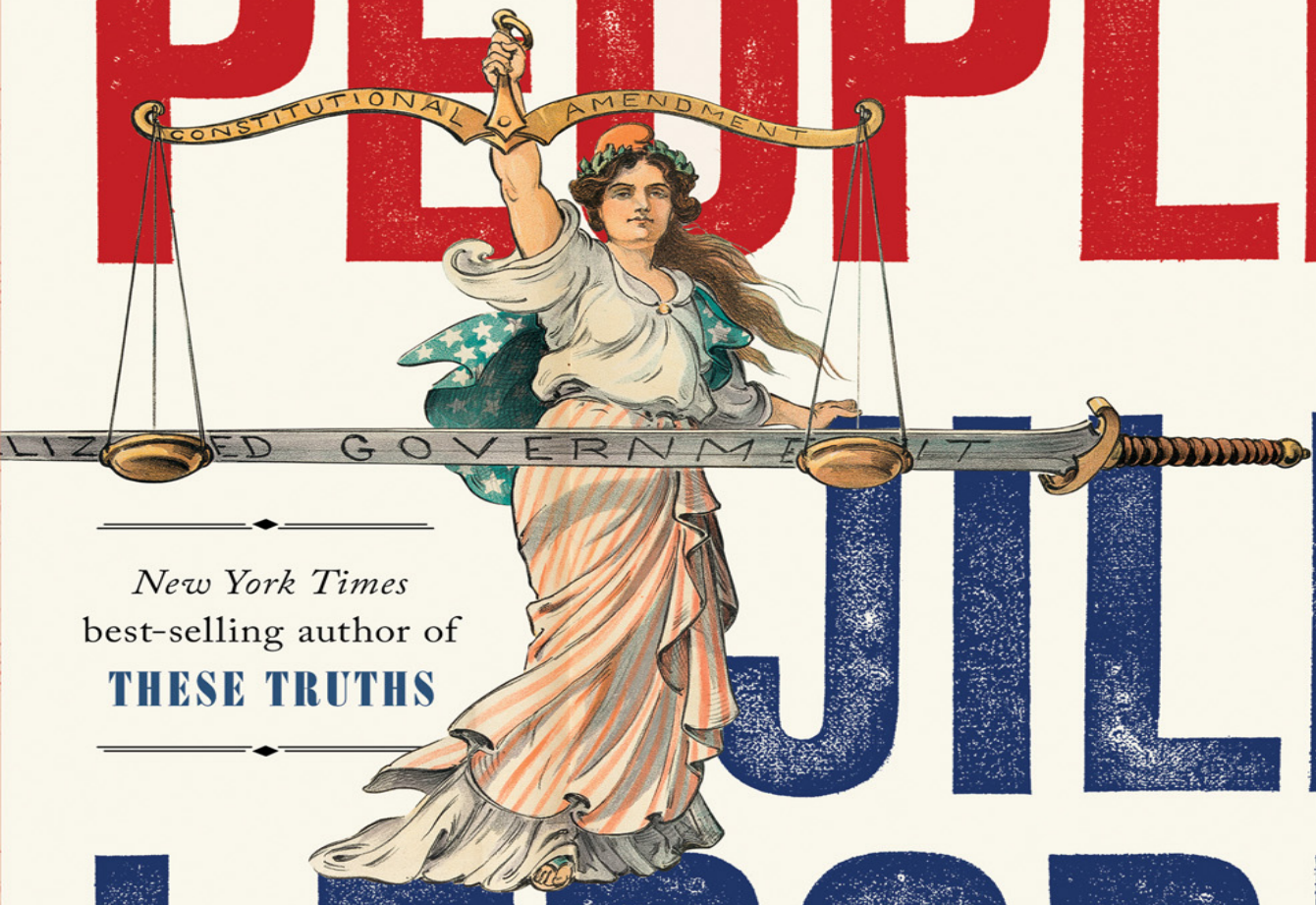
A History of the U.S. Constitution

WE THE PEOPLE



New York Times
best-selling author of
THESE TRUTHS

JILL LEPORE

We the People

A History of the U.S. Constitution

Jill Lepore

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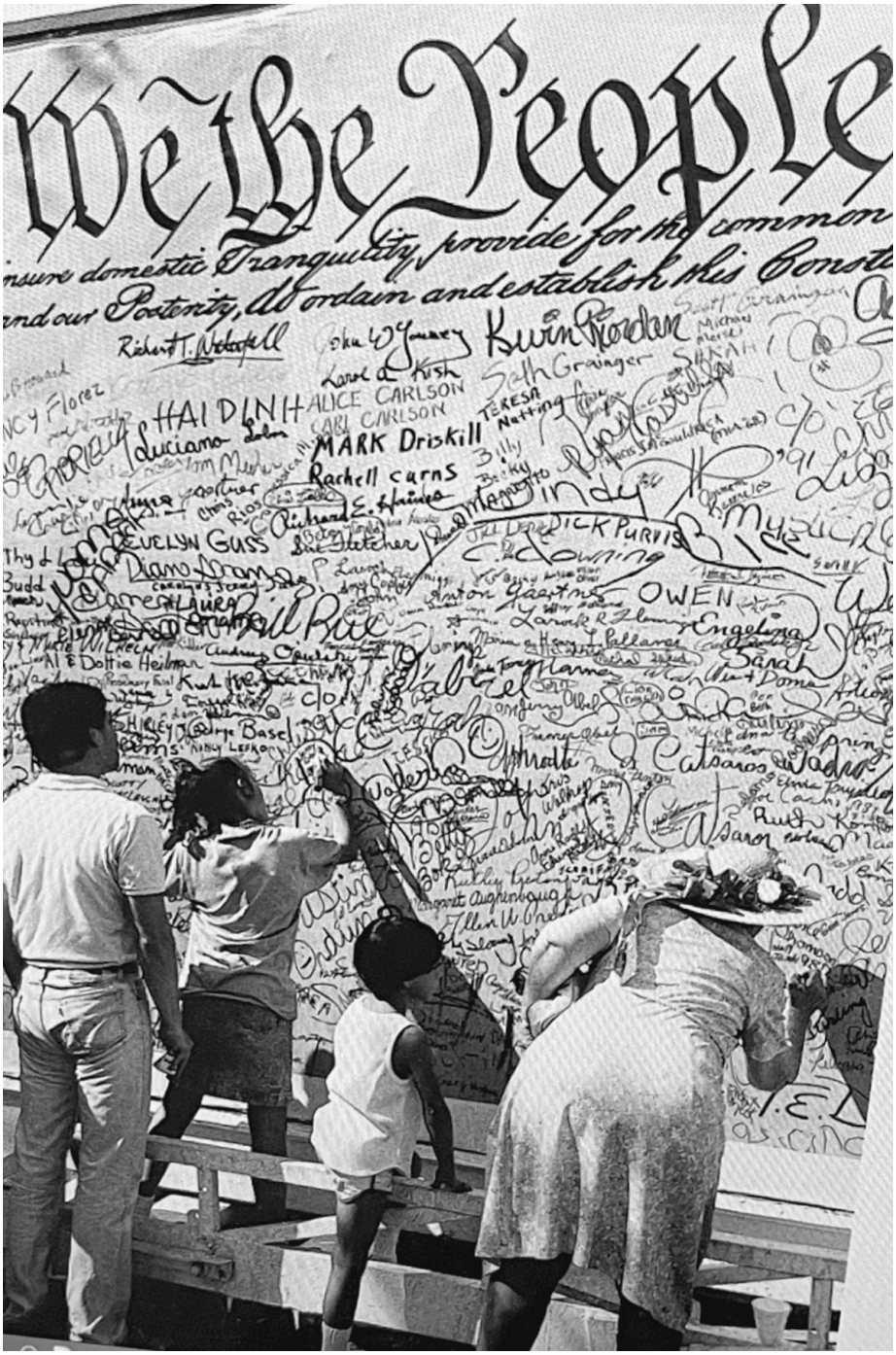

David Lee Guss, *We the people signing the Constitution at the Celebration of the Constitution's Bicentennial, Tucson, Arizona*, 1987

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To Tim, Gideon, Simon, and Oliver, my sun and stars.

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It was intended!
to be amended!

—Bugs Bunny to Daffy Duck, "An Ode to the Amendments of the U.S. Constitution," 1986

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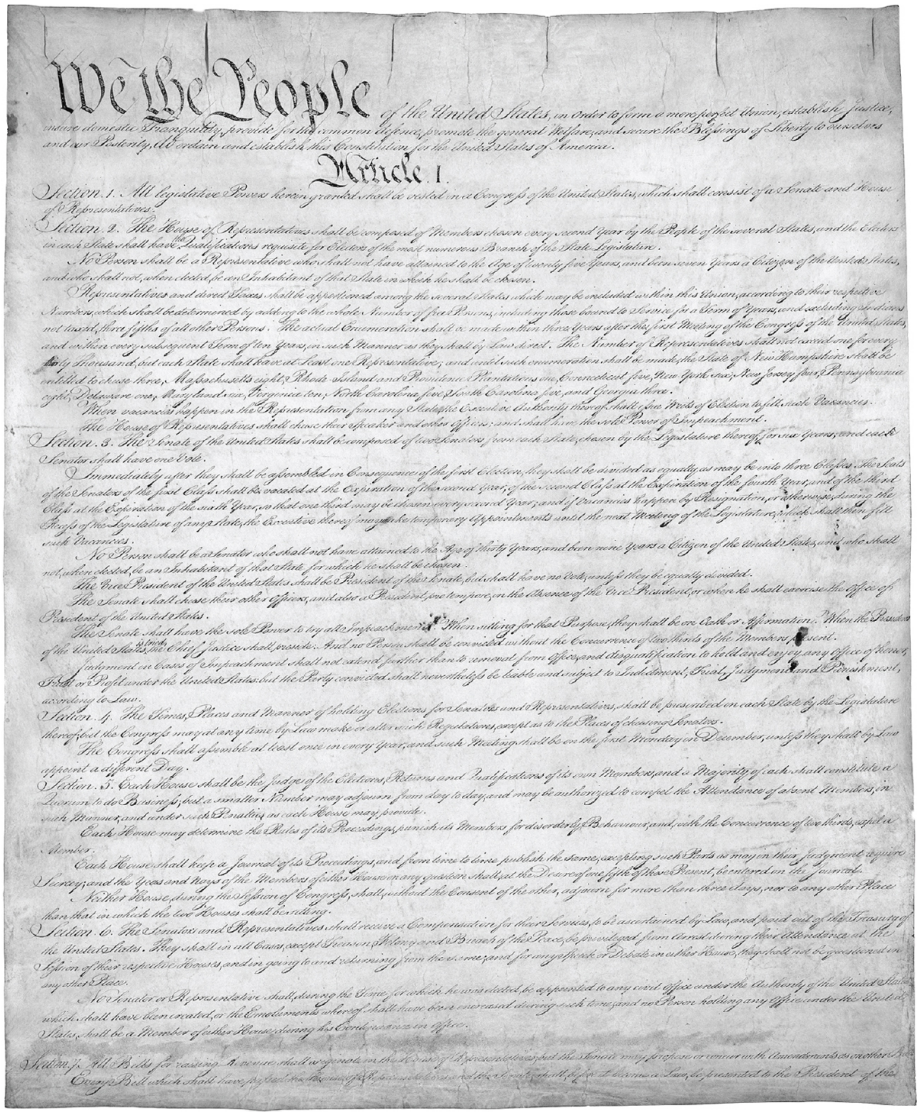

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at least one Representative; and until such Enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such Time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the

The first page of the Constitution of the United States, 1787

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Introduction

The Philosophy of Amendment

> *The people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.*
>
> —James Madison, failed First Amendment to the U.S. Constitution introduced into Congress, 1789

We the People. The Constitution of the United States is made of things that are born, live, thrive, decay, and die: insects, animals, plants, ideas. *In order to form a more perfect Union.* Each of its elements began, long ago, in the loamy earth, hatching and creeping or slipping, slick and squealing, from the womb of the mind. *Establish justice, insure domestic tranquility.* The text is written on parchment made from sheep, fleeced, their hides soaked in lime, stretched and dried. *Provide for the common defense.* The ink came from the buds of oak leaves, swollen to the size of musket balls by the eggs of wasps. *Promote the general welfare.* Its words were shaped by quills fashioned from the feathers of molting geese. *Secure the blessings of liberty.* Its lofty, momentous ideas came from the minds of men, long since dead, and from the books they read. *To ourselves and our posterity.* Of the nearly two hundred written constitutions, the Constitution of the United States—the most influential constitution in the world—is also among the oldest, a relic, as brittle as bone, as hard as stone. *Do ordain and establish.*

But the U.S. Constitution is neither bone nor stone. It is an explosion of ideas. Parchment decays and ink fades, but ideas endure; they also change. The Constitution attempted to solve ancient problems having to do not only with the people and their rulers, the structure of government, and the nature of rights, but also with the knowability and endurance of law. Ingeniously, it accounted for the passage of time.

The U.S. Constitution was intended to be amended. “The whole purpose of the Constitution,” Supreme Court justice Antonin Scalia once said, “is to prevent a future society from doing whatsoever it wants to do.” [1] This is not true. One of the Constitution’s founding purposes was to prevent change. Another was to allow for change without violence. Amendment is so essential to the American constitutional tradition, so methodical and so entire a conception of endurance through adaptation, that it can best be described as a philosophy.

This book, a history of the Constitution, argues that the philosophy of amendment is foundational to modern constitutionalism. Amendment is also a constitution’s mechanism for the prevention of insurrection. This book aims to chronicle the origins of amendment, to identify the conditions under which amendment is possible, to examine why the practice of amendment has been abandoned, and to reckon with the question of whether the Constitution can endure without it.

A government of laws and not of men

Every ordered society is governed by a set of core rules, customs, and principles. This is true for every species that lives in a structured community: a pack of wolves or a pod of whales, a hive of honeybees or a colony of ants, a herd of deer or a flock of geese, a clan of elephants or a tribe of apes and even a forest of trees.[2] Only humans devise constitutions. Devising constitutions, or fundamental laws, is so elemental to human society that the collective noun might be a *constitution* of humans.

Since long before the keeping of records, humans erected governments, codified laws, anointed rulers, imposed or banned religious practices, federated or severed states, claimed territory, and established sovereignty. Once writing was invented, rulers of ancient human societies began recording laws, etching them into clay and stone in the hope that they would last, binding one generation to the next. The Sumerian Code of Ur-Nammu, the oldest surviving written law, was carved into sunbaked clay tablets four thousand years ago. It declared that the king had “banished malediction, violence and strife” from the land. Three hundred years later the Code of the Babylonian king Hammurabi was etched into an eight-foot-tall slab of black stone, weighing four tons, declaring Hammurabi anointed

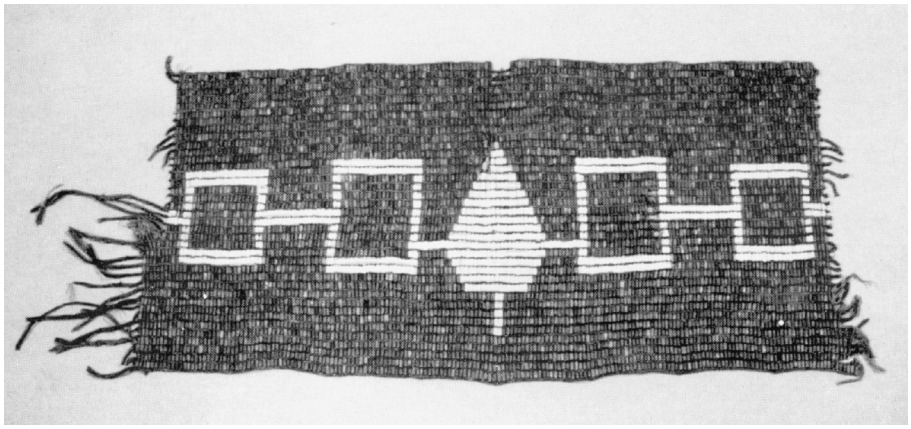
by God “to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong should not harm the weak.” Sometime around 1300 BCE, Yahweh, the Hebrew god, issued ten commandments to the prophet Moses, according to the Book of Deuteronomy, “and he wrote them in two tables of stone.” Ancient Chinese written law dates to the Zhou Dynasty in the sixth century BCE, inked onto *jiǎndú*, strips of bamboo.[3]

The eight-foot-tall Code of Hammurabi, 1755–1750 BCE

Laws govern people; constitutions govern governments. Nearly all constitutions are assemblages, as an eighteenth-century English political philosopher once explained, gatherings together “of institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of publick good.” The idea that the object of a constitution is the common good dates to antiquity. When Aristotle wrote *Politics* around 350 BCE, forming its letters by pressing a pen made of reed upon papyrus made from the soaked and woven pith of the stalks of a sedge that grew on the bank of a river, he divided constitutions into those “which aim at the common advantage” and “are correct and just” and “those which aim only

at the advantage of the rulers" and "are deviant and unjust." [4] Most were unjust.

Many legal instruments combine the constituting of governments with the assigning of territory and the proclaiming of laws. Whether to call these records constitutions is debatable; some are more like treaties; others are more like criminal codes. The prophet Muhammad drew up the now-lost Ṣaḥīfa in 622 CE, establishing a pact between certain Muslims and the Jews of Medina. Sometimes scholars translate the Arabic word *ṣaḥīfa* as "scripture," sometimes as "constitution." In 1215 CE, outside London, King John of England signed a parchment made of sheepskin known as the Magna Carta, the great charter, guaranteeing his noblemen "all the liberties written out below, to have and to keep for them and their heirs." Meant to last, it was almost immediately annulled, even though later generations of English politicians liked to call it England's "ancient constitution." Other ancient constitutions have lasted longer. About 1450 CE, Dekanawidah, the Great Peacemaker, and delegates from the Five Nations of the Iroquois, or Haudenosaunee—Seneca, Cayuga, Oneida, Onondaga, and Mohawk—adopted an agreement known as the Gayanashagowa or Great Law of Peace and often referred to as a constitution, which they recorded on wampum, a light and dark pattern of shells strung together. It begins, "I plant the Tree of Great Peace." [5] It was meant to grow, root and branch.



Wampum belt recording the Great Law of Peace, c. 1450 CE

The revolutionary idea that the ruled rather than the rulers decide the rules emerged only haltingly. In 1765 Catherine the Great, the Empress of Russia, began drafting the Nakaz, or constitution, to proclaim her

sovereignty and guarantee her subjects liberty and equality. To consider it, she called for an assembly of 564 elected representatives—elected by everyone, including women and peasants, with fifty-four seats allotted for Muslims—to meet in Moscow in 1767. The course of human events turned upside down in 1776—the ruled became their own rulers—when the United States declared independence and stated what Thomas Jefferson described as self-evident truths: "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it." Four years later the people of the Commonwealth of Massachusetts ratified a new constitution, written by John Adams, whose aim, as Adams wrote, was to establish "a government of laws and not of men." [6] They wrote that constitution down, ink on parchment. It is still in force: it is the law. It also still exists, in a museum in Boston, sealed in a double-paned bulletproof glass case filled with a mix of argon and helium gas to preserve it from the forces of decay: water and oxygen and sunlight.

All written constitutions contain unwritten elements, as invisible as those glass-boxed gases.[7] "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records," Alexander Hamilton advised seekers in 1775. "They are written, as with a sunbeam, in the whole volume of human nature." A written constitution's power comes not from the words themselves but from the life breathed into it, or what Montesquieu called "the spirit of laws," ethereal and even enchanted. James Madison warned that early state constitutions—the first was written in 1776—offered little more than "parchment barriers" to those who would seek to defy them. "The Constitution of a country is not the paper or parchment upon which the compact is written," John Quincy Adams agreed. "It is the system of fundamental laws, by which the people have consented to be governed, which is always supposed to be impressed upon the mind of every individual, and of which the written and printed copies are nothing more than the evidence." [8]

All the same, a written constitution is a different creature from an unwritten one. Committing a constitution to writing offers stability, a form of endurance akin to inheritance, but it also presents a problem: how is a

government established by a written constitution to be altered except by its destruction?

Amend your ways

The U.S. Constitution drew from ancient ideas, but it was also something new and truly revolutionary, an eighteenth-century invention: a body of fundamental law drafted and ratified by representatives of an invented polity—a constituency—known as the People, binding them to their government by an act of consent. It was meant to transcend ordinary law by establishing fundamental principles, structures, powers, and rights. Printed, copied, and circulated among an extraordinarily literate population, the Constitution executed a covenant and allowed, too, for the exertion of power over vast distances.[9] The U.S. Constitution is not a list of commandments, like the Code of Hammurabi or the laws Moses found etched on tablets, engraved in stone, a monument. Nor is it a form of scripture. Unlike all of these, but very much like the Massachusetts Constitution of 1780, which has been amended more than a hundred times, it was meant to be revised, updated, and improved. The eighteenth century was an age not only of revolution and empire but also of enlightenment animated by the idea of progress—political, scientific, economic, technological, and moral. By far the most radical innovation of the U.S. Constitution, and of state constitutions, was the provision they made for their own repair and improvement by the people themselves, *to the end it may be a government of laws and not of men*.

This mechanism for improvement is called amendment. In English, the verb *amend* goes back to about the twelfth century, when it meant to correct a fault; to repair an omission; to fix what's broken; or to improve in a moral sense: to make something better. The word shares a root, four of its five letters, and almost the entirety of its meaning, with the verb *mend*. (Both words came to Middle English by way of the Old French verb *amender*.)[10] To amend something is to mend it, although you amend a text but you mend a textile. Like *amend* and *mend*, *text* and *textile* share a root and most of their letters and almost the entirety of their meanings. A text is made of woven letters; a textile is made of woven threads. Weaving and mending were not, at the time the Constitution was written, mysterious arts; they

were the everyday work of women. More than half of eighteenth-century American households had spinning wheels, and in some parts of the country as many as a third of households had looms.[11] Men amended and women mended. Men wrote and revised texts—bills, laws; women wove and repaired textiles—clothing, bedding. Men wielded pens and operated binderies, stitching books together; women wielded needles and operated spinning wheels and looms. *We began this quilt*, one woman stitched, with her needle and silken thread. Not *We the people do ordain*.

To *amend* also means to rectify something that has become corrupted and, in that sense, not only to repair but to restore, to fix not only something broken but also something that's gone wrong. *Amend* and *mend* have moral meanings: you can make amends, and you can mend your ways. "Amend this fault," an earl instructs his nephew in Shakespeare's *Henry IV* in 1598. "Amend your ways and your doings," reads a passage from the King James Bible in 1611. By the eighteenth century, the meanings of *mend* and *amend* had hardly changed. "Tell me my Faults, and *mend* your own," Benjamin Franklin advised in 1745. Ten years later the English lexicographer Samuel Johnson caught each of these meanings in his *Dictionary of the English Language*:

A sampler of mending stitches, 1797

To AME'ND. *v.a.*

[*amender*, Fr. *emendo*, Lat.]

1. To correct; to change any thing that is wrong to something better.

2. To reform the life, or leave wickedness. In these two cases we usually write *mend.* See MEND. *Amend* your ways and your doings, and I will cause you to dwell in this place. *Jerem.* vii. 3.
3. To restore passages in writers which the copiers are supposed to have depraved; to recover the true reading.[12]

These meanings became American. The lexicographer Noah Webster, in an early dictionary, defined *amend* as "to correct, grow better, reform, mend" and the noun *amendment* as "a change for the better, a correction." In his monumental *American Dictionary of the English Language*, Webster elaborated that to amend is "to correct; to reform; to improve or make better, by adding what is wanted, as well as expunging what is wrong." All this was—and is—contained within the philosophy of amendment.[13]

Amendment is necessary because everything decays, even laws. As the English jurist Matthew Hale put it in 1697, "As all sublunary things are subject to corruption and putrefaction, to diseases and rust, so even laws themselves, by long tract of time gather certain diseases and excrescences, certain abuses and corruptions grow into the law, as close as the ivy unto the tree, or the rust to the iron, and in a little tract of time gain the reputation of being part of the law." Or as Montesquieu explained, "Sometimes it is proper the Law should amend itself." In the eighteenth century, people hoped written constitutions would endure, to bind one generation to the next. They cherished stability. The Scottish philosopher David Hume argued that "as human society is in perpetual flux, one man every hour going out of the world, another coming into it, it is necessary in order to preserve stability in government that the new brood should conform themselves to the established constitution, and nearly follow the path which their fathers, treading in the footsteps of theirs, had marked out for them." But alongside that idea they held in their heads the equally important idea that constitutions need to be revised or even entirely rewritten, either as occasion demands or at regular intervals.[14] Even the mere passage of time would necessitate alterations.

Through experiment and experience, Americans came to agree that if such a strange, fragile thing as a written constitution were to endure, it would, as time passed, the ticking of a clock, need to be both revised and repaired, improved and updated.[15] Mostly, the demand for amendments came from ordinary Americans who insisted that their constitutions be

revisable, “to rectify the errors that will creep in through lapse of time, or alteration of situation,” as one Massachusetts town meeting put it in 1778, demanding an amendment mechanism in the state’s constitution. The U.S. Constitution was itself an act of amendment.[16] It was written because the existing frame of government, the Articles of Confederation, were technically amendable but, for all practical purposes, not.[17] Eight times members of Congress had tried to amend the Articles, but as any change required the unanimous consent of all thirteen states, eight times they failed. The Articles of Confederation, as Hamilton wrote, suffered not “from minute or partial imperfections, but from fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and main pillars of the fabric.” At the Constitutional Convention in Philadelphia in 1787, Virginia delegate George Mason, pointing out that everyone knew the Constitution was imperfect, argued that “amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.” [18]

Amendability is the essential contribution of American constitutionalism.[19] “Permit me to mention one great principle, the *vital* principle I may well call it,” Pennsylvania delegate to the Constitutional Convention James Wilson declared in 1791. “The principle I mean is this, that the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient.” This vital principle, Wilson argued, was not an incitement to violence but an alternative to it, “not a principle of discord, rancor, or war” but “a principle of melioration, contentment, and peace.” [20] A constitution too easily amended leads to chaos. But a constitution too difficult to amend leads to chaos, too. Without amendment, Wilson argued, there would be nothing *but* revolution: everlasting insurrection.

The Fifth Article

The trick was finding that sweet spot: devising a method of amendment that, as Madison hoped, would leave open a “constitutional road to the decision of the people” but would guard against both “that extreme facility,

which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults." [21] Not too easy, not too hard. In this, the framers did not succeed.

The amendment power is defined in Article V of the Constitution. It reserves to the people the power of amendment and sets out two paths to propose amendments (Congress can propose amendments, and the state legislatures can call for a convention to propose them) and two paths for ratifying amendments (either by the state legislatures or by special conventions held in the states). Article V requires a double supermajority: to pass, an amendment must be approved by a two-thirds majority in both houses of Congress, and to be ratified, it has to be approved by the legislatures or special conventions in three-quarters of the states.[22]

The Fifth Article was the triumph of the Constitutional Convention; without it, the Constitution would never have been ratified.[23] Everyone expected the Constitution would need amending. There are features of the Constitution that sizable numbers of Americans have complained about for centuries, including its strange method of electing the president, and the absence of any acknowledgement of God. Some problems emerged due to an alteration of circumstances, like the growth and changing distribution and composition of the population; the shifting balance of power between the three branches of government; the rise of capitalism and the attendant widening of inequalities of wealth, income, and political power; and the tremendous growth of the federal government. Many proposed changes were animated by the spirit of moral reform. ("The paramount duty of man upon earth is to amend himself," as John Stuart Mill once wrote, but all bear the duty, too, of "amending the world.")[24] Then, too, in its failures to abolish slavery, extend rights to women, and fully recognize the sovereignty of Native nations, the Constitution defied its own principles of liberty, equality, and republicanism, even though for decades the people most affected by those defects were least able to participate in public debate, and to propose amendments.[25]

Article V is the mechanism the framers devised to revise, reform, correct, update, and improve the Constitution.[26] But due to factors that they could not possibly have foreseen—the emergence of political parties, the astounding geographical and demographic growth of the country, and the political paralysis of polarization—amending the Constitution turned out to

be infinitely more difficult than they intended. Almost all efforts to amend the Constitution fail. Success often takes decades. And for long stretches of American history, amending the Constitution has been effectively impossible.

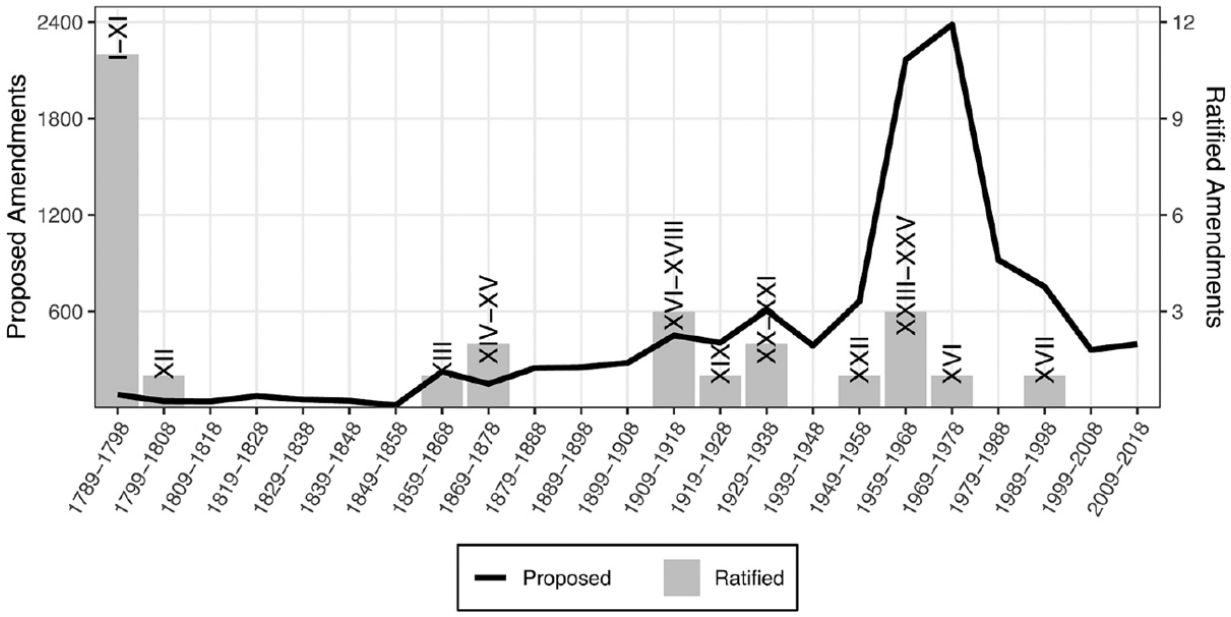
Article V is a sleeping giant.[27] It sleeps until it wakes. War is, generally, what wakes it up. And then it roars. In 1789, in the aftermath of the Revolutionary War, Congress passed twelve amendments, ten of which, later known as the Bill of Rights, were ratified by the states by 1791. No amendments were ratified in the sixty-one years between 1804 and 1865, and then, at the end of the Civil War, three in five years. What became the Thirteenth Amendment in 1865, abolishing slavery, had first been proposed fifty-seven years earlier. No amendments were ratified in the forty-three years between 1870 and 1913, and then, during the First World War, four in seven years. The Nineteenth, granting women the right to vote and first called for in 1848, was ratified in 1920 only after a seventy-two-year moral crusade.

Again, the giant slept. In the 1930s, Franklin Delano Roosevelt abandoned constitutional amendment in favor of applying pressure on the Supreme Court, even as the civil rights movement, too, adopted a legal strategy that involved seeking constitutional change through the Court. The Second World War did not awaken Article V because midcentury liberals disfavored amendment in favor of the exercise of executive and judicial power. Between 1961 and 1971, as the United States became engulfed in the war in Vietnam, Americans ratified four amendments and seemed very likely to ratify two more. Those that succeeded included the Twenty-Fourth Amendment, which in 1964 abolished poll taxes, and the Twenty-Sixth Amendment, which in 1971 lowered the voting age to eighteen. Both relied on a broad liberal consensus. Other efforts, like an amendment abolishing the Electoral College, which passed the House in 1969, failed. The Equal Rights Amendment, introduced into Congress in 1923, was sent to the states in 1972, nearly a half century later. It was never ratified.[28] Liberals stopped proposing amendments, and amendments proposed by conservatives—providing for school prayer, banning flag-burning, defending marriage, protecting fetal life, and requiring a balanced budget—all failed. Given those failures, conservatives, like earlier liberals, then instead sought constitutional change through the federal judiciary. The amending stopped (Figure 1). (The Twenty-Seventh Amendment, which concerns

congressional salary and was ratified in 1992, was one of the twelve amendments sent by Congress to the states in 1789, then was more or less forgotten; it can hardly be said to have introduced a new idea into the Constitution.) The Constitution has not been meaningfully amended since 1971. The military draft ended in 1973. The giant has not awoken since.

FIGURE 1

Proposed and Ratified Amendments by Decade, 1789–2018



Follow for extended description

The people will have ceased to be their own rulers

"Nothing new can be put into the Constitution except through the amendatory process," Justice Felix Frankfurter declared in 1956, and "nothing old can be taken out without the same process." [29] This is an exceedingly narrow view of the facts of the matter. In truth, the Constitution is changing all the time: by judicial decisions, by the enactment of new state and federal laws, by the application of new meanings to old laws, and by popular protest.[30] Scholars sometimes call these methods of constitutional change the "informal amendment process" or "common-law constitutionalism." [31] Ordinary Americans from abolitionists and suffragists

to Tea Partiers and advocates of same-sex marriage have sought constitutional change by petitioning, protesting, organizing, and voting, in a process of informal amendment known as popular constitutionalism.[32] Informal amendment has advantages: the Supreme Court, which is specifically designed to be unaccountable to public opinion, can protect the interests of minorities against a tyrannical majority.[33] But none of these exercises of power is as mighty or as enduring as formal amendment, since any changes that informal amendment imposes, including changes made by the Supreme Court, can be reversed.[34]

Article III of the U.S. Constitution created the Supreme Court and granted it judicial power—the power to pronounce judgments—over all cases and controversies "arising under this Constitution." It did not specify how many justices were to serve on the Court or explain what method they were to use to decide constitutional cases.[35] It also did not expressly grant the Court the power of judicial review, the authority to determine the constitutionality of government action. Instead, after much contestation, the Court assumed this power. If judicial review has been disputed both frequently and vehemently, it is a well-established and regular feature of American constitutional practice.[36] But Americans have never been wholly resigned to the Court's assertion that its word is the first, last, and only word on the meaning of the Constitution. This is known as judicial supremacy, and it emerged only in the nineteenth century.[37] Much use of Article V has involved defying the judiciary. Of the fifteen amendments ratified after the Bill of Rights (discounting the Eighteenth and the Twenty-First, because the one repealed the other), seven—the Eleventh, Thirteenth, Fourteenth, Sixteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth—overturned opinions issued by the Supreme Court.

Informal amendment happens all the time, but formal amendment happens hardly ever. The relationship between these two methods of constitutional revision has aptly been described as hydraulic: the more willing the Court is to offer new interpretations, the less likely is revision by amendment. And the more difficult it becomes to amend the Constitution, the more necessary is recourse to the Court for Americans seeking to alter fundamental law.[38] The nature of the situation has encouraged political actors to take alternating positions about both the feasibility and the desirability of formal amendment and the legitimacy of judicial review.

When the Supreme Court is conservative, liberals defend the formal amendment process as the only democratic method of constitutional change and denounce judicial interpretation as antidemocratic; when the Court is liberal, the reverse is true. In 1857 the Supreme Court ruled in *Dred Scott v. Sandford* that no people of African descent can ever become American citizens. Frederick Douglass rejected the Court's authority to make any such declaration: "No Court in America, no Congress, no President, can add a single word thereto, or take a single word therefrom. It is a great national enactment, done by the people, and can only be altered, amended, or added to by the people." [39] Abraham Lincoln, too, refused to concede the Court's authority to revise the Constitution. "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court," Lincoln said in his First Inaugural Address, then "the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." [40]

Nearly a century later, after the Court declared school segregation unconstitutional in *Brown v. Board of Education* in 1954, North Carolina senator Sam Ervin accused liberals who celebrated the decision of believing that Article V "is too cumbersome and slow" and that "the Supreme Court must do the amending." [41] Beginning on the very day the Court issued its opinion in *Brown*, segregationists called for amending the Constitution to overturn the decision. More recently, after the Court issued its opinion in *Roe v. Wade* in 1973, the right-to-life movement began proposing formal amendments to overturn that decision, accusing the Court of having unlawfully amended the Constitution by finding a right (to privacy) where none existed. Those same advocates expressed no concern about judicial overreach in the Supreme Court's decision to overturn *Roe* in 2022, in *Dobbs v. Jackson Women's Health Organization*, when the Court denied the existence of a right that, whatever its earlier history, had existed since 1973. One's commitment to Article V, it seems, depends on whether one agrees or disagrees with the Court's decisions. This arrangement is not sustainable.

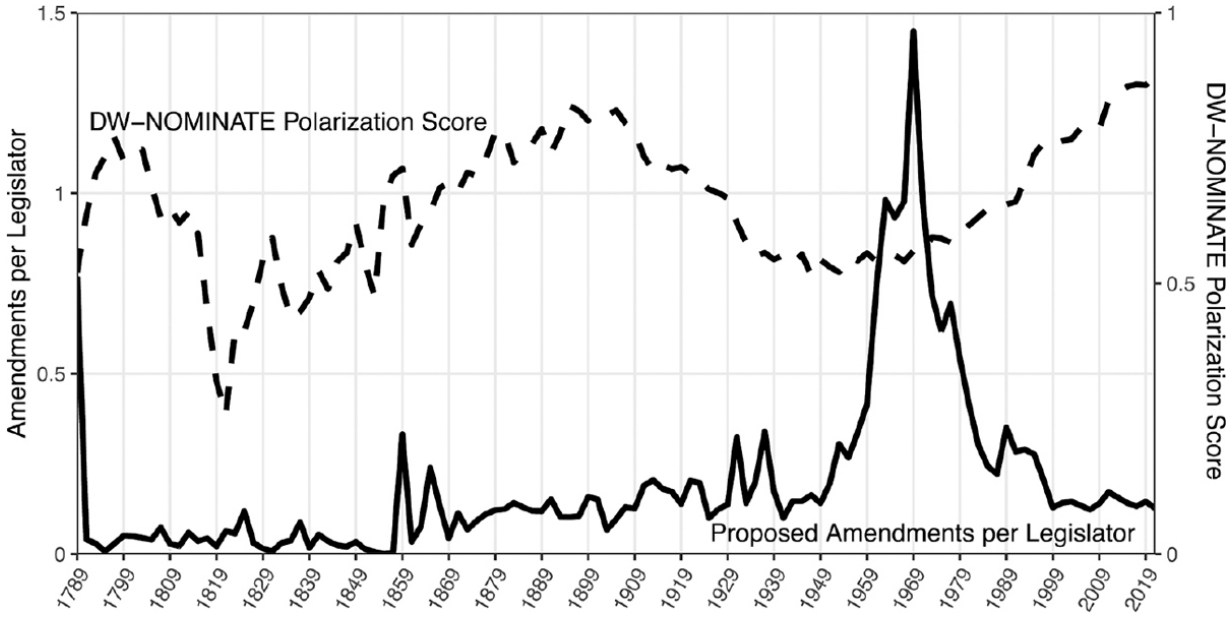
The philosophy of amendment has structured American constitutional and political development for two and a half centuries. It has done so in a distinctive, halting pattern of progression and regression in which constitutional change by way of judicial interpretation, in the form of opinions issued by the U.S. Supreme Court, alternates with formal

amendment as a means of constitutional revision. This pattern has many times provided political stability, with formal amendment and judicial interpretation as the warp and weft of a sturdily woven if by now fraying and faded constitutional fabric. But this pattern, which features, at regular intervals, the perception by half the country that the Court has usurped the power of amendment, has also undermined the idea of representative government, increased the polarization of American politics, contributed to political violence, and led to the underdevelopment of the U.S. Constitution.

With only twenty-seven amendments, the U.S. Constitution has one of the lowest amendment rates in the world.[42] But since 1789, Americans have submitted nearly ten thousand petitions and countless letters, postcards, and phone and email messages to Congress calling for or opposing constitutional amendments, and they have introduced and agitated for thousands more amendments in the pages of newspapers and pamphlets, from pulpits, at political rallies, on websites, and over social media. Some twelve thousand amendments have been formally introduced on the floor of Congress.[43] During the era of rising polarization that began around 1968, members of Congress all but stopped bothering even to propose amendments (Figure 2). The more conservative the Court, the smaller the number of amendments proposed by members of Congress.[44] Instead of arguing for amendments, legislators, lobbyists, and other advocates pursued different means of either securing or thwarting constitutional change: influencing the nomination and confirmation of Supreme Court justices and altering the method those justices use to interpret the Constitution.

FIGURE 2

Proposed Amendments per Legislator and DW−NOMINATE Polarization Score by Congress, 1789–2019



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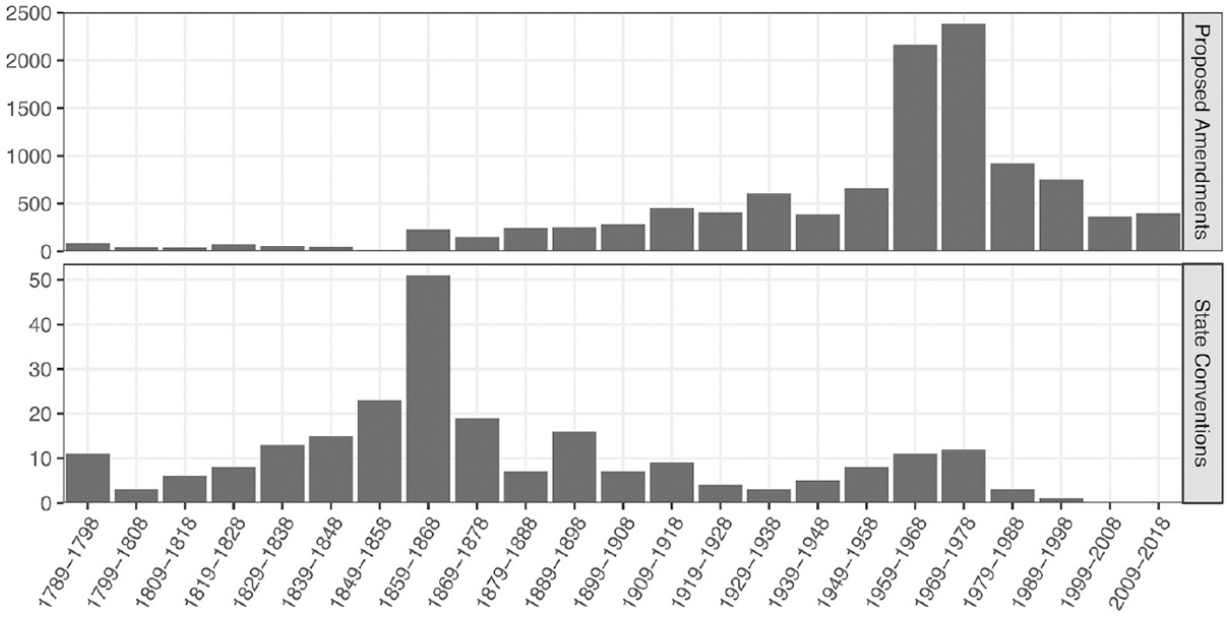
That only twenty-seven amendments have ever been ratified is not because Americans are opposed to amending constitutions.[45] Every U.S. state has its own constitution; these have been frequently revised and even replaced. One delegate to a nineteenth-century constitutional convention in Missouri suggested that a state constitution ought to be rewritten every fourteen years because every seven years "every bone, muscle, tissue, fibre, and nerve matter"—every cell in the human body—is replaced, and surely, in twice that time, every constitution ought to be amended, too.[46] And that has nearly proven to be the case. Since 1776, the states have held some 250 constitutional conventions and have adopted 144 constitutions, or about three per state (Figure 3).[47] Every state constitution currently in place has an amendment provision. For most of American history, the states have been exceptionally busy holding constitutional conventions, but like the practice of amending the U.S. Constitution, the practice of holding state constitutional conventions has stagnated. (No U.S. state has held one since 1986.) Nevertheless, the practice of amendment by popular vote thrives in the states, where revision is exponentially easier to achieve.[48] Since 1789, of more than ten thousand amendments formally proposed in the states, nearly seven thousand—well more than two out of three—have been ratified.[49]

FIGURE 3

Proposed Amendments and State Conventions by Decade, 1789–2018



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The difficulty of amending the federal constitution has had profound consequences. The U.S. Constitution is older than modern democracy and is burdened with all manner of vestigial provisions. Over time, both the U.S. states and other nation-states have amended their constitutions to replace aristocratic provisions. In the American federal government, such provisions—the Electoral College, the malapportionment of the Senate, and life tenure for Supreme Court justices—cannot be changed without first amending the Constitution and, in the case of the Senate, first amending Article V itself. (Article V places equal suffrage in the Senate effectively beyond amendment.) This impasse leaves Americans subject to what political scientists have called the "tyranny of the minority." [50] The Fifth Article was meant as a constitutional door, open to the people. After 1971, that door slammed shut.

If we are not originalists . . .

The year 1971, the last time the U.S. Constitution was meaningfully amended, marked a turning point in the history of American

constitutionalism. That year a method of constitutional interpretation that became known as originalism was put forward by a distinguished legal scholar, Yale law professor Robert Bork.[51] The word *originalism* did not enter the English language until 1980, and it had virtually no currency before 1987, when Ronald Reagan nominated Bork to a seat on the U.S. Supreme Court. But it was in 1971—just when formal amendment was becoming impossible—that Bork first advanced his theory that the only way to read the Constitution is to determine the original intentions of its framers and that every other method of interpretation amounts to amendment by the judiciary.[52]

Originalism rose from the ashes of Article V. Originalists argued that if the Constitution requires changing, it ought to be done by the democratic method of Article V amendment rather than by nine unelected judges. This is an argument that, in earlier eras, liberals had made, too. (As with earlier progressives and midcentury liberals, conservatives' objections to judicial power did not last past their acquisition of that power.) A problem with this argument, and it is not a small problem, is that Article V hasn't worked since 1971. Scalia, asked in 2013 if he considered any part of the Constitution to be a flaw, pointed to Article V. It was "not originally a flaw," he said, but it had become one because "the country has changed so much." He said he'd run the numbers and concluded that, "if you picked the smallest number necessary for a majority in the least populous states, something like less than 2 percent of the population can prevent a constitutional amendment." [53] That is not a constitutional door. That is a constitutional barricade.

Bork's method of constitutional interpretation came to be called "original intent originalism," to distinguish it from "original meaning originalism" and "original understanding originalism." Notwithstanding the semantic schisms among originalists and the Senate's rejection of Bork's nomination, originalism steadily gained ground. "The Constitution means what the delegates of the Philadelphia Convention and the state ratifying conventions understood it to mean, not what we judges think it should mean," said Supreme Court justice Clarence Thomas in 2001.[54] By then, originalism had become not only the prevalent mode of interpretation on the federal bench but also strikingly familiar to the public, where, according to public opinion surveys, nearly half of Americans had come to see it as the

only way to interpret the Constitution.[55] Its outcomes mapped onto the policy agenda of conservatives, but as the liberal Supreme Court nominee Elena Kagan said during her Senate Judiciary Committee confirmation hearings in 2010, "We are all originalists." [56] By the 2020s, the dominance of originalism was so overwhelming that the constitutional scholar Cass Sunstein was left to ask, "If we are not originalists, what might we be?" [57]

Originalists have not often agreed on what originalism is; it is also, perhaps surprisingly, quite changeable.[58] The term is also confusing, since it is used to apply both to a serious and important set of arguments about constitutional interpretation and to a form of popular constitutionalism driven by views that range from patriotism and earnest admiration for the nation's founding to xenophobia and white nationalism. As a method of constitutional interpretation, a great deal that has gone by the name of originalism is perfectly ordinary, unsurprising, and indispensable. All interpretation of the Constitution, like the interpretation of any piece of writing, involves a close inspection of a document's text, meaning, purpose, and structure. These methods have been used since even before the death of the last surviving delegate to the 1787 Constitutional Convention, James Madison, in 1836.[59] What was new about originalism as it emerged in the last decades of the twentieth century—when the Fifth Article lay dormant—was its insistence that the only way to interpret the Constitution is to read it the way a probate judge reads a dead man's last will and testament. James Madison is that dead man.

Originalists deny that originalism is a method of constitutional change, insisting that it is, instead, a method of constitutional restoration.[60] But originalism *is* a method of constitutional change; it provides a path to change by way of a new method of constitutional interpretation. That method is not original.

To interpret the Constitution—whether to determine the framers' original intent, the document's original meaning, or the public's understanding of it—originalists consult the Constitution, Madison's notes from the Philadelphia convention, the records of the ratifying conventions, and the Federalist Papers, eighty-five essays written in support of ratification by Madison, Hamilton, and John Jay, in 1787 and 1788.[61] None of these sources were widely read in the eighteenth century, nor were they even widely available. The *Federalist* essays originally appeared only in

New York newspapers. Madison's notes were not published until 1840. Nineteenth-century law offices did not generally contain these materials. Before the twentieth century, consulting sources like eighteenth-century dictionaries or the records of the ratifying conventions would have been impossible for most lawyers in the United States. Not until the 1980s, when many key historical collections began to be digitized, could these sources be extensively searched with ease, and not until the twenty-first century could they be searched at the stroke of a key by anyone with a laptop and access to the internet.[62]

At any rate, Madison himself did not endorse this method.[63] The framers believed the Constitution to be not merely a text, words woven together, but also a set of unstated principles, no more material than a sunbeam or a shaft of light. They also warned against deference to the past. "Is it not the glory of the people of America," a young Madison asked in 1787, "that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?" [64] Madison, the chief keeper of the records of the Constitutional Convention, did not believe those records had any bearing on the interpretation of the Constitution. "Whatever veneration might be entertained for the body of men who formed our Constitution," he said, "the sense of that body could never be regarded as the oracular guide in expounding the Constitution." [65] He also warned against relying on the Federalist Papers, given, as he remarked, rather understating the case, that its authors had been "sometimes influenced by the zeal of advocates." [66] Late in his life, when both he and the Constitution were older—and when Madison sought specific political outcomes—he would on occasion urge deference to 1787. This isn't evidence that Madison was an originalist; it's evidence that both the meaning of the Constitution and the methods of discovering that meaning, far from being fixed, established, and beyond dispute, have never been anything other than changeable, contingent, and contested.

How James Madison, Thomas Jefferson, Alexander Hamilton, and John Quincy Adams came to their view of constitutionalism, and how Robert Bork, Antonin Scalia, and Clarence Thomas came to a very different view

in the late twentieth century, which they nonetheless claimed to belong to the late eighteenth century, is one of the stranger paradoxes of American constitutional history. It is also one of the questions that animates this book.

If anything human can so long endure

Recovering the philosophy of amendment requires starting at the nation's founding in 1776 and proceeding, through two and a half centuries of history, by recounting the stories not only of people who wrote, interpreted, and revised the U.S. Constitution but also of the people it was never meant to include. "We the People" is the most richly amended phrase in the Constitution. As Justice Thurgood Marshall remarked on the occasion of the Constitution's bicentennial in 1987, "When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens." [67] In the eighteenth century, "the people" were not very many people at all.[68] Half of the land that the United States claimed as its own in 1787 was inhabited by indigenous peoples who had their own constitutions and who rejected the U.S. Constitution; they and their descendants have contested their relationship to it and their status under it for centuries. Poor white men could not vote before the 1820s, Black men could not vote before 1870, and in much of the country, in practice, they could not cast ballots without risking their lives before the Voting Rights Act of 1965; women could not vote in federal elections before 1920; immigrants from many parts of the world but especially from China and Japan and later Mexico and other parts of Central and South America were frequently denied both suffrage and citizenship; and indigenous peoples, as sovereign nations, charted their own constitutional paths.[69]

Because my account of the history of the Constitution places these people well within the story, it is at variance with accounts of the Constitution offered by originalists.[70] This is not surprising.[71] Historians and lawyers belong to different disciplines and engage in different practices; they use different methods and abide by different rules of evidence.[72] Originalists defend originalism as the only democratic method of constitutional interpretation by claiming that it binds unelected judges both to law made by lawmakers elected by the people and to the original intent, understanding, and public meaning of words framed by delegates

and representatives elected by the people between 1787, when the Constitution was written, and 1791, when the last state ratifying convention met. But in researching that history, originalists rely on an artificially bounded historical record that disadvantages the descendants of people who were disenfranchised or poorly enfranchised at the time the Constitution was written, people who could not participate in ratifying conventions or serve in Congress or state legislatures or cast a vote for any of the men who did hold those offices, people whose political views were neither sought nor recorded. Originalism follows rules of evidence that no historian could accept. As Bork once explained: if George Washington had written a letter to his wife Martha, from the convention in Philadelphia in 1787, explaining what the delegates meant by "the power to lay taxes," originalists would not consider this letter in any sense relevant. ("Secret reservations or intentions count for nothing," Bork explained.)[73] He did not need to add that in interpreting the Constitution, he had no interest in letters written *to* Washington, by Martha, say, or by a dirt-poor Virginia farmer or a carpenter's apprentice in Richmond, or by a Chippewa woman in western Pennsylvania, or by any of the more than three hundred people held in human bondage at the Washingtons' plantation in Virginia.[74] No historian could defend setting such documents aside as inadmissible or irrelevant to an understanding of the Constitution on the argument that their authors had not served as delegates to the Constitutional Convention and had been in no position to publish their opinions in 1787. For the historian, unpublished documents written by less powerful people do not "count for nothing"; in fact, they count for rather a lot.

To question originalism is not to question constitutionalism. Originalists argue that "any theory of law that chafes at being bound by generations past is a theory that is incompatible with written law," as if anyone who does not subscribe to originalism is endorsing lawlessness.[75] But originalism is unknown in most of the rule-of-law-abiding world, and it is not even ordinarily employed as the method of interpreting constitutions in American states; it is peculiar to the U.S. Constitution.[76]

Originalism, in short, defies the philosophy of amendment. Nevertheless, this book is not a polemic against originalism. Nor is it either a treatise on constitutional law or a compendium of Supreme Court decisions. With apologies to lawyers, jurists, and legal scholars, references

to doctrines will not be found in its pages, and major cases are missing.[77] Instead, this book is a history of American constitutionalism as told through a collection of stories about constitutional change. It relies on an archive that I began building in 2020, the Amendments Project, a digital collection of every significant proposal to amend the U.S. Constitution. “Taken as a whole,” an astute political scientist wrote more than a century ago, “the proposed amendments to the Constitution afford an index of real problems confronting the government and the people.” [78] To recover lost and overlooked constitutional intentions, meanings, and understandings, this book examines not only the twenty-seven constitutional amendments that have succeeded but the countless numbers that have failed.[79] I believe that they, too, count for rather a lot.

The U.S. Constitution, made from the hides of fleeced sheep, the feathers of molting geese, and sunbeams and shafts of light, is not perfect and never was perfect and never will be perfect. “Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched,” an aging Thomas Jefferson lamented in 1816, forty years after he wrote the Declaration of Independence, forty years after the first American state constitutions were adopted. “They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.” Jefferson knew those men were never so wise and that the constitutions they wrote were flawed. He believed that constitutions can last—“if anything human can so long endure”—only if they are regularly revised: “laws and institutions must go hand in hand with the progress of the human mind,” and constitutions need amending as “new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances.” This was not a quirk of Jefferson’s eccentric mind; it was a principle upon which the United States was founded, an idea embraced by an entire generation: “This they would say themselves, were they to rise from the dead.” [80]

For the Constitution of the United States to endure, if anything human can so long endure, it needs to bind Americans to one another by way of something other than an imaginary eighteenth century.[81] Americans have argued over the Constitution year after year, decade upon decade, not only in courthouses and the halls of Congress but inside crowded tenements and

thrumming factories and suburban tract homes and mom-and-pop shops and alongside dusty roads and rushing rivers and sun-scorched fields. Americans drove change, were caught up in change, sought change, and fought change. Not all that change was noble: much of it was dreadful. It doesn't matter what they would say, were they to rise from the dead, because they will not rise from the dead. Instead, as Lincoln said at Gettysburg, "It is for us the living" to honor the dead, and the unborn, by mending, and by making amends, so that "government of the people, by the people, for the people, shall not perish from the earth."

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American women drafting a document that begins “We the Ladys,” 1775

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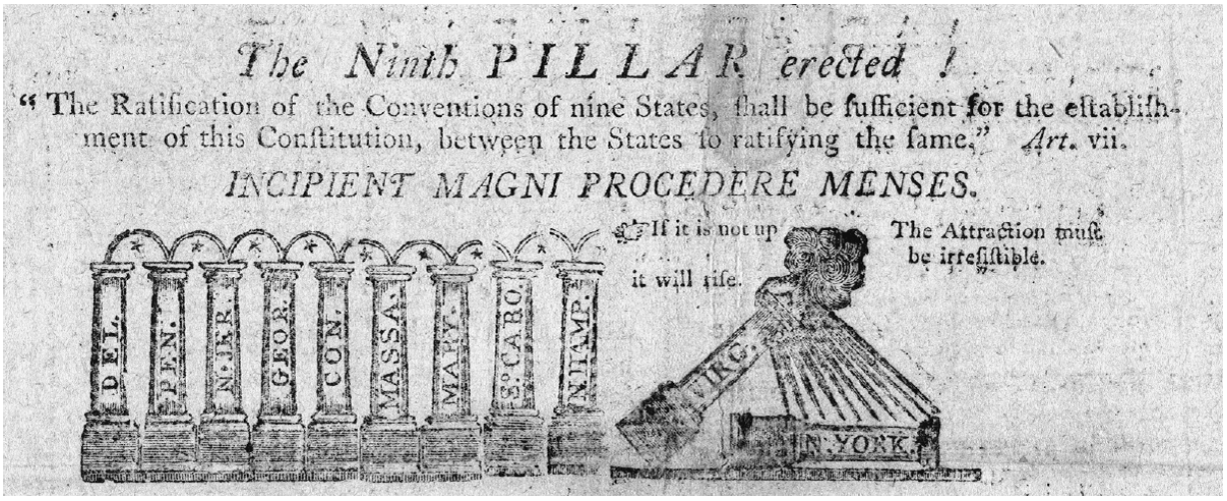
Part One

The Invention of the Constitution, 1774–1791

> *Whenever the Ends of Government are perverted, and public Liberty manifestly endangered, and all other Means of Redress are ineffectual, the People may, and of right ought, to object to, reform the old, or establish a new Government.*
>
> —Failed amendment to the U.S. Constitution, introduced at the Maryland State Ratifying Convention, 1775



Follow for extended description

"The Ninth Pillar Erected," *Independent Chronicle and the Universal Advertiser*, June 26, 1788

On the Fourth of July 1788, the bells at Christ Church in Philadelphia pealed out the news that a new era in American history had begun. Men and horses, oxen and wagon wheels, clattered along the cobbles, forming a procession that started on the corner of South and Third streets and stretched out for a mile and a half along streets that had been specially swept the night before for a parade to honor both the anniversary of the Declaration of Independence and the ratification of the Constitution. Branches of the city's trees had been lopped off to make room for floats, elephant high. Five thousand men wended through the city, artillery, infantry, and calvary, farmers, merchants, and tradesmen: 450 architects and carpenters; 124 hatters; weavers, boat builders, ship joiners, brickmakers and bricklayers, sign painters and coach painters, coopers and tailors, Windsor chair and spinning-wheel makers, lock and watch makers. Blacksmiths marched behind a float drawn by nine horses. Bakers rode atop a float carrying an oven, six-foot-wide, and baked bread, throwing hot loaves to the crowd. Tallow chandlers carried flags decorated with blazing lamps, one with the motto "The stars of America, a light to the world." Printers rode on a stage, nine feet square, carrying a printing press from which they pulled out and threw to the crowd copies of an ode to the Constitution: "Behold! Behold! A nempire rise!"

Boston, Annapolis, Baltimore, New Haven, Charleston, and Portsmouth held their own constitutional processions. But Philadelphia's was the biggest parade anyone in America had ever seen, said to be "the most brilliant and interesting spectacle that ever occurred in the annals of the new world." One float, pulled by six horses, took the shape of an eagle, thirteen feet high and twenty feet long, the breast emblazoned with thirteen silver stars, in a sky-blue field, and underneath, thirteen stripes, alternate red and white. Three judges in black robes had climbed up a very tall ladder to sit on the eagle's back carrying a giant framed copy of the Constitution, hoisted on a staff topped with a liberty cap. On the staff, in gold letters, was painted the words, "THE PEOPLE." [1]

Congress had sent the Constitution to the states for ratification in September 1787, just as farmers were bringing in the fall harvest, pumpkins and corn, beans and oats. The approval of only nine states—three-quarters of what were then thirteen—was required for ratification, but, as a practical matter, all thirteen states needed to agree. This process did not go as planned. Much of the debate over ratifying the Constitution became, instead, a debate about amending it.

Most eighteenth-century Americans were farmers, not lawyers. Amendments, to them, meant what they added to exhausted soil. Every year, in late winter and late summer, farmers amended their fields. By oxcart, they spread lime, wood ash, and manure, "to meliorate and amend those fields which may have been worn out by excessive crops," as one magazine advised.[2] Then, in early spring, on top of frost that sheeted the fields like cream on a pail of milk, farmers cast seeds: fescue and clover, sorghum and deer tongue. By the Fourth of July, the grasses waved in the wind like kelp in an ocean of green. Come the first cutting of the hay, newspapers advertised scythes and sickles "Ready for the Ensuing Harvest." [3] And then the amending began again.

With the Constitution, ratification began well enough. Conventions in Delaware and New Jersey approved it in December, by unanimous votes. Pennsylvania's convention ratified that month, too, but by a much closer vote, 46–23, and only after defeating calls for fifteen amendments. Georgia and Connecticut ratified in January of the new year. Then in February, Massachusetts ratified only narrowly, 187–168, and its convention could not quiet calls for amendments: it recommended nine. New Hampshire's ratifying convention met in February, too, but Federalists—advocates of the

Constitution—expected a vote to fail and so called for an adjournment instead. Maryland ratified in April, 63–11, then hastily adjourned to avoid entering into the record a minority report that demanded twenty-eight amendments. South Carolina ratified in May, asking for four. That made eight states and fifty-six proposed amendments. Summer solstice fell on the twentieth of June. The next day, with the sun high in the sky, New Hampshire finally ratified, becoming the necessary ninth state, but not without recommending twelve amendments. "*Incipient magni procedere menses*," read the caption above a newspaper illustration of the nine pillars of a federal edifice, Roman columns, topped by stars, published that day. The quote was from Virgil: *The golden age begins*.

Virginia had ratified five days after New Hampshire, 89–79, becoming the tenth state—and suggesting forty amendments. But New York had not yet ratified; nor had North Carolina or Rhode Island.

Philadelphia held its Fourth of July parade not only to celebrate ratification but also to push for it. Ten men representing the ten ratified states walked near the head of the procession, arm in arm. A float pulled by ten white horses carried a twenty-foot-high Greek temple, the Federal Edifice, designed by Charles Willson Peale, a dome supported by thirteen columns—"ten of the columns complete, and three left unfinished."

At one o'clock, the parade having wound its course, ships in the harbor fired cannons, and James Wilson, who, with Benjamin Franklin, had represented Pennsylvania at the Constitutional Convention, climbed to the front of the Federal Edifice before a crowd seventeen thousand strong. His speech was a celebration of amendment. "You have heard of Sparta, of Athens, and of Rome," Wilson shouted. "You have heard of their admired constitutions, and of their high prized freedom." But these were as nothing compared to America, he declaimed, his voice rising, as he asked his audience a series of questions, in what must have been a call and response, as fiery as the fiercest prayer meeting.

"Were their constitutions framed by those, who were appointed for that purpose, by the people?"

No! the crowd thundered back.

"After they were framed, were they submitted to the consideration of the people?"

No!

“Had the people an opportunity of expressing their sentiments concerning them?”

No!

“Were they to stand or fall by the people’s approving or rejecting vote?”

No!

Only in the United States, Wilson said, were the People trusted to write and ratify their own constitutions—and to improve them. “A progressive state is necessary to the happiness and perfection of Man,” he said, to roars of applause. “Let us, with fervent zeal, press forward, and make unceasing advances in everything that can support, improve, refine, or embellish Society.” [4] Press forward, advance, improve, refine, embellish. *Amend*.

Dates, Votes, and Proposed Amendments of State Ratifying Conventions, 1787–90

1787			
Dec. 7	Delaware	30–0	
Nov. 21–Dec. 13	Pennsylvania	46–23	after defeating 15 amendments
Dec. 11–18	New Jersey	38–0	
1788			
Jan. 2	Georgia	25–0	
Jan. 9	Connecticut	128–40	
Jan. 9–Feb. 6	Massachusetts	187–168	with 9 amendments
Feb. 13–?	New Hampshire		(adjourned without voting)
Apr. 21–28	Maryland	63–11	with 28 amendments
May 12–23	South Carolina	149–73	with 4 amendments
Jun. 2–25	Virginia	89–79	with 40 amendments

1787			
Jun. 18–21	New Hampshire	57–47	with 12 amendments
Jun. 17–Jul. 26	New York	30–27	with 56 amendments
Jul. 21–Aug. 4	North Carolina	84–184	
1789			
Nov. 16–23	North Carolina	195–77	with 8 amendments
1790			
May 29	Rhode Island	34–32	with 36 amendments

But the people's support for the Constitution was hardly overwhelming. New York City had wanted to hold its own parade on the Fourth of July, but at that state's ratifying convention in Poughkeepsie, delegates remained locked in debate. During a Fourth of July parade in Albany, Anti-Federalists—opponents of the Constitution—burned a copy of the Constitution in protest. Federalists attacked them, and in the ensuing violence, some twenty men were wounded. In Providence, Rhode Island, when news spread that Federalists intended to hold a constitutional celebration on the Fourth and were roasting an ox on the night of the third, to feed the crowd, armed men surrounded the very barbecue.[5]

Frustrated Federalists went ahead and held a parade in New York on July 21, not to celebrate the state's ratification, which was still iffy, but instead, and not a little desperately, to press for it. A thirty-two-gun federal ship was rolled through the streets. Thousands of tradesmen marched. The bakers baked a ten-foot-long "federal loaf." The brewers brewed "ale, proper drink for Americans." A boy dressed as Liberty carried a parchment Constitution on an elaborate float designed by the city's upholsterers. Five

days later delegates in Poughkeepsie finally voted to ratify by the narrowest margin of any state thus far, 30–27, and demanded the largest number of amendments: fifty-six.[6]

The golden age begins. When the First Congress met in 1789, it took up the question of amendments only reluctantly. The members had a great deal of work to do, setting up an entirely new government. They were busy, too, arguing over the meaning of the Constitution. In the end, of the more than two hundred amendments that came out of state ratifying conventions, only ten were ratified by 1791. But a fate worse than defeat awaited amendments proposed by Americans who did not participate in the state ratifying conventions, people who were not among the People—the poor, women, children, the enslaved, servants, Indians, free Black men—anyone deemed a dependent, insufficiently independent to participate in politics, unable to govern themselves, and needing, instead, to be governed. This was not their golden age. In the eighteenth century, their amendments never got a hearing. Most were never recorded. Nearly all have been forgotten.

Press forward, advance, improve, refine, embellish. *Amend*. Nearly two centuries later the Black constitutional theorist Pauli Murray would issue a statement to the U.S. Senate in which she described an amendment guaranteeing equal rights regardless of sex as essential to the future of American constitutionalism, a necessary remedy to the errors and omissions of the past, a mending, a making of amends. “The adoption of the Equal Rights Amendment and its ratification by the several States could well usher in an unprecedented Golden Age of human relations in our national life,” Murray said.[7] But that golden age never began. There are no golden ages. There is only the slow unfurling of history, as serpentine as a parade wending through a city’s newly swept streets.

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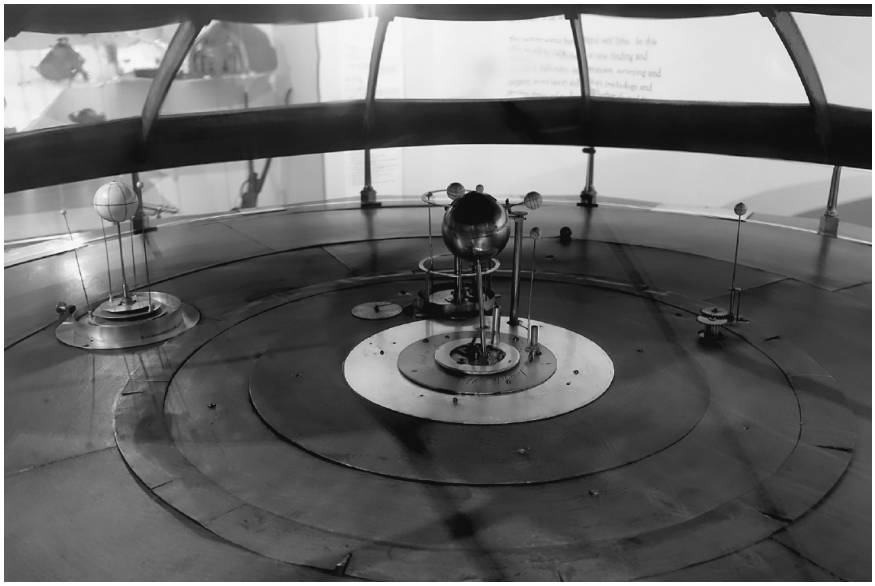
The Constitution of a Clock



Joseph Pope, Grand Orrery, 1787

We don't find any sufficient Provision for any Alteration, or Amendment of this Constitution, but by the General Court, or by instructing our Representatives. Whereas, it appears to Us, at least, of the highest Importance, That a Door should be left open for the People in this Matter.

—The Lexington Town Meeting's explanation for its vote to reject the proposed Massachusetts Constitution, 1777

At sunset on Friday, April 20, 1787, a fire broke out in Boston at a malthouse in the city's South End. Wind carried burning shingles and flying cinders from roof to roof, the flames spreading "with awful fury." The fire raged for three hours, even as men from Boston, Cambridge, Charlestown, Medford, Roxbury, Dorchester, and Milton raced to the scene

to form a bucket brigade, damning the lowness of the tide as they passed slippery leather buckets of water from the harbor. Women carried their screaming children in their arms as they fled the flames. People threw furniture and bedding out into the streets—books and teapots, linens and lanterns—trying to save what they could. A hundred buildings burned to the ground, ravaged, smoldering, ruined. In the midst of this chaos—the running and wailing, the falling of beams, the spit of sparks, and the creaking, groaning collapse of buildings—a body of men entered the wood-framed house of a watchmaker named Joseph Pope, on Washington Street, and climbed to the garret to rescue "a curious specimen of art and industry, which does honour to our country."

It was six and a half feet wide and exactly as tall, an elegant Chippendale twelve-cornered cabinet of mahogany and glass, containing not quite clockworks but a set of clocklike gears, forged of brass, and planets made of ivory, the tusks of elephants. Set in motion—cranked by hand—it displayed the workings of the solar system. Every planet and each of its moons turned on its axis and traveled in its orbit, a perfect mechanical model of the known universe—a machine known as an orrery, after the 4th Earl of Orrery, who had the first modern one built at the beginning of the eighteenth century. Joseph Pope—a distant cousin of Benjamin Franklin's—had been building it for years. As a closer observer wrote, "He was assailed with the advice, predictions, and reproaches of several of his well-wishing friends, for neglecting his watch work, to pursue what they deemed an unprofitable play-thing." [1] But Pope persisted. No one knows quite why he decided to build an orrery, but he had begun in 1776, when the United States declared its independence, and by the spring of 1787, weeks before the opening of the Constitutional Convention in Philadelphia, he had very nearly finished.[2]

The U.S. Constitution, too, is a machine, every bit as much an artifact of the age of Isaac Newton and his formulation of the laws of motion and gravity as was Joseph Pope's orrery. Delegates to the federal Constitutional Convention, many already on the road to Philadelphia at the time of the fire in Boston, imagined government in much the same way that Joseph Pope imagined his mechanical model of the solar system. They hoped to design a machine aligned with the latest mathematical and geometrical principles of the science of politics, its gears and springs forged with precision and arranged in perfect balance. Virginia's James Madison would write about

self-government as “this great mechanical power in government, by the simple agency of which the will of the largest political body may be concentrated, and its force directed to any object which the public good requires.” New York’s Alexander Hamilton, remarking that the ancients had not “devised models of a more perfect structure,” explained the constitution drafted in Philadelphia as the result of scientific progress. The planets had Copernicus and Newton; politics had Locke and Hobbes. “The science of politics,” Hamilton wrote, “like most other sciences, has received great improvement,” especially in the understanding of the separation of powers and the importance of checks and balances, matters that were, metaphorically, mechanical. Each of these advances in the science of politics meant that the machinery of the Constitution was more perfectly balanced than that of any other government ever designed before, Hamilton argued, and yet there was one more difference: “I mean the ENLARGEMENT of the ORBIT within which such systems are to revolve.” [3]

The framers described the new federal government as the sun at the center of a political system whose states were so many planets, each spinning on its own axis and traveling through its own orbit, encircled by its own moons. They intended the Constitution as an orrery, a mechanical apparatus that modeled every motion, anticipated each force, and followed known rules: laws of gravity and motion, laws of human nature. They meant it as more than a model: they meant it to *control* the movement of the parts of government. They also understood that, like all machines, the Constitution would likely break and need to be repaired or even replaced, and that as time passed, it would need to be updated with the latest advances in the science of politics. Having designed the Constitution with improving it in mind, they included within it a mechanism for amendment, a lever to pull, to grind the machine to a halt and undertake repairs.

But the Constitution, however Newtonian, was also Machiavellian, a product less of the science of politics than of its arts, and its craftiness. Like any machine devised by humankind, it could weaken and stagger, wear down and break. The Constitution is a machine. Amendment is the mechanism that the framers devised to repair it. But the men who met at the Constitutional Convention in 1787, not long after that fire in Boston, didn’t simply ride into Philadelphia with this idea in their saddlebags. They had come to it, often begrudgingly, by way of years of political and

constitutional debate in the states, especially in the rebellious towns of Massachusetts.

Calculated to Answer Their Own Ends

If constitutions are astronomical, it can hardly be surprising that some of their framers were astronomers. The constitutional debate in Massachusetts revolved around James Bowdoin, who is also the person who did the most to save Pope's orrery. Bowdoin graduated from Harvard in 1745 and two years later inherited his father's fortune. He became enchanted with Newtonian physics, a wholly new way of understanding the world, believing in its predictability and even its perfectibility. The second-floor library in his house on the corner of Beacon and Somerset streets held twelve hundred books, five telescopes, a microscope, and two "Electrical Machines." Bowdoin was an avid amateur astronomer; in 1761 the *London Magazine* published his article, "An Improvement Proposed for Telescopes." Seven years later he presented an orrery made in London to Harvard College.[4]

Bowdoin's ideas about mechanical constitutionalism emerged during decades of conflict with Parliament. In 1753 he was elected to the Massachusetts legislature; in 1757 he was elevated to the governor's council. In 1764, at the end of the Seven Years' War, when Parliament began attempting to tax its North American colonies to raise revenue to pay the war debt, the council argued that such taxation was "unconstitutional," on the ground that, having no members in Parliament, they were without representation and so were governed without their consent. Parliament twice relented, repealing first a stamp tax and then a series of revenue measures known as the Townshend Acts. The colonies objected to these, too.

Bowdoin was of course far from alone in calling the new taxes "unconstitutional," since the frequent use of the word now occasioned a great deal of thinking about what was and was not authorized by England's constitution as well as considerable frustration that it had never been written down. In the 1760s John Adams, a young lawyer, wrote a series of essays for the *Boston Gazette* opposing British taxation and, in his diary, wondered how to tell what an unwritten constitution contains, by way of fundamental

law. The body of a man, like a body of law, is made of many parts, Adams considered, of which only some are essential or fundamental; the fundamental parts are the constitution; the rest is something else, like ordinary legislation, or the parts of your body you can live without. “The Limbs may be all amputated, the Eyes put out,” he wrote, and yet such a man may yet live: he breathes, eats, thinks; he lives. A clock, too, has a constitution, “certain Parts in the Frame of a Watch without which it will not go att all.” The dial plate, the hands: these “are the Essentials and Fundamentals of a Watch.” What, then, are the essentials and fundamentals of government? These, he deduced, are determined by its purpose. The purpose of the human body is to live; the purpose of a clock is to measure time; and the purpose of a constitution is the preservation of liberty and the proper operation of power. Whatever is necessary to these ends, he concluded, is what must be contained in an, again, unwritten, constitution.[5] Whatever thwarts these ends is, therefore, unconstitutional.

Neither Bowdoin nor Adams was, at this point, thinking about amendment because neither man was thinking about a constitution as something written down. This came about only as the conflict grew, and as the colonists began writing down their grievances and then, beginning in 1774, their constitutions.

In 1769 the royally appointed governor removed Bowdoin from his council, and the next year, after British soldiers fired on a rowdy crowd, the Boston Town Meeting chose him to prepare a report on what the Sons of Liberty called the “Boston Massacre.” (Adams, believing that every man deserved a fair trial, defended the soldiers and won their acquittal.) In 1773 Parliament passed the Tea Act, with which it aimed both to rescue a financially struggling East India Company and to convince its rebellious colonies to acknowledge its right to tax them. This they did not do. In December 1773 Bostonians dressed as Mohawks protested the tax by dumping a fortune’s worth of it into the harbor. In 1774 Parliament responded with the Coercive Acts—called, by the colonists, the Intolerable Acts—which included initiating a blockade of Boston harbor that was to be lifted only if the city made full restitution to the East India Company. General Thomas Gage, commander in chief of the British Forces in North America, arrived in Boston to become the military governor of Massachusetts. These measures were intended to force the city into submission. Instead, they elicited only defiance.[6] And as for actual Indians,

as opposed to colonists dressed up as Mohawks, Parliament halted all land grants to American settlers, in response to armed incursions of men from Virginia into Shawnee and Seneca-Cayuga territory in Ohio Country. Americans counted this thwarting of their desire to dispossess the Native inhabitants of their land as yet another grievance against Parliament.[7]

Even as acts of Parliament drove Massachusetts colonists to resist arbitrary authority, the acts of the colonists drove the people they held in a state of slavery to organize, too.[8] They gathered, if not in congresses, then in "companies." [9] They submitted their appeals to newspapers, and once Gage took charge, they petitioned him on behalf of all those "held in a State of Slavery, within the Bowels of a free and Christian Country," making the constitutional argument that they had "in common with all other men, a natural right to our freedoms." [10] These were their own declarations and resolves. It nearly worked. Gage's administration set in motion a bill that would have ended the slave trade, if not slavery itself. The bill was derailed when Gage dissolved the assembly.[11] In further defiance of Gage, colonists also disrupted the courts, beginning in Pittsfield, where they filed a petition arguing that the people of Massachusetts had been returned to "a State of Nature until our greavences are fully redressed by a final repeal of those injurious oppressive and unconstitutional acts." A crowd fifteen hundred strong surrounded the courthouse and prevented the sitting of the judges. Colonists in Springfield followed the same course, and by September, all the courts had been shut down.[12]

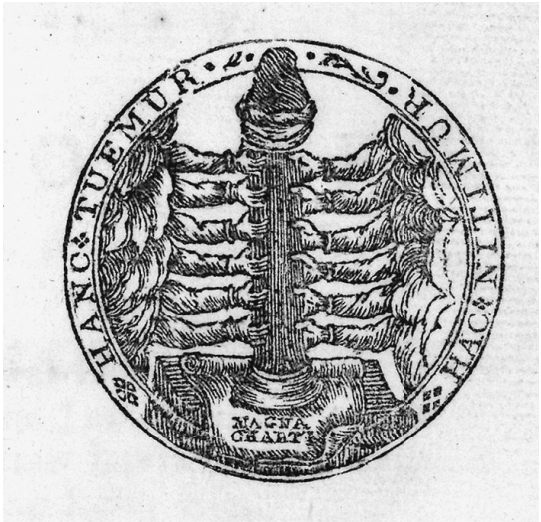
The colonists set up a new legislature, the Provincial Congress, that elected Adams and Bowdoin as two of Massachusetts' four delegates to the First Continental Congress. Bowdoin, citing poor health, declined. But Adams soon made his way to Philadelphia.

Beginning on September 5, 1774, fifty-six delegates from twelve colonies met in Philadelphia. (Georgia did not send a delegation.) They devised what might be considered the very earliest draft of what would become the U.S. Constitution, the Declaration and Resolves. It asserted Congress's authority to exist—"in a full and free representation of these Colonies"—and argued that the Coercive Acts violated "the immutable laws of nature, the principles of the *English* Constitution, and the several Charters or Compacts"—that is, the original charters of the colonies—and were therefore unconstitutional.[13] Congress also adopted a quite striking

seal: an unapologetically phallic pillar stands on the parchment Magna Carta, where it is being stroked, lovingly, even lewdly, by the hands of twelve men who are erecting this new constitution.[14]

Thoughts on Government

The start of the war, on April 19, 1775, created a crisis of governance that became a crisis of constitutionalism. Colonists ousted royally appointed governors and ministers and judges who had not fled, and they cobbled together emergency governments.[15] Their colonial charters now obsolete, they began to think they needed new ones (although Rhode Island and Connecticut didn't bother to replace theirs).[16] In Massachusetts, the Provincial Congress, which no longer in any way recognized Gage's authority, sought guidance from the Continental Congress, which answered that the commonwealth ought to continue to "conform, as near as may be," to its unrevised and recently abrogated 1691 royal charter, much to the frustration of those who wished to throw it off.[17]



Emblem of the Continental Congress, 1774

On July 6, 1775, Congress issued a Declaration of the Causes and Necessity of Taking Up Arms. "Our cause is just," it read, but it fell well short of a declaration of independence: "we mean not to dissolve that union which has so long and so happily subsisted between us, and which we

sincerely wish to see restored." [18] For the colonists, declaring independence could wait; devising constitutions could not. On November 3, Congress instructed New Hampshire, which had been governed by a 1692 charter, to "call a full and free representation of the People, and that the Representatives if they think it necessary, establish such a form of Government, as in their Judgment will best produce the happiness of the People." By the end of 1775, it had given the same instructions to South Carolina. Massachusetts now even more painfully chafed at its royal charter, and in the western part of the state, a faction calling themselves the Berkshire Constitutionalists simply refused to abide by it. To protest the provisional government, they employed the same strategy they had used to protest Gage's government: they shut down the courts. They furthermore submitted a complaint to the Massachusetts Provincial Congress, expressing their "abhorrence of that Constitution now adopting in this province"—the repugnant 1691 charter—and demanding a new one.[19]

In January 1776, John Adams told a delegate from Virginia that each colony "should form a government for itself, as a free and independent State." Their new constitutions would borrow from the written nature of the colonial charters and the unwritten nature of the English constitution. Adams drafted what he considered to be a model state constitution, published as *Thoughts on Government*. "The divine science of politicks is the science of social happiness, and the blessings of society depend entirely on the constitutions of government," he wrote. A man could live without arms and legs and even eyes, so long as he still had his constitution. So, too, a society. But notably, momentously, Adams insisted that the new state constitutions had to be not only devised but *written down*. This was only sensible. Their charters had been written documents; the colonists were, in this sense, used to written constitutions. But they were also used to the unwritten common law and England's unwritten constitution. Early Americans' ideas about constitutionalism would rely on both practices: some things were committed to writing, but many things were not, including natural laws, fundamental principles, customs, and traditions.[20]

Adams's model constitution provided for three branches of government, consisting of a representative assembly, an executive, and a judiciary, whose powers would be defined, and constrained, by a written constitution, printed and circulated. The very act of devising such a constitution would improve a people. "A CONSTITUTION, founded on these principles,

introduces knowledge among the People, and inspires them with a conscious dignity, becoming Freemen," he wrote. "A general emulation takes place, which causes good humour, sociability, good manners, and good morals to be general." [21] At nearly the same moment, Thomas Paine, in *Common Sense*, urged independence, calling on Congress to draft a "Charter of the United Colonies" and announcing, "We have every opportunity and every encouragement before us, to form the noblest purest constitution on the face of the earth." [22] In Berkshire County, Massachusetts, Thomas Allen, the leader of the Berkshire Constitutionalists, read *Common Sense* aloud at a meeting that led twenty-eight towns in neighboring Hampshire County to shut down their courts, too.[23]

"A mere demarