates' decision not to constitutionalize a requirement of civil juries in all federal cases.[64] Across the thirteen states, juries sat in most but not all civil cases. Admiralty, chancery, and probate matters were not universally jury-triable. Different states defined the precise boundary between jury cases and nonjury cases in different ways; moreover, the boundary in some states had shifted over time and might continue to do so. Many of the civil cases apt to be brought in federal courts would arise under state-law rules of tort, contract, property, and the like; perhaps these courts should pay some regard to state procedural rules concerning when juries should sit. Had Article III imposed a rigid mandate for all federal civil cases in all states at all times, such inflexibility might, ironically enough, have symbolized *disrespect for local diversity—for the very states' rights* Anti-Federalists claimed to embrace.

Federal criminal cases did not pose the same problem, since virtually all such cases were expected to arise under substantive federal law, not state law. Here, Article III sensibly laid down a uniform federal rule—a rule that also tracked the unanimous consensus of American states that *in all serious criminal cases, juries were a must.*[65] *Nevertheless, different*





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states had somewhat different rules about the precise region from which the criminal jury should be drawn and how jurors should be summoned. On this vicinage issue, the First Congress could be trusted to fill in the details, Federalists argued. These advocates also claimed that Congress would doubtless provide for federal grand juries, as had state legislatures in jurisdictions that lacked explicit grand-jury language in state constitutions.[66] In fact, language elsewhere in the Constitution—affirming that impeached officials were subject to ordinary criminal "*Indictment,* Trial, Judgment and Punishment"—arguably did implicitly commit the new federal government to a regime of grand-jury indictments for serious federal offenses.

Federalists further predicted/promised that the First Congress would ensure that the Supreme Court would respect factual findings made by local juries, civil and criminal, in both state and inferior federal courts (absent, say, some unusual situation where factual findings were being manipulated to undermine federal rights).[67] But in some types of traditionally nonjury lawsuits—admiralty cases involving captured ships, for example—it might be appropriate to allow the Supreme Court on appeal to review the lower court judge's factual findings as well as his legal conclusions.[68] Thus, Federalists explained, Article III properly extended the Supreme Court's appellate jurisdiction over both "Law and Fact."

How SHOULD WE ASSESS these Federalist arguments? If we read the words of the Constitution strictly or suspiciously, as did the Anti-Federalists, it is hard to ignore the document's gaping holes on the subject of juries. But a different picture emerges if we understand the Constitution not merely as a text but also as an act—a continent-wide ordainment process of contestation and conversation that gave birth to additional promises every bit as binding on the new government as the words of the document itself. From this angle, the Constitution did indeed—thanks in part to the Anti-Federalists—broadly secure jury rights.

Thus the First Congress, in its notable Judiciary Act of 1789, guaranteed that juries would decide the "issues in fact" in "all" non-equity and non-admiralty civil cases tried by inferior federal courts; and also guaranteed that civil juries would sit in "all actions at law against citizens of the United States" tried by the Supreme Court in its original jurisdiction. In addition, the act sharply limited the ability of the Supreme Court, when sitting on appeal, to displace good-faith findings of fact made by state courts. On the criminal side, the act mandated that in all federal capital

cases, jurors must come not merely from the state but from the "county where the offence was committed." Though the act oddly made no explicit mention of grand juries, earlier federal criminal statutes did require prosecutors to win indictments from grand juries, and federal judges regularly convened federal grand juries from the start.[69]

What's more, the First Congress proposed a dozen amendments to the Constitution, ten of which ultimately became America's Bill of Rights. One of these amendments (the Fifth) guaranteed federal grand juries and also, via its double-jeopardy clause, barred federal judges from reversing criminal-jury acquittals. Another amendment (the Sixth) provided for criminal juries from "districts" within states; and yet another (the Seventh) safeguarded the right to civil-jury trial in federal courts while also shielding certain factual findings made by state court civil juries.

Although these protections of liberty gestated in the First Congress, they had been conceived by the American people themselves in the very act of constitution. By August 1788—months before Congress would gather and more than a year before it would finally propose its amendments—five of the thirteen ratifying conventions had already made clear, in a series of formal declarations, that Americans wanted more jury safeguards than Article III offered. On this subject—as on many others at the Founding—the People spoke, and Congress obeyed.[70]

IN THE ARTICLE III vesting clause and roster, "shall" and "all" meant what they said. So, too, in the Article III jury-and-venue clause: "The Trial of *all* Crimes, except in Cases of Impeachment, *shall* be by Jury; and such Trial *shall* be held in the State where the said Crimes shall have been committed." Though a criminal defendant might plead guilty and thus avoid trial altogether, any federal defendant who pleaded not guilty and thus went to trial would face a jury—even if he might prefer to be tried by the bench alone. A criminal judge sitting without a criminal jury was simply not a duly constituted federal court capable of trying cases, just as the Senate sitting without the House was not a duly constituted federal legislature capable of enacting statutes. And even if a defendant preferred to be tried outside the crime-scene state—far from the madding crowd or the victim's family—the Judicial Article did not permit judges to operate in such a closet, much as the Legislative Article did not permit congressmen to suspend publication of house journals.

In the twentieth century, the Supreme Court began to disregard the plain meaning of "shall" and "all" in the Article III jury-and-venue clause,



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treating the issue as merely one concerning the waivable rights of the criminal defendant.[71] But the Founders' jury-and-venue rules had deeper roots. Trials were not just about the rights of the defendant but also about the rights of the community. The people themselves had a right to serve on the jury—to govern through the jury. In effect, each of the three branches of the federal government featured a bicameral balance. In the legislature, members of Congress's lower house—more numerous than senators, more localist, with shorter terms of office and more direct links to the electorate—would counterbalance the members of the upper house. In the executive branch, local citizen militias would counterbalance the central government's professional soldiers, and local citizen grand jurors would counterbalance the central government's professional prosecutors. So, too, within the judiciary, trial jurors would counterbalance trial judges.

Unchecked by a jury, a judge might be tempted—quite literally—to go easy on his wealthy friends. (Permanent magistrates would generally be easier targets to bribe than jurors whose identities would not be known long in advance.)[72] Particularly in cases where government officials had committed crimes against the citizenry, judges acting alone might be overly inclined to favor fellow government officers. Thus Article III promised that local citizens who had felt the brunt of these outrages would not be displaced by judges willing to try the matter on their own, or even by juries remote from the scene of the crime.

Nor did eighteenth-century Americans believe that their commitment to local jury trial would violate the defendant's right to a fair trial. When shots rang out on the streets of Boston on March 5, 1770, leaving five men dead from bullets fired by imperial soldiers, patriots had insisted that fair trials could and should be held in Boston itself, in proceedings that would showcase both community rights *and* defendant rights, republican freedom *and* individual fairness. In fact, most of the Boston Massacre defendants won acquittals on most charges. These verdicts carried special legitimacy precisely because local juries had made the decisions, after open trials that could be easily monitored by the victims' friends and families and Bostonians more generally. When, in the aftermath of these verdicts, Parliament enacted the Administration of Justice Act, which provided for trials back in England for murders committed by imperial officers in America, patriots quickly dubbed the act "intolerable." Indeed, this was the act that the Declaration of Independence derided as offering a "mock Trial"—language all the more striking when we recall that alongside draftsman Thomas Jefferson stood John Adams, who had in fact served as defense counsel in the Massacre trial.

Consistent with the commonplace eighteenth-century analogy between legislative and judicial bicameralism, local juries had to be part of some proceedings—trials, for example—much as the House had to be involved in ordinary lawmaking. At other times, however, judges might properly act on their own. Just as the Senate but not the House would ratify treaties and confirm appointments, so judges but not jurors would, for example, issue warrants and set bail.

Symmetrically, only the House could initiate appropriations bills; and jurors would likewise enjoy certain unique privileges. Only a grand jury, and not a judge, could authorize a criminal indictment. No matter how clear the proof against a man, grand jurors were free to just say no and thereby spare the potential defendant from even having to stand trial (unless prosecutors tried to proceed by "information"—a disfavored process nowhere mentioned in the original Constitution and all but prohibited by the later Fifth Amendment). Even if a grand jury said yes to the prosecution, criminal trial jurors were free to say no—or more precisely, "not guilty"—and no judge could stop or reverse them, no matter how clear (to the judge) the defendant's guilt. In short, eighteenth-century criminal jurors had both the right and power to acquit against the evidence. In a criminal case, no judge could snatch the case from the jury and unilaterally pronounce the defendant guilty; no judge could order jurors to enter a verdict of guilty; no judge could require jurors to make specific factual findings to justify their general verdict of not guilty; nor could any judge overturn the jurors' acquittal, even if it plainly contradicted the facts (as the judge saw them) or other verdicts that the jurors had rendered.

Alongside their right and power to acquit against the evidence, eighteenth-century jurors also claimed the right and power to consider legal as well as factual issues—to judge both law and fact "complicately"—when rendering any general verdict. Founding-era judges might give their legal opinions to the jury, but so might the attorneys in a case, and the jurors could decide for themselves what the law meant in the process of applying it to the facts at hand in a general verdict of guilty or not guilty (in a criminal case) or liable or not liable (in a civil case). Jurors today no longer retain this right to interpret the law, but at the Founding, America's leading lawyers and statesmen commonly accepted it.[73] Indeed, so did the United States Supreme Court itself, in one of its earliest cases, where the court sat in original jurisdiction in a civil case brought by Georgia against a British subject named Brailsford. According to Chief Justice Jay's 1794 instructions to the jury,





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> Gentlemen, . . . you have . . . a right to take upon yourselves to judge of both . . . the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay the respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.[74]

In *Georgia v. Brailsford,* Jay spoke these words for a unanimous Court. But in other trials presided over by multiple judges—both in the Supreme Court and in federal circuit courts—judges could and did sometimes disagree amongst themselves. Each judge or justice at the Founding felt free to offer his own views; and in this every-man-for-himself legal universe, the power of each juror to decide for *himself* after considering the various opinions laid before him seemed all the more natural.

BUT IF JURORS, when rendering general verdicts, had the right to follow the law as they understood it, and if the Constitution was the supreme law, then surely—many leaders at the Founding argued—jurors had the right to follow the Constitution as they understood it. Thus, alongside legislative review (in which both the House and Senate weighed the constitutionality of pending legislation), executive review, and judicial review, there was a strong argument at the Founding for jury review, in which jurors might refuse to enforce any law that they deemed unconstitutional. Jury review would not substitute for judicial review but would supplement it. In a criminal case, if *either* judge *or* jury found the underlying criminal statute unconstitutional, the defendant would walk free. The judge could always dismiss the case on constitutional grounds, and symmetrically the jury could irreversibly pronounce the defendant not guilty (since the "law" he had violated was really, in the jurors' eyes, no law). Analogously, no legislative bill could be enacted if either Senate or House deemed it unconstitutional and just said no. Nor could a prosecution take place if either the president or the grand jury had constitutional objections to it. The president could always pardon, even before trial, and the grand jury could simply refuse to indict.

Leading Federalists lent modest support to the idea of jury review. In 1791, Wilson, who in 1787 had openly championed executive review alongside judicial review, declared that "whoever would be obliged to

obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature." In such "delicate" situations, "every one who is called to act, has a right to judge"—a general formulation that seemed to encompass grand jurors called upon to indict and petit jurors called upon to convict. More emphatic was Massachusetts's Theophilus Parsons, later to become his state's chief justice, who declared in the ratification debates that, via juries, "the people themselves" could thwart congressional acts of "usurpation." Such enactments were "not law," and if any man resisted the government and were prosecuted, "only his fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation." Though perhaps limited to statutes that were not merely unconstitutional but egregiously so—"usurpations"—Parsons's argument plainly envisioned some form of jury review. The Federalist essayist "Aristides" put the point more softly. "Every judge in the union, whether of federal or state appointment, (and some persons would say every jury) will have a right to reject any act, handed to him as a law, which he may conceive repugnant to the constitution."[75]

True, on this view, one constitutionally scrupulous jury might acquit defendant A, while another jury with different views might convict otherwise identical defendant B. But the same point of course applied to judicial review, which was not limited to one Supreme Court but rather reflected a right and power of all courts and could operate even in disputes between private parties where the government was not a litigant.[76] Thus, one constitutionally scrupulous judge might dismiss charges brought against defendant A, while another judge with a different view allowed defendant B to be convicted. Even after the Supreme Court itself had pronounced a statute unconstitutional by refusing to apply it in a given case, the statute would formally remain on the statute books, and a differently composed Court at a later time might come to a different constitutional judgment.

Nor was the average juror's lack of formal law training a decisive argument against jury review in the Founding era. After all, jurors would have the benefit of the legal opinions of judges and lawyers in the courtroom—judges and lawyers who themselves may have received rather informal legal training. (Law schools as we know them today did not exist in eighteenth-century America.) And it bears repeating that even if ordinary jurors lacked understanding of technical lawyers' law, the Constitution embodied a very different, more populist, kind of law—law





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Yet there was an obvious difference between the countless thousands of ordinary voters, and ratification-convention delegates, across a continent who had ordained and established the Constitution and the twelve men, good and true, from some particular locality who would sit on a typical trial jury (or, for that matter, the twenty-three men who would form a grand jury). Without limits, a sweeping right of jury review might well have given eccentric localities too much power to frustrate—essentially, to nullify—federal laws strongly supported by the national citizenry.

Moreover, both the text and the act of constitution offered only modest support for a broad right of jury review. Civil juries had no automatic entitlement to enter general verdicts, and it was only in the context of general verdicts that, by tradition, juries could judge law (and thus, by implication, judge the Constitution as part of the law). Over the course of the nineteenth century, judges increasingly reined in the powers of civil juries through a variety of technical devices—directed verdicts, special verdicts, demurrers, judgments notwithstanding verdicts—that limited general verdicts.[77] Even on the criminal side, the jury's role eventually shrank to the domain of fact, as antebellum judges asserted a more general monopoly over issues of law in their courtrooms. Jurors could point to no strong statements in constitutional text or the framework Judiciary Act of 1789 that forbade this shrinkage. If anything, the Seventh Amendment highlighted the civil jury's role in deciding issues of "fact," and the Judiciary Act similarly stressed, in both criminal and civil cases, that the "trial of issues [of] *fact*" in all common-law cases would be "by jury."[78]

Having long since lost their Founding-era power to decide law, American juries nevertheless have retained two Founding-era rights that continue to support a limited form of jury review even today. A modern grand jury may decline to indict for any reason it deems proper. By sharing in the president's prosecutorial discretion—which is really the discretion *not* to prosecute—the grand jury would seem to retain the right to decline to indict if it deems the underlying criminal statute constitutionally invalid. Likewise, criminal trial jurors have never lost the right to acquit against the evidence, a right that even today arguably encompasses the authority to acquit for reasons of constitutional scruple.

Or at least, so it has been argued by respectable citizens and scholars. Though twenty-first-century judicial orthodoxy frowns on these claims of constitutional competence, the right of grand juries and trial juries to just

say no in certain contexts draws strength from the letter and spirit of the Bill of Rights. As we shall see in more detail later, the Fifth Amendment continues to require grand-jury participation for all serious federal crimes (outside the special context of military justice), and also continues to shield any acquittal rendered by a criminal jury. Jury review today is just a shadow of what it was to our forebears. But it still lives—perhaps.

## "Treason"

Article III's concluding section mapped out a miniature Constitution within the Constitution, compressing the document's grand themes into a single paragraph. Words that first appeared at the end of Articles I and II—"Attainder" and "Treason"—came back into view at the end of Article III, this time with more color and precision.

Begin with the Constitution's promise of a more perfect union—an indivisible nation in which no single state or handful of states could secede absent the consent of America as a whole. This idea lay on the surface of the Constitution's opening and closing provisions (the Preamble and Articles V, VI, and VII), and just beneath the surface of Article I's final paragraph, which banned states from unilaterally keeping troops or warships. The Article III treason clause brought the matter to life in strong language. In the event a state made war on the United States, those who fought for the state would be, in a scarlet word, traitors: "Treason against the United States, shall consist . . . in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."

Anti-Federalist Luther Martin called attention to the issue during the ratification process. In remarks delivered to the Maryland House of Representatives and later expanded into a widely read pamphlet, Martin reported that at Philadelphia, he had proposed an alternatively worded treason clause, which he paraphrased as follows: In a "Civil War" between "any State . . . [and] the General Governmt. . . . no Citizen . . . of the said State should be deemed guilty of Treason, for acting against the General Government, in conformity to the Laws of the State of which he was a member." Yet the Philadelphia delegates had rejected his alternative, said Martin, who thereby reminded Americans that the treason clause as finally worded made no exception for unilateral state secession or civil war. With evident understanding of these words, the American people ratified the document as a whole.[79]

Consider next the treason clause as an exemplification of separation of powers, the rule of law, and open government. While Parliament had





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often tried Englishmen for treason and put them to death, Congress would have judicial powers only over its own members and federal officers, and punishments in such cases of congressional expulsion and impeachment were sharply limited: Congress could remove a man from power, and even disqualify an officer from future officeholding, but could not touch a hair on his head. Reinforcing this structure, Article III's treason clause confirmed that any truly criminal prosecution for treason would occur in an "open Court" independent of Congress. The explicit reminder that the court would be "open" to the public, in keeping with a long American tradition of open judicial proceedings, complemented Article I's transparency guarantee—its requirement of published legislative journals—and anticipated the Sixth Amendment promise of public trials in all federal criminal cases.

A general commitment to Enlightenment values (slavery aside) pulsated through the Constitution, and this theme also manifested itself in the treason clause. Under England's feudalistic treason rules (eventually abolished in 1834), the Crown could lawfully seize a traitor's homestead from the family members due to inherit it. The traitor's blood was deemed corrupt, and descendants whose property claims flowed through that blood were divested of these claims.[80] By contrast, Article III barred the federal government from imposing any "Corruption of Blood" in treason cases. In the New World, the black mark—the taint, the "attainder"—of a treason conviction was to be individual, not familial. Just as no favorite son should be handed his sire's government post, so no child should be punished for the sins of his father.*[81]

The treason clause also underscored the Constitution's commitment to broad rights of speech and dissent. Treason would consist "only" in levying war or adhering to enemies with aid and comfort—notably, this was the only clause in the entire Constitution that used the word "only." In England, kings and Parliaments had for centuries treated treason law as a political instrument to be expanded or contracted at will. English history was littered with the corpses of men who had been found guilty of various "constructive" treasons—which often meant little more than being in the wrong political place at the wrong political time. In the Pennsylvania ratifying debates, James Wilson related the story of an Englishman who had

*Of course, American slavery made a mockery of this Enlightenment ideal. Even if an African warrior who was captured in a "just war" might justifiably be enslaved rather than killed—accepting for a moment all the grotesque fictions this theory invited—how could enslavement of the captive's offspring, born and unborn, be justified? In effect, slavery transformed the master class into hereditary lords while corrupting the blood of all captives.

been convicted of treason simply because he had killed one of the king's hunting stags.[82] More ominously, American Whigs knew that Algernon Sidney and other English martyrs had been executed as traitors for holding political opinions that power-holders sought to crush.

Before the adoption of the Bill of Rights, the treason clause thus formed an important proto–First Amendment, prohibiting any federal treason law that criminalized mere dissent. As men who had first raised their voices in loyal opposition to imperial policies in the 1760s and early 1770s and later waged war against their king—treason under the strictest of definitions—Washington, Franklin, and company knew the difference.

Viewed from yet another angle, Article III's concluding section was not merely a proto–First Amendment, but an entire proto–Bill of Rights, spelling out various procedural privileges of treason defendants that anticipated the broader Fifth and Sixth Amendments, and limitations on Congress's punishment power that foreshadowed the Eighth Amendment. Under Article III, a treason conviction would require either two witnesses testifying to the same overt act or a confession in open court. In specifying certain rights of treason defendants above and beyond those of all other accused persons, the framers borrowed a page from the famous English Treason Trials Act of 1696, which had done much the same thing, though with a different set of specified procedural entitlements. In one particular—its rule that two witnesses testify to the *same* overt act—Article III went beyond the 1696 statute, albeit in a clumsy way. Exactly how much did the two witnesses' testimony need to overlap in order to satisfy the sameness requirement?

Despite the considerable virtues of the treason clause, Anti-Federalists remained skeptical. Substantively, the word "only" offered uncertain protection for political speech. Without an emphatic constitutional guarantee of free expression, couldn't Congress outflank the bulwark of the treason clause simply by devising some other criminal label—say, "sedition"—and criminalizing expression under that new label? (As later events would prove, this was no idle hypothetical.) Even in treason trials, what about other key rights that England protected in its landmark 1696 statute, such as the rights of counsel, compulsory process, and notice of specific criminal allegations? What about the obvious need to provide criminal safeguards in other kinds of criminal prosecution—whether for sedition or forgery or counterfeiting?

During the ratification debates, Federalists ultimately agreed with many of these suggestions for additional protections, which found their way into the formal declarations of three of the four ratifying conventions



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held in the summer of 1788, in the states where the Federalists faced the stiffest resistance. Virginia, New York, and North Carolina all demanded that Congress move toward a bill of rights that, among other things, would bolster free expression via language far more explicit than anything in the treason clause. These state conventions also called for explicit guarantees of various criminal-procedure entitlements—rights of counsel, confrontation, notice, and compulsory process—beyond what the treason clause had promised. North Carolina, which declined to ratify the Constitution at its summer convention and thus remained outside the new union, went so far as to suggest that it would not say yes until some action had been taken on its suggested amendments.[83] When the First Congress convened in March 1789, it would confront a daunting list of constitutional holes to fill and promises to keep.

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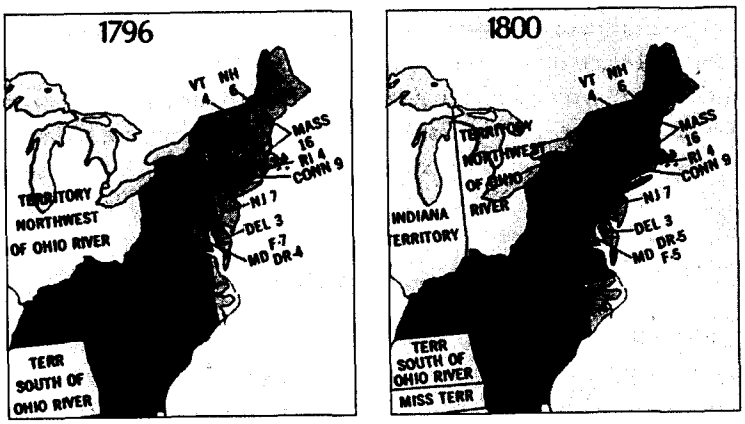
*Chapter 9*

# MAKING AMENDS




THE PRESIDENTIAL ELECTIONS OF 1796 AND 1800.
*In two contests pitting Adams against Jefferson, the nation divided sharply along regional lines. In the first election, Adams won by an electoral vote of seventy-one to sixty-eight, and in the second Jefferson triumphed seventy-three to sixty-five—thanks to his New York running mate Aaron Burr, whose involvement would create its own set of issues. In the wake of these elections, the Twelfth Amendment changed the rules of the game in 1804.*

OF THE TWENTY-SEVEN AMENDMENTS that Americans have made to the Constitution over the course of two centuries, twelve occurred in the document's first decade and a half—an average rate of almost one amendment per year (compared to an average of less than one amendment per decade thereafter). The first ten amendments, today known as the Bill of Rights, secured a broad range of vital liberties, including freedom of expression and religion, the right to bear arms, immunity from unreasonable searches, and various jury-trial privileges. In both word and deed, the Bill dramatized the rights of "the people," a phrase that appeared no less than five times. Yet that phrase in effect excluded slaves, as did the substance of all the early amendments—especially the Twelfth, which brought the presidency closer to the voters but reinforced slavocrats' unfair advantage in the electoral college.

## "Congress shall make no law . . ."

Self-denial is a wondrous thing to behold and an intriguing one to explain. In September 1789, the First Congress voted (by the requisite two-thirds of each house) to propose twelve constitutional amendments protecting a host of rights and freedoms against federal encroachment. By the end of 1791, ten of these twelve had won enough state ratifications (from eleven of the fourteen states then in the union) to become valid for all intents and purposes.* But why, we might ask, did federal lawmakers agree to a Bill of Rights that, after all, limited their own power?

In part, no doubt, because of a love of liberty and a belief in basic American freedoms. Many of these early amendments distilled familiar principles that had already found expression in several state constitutions and state bills of rights. Also, in proposing to restrain the federal government, members of the first federal legislature were tying not just their

*The original first amendment, regulating congressional size, fell one state shy of the needed three-quarters of the states in 1791. (For more discussion of this proposal, see Chapter 2, page 82.) The original second amendment also fell short in the 1790s but eventually rebounded to become the Twenty-seventh Amendment, ratified in 1992. We shall consider its curious tale in Chapter 12. Readers seeking additional background on the original first amendment or an extended analysis of the Founders' Bill of Rights more generally may wish to consult my earlier book *The Bill of Rights: Creation and Reconstruction* (1998).

own hands but also the hands of their successors. In a world of frequent congressional rotation, where extended tenure in the national seat often meant spending many nights far from home, most members of the First Congress probably did not expect to continue into, say, the Sixth. (If they did, they were wildly unrealistic. Less than 20 percent of the men who voted on the proposed amendments in 1789 remained in Congress a decade later.)[1] Thus, at least some 1789 congressmen voting to restrain post-1789 Congresses may have done so in order to protect their own expected noncongressional positions in the future, whether as officeholders in the federal executive or judicial branch, as state governmental leaders of some sort, or as private citizens.

We should also note that while the Bill of Rights plainly limited Congress, it applied against other branches of the federal government as well. Even the First Amendment, which began by proclaiming that "*Congress* shall make no *law*" of a certain sort, has properly come to be construed more broadly. In essence, the amendment declared certain preexisting principles of liberty and self-government—"*the* free exercise" of religion and "*the* freedom of speech, [and] of the press"—that implicitly applied against all federal branches (not just Congress) and all federal actions (not just laws). Thus a president today may not condition a pardon on a promise that the recipient will join a particular church or will refrain from speaking out against the administration; nor may federal judges impose a religious test on courtroom spectators or bar them from publishing criticisms of the judiciary. None of the other nine amendments in the Bill of Rights used the word "Congress," and hence there was never any doubt that they, too, applied against all federal branches, often in their core applications. For instance, the Fifth through Eighth Amendments, regulating civil and criminal litigation, imposed limits not just on congressional lawmaking but also on the nonstatutory practices of federal prosecutors and judges.

While the First Congress proposed to restrain itself, its successors, and other federal branches, it suggested no new limits on state governments. Nor did it propose any new federal powers. Tellingly, none of the amendments ratified prior to the Civil War aimed to rein in state governments or expand the regulatory domain of the federal government. (By contrast, the vast majority of the amendments ratified thereafter would indeed strengthen the center in one or both of these ways, as we shall see in later chapters.) To be sure, Congressman James Madison, who spearheaded the 1789 amendment project, prefigured postbellum developments when he advocated a sweeping amendment that would have prohibited *state* abridg-





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ments of free expression, freedom of religion, and the right to criminal jury trials. Though Madison steered this proposal through the House, which presciently numbered it amendment fourteen, a Senate structured to embody special sensitivity to states' rights refused to go along. In this rejection of what Madison himself deemed "the most valuable amendment in the whole list," we can see several interrelated factors at work in the process that led to the First Congress's epic act of self-denial.[2]

For starters, let's recall that the American people themselves, in several state ratifying conventions, had demanded various amendments that would clarify implicit limits on federal power and add new limits. No convention had called for additional constraints on state government. Though the assorted convention suggestions lacked formal legal status, many Federalist delegates had either voted for these informal proposals or otherwise signaled a willingness to consider them after ratification had been won. Beyond these implicit promises, several members of the First Congress—Madison most notably—had been obliged to offer additional pledges to their constituents in the first congressional elections, which occurred in late 1788 and early 1789.[3]

And if all this were not enough to tug on the First Congress's collective conscience, there was of course the next round of elections to keep in mind. Every House member who desired to retain his seat would in two short years need to explain to his constituents why he had either supported or opposed a federal bill of rights—and in some cases, why he had kept or betrayed a personal pledge to back such a bill. Most senators in the First Congress found their own political leashes unusually short. Whereas a senator elected after 1789 could generally look forward to a full six-year term before being judged again by his state legislature, two-thirds of the first senators were denied this luxury. In order to launch the Senate system of staggered elections, Article I, section 3 provided that one third of the Senate class of 1789 would need to face reelection after only two years of service, while another third would be given an initial term of four years.

The prospect of a second constitutional convention further helped to concentrate the congressional mind. During the Virginia ratification convention, presiding officer Edmund Pendleton had reassured skeptics by predicting that if congressmen motivated by "self-interest" ever balked at desirable amendments, the people would "assemble in Convention" to "reform" the system and "punish" the obstructionists.[4] In New York, Jay and Hamilton had even agreed to support an Article V amendment-proposing convention if moderate Anti-Federalists would first ratify the Philadelphia plan as written.[5] By mid-1789, only two state legislatures—Virgi

and New York's—had formally requested a new convention, but if the First Congress failed to act, political pressure for such a convention might begin to build, and a new political bandwagon might start to roll. If the bandwagon were to gain momentum, who could tell whether Congress could halt or detour it? If, instead, the First Congress itself took the lead in formulating amendments, it might be able to harness some of the outside reformers' political energy, steering the process toward amendments that Congress favored, or at least did not strongly disfavor. On the day that Madison introduced his proposed Bill of Rights, three of his colleagues pointed to the prospect of a second convention as a decisive reason to move quickly on his proposal.[6]

Co-opting the opposition agenda could also help achieve national cohesion and enhance national security. A thoughtfully drafted set of amendments could both cement the loyalty of Anti-Federalists across the continent and woo North Carolina and Rhode Island back into the union. In his First Inaugural Address, President Washington went out of his way to mention that suitably drafted amendments might answer various "objections which have been urged against" the Constitution and thereby reduce skeptics' "inquietude." Though as president he had no official part to play in the amendment process,[7] Washington devoted more than 10 percent of his brief address to the topic of amendments, advising Congress to consider whether the new Constitution might be revised so as to "impregnably fortif[y]" the "characteristic rights of freemen" without "endanger[ing] the benefits of an united and effective government." When Madison himself tried to explain the urgency of amendment to his colleagues, he stressed not just the intrinsic propriety of a bill of rights, but also its usefulness as an olive branch to those who had opposed—and in two states were still opposing—the Constitution:

> There is a great number of our constituents who are dissatisfied with it [the Constitution]; among whom are many respectable for their talents and patriotism [and who are] inclined to join their support to the cause . . . if they were satisfied on this one point. We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution. . . . But perhaps there is a stronger motive. . . . It is to provide those securities for liberty which are required by a part of the community; I allude in a particular manner to those two States that have not thought fit to throw themselves into the bosom of the Confederacy. . . . A re-union should take place as soon as possible.[8]





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Representative Elbridge Gerry, a Philadelphia Convention alumnus who had opposed the Constitution, echoed Madison. "There are two States not in the Union; it would be a very desirable circumstance to gain them. I should therefore be in favor of such amendments as might tend to invite them and gain their confidence; good policy will dictate to us to expedite that event." Several weeks later, Gerry reiterated the point. "There are two States not in the Union; but which we hope to annex to it by the amendments now under deliberation. These are inducements for us to proceed and adopt this amendment, independent of the propriety of the amendment itself." Notably, the First Congress resolved to send copies of its proposed amendments not just to the eleven states in the union but also "to the Executives of the States of Rhode Island and North Carolina."[9]

YET EVEN AS MADISON aimed to placate Anti-Federalists, he also sought to place his own imprint on a federal bill of rights. In reviewing the scores of suggestions spawned by the ratification process, he screened out all proposals that would have radically weakened the new federal government or warped its basic structure. Instead, he generally endorsed clauses that either *clarified* or *codified*—that is, clauses that clarified limits that Federalists had claimed were implicit in their plan all along, or that codified principles that were common practice among the states (which Washington had described as the "*characteristic* rights of freemen").

Much of the First Amendment, for instance, simply textualized the Federalist party line in 1787–88 that Congress had no proper authority to censor opposition speech or meddle with religion in the several states. The First Amendment's particular phraseology—"*Congress shall make no law* . . . abridging the freedom of speech, or of the press"—sounded in federalism and enumerated power, invoking and inverting a prominent Article I clause under which "*Congress shall* have Power . . . To *make all Laws*" that were necessary and proper to federal ends. Anti-Federalists had worried that the sweeping "make all Laws" language might enable Congress to pass general censorship statutes. Federalists had repeatedly responded that such pretextual federal legislation, going far beyond the legitimate purposes underlying the various enumerated powers, would be constitutionally improper. By turning Article I's "Congress shall . . . make all Laws" language into "Congress shall make no law" phraseology, the First Amendment underscored that Congress lacked authority under the necessary-and-proper clause, or any other Article I enumeration, to censor expression in the states. The other main object of the "make no law"

amendment—religion—also lay beyond Congress's Article I enumerated powers, according to leading Federalists in the ratification process. Thus it made sense to yoke religion and speech in a single federalism-related provision, even though no previous state bill of rights had linked the two topics.[10]

Likewise, the Tenth Amendment distilled into a single sentence a principle that supporters of the Constitution had insisted was already part of the document's general structure: The new federal government would enjoy only those powers explicitly enumerated or otherwise implicit in the Constitution's general framework. In crafting the language of this textual nod to states' rights, Madison nevertheless avoided anything that might revive the Articles of Confederation's stingy formula limiting the central government to powers "*expressly*" enumerated. When South Carolina's Thomas Tudor Tucker proposed adding the word "expressly," Madison rallied his allies to beat back the unwanted addition: "It was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the constitution descended to recount every minutia."[11]

Madison also tried to sneak a few of his own pet ideas into the first round of amendments, but with limited success. His biggest defeat came when the Senate killed his beloved "No state shall" proposal, which ill fit the general public mood. None of the state conventions or leading Anti-Federalist speakers had urged this or any other sweeping new prohibition on state government. Nor did the idea of restricting states resonate with the Anti-Federalist impulse that Madison himself was urging Congress to heed. To disaffected states' rightists and partisans of America's long tradition of local self-rule, Madison's suggested expansion of federal control over states doubtless looked more like a musket shot than an olive branch. True, Madison's proposal did follow the logic of his own *Federalist* No. 10, which had emphasized the need to rein in state legislatures prone to majority tyranny. But this particular *Federalist* essay had few adherents in the late 1780s, especially among moderates and states' rightists. Just as Madison in 1787 failed to persuade the Philadelphia framers to give Congress a veto over state laws that it deemed unconstitutional, so in 1789 he failed to persuade Congress to propose sweeping new limits on state government.*

*In the next chapter, we shall see how the Reconstruction generation succeeded precisely where the prescient Madison failed. The Fourteenth Amendment, ratified in 1868, would begin by proclaiming that "No state shall" violate fundamental civil rights—including rights of expression, religion, and jury trial—and would end by empowering Congress to overrule offending state laws.





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Madison did a better job crafting another of his favorite ideas—property protection—into words that fit the spirit of the age and escaped the blue pencils of his colleagues. Though no state convention had demanded that the federal government pay just compensation whenever it took private property for public use, Madison's proposal to that effect (a proposal that left state practices unhindered) harmonized with a general Anti-Federalist desire to limit central officialdom. Also, by tacking his just-compensation clause onto an omnibus amendment guaranteeing various procedural rights previously endorsed by several ratification conventions, Madison drew attention away from his own original contribution. His "No state shall" amendment, by contrast, stood by itself and was thus easier to spot and to kill.

## "the right of the people"

In both its enactment and its script, the Bill of Rights began and ended with the people. As we have seen, the initial political demand for the Bill bubbled up from the general citizenry during a uniquely democratic ratification process; and the prompt willingness of a supermajority of state legislatures to agree to ten of the amendments proposed by congressional supermajorities further attested to the general popularity of these proposals. The text of the Bill itself poetically recapitulated its own populist enactment saga. Just as the idea of a bill of rights had begun with the people assembling in conventions and petitioning for change in 1787–88, so the Bill's opening sentence insisted that future generations of "the people" would likewise retain the right to assemble and petition.[12] Though the First Amendment radiated beyond the core case of a constitutional convention, such a convention exemplified "the right of the people peaceably to assemble" and make their views known. And just as the amendment process would culminate in 1791 with ratifications by state governments under the citizenry's watchful eye, so the Bill's closing sentence affirmed the vast reservoir of authority reserved to "the States respectively, *or to the people*." Perhaps the most fundamental power reserved to "the people" was their power to participate in the process of constitutional amendment, as the people dramatized in the very enactment of the Bill.

Between its opening and closing appearances in the Bill of Rights, the phrase "the people" surfaced three more times, in three amendments whose full significance has eluded many modern-day interpreters, who miss the popular-sovereignty overtones of this phrase.

LET'S BEGIN WITH THE WORDS of the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." This simple sentence has perplexed most modern readers. How do the two main clauses with different subject-nouns fit together? Do these words guarantee a right of *militias,* as the first clause seems to suggest, or a right of *people,* as the second clause directly asserts? In one corner, gun controllers embrace a narrow, states'-rights reading, insisting that the amendment merely confers a right on state governments to establish professional state militias like the modern National Guard. On this view, no ordinary citizen is covered by the amendment. In the other corner, gun lovers read the amendment in a broad, individual-rights way, arguing that it protects a right of every person to have weapons for self-protection, for hunting, and even for sport. Virtually nothing having to do with personal weaponry is outside the scope of the amendment on this view. Neither modern reading does full justice to the eighteenth-century text.

The states'-rights reading slights the fact that the amendment's actual command language—"shall not be infringed"—appeared in its second clause, which enunciated a right of "the people" and not "the States." Surely the Tenth Amendment, which contradistinguished "the States" and "the people," made clear that these two phrases were not identical and that the Founders knew how to say "States" when they meant states. Also, the eighteenth-century "Militia" referred to by the first clause was miles away from the modern National Guard, which is nowadays composed of a relatively narrow band of paid, semiprofessional volunteers. For the Founders, the general militia encompassed a wide swath of the adult free male citizenry, much as does the modern Swiss militia.

But the individual-rights reading must contend with textual embarrassments of its own. The amendment announced a right of "the people" collectively rather than of "persons" individually. Also, it used a distinctly military phrase: "bear Arms." Though a deer hunter or target shooter carries a gun, he does not, in the strictest sense, *bear arms.*[13] The military connotation was even more obvious in an earlier draft of the amendment, which contained additional language stating that "no one religiously scrupulous of bearing arms shall be compelled to render military service in person." Even in the final version, the military phrase "bear Arms" was sandwiched between a clause discussing the "Militia" and a clause (the Third Amendment) regulating the quartering of "Soldier[s]" in times of





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By now it should be evident that we need to understand how all the words of the amendment fit together and also how they dovetailed with other words in the Constitution. The amendment's syntax has perplexed modern readers precisely because these readers persistently misconstrue the words "Militia" and "people" by imposing twentieth- and twenty-first-century definitions on an eighteenth-century text. In 1789, the key subject-nouns were simply slightly different ways of saying roughly the same thing. As a general matter, the Founders' militia were the people and the people were the militia. Indeed, an early draft of the amendment linked the two clauses with linchpin language speaking of "a well regulated militia, composed of the body of the people."[15] This unstylish linchpin was later pulled out, but the very grammatical structure of the final amendment as a whole equated the "Militia" of the first clause with "the people" of the second. As the amendment envisioned the republican ideal, those who voted should serve in the military; and those who served should vote.

Beneath these words lay a profound skepticism about a permanent, hierarchical standing army that might not truly look like America. Such an army might come to embody a dangerous culture within a culture, a proto-military-industrial complex threatening republican equality and civilian supremacy. The amendment's root idea was not so much guns per se, nor hunting, nor target shooting. Rather the core idea concerned the necessary link between democracy and the military: We, the People, must rule and must assure ourselves that our military will do our bidding rather than its own. According to the amendment, the best way to achieve this goal would be via a military that would represent and embody us—the people, the voters, the democratic rulers of a "free State." Rather than placing full confidence in a standing army filled with aliens, convicts, vagrants, and mercenaries—men who would not truly represent the electorate and who might well pursue their own agendas—a sound republic should rely on its own armed citizens, a "Militia" of "the people." Thus, no Congress should be allowed to use its Article I, section 8 authority over the militia as a pretextual means of dissolving America's general militia structure—this was the core meaning of the operative "shall not be infringed" command.

Let's call this the republican reading, as opposed to the states'-rights and individual-rights readings that dominate modern discourse. States' rightists anachronistically read the "Militia" to mean the government (the

paid professional officialdom) rather than the people (the ordinary citizenry). Equally anachronistically, individual rightists read "the people" to mean atomized private persons, each hunting in his own private Idaho, rather than the citizenry acting collectively. But when the original Constitution spoke of "the people" rather than "persons," the collective connotation was primary. In the Preamble, "the People" ordained and established the Constitution as public citizens meeting together in conventions and acting in concert, not as private individuals pursuing their respective hobbies. The only other reference to "the people" in the Philadelphia Constitution of 1787 appeared a sentence away from the Preamble, and here, too, the core meaning was public and political, not private and individualistic. Every two years, "the People"—that is, the voters—would elect the House.

To see the key people/person distinction another way, let's recall that (nonslave) women in 1787 had various rights as "persons" (such as freedom of worship and the entitlement to due process) but did not directly participate in the acts of "the people." Thus, eighteenth-century women did not vote for constitutional conventions or for Congress, nor did they serve on juries, nor were they part of the people/militia at the heart of the Second Amendment. Elsewhere in the Bill of Rights, the phrase "the people" generally gestured toward voters as the core rights-holders, even as the phrase in certain contexts plainly radiated beyond the core group.

Founding history confirms a republican reading of the Second Amendment, whose framers generally envisioned Minutemen bearing guns, not Daniel Boone gunning bears. When we turn to state constitutions, we consistently find arms-bearing and militia clauses intertwined with rules governing standing armies, troop-quartering, martial law, and civilian supremacy. A similar pattern may be seen in the famous English Bill of Rights of 1689, where language concerning the right to arms immediately followed language condemning unauthorized standing armies in peacetime. Individual-rights advocates cannot explain this clear pattern that has everything to do with the military and nothing to do with hunting. Yet states' rightists also make a hash of these state constitutional provisions, many of which used language very similar to the Second Amendment to affirm rights *against* state governments.

Founding-era militias were closely akin to Founding-era constitutional conventions, electorates, and jurors. In each context, state law helped define the precise boundaries of "the people," specifying when and how the people could properly act. Yet these webs of state law did not thereby transform any of these entities into an ordinary government agency.





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With the analogies between militias, juries, conventions, and electorates in mind, we can see the kernel of truth in each main modern account and also what's missing from each. States' rightists are correct to see the militia as a local body organized by law. So too with, say, the jury. Twelve private citizens who simply got together on their own to announce the guilt of a fellow citizen would not be a lawful jury, but a lynch mob. Similarly, self-selected clusters of private citizens who choose to own guns today are not a well-regulated militia of the people; they are gun clubs. But what the states'-rights reading misses is that when the law summons the citizenry together, these citizens nevertheless in some sense act *outside* of government, rather than as a professional and permanent government bureaucracy. Just as today's Environmental Protection Agency is obviously not a true jury, so the modern semiprofessional National Guard is not a general militia. Individual-rights advocates rightly recoil at their adversaries' authoritarianism but wrongly privatize what is an inherently collective and political right. It is as if some private citizen insisted that the First Amendment guaranteed him the right to conduct his own political opinion poll and on the basis of its results proclaim himself president.

Yet to see all this is to see what makes the Second Amendment so slippery today. The legal and social foundations on which the amendment was built have washed away over the years. The Founders' juries—grand, petit, and civil—are still around today, but the Founders' militia is not. America is not Switzerland. Voters no longer muster for militia practice in the town square.

How could this erosion of the Second Amendment's very foundation have occurred? Part of the answer can be found in a major drafting omission: The amendment effectively barred the *federal* government from using its authority under Article I to dissolve America's militia structure but imposed no direct ban on state and local governments. The amendment simply presupposed—yet failed to guarantee—the continued existence of general militia laws and practices at the state and local level. Over the years, these local structures and practices have crumbled into practical irrelevance.

Drafting loopholes aside, the Civil War and Reconstruction generated a powerful constitutional counternarrative to the (romanticized) Revolutionary War vision at the heart of the Founders' Second Amendment. The very birth-logic of the Reconstruction Amendments—the process by which they came to be proposed and ratified—depended on the good of-

fices (and good officers) of the Union Army. As constitutional events of the highest import, these amendments necessarily valorized the central army and called into question the anti-army ideology driving the Founders' Second Amendment. But even as Reconstruction Republicans buried their fathers' Second Amendment, they helped unearth a new understanding of its intriguing language. Reading the amendment's words in the light of their own lived experience, they deemphasized militias and states' rights while accentuating an individual right of all citizens—women as well as men, nonvoters as well as voters, civilians as well as militiamen—to keep guns in private homes for personal self-protection.

We shall briefly consider a few of the fascinating details of this death and rebirth in the next chapter. For now, it suffices to observe that, much as other "rights of the people" may be read broadly, beyond their core textual and historical concerns, so, too, may the right of the people to keep and bear arms.

CONSIDER NEXT THE LANGUAGE of the Fourth Amendment, affirming that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Here, the collective phraseology of "the people" immediately gave way to more individualistic language of "persons." Clearly, this amendment seemed to center on the domain of domesticity—on "persons" in their private "houses" as distinct from the people in the public square. Why, then, did the Fourth even mention the more republican-sounding phrase "the people"?

Perhaps to highlight the part that civil jurors, acting collectively and representing the electorate, were expected to play in deciding which searches and seizures were reasonable and how much to punish government officials who searched or seized improperly. Private "persons" would remain the core rights-holders, but "the people" on civil juries would retain a vital role in shaping the boundaries of the right. In the first draft of Madison's proposed civil-jury amendment, we can, if we listen with care, detect distinct echoes of the Fourth Amendment and also of the Second: "In [civil] suits at common law . . . the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."[16] The multiple textual harmonies at play here—"security" (Second Amendment), "secure" (Fourth Amendment), and "securities" (civil-jury draft amendment); "shall not be infringed," "shall not be violated," and "ought to remain inviolate"; and, of course, "the right[] of the people" in all three





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places—suggest that all three amendments aimed to protect popular rights via institutions (the militia and the jury) that would embody "the people" themselves.

THE POPULISM EVIDENT in the Second Amendment's people/militia and the Fourth Amendment's people/jury resurfaced again in the Ninth Amendment, which declared that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." On one level, this amendment worked alongside cognate language in the Tenth (which affirmed "powers . . . reserved . . . to the people") to reaffirm that, qua popular sovereign, the American people would "retain[]" and "reserve[]" the right to alter or abolish what they had ordained and established.

But the Ninth also operated on several other levels. As a federalism provision, it buttressed the Tenth Amendment's reaffirmation that the central government would wield only limited powers. The Tenth made clear that Congress had no inherent power to legislate in all cases whatsoever but said not a word about how interpreters should decide whether Congress had express or implied power over a given topic. The Ninth worked alongside the Tenth to suggest that nothing in the Bill of Rights should be read as conferring additional government power. For instance, readers should not infer from the language of the Fifth Amendment just-compensation clause that Congress enjoyed a general power of eminent domain. Rather, eminent-domain power, like all other powers, had to be deduced from the Constitution's earlier enumerations of governmental authority. This federalism aspect of the Ninth Amendment helps explain why no state constitution circa 1789 contained language closely analogous to it (or to the Tenth Amendment, for that matter). After all, no state constitution had purported to confer only certain enumerated legislative powers.

Beyond its federalism dimension, the Ninth Amendment warned readers not to draw certain types of strong negative inferences about constitutional rights. Thus, the *textual* enumeration of various constitutional rights was not to be read to negate other constitutional rights derivable from the document's *general structure*. Similarly, a text that explicitly *expressed* certain rights was not to be read to negate closely related rights that were merely *implied*. For instance, the mere fact that the First Amendment enumerated free-speech and free-exercise rights against Congress did not mean that Americans lacked similar rights against the president

and federal courts, if those rights could indeed be properly inferred from the Constitution as a whole or from the spirit of the First Amendment itself. Likewise, the Sixth Amendment's enumerated right of the accused to enjoy the assistance of counsel should not be read to negate his unenumerated right to represent himself, given that this latter right was implicit in the Sixth Amendment's general logic. Nor did the Sixth Amendment's express statement of the right of "the accused" to enjoy a public trial negate the idea that the public also had a right to attend the trial even if the accused proved willing to waive his own entitlement. The people's independent right to attend was strongly implicit in the Constitution's general structure of governmental transparency, and in the wording of Article III, which spoke of presumptively open "courts" as distinct from closed "chambers."

In 1787 and 1788, Federalists had repeatedly warned that a bill of rights, if incautiously drafted, might actually weaken certain protections in the original Constitution by unintentionally expanding federal powers and restricting implicit rights. In response, the Anti-Federalists had delighted in poking logical holes in the Federalists' defense and casting doubt on the Federalists' good faith. The Ninth Amendment offered a happy democratic synthesis of these clashing positions. One side would get its bill of rights, and the other side would save face via an amendment that solved the arguable drafting problem that it had identified. Though the Ninth Amendment was perhaps unnecessary as a matter of logic—making express what would otherwise have been the most sensible constitutional inference—the same thing might be said of several other provisions of the Bill of Rights, such as the Tenth Amendments and parts of the First Amendment.

It remains for us to ponder the possible existence of other Ninth Amendment "rights" of "the people," rights that might not be inferable from the Constitution's text and structure but that nevertheless might deserve constitutional status.* Although no major Supreme Court case has ever been decided solely on the basis of the Ninth Amendment, some modern judges and scholars have suggested that this amendment should be read to invite judges to mint an expansive set of new rights as the judiciary deems fit. However, the very language of the amendment itself would suggest that judges (and other constitutional interpreters, for that matter)

*The Ninth Amendment suggested that various rights of "the people" were not to be *denied* or *disparaged* by the existence of the Bill of Rights, but this command obviously presupposed a baseline, namely, what would the status of a given right have been in the absence of the Bill of Rights?





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who range beyond the Constitution's text and structure must give "the people" their due: Any rights that are to be enforced in the name of the Ninth Amendment must genuinely be rights of "*the people.*"

Rights of "the people" need not involve the collective people as direct rights-holders. The Fourth Amendment, after all, focused on individual persons as core rights' bearers, yet nevertheless involved the people (via civil juries) as implementers and interpreters of the rights at stake. More generally, all the provisions of the Bill of Rights might be said to be rights of "the people" insofar as these rights emerged from a populist process. Modern judges (and others) seeking to discover and declare unenumerated rights of "the people" should look for rights that the people themselves have truly embraced—in the great mass of state constitutions, perhaps, or in widely celebrated lived traditions, or in broadly inclusive political reform movements. In short, judges seeking guidance on the real rights of "the people" must give due weight to the very sources and sorts of legal populism that helped generate the Bill of Rights itself.[17]

## "trial by jury"

Of the five amendments in the Bill of Rights that did not directly invoke "the people," three explicitly referred to the closely related idea of the "jury." The Fifth Amendment guaranteed a role for federal grand juries, the Sixth Amendment elaborated the parameters of federal criminal-trial juries, and the Seventh Amendment preserved certain entitlements to and of civil juries.

This pattern faithfully reflected the broader legal culture of post-Revolutionary America. During the 1760s and early 1770s, the British Empire had repeatedly sought to evade local jury trials via expanded uses of juryless admiralty, vice admiralty, and chancery courts and via laws authorizing trials in England for crimes committed in America. In response, the colonists had demanded an end to all such evasions. In 1765, delegates representing nine state assemblies met in an intercolonial Stamp Act Congress to declare, among other things, "that trial by jury is the inherent and invaluable right of every British subject in these colonies" and that imperial extensions of "the jurisdiction of the courts of Admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists." A decade later, in response to a fresh set of British provocations, the First Continental Congress insisted on Americans' right "to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of [common] law"; and the Second Conti-

nental Congress reaffirmed Americans' entitlement to "the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property." The Declaration of Independence featured three distinct paragraphs condemning the Empire's violations of the rights to and of local juries. Every state that penned a constitution between 1775 and 1789 featured at least one express affirmation of jury trial, typically celebrating the jury with one or more of the following words: "ancient," "sacred," "inviolate," "great[]," and "inestimable." The Northwest Ordinance also affirmed "trial by Jury" and, in a separate provision, a man's right not to be deprived of his liberty or property in the absence of "the judgment of his peers, or the law of the land."[18]

Small wonder, then, that even though the Philadelphia framers explicitly guaranteed in Article III that "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed," Anti-Federalists demanded much more—more guarantees of local criminal trials within a state, more explicit safeguards of the historic role of grand juries, and more security for civil juries. Amendments V–VII aimed to give the people what they wanted while accommodating certain practical considerations confronting the new continental government.

The Fifth Amendment required grand-jury indictments for all serious federal crimes but carved out an exception for matters of military justice within the army or navy or within the militia when called into actual federal service. (While expressly exempting the military only from the ordinary civilian system of pretrial indictments, the amendment also implicitly recognized that military justice more generally could be governed by a distinct set of procedures across the board; thus, military trials themselves have traditionally operated outside the ordinary Article III rules governing judges and juries.) Two other clauses of the Fifth Amendment further affirmed jury rights, though not in so many words. First, the amendment promised that all federal actions depriving persons of "life, liberty, or property" would comport with "due process of law"—an English-law term of art that had long been linked to the right to grand and petit juries. Second, the Fifth Amendment ban on double jeopardy empowered duly instructed trial jurors to irreversibly acquit a criminal defendant, even in the face of overwhelming evidence of guilt, if these twelve men, good and true, saw fit to do so.

The Sixth Amendment supplemented Article III by specifying that criminal juries would be "impartial" and that they would represent not merely the "State" but also the intrastate "district" wherein the crime had





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occurred. This was rather less than the Anti-Federalists had demanded, however, for the amendment pointedly avoided any entitlement to a jury from the common-law "vicinage" and indeed allowed Congress to treat an entire state as a single district. Similarly, the Seventh Amendment promised that the right of civil juries would be "preserved" but failed to identify with precision the proper preservation baseline. Would a federal civil jury need to preserve the jury-trial right as it existed in each state at the time of the Founding or as it existed in the forum state at the time of the trial? Or should federal courts instead look to English practice circa 1790?

The complexities surrounding the vicinage/district debate and the preservation-baseline issue arose in part because federal jury trials needed to apply in a wide variety of current and future states featuring different state court jury practices, practices that were also subject to change within any given state. By allowing Congress to define districts, the Sixth Amendment freed the federal criminal system from the intricacies of state-vicinage rules, much as Article I, section 4 allowed Congress to trump state-defined district lines for congressional seats. Similarly, the Supreme Court eventually opted to use the uniform metric of Founding-era English practice as a Seventh Amendment baseline and thereby avoid the welter of conflicting state practices.[19] As a result, Article III civil litigation could more easily be consolidated and transferred across state lines within a unitary system of federal court justice.

The remaining provisions of the Sixth Amendment paralleled the celebrated English Treason Trials Act of 1696 but extended its safeguards to all federal criminal defendants, whether or not accused of treason. Thanks to this amendment, every man facing federal charges would be guaranteed the rights to receive proper notice of those charges, to subpoena his own witnesses, and to have legal counsel. Even before the states had ratified this proposal, Congress adopted an omnibus crime bill in 1790 recognizing these rights in language lifted directly from the English Act of 1696.[20] The Sixth Amendment also declared rights to speedy trials and to confrontation of prosecution witnesses—entitlements that, although absent from the landmark English statute, had appeared repeatedly in state constitutions.[21] Supplementing this Sixth Amendment package, the Fifth Amendment declared that a federal criminal defendant (who had no common-law right to testify on his own behalf) would retain the right to resist any demand that he testify against himself. Rooted in English and American practice,[22] this right prevented the government from tricking or tormenting an innocent soul into a false confession.

Completing the complement of judicial-procedure rules based on English law, the Eighth Amendment copied the English Bill of Rights verbatim—save for a substitution of "shall not be" for "ought not to be"—in forbidding excessive bail, excessive fines, and cruel and unusual punishments. Though the jury went unmentioned here, its very absence helps explain the special appeal of this amendment to pro-jury eighteenth-century Americans. Precisely because judges, in setting bail and imposing criminal sentences, would often be acting on their own, without jury oversight, special safeguards were necessary to prevent them from running amok.

## "Judicial power . . . shall not . . . extend"

An amendment enacted shortly after the Bill of Rights also aimed to rein in federal judges who seemed at risk of going too far—indeed, who had already gone too far.

To appreciate the impulse animating this (the Eleventh) amendment, we need to understand the first constitutionally significant case ever decided by the Supreme Court, *Chisholm v. Georgia.*[23] In 1792 the executor of a South Carolina merchant brought suit in the original jurisdiction of the Supreme Court against the state of Georgia. The plaintiff sought damages against the state, which he claimed had breached a war-supplies contract. Georgia declined to argue the case orally and instead filed a written objection asserting its sovereign immunity from suit.

Five justices heard the case and delivered five individual opinions. Perhaps because Georgia's tactics created an awkward procedural posture requiring the state to present sovereign immunity as a jurisdictional bar rather than as a substantive defense, all five justices tended to collapse the two distinct questions posed by the lawsuit. First, the jurisdictional issue proper: Did the Court have judicial power to entertain a lawsuit brought by a private citizen against a state government? Second, the substantive issue: Could a state government be held liable in damages for a mere breach of contract? Four justices appeared to answer yes to both questions. Justice Iredell dissented.

The plaintiff argued that the straightforward language of Article III allowed the Supreme Court to hear any lawsuit—whether or not based on federal law—that arose between a "State and Citizens of another State." The Judiciary Act of 1789 seemed to confirm the breadth of this part of the Article III roster, authorizing the Court to hear all civil suits "where a state is a party, except between a state and its [own] citizens."[24] The





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majority of the Court agreed with the plaintiff's jurisdictional analysis, rejecting Georgia's argument that the Judiciary Article and the Judiciary Act tacitly applied only to suits brought *by* states *against* private parties and not the reverse. The majority justices then proceeded to imply that Georgia was not only suable by a private citizen in a jurisdictional sense, but also suable in a substantive sense—that is, liable to a private citizen in damages for its breach of contract.

This was a bold leap. Under the common law of Georgia and South Carolina—and indeed, of every other state in 1792, it would appear—no damages lay for a breach of contract by the state itself. At common law, such a contract, though morally binding upon a state, was not legally enforceable against it in a damage suit unless the state itself consented to the suit. Anyone who did not like this rule was free to avoid making contracts with the state, or to demand some other up-front compensation or collateral to offset the risk of subsequent nonpayment.

What justified the Court majority's disregard of Georgia's valid state-law defense? After all, the Tenth Amendment seemed to promise that state laws would continue to govern unless such laws were properly displaced by some valid federal legal norm. Indeed, the Judiciary Act of 1789 expressly directed federal courts to follow substantive state law as "rules of decision" in the absence of some preempting federal law.[25] Given that the very purpose of federal court jurisdiction in a case pitting Georgian interests against South Carolinian interests was to ensure the impartial application of state law, lest state courts discriminate against out-of-staters, by what right did federal judges simply disregard the substantive law of *both* states?

We must be clear on what the majority justices did *not* say. Nowhere did they claim that Georgia, in breaching its contract, had violated any federal statute or federal constitutional provision. In particular, the justices never claimed that Georgia's breach violated the Article I, section 10 ban on state laws impairing the obligation of contract.* Yet the justices

*The contract clause was designed to prevent the impairment of a preexisting legal obligation, not to create a new legal obligation where none had existed before. Thus, there is reason to doubt the soundness of the Court's later approach in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), which applied the contract clause to a contract in which the state itself was a party. In light of the basic purpose of the contract clause—the avoidance of retroactive impairments—any invocation of this clause by *Chisholm* would have been ironic, giving the creditor a legally enforceable claim ex post facto when at the time of the contract he had bargained only for a morally enforceable claim (and had presumably been compensated in other ways for the risk of nonpayment). Such a dramatic retroactive change in the legal rules, leading to unjust enrichment of one contracting party, would seem antithetical to the basic spirit of the clause.

vertheless seemed prepared to hold Georgia liable, despite its substantive state-law defense.

The *Chisholm* decision provoked widespread resentment, culminating in an amendment designed to overrule the Court. (Here again, in the emphatic reversal of the justices' first decision of any significance, we see the weakness of the early Court. Only three more times in all the rest of American history would the public successfully mobilize against a specific Court case and overrule it via amendment.)[26] Some arch states' rightists objected in principle to the notion that a state could ever be dragged into federal court and forced to pay money, even in cases where the state *had* violated a valid federal law or the federal Constitution itself. But this extreme faction did not command enough support to ram through an amendment banning all federal lawsuits against states. Instead, just as moderate Federalists had compromised with moderate Anti-Federalists to find common ground in a bill of rights, so once again common ground was found, repudiating *Chisholm,* but on a much narrower basis that even nationalists could live with.

Had states'-rights extremists prevailed, the Eleventh Amendment would have read something like this: "No State shall ever be sued in any Article III court by any private party." Language similar to this was indeed floated by *Chisholm*'s critics immediately after the Court announced its decision, but this language was never seriously considered.[27] The amendment that did pass—proposed by Congress in 1794 and ratified the following year—featured much narrower wording: "The Judicial power of the United States shall not be construed to extend to any suit *in law or equity,* commenced or prosecuted against one of the United States *by Citizens of another State, or by Citizens or Subjects of any Foreign State.*"

This amendment simply rewrote the particular state-party language in Article III that had authorized federal jurisdiction in *Chisholm.* Because the federal judiciary had shown itself to be overly activist in adjudicating state-law disputes brought by out-of-state litigants against state governments, these diversity lawsuits would henceforth be relegated to state courts. But all other Article III clauses would remain intact, even though such clauses might well authorize federal court suits against states if federal laws were at issue.

In other words, moderate Federalists were willing to lop off some of the bottom tier of Article III, which covered various *state-law* controversies, but carefully crafted the amendment so as to preserve intact the top tier of *federal* law cases. This explains why the Eleventh Amendment's text spoke only of ousting jurisdiction over certain cases in "law or





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equity"—phraseology that artfully preserved mandatory Article III jurisdiction over federal admiralty law. Likewise, the amendment's last fourteen words left intact top-tier federal jurisdiction whenever a citizen sued his *own* state on the basis of a federal-law claim in law or equity. The Federalists who in the late 1780s had painstakingly structured Article III so as to give federal courts the last judicial word over all federal questions thus managed to maintain this basic structural principle in the mid-1790s.

On this reading, the Eleventh Amendment's text cohered nicely with the Constitution's general structure. The goal of both the Article IV privileges-and-immunities clause and Article III's companion diversity clauses was to end state discrimination against citizens of sister states. *Chisholm* had gone too far, giving out-of-staters an outright (and unfair) advantage: Inexplicably, the Court had said that a South Carolinian creditor could recover damages against Georgia even though an identically situated Georgian creditor would have received nothing from a Georgia court.[28] In repudiating *Chisholm,* the Eleventh Amendment restored interstate equality. Since a Georgian could constitutionally sue Georgia in federal court if the state violated federal rights, a South Carolinian could likewise sue Georgia under federal law but would henceforth have no special *Chisholm*-like diversity-clause access in state-law suits.[29]

Although the Eleventh Amendment itself (properly construed) did not bar private damage actions against states, it could be and was argued in the Founding era that general structural considerations nevertheless immunized states from such lawsuits. In eighteenth-century England, for example, the Crown could not be sued absent its consent. Why, then, asked some Americans, shouldn't state governments (and the federal government, for that matter) likewise enjoy structural immunity?

The short answer was that, in America, neither federal institutions nor state governments were truly sovereign. Only the people were. In England, the king-in-Parliament was the source of all law, and so no law could be wielded against the king or Parliament without their consent. But in America, We the People, via the Constitution itself, had laid down certain laws that did indeed bind all government officials and entities. Whenever a government violated the Constitution, that government was not truly sovereign and thus could not, properly speaking, claim a sovereign's immunity. Similar logic applied whenever a state government violated valid federal laws, for such laws had themselves been authorized in the Constitution by the true sovereign, the American people.

A government might nevertheless properly insulate itself from liability for constitutional violations so long as it assured meritorious plaintiffs that

some other legal remedy would make them whole. At the Founding, plaintiffs could typically sue government officials directly whenever such officials had acted unconstitutionally. In such cases, courts generally awarded plaintiffs damages even when the unconstitutional conduct had occurred in good faith; in turn, the government typically indemnified the officials involved and thus indirectly footed the bill.

But in the twentieth century, the Supreme Court began to widen immunities for errant officials while also slamming the courthouse door on injured citizens seeking redress directly against the state or federal government itself. The door has often remained shut even in cases where the government itself has clearly violated constitutional rights. To make matters worse, the modern Court has tried to defend some of its stinginess by hiding behind the words of the Eleventh Amendment, stretching these words beyond all recognition. According to the current Court, the amendment itself and its animating principles prohibit a multitude of federal-law claims against states, even in admiralty cases and in lawsuits brought by citizens against their own states—fact patterns far beyond the amendment's text. Instead of respecting the Constitution's general theme of popular sovereignty, today's Court has exalted *governmental* sovereignty and in fact made it harder for twenty-first-century Americans to achieve redress than it ever was in eighteenth-century England. Instead of honoring the celebrated common-law maxim that "for every right, there should be a remedy,"[30] the modern Court seems intent on insisting that for many a right there must be no remedy. Sovereignty means never having to say you're sorry.[31]

Thus an amendment born in judicial error has bred more judicial error. *Chisholm* was only the first of a long line of embarrassing judicial pronouncements on the topic of state (and federal) suability.

## "Electors shall . . . vote . . . for President and Vice-President"

When Americans in 1804 enacted the Twelfth Amendment close on the heels of eleven predecessor amendments, no one could have known that more than sixty years would elapse before a thirteenth would follow. What the Twelfth's drafters and ratifiers could and did know was that the Philadelphia delegates' device for electing presidents and vice presidents had badly misfired and needed to be repaired as soon as possible, preferably before the next presidential contest.

In retrospect, we can detect cracks in the framers' electoral-college system even in the first presidential election, which occurred in early 1789.





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Under the rules cobbled together at Philadelphia, each elector would ballot for his top two presidential choices, at least one of whom had to be an out-of-stater. If the highest vote-getter had the support of a majority of electors, that candidate would become president and the next highest vote-getter, regardless of his vote total, would automatically become vice president. But this double-ballot system created a problem in 1789. If virtually all electors wanted Washington as president and Adams as vice president, yet viewed Adams as a distant second choice to Washington, how could they effectively communicate this ensemble of preferences? If each elector voted sincerely for his top two choices, there would be no way of formally signaling the huge difference between the two. Washington and Adams might emerge with nearly identical numbers, thereby creating the illusion that the two were close substitutes in the collective mind of the college.

Working quietly behind the scenes to forestall this result, Hamilton urged various electors to divert their second votes away from Adams (their true second choice) toward lesser candidates. In the end, the scheme worked rather well (from Hamilton's, if not Adams's, perspective). Each of the 69 participating electors cast one vote for Washington, 34 cast their second votes for Adams, 9 gave their second ballots to Jay, and 26 scattered their second votes across an assortment of regional favorites and lesser figures. The cumulative results gave Washington an emphatic mandate reflecting his status as head and shoulders above Adams. In the next presidential election, held in 1792, a similar pattern emerged. Washington won the support of all 132 electors, Adams got 77 votes, and George Clinton came in third with 50.

Yet the 1789 results had come about in part through a coordinated scheme of strategic voting that operated in tension with the spirit of the system created at Philadelphia. Article II had required electors to cast secret ballots on the same day in separate states so as to make it difficult for large blocs of electors to form cabals. And precisely because Article II aimed to discourage enforceable agreements among electors, the situation was rife with the possibility of double cross, if one or more electors pledged to do one thing and then turned around and did something else. Where the margins between the top three candidates were wide, as they were in both 1789 and 1792, a handful of breached promises would do little damage. In a tight race, however, even a small number of strategic defections might make all the difference, as evidenced by the elections of both 1796 and 1800–01.

In 1796, the first post-Washington election, the emerging Federalist

faction offered the nation a geographically balanced ticket of Northerner John Adams and Southerner Thomas Pinckney. The opposing Republican faction rallied around Southerner Thomas Jefferson as their leader, with Northerner Aaron Burr a distant second choice. In this new, more openly partisan landscape, the double-ballot system gave rise to several interrelated risks. First, the risk of in-party inversion: Though most Federalists agreed that Adams, the incumbent vice president, deserved the top spot on the ticket, not all Federalists shared this ranking. If a small handful of Northern Federalist delegates diverted their second ballots from Pinckney—so as to assure that Adams would end up with more votes than his running mate—there was always a danger that Southern Federalist delegates might double-cross them by diverting a greater number of ballots away from Adams, thereby giving Pinckney the top spot. In effect, a handful of Federalist schemers could invert the party ticket from Adams-Pinckney to Pinckney-Adams.

The double-ballot system also risked cross-party inversion. If Republicans knew they were going to lose, they might at the last minute strategically cast a few votes for Pinckney and thus reverse the Federalist ticket. To minimize both in-party and cross-party inversion risks, Northern Federalists would need to throw a substantial number of their second ballots away from Pinckney. But this broad diversion would create yet a third risk by opening an electoral window through which Jefferson might slip ahead of Pinckney into second place overall and thereby capture the vice presidency for himself. As the 1796 contest played out, Jefferson did indeed enter through the open window. Adams won with seventy-one votes, and strategic Northern diversions left Pinckney with only fifty-nine, enabling Jefferson, with sixty-eight votes, to claim second prize.

Between 1797 and 1801, Americans witnessed a curious spectacle plainly envisioned by Article II, but previously hidden from view by Washington's preeminence: Two closely matched rivals who had run against each other now stood as president and vice president. During these years, political factions continued to harden, thanks largely to the polarizing events of the French Revolution and the Federalists' overreaction in the notorious Alien and Sedition Acts. The election of 1800 featured a rematch between Adams and Jefferson, but this time with much greater interparty hostility and much tighter intraparty discipline. Once again, each party offered up a geographically balanced ticket—Adams and Charles Cotesworth Pinckney (Thomas's older brother) for the Federalists, and Jefferson and Burr for the Republicans. With enmity between the parties so intense and the race so tight, virtually no wasting of votes occurred; any extra di-





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version by one party would open a window for the other. Thus, only one Federalist elector threw a vote away from Pinckney so as to signal the Federalists' preference for Adams at the top of the ticket. More important, no Republican electors diverted, with the result that Jefferson and Burr ended up tied, with seventy-three votes apiece as compared to sixty-five for Adams and sixty-four for Pinckney.

This tie at the top highlighted yet a fourth electoral-college imperfection, which Hamilton had foreseen in 1789 but which had subsequently receded from view. Even though almost all Republicans had in their minds voted for Jefferson first and Burr second, on the formal paper ballots these two candidates emerged as equals. (Indeed, a single sly Republican elector could have double-crossed his party by diverting his vote from Jefferson and thus inverting the ticket; likewise, had Federalists known for certain that they were going to lose, their electors could have crowned whichever Republican candidate they honestly preferred.)

Compounding the problem, the Constitution gave the decisive choice in tie-vote situations to the House of Representatives, operating under a quirky set of balloting rules reminiscent of the old Confederation. Each state delegation in the House would act as a unit—one state, one vote—with an absolute majority of state delegations required for victory. But what if, thanks to absenteeism and divided state delegations (whose votes would count as zero rather than one-half for each candidate), neither Jefferson nor Burr could command such an absolute majority? To make matters worse, the House entrusted with this all-important decision in 1801 would be filled with lame ducks whose party had just been trounced at the polls. Although Federalists had entered the 1800 contest with a substantial House majority, Republicans running under the Jefferson/Burr banner had won more than 60 percent of the seats. Yet it would be the old—electorally repudiated—body that would choose the new president. The new House was not due to convene until nine months *after* Inauguration Day.

True, nothing in the Philadelphia Constitution had explicitly mandated that the presidential election be resolved by the outgoing representatives as distinct from the incoming ones. In 1789, for obvious reasons, the electoral ballots for George Washington were unsealed and counted by the newly chosen (eleven-state) First Congress rather than the old Confederation Congress. The new Congress had been summoned into existence on March 4, 1789, and its term therefore ended on March 3, 1791. But what about Washington's term? The First Congress certified Washington's election on April 6, 1789, and he took the oath on April 30. Had either of these

two dates been used to mark the beginning of the president's four-year term, the way would have been clear for future *incoming* Congresses to count presidential ballots in early March, as had the first incoming Congress. But without giving the matter much thought, Congress decided in a 1792 law—the same sorry statute that put legislative leaders atop the presidential succession list—that Washington's first term had truly begun, *nunc pro tunc,* at the precise moment that Congress's had, on March 4, 1789.[32] Thus in 1793 Washington took his second oath of office on March 4. The unforeseen consequence of this date choice, however, was to mandate that future electoral-college disputes be decided by congressional lame ducks rather than spring chickens.

When the Federalist-dominated lame ducks met in early February 1801, they initially deadlocked. In a sixteen-state union, the winner needed the votes of nine state delegations, yet after thirty-five consecutive ballots over the course of a week, Jefferson remained stuck at eight votes, with six state delegations backing Burr and two evenly divided (and thus not counted). Though Federalist Burrites in Congress have been depicted by some modern writers as political saboteurs and dirty tricksters defying Jefferson's popular mandate, the Constitution plainly gave the House the right to pick either Burr or Jefferson. (As previously noted, had any prescient Federalist elector been so inclined earlier in the process, he could have single-handedly inverted the Republican ticket by switching his second ballot from Pinckney to Burr.) And as we shall see, Jefferson's popular mandate was not quite so popular as many today might think.

The real legitimacy crisis in February 1801 sprang not from the possibility that the House might pick Burr over Jefferson, but rather from the danger that it might choose *neither.* What if congressional Federalists simply kept the deadlock going until the end of the congressional term on March 3? Would Adams continue to hold office by dint of inertia—beyond his allotted four years? For how long? Even if Adams were to summon the new Congress into emergency session, by what authority could that body purport to untie the Burr-Jefferson knot, given that it was not the Congress that had opened the ballots? If Adams refused to budge, could Jefferson and Burr jointly summon Congress on March 4 on the theory that surely one of them was the new president and thus had authority to convene Congress, which once in session could then choose between them *nunc pro tunc,* à la 1789? (This was Madison's proposal, a clever if concededly extra-constitutional improvisation in a devilish situation.)[33]

Alternatively, might the dawn of March 4 trigger the 1792 succession law designed to deal with situations where both president and vice presi-





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dent were dead or disabled? Was a lapsed president the same in law as a disabled one? If the act did apply, the first in line would be the president pro tempore of the Senate, but no person occupied this position in early February 1801, as Vice President Jefferson took care to hold the Senate chair continuously while the House drama was playing itself out. Could the Senate nevertheless proceed to name a president pro tempore while Jefferson presided? And what about Madison's earlier argument that the act was itself unconstitutional, and that only a true officer—such as the secretary of state—could be named? (An anonymous newspaper essay in 1801 made the case for the secretary of state as the most apt successor. The essay's author may well have been John Marshall, who himself was—you guessed it—secretary of state.)[34] Could the lame ducks properly enact a new succession act naming Marshall, or anyone else they preferred, as interim president? For what interim?

In short, America in February 1801 neared the brink of a constitutional crisis as March 4 irresistibly drew closer while the House refused to make way. The air swirled with far more constitutional questions than answers, and rumblings arose from several state militias ready to march—or so it was widely rumored—if Adams overstayed his term or the Republicans were otherwise deprived of what they believed was rightfully theirs.

And then, on the thirty-sixth ballot ending a week of stalemate, the House anointed Jefferson over Burr by a vote of ten states to four, with two states divided. The succession crisis was over.

OR AT LEAST, over for the moment. For the Constitution mandated a presidential election every four years, and what had happened once could happen again unless Americans repaired Article II's defective machinery. Enter the Twelfth Amendment, proposed in December 1803 and ratified half a year later, just in time for the presidential election of 1804. Under the amendment's provisions, each elector would cast *one* ballot for president and a *wholly separate* (non-presidential) ballot for vice president. Political parties could henceforth openly designate tickets that could not easily be inverted or subverted. A party that commanded an electoral-vote majority would automatically win both presidency and vice presidency, and it would be clear from the start which party candidate was running for the top spot and which was instead slated solely for the vice presidency.

The amendment also provided a revised backup system: If no presidential candidate received an absolute majority of electoral votes, the House (acting under the old one state, one vote rule) would decide among

the top three candidates (as opposed to the top five under the original Philadelphia plan). Though this new backup system might conceivably jam up much as the old one had threatened to do in February 1801, the new one would itself be less likely to be triggered in the first instance, thanks to the introduction of separate ballots for presidents and vice presidents. Also, in the event of a House deadlock in the presidential contest, the amendment provided that the incoming vice president could act as president—an option that had not been available under the Philadelphia plan whereby any House deadlock over the presidency also left the nation without an incoming vice president.

The amendment failed to make clear what would happen if both the presidential and vice-presidential selection machinery simultaneously seized up. Under the amendment's new rules, unless one of the vice-presidential candidates won an absolute majority of electoral votes for the number two job, the Senate would proceed to choose between the top two electoral-vote recipients, with the winner needing the support of a majority of the entire Senate. If, thanks to absenteeism, neither candidate could command an absolute Senate majority, and if the House simultaneously found itself deadlocked over the presidential contest, the ghost of February 1801 might return to haunt the nation.

THROUGH ITS SEEMINGLY small modifications of the original electoral college, the Twelfth Amendment in fact worked rather large changes in the basic structure of the American presidency and its relation to other parts of the American constitutional order. First, by knowingly facilitating the efforts of political parties to run presidential–vice presidential tickets—tickets likely to be linked to slates of local and congressional candidates—the amendment paved the way for increased involvement of ordinary citizens in the presidential-selection process. Even if an ordinary voter did not know the presidential candidates directly, he could with relative ease learn about party ideologies and traditions. He could also make plausible inferences about each party's presidential candidate by directly assessing that party's local candidates, whom he *was* well positioned to know personally or with one degree of separation. In 1800, the last presidential election held under the Philadelphia plan, only one-third of the states allowed voters to pick electors directly. In 1804, the first election under the amendment, this number doubled. By 1828, voters were directly choosing electors in twenty-one of the twenty-four states.[35]





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Alongside the increased informal role for ordinary voters would come a decreased formal role for Congress in the presidential-selection process. By eliminating double-ballot rules apt to create electoral-college deadlocks and misfires, the Twelfth Amendment lessened the likelihood that any given presidential election would be decided by Congress. The new system would thus work to enhance the executive's formal independence from the legislature. After its dramatic selection of Jefferson over Burr, Congress would be called upon to act in only two of the ensuing fifty presidential contests—directly in 1824–25 and indirectly in 1876–77.

The Twelfth Amendment also helped shape a new kind of vice president, a rather diminished figure compared to his Philadelphia-plan predecessor. Under Article II, the vice president was supposed to be a genuinely presidential personage, a statesman who had in fact received the second-highest vote total for the presidency itself. Under the amendment, the vice presidency would instead go to a man who no elector had picked—and that perhaps no elector would pick—for the top job. The Philadelphia plan had undeniably generated vice presidents of stature in the persons of Adams and Jefferson, twin giants of the American Revolution who would each go on to become president in his own right. (Whether Burr himself, the last man elected vice president under the Philadelphia plan, was of remotely comparable gravitas is a harder question that continues to divide historians.) By contrast, the first two vice presidents elected under the Twelfth Amendment, George Clinton and Elbridge Gerry, were political warhorses well past their prime. Both died in office—Clinton in his second vice-presidential term, Gerry in his first—and Clinton was said to have viewed his final post as a "respectable retirement."[36] According to one leading scholar of the vice presidency, only one "statesman of the first or second rank" held the office between Burr and Theodore Roosevelt a full century later; and that one, John C. Calhoun, would in fact resign (thereby leaving the country bereft of a vice president) in order to serve as a United States senator.[37]

Most important of all, the Twelfth Amendment sired a new kind of president, apt to be far more openly populist and partisan than his predecessors. Modeling himself as an American version of Bolingbroke's fabled Patriot King, Washington had tried to stand as a man above party, with Hamilton as his right hand and Jefferson as his left. (Republican critics complained that in practice, he had often favored his right hand.) In the Age of Jackson, however, Washington's initial effort to embody a president above party would decisively give way to a more modern model of

the president as an avowed party leader. Though the Twelfth Amendment did not compel this shift, it plainly enabled it.

In the words of one early expert on the Twelfth Amendment, Lolabel House, "The enormous consequence of [the amendment] has been to make party government constitutional." A more recent book by Tadahisa Kuroda, *The Origins of the Twelfth Amendment*, seconds this assessment: "The amendment modifying the electoral college had a partisan motive and in effect recognized the existence of national political parties." Modern commentators who stress that the Constitution presupposed the absence of organized national parties and aimed to discourage the development of such parties may well be right about the text that emerged from Philadelphia with Washington's signature but are wrong about the document as it came to be revised in the shadow of Jefferson's ascension.[38]

THE TWELFTH AMENDMENT also gave the nation a more visibly and undeniably slavocratic presidential-selection system than the one that America had ratified in the late 1780s. In 1803, it could not be persuasively argued that Article II's rules had in fact worked to boost small states. In the four presidential elections that had taken place thus far, the rules had thrice crowned a man from the largest state (in electoral votes) and once anointed a man from the second-largest state. The runner-up slot had also gone to a big-state man every time. Six of the seven largest states (in free population, circa 1800) had sent men to the executive cabinet, while only one of the ten smallest states had done so.[39]

The Twelfth Amendment itself, by both omission and commission, would only compound the big-state advantage, as was repeatedly emphasized during congressional debate over the measure. After 1800 it was evident both that any state seeking to maximize its clout had to select a statewide slate of electors, winner-take-all, and also that under a general regime of state-winner-take-all, big states would enjoy an advantage. Though prominent proposals had surfaced after 1801 to require states to renounce winner-take-all systems, the framers of the Twelfth Amendment spurned all such proposals and instead increased the big-state advantage in two distinct ways. First, the Amendment's separate ballots for presidents and vice presidents reduced the likelihood of an electoral-vote tie between running mates and thus increased the odds that elections would be decided by the electors themselves (in a system favoring big states) rather than in the House (operating on a one-state, one-vote rule).





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Second, in the event no presidential candidate had an electoral-vote majority, the House could choose only among the top three vote-getters, rather than among the top five. This, too, shrank the domain over which the state-equality principle would operate.[40]

Several congressmen attacked the amendment for its obvious weakening of the influence of small states, and tiny Delaware in fact refused to ratify the amendment on these grounds.[41] However, by 1803 politically savvy Americans had come to see that the nation's deepest fissures ran not between big states and small states, but rather between free states and slave states.[42] Every actual combination of president and vice president (and indeed every losing ticket as well) had balanced a Northerner and a Southerner. Many of the major debates in Congress—over the assumption of state debt, the location of a national capital, the establishment of a federal bank, the apportionment of representatives after the first census, the ratification and enforcement of the Jay Treaty, and much more—had either highlighted or thinly papered over obvious sectional differences. In both 1796 and 1800, electors had divided along sectional lines,* and even the final vote in the House on February 17, 1801, had called attention to the geographic gradient. The four states that held out to the bitter end for (Northerner) Burr over (Southerner) Jefferson were all located in New England: Connecticut, Rhode Island, Massachusetts, and New Hampshire.

The election of 1800–01 had also drawn the nation's attention, in the most dramatic fashion possible, to the Philadelphia plan's proslavery bias. In 1787–89, many Northern ratifiers had failed to understand the full significance of the words "three fifths." Refighting the last war, they had focused more on apportioning taxes than on allocating House members and presidential electors. But by 1803, everyone understood that virtually no revenue would come from direct taxes subject to the three-fifths clause. (Only once, in 1798, had a small direct tax been levied.)[43] By contrast, the hard-fought and razor-close election of 1800–01 had made the three-fifths clause's electoral significance obvious to anyone with eyes and a brain.

*For without the added electoral votes created by the existence of Southern slaves, John Adams would have won the election of 1800—as everyone at the time plainly understood.* Jefferson's (and Burr's) electors came from states that had a smaller total free population than the states whose electors backed Adams. Had the electoral college been apportioned on the basis of

*See the election maps on the first page of this chapter.

free population—with no three-fifths bonus—Jefferson would have ended up with about four electoral votes less than Adams rather than eight votes more. As one New England paper sharply put the point, Jefferson was riding "into the TEMPLE OF LIBERTY, upon the *shoulders of slaves.*"[44]

Congressional critics of Mr. Jefferson, and of the electoral-college amendment that his political party was pushing, repeatedly called attention to the unpleasant facts underlying his claimed mandate. In 1802, Connecticut Congressman Samuel Dana declared that if Republican reformers were in earnest about changing the electoral rules, they should ponder a wider range of issues, including whether the apportionment of representatives (and thus presidential electors) "should be in proportion to the whites, or in proportion to the whites compounded with slaves." The following year, Representative Seth Hastings of Massachusetts argued that if any amendment should be made in the wake of the preceding presidential election, it should be one establishing "an equal representation of free citizens, and free citizens only," thereby undoing the Philadelphians' "compromise . . . by which one part of the Union has obtained a great, and in my opinion, unjust advantage over other parts of the Union. A compromise, sir, by which the Southern States have gained a very considerable increase of Representatives and Electors, founded solely upon their numerous black population." Echoing his colleague, fellow Bay Stater Samuel Thatcher chafed at the "peculiar inequality" between regions created by "the representation of slaves," who would add "eighteen Electors of President and Vice President at the next election."[45]

In the upper house, New Hampshire Senator William Plumer likewise called attention to the "eighteen additional Electors and Representatives" created by chattel slavery. "Will you, by this amendment, lessen the weight and influence of the Eastern states, in the elections of your first officers, and still retain this unequal article in your Constitution? Shall property in one part of the Union give an increase of Electors, and be wholly excluded in other States? Can this be right?"[46] Yet the Twelfth Amendment's Republican backers were plainly not interested in fixing *this* aspect of the presidential-selection system, even as they freely altered other parts of the Article II machinery. Ultimately, the New England states accounted for six of the ten votes against the amendment in the Senate, while in the House, states north of New Jersey generated thirty-one of the forty-two no votes.[47]

In short, whereas Article II originally created the presidency in the image of George Washington, Amendment XII refashioned the office in





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the likeness of Thomas Jefferson and in a manner that prefigured Andrew Jackson.* After the adoption of this amendment, America's presidential-election rules—and thus America's presidents—would generally be more democratic, more partisan, and more openly slavocratic. Prior to the amendment, America's first president had taken steps to free his slaves, and America's second president had none who needed freeing. America's third president—a transitional figure elected under Article II and re-elected under Amendment XII—had passionately condemned slavery in his early years but did rather little to back up his youthful rhetoric after his slavery-supported triumph in 1801. The next dozen presidents—mostly Southern slaveholders or Northern doughfaces—likewise did little to challenge slavery.

AND THEN, IN ONE of those delicious ironies that abound in history, the Twelfth Amendment eventually came to advantage an emphatically anti-slavery candidate. In 1804, this future president had yet to be born, and the state from which he sought the presidency did not even exist. Surely no one at the turn of the nineteenth century could have foreseen the long and twisting path that would lead from a proslavery Twelfth Amendment to an abolitionist Thirteenth. Yet lead it did. Thanks to the Twelfth Amendment, the presidency in 1860–61 went to a partisan dark horse who commanded less than 40 percent of the popular vote and who probably could not have won an outright national majority in a one-on-one matchup against his leading rival. Though this 1860 winner managed a virtual clean sweep of the North, he was reviled in the (white) South; he received not a single popular vote—none!—in the ten states south of Virginia. His name, of course, was Abraham Lincoln, and the next great wave of amendments would reflect the new political coalition that he helped bring into power.

*In his First Annual Message to Congress, on December 8, 1829, Jackson himself advocated a constitutional amendment that would eliminate both the office of presidential elector and the backup system of congressional selection. In their place, Jackson proposed a system of direct election. The devil of course was in the details—direct election would occur only within each state, with the final continental results tallied up using the three-fifths formula. "I would therefore recommend such an amendment of the Constitution as may remove all intermediate agency in the election of the President and Vice President. *The mode may be so regulated as to preserve to each State its present relative weight in the election.*" *Senate Journal,* 19:9–10 (emphasis added).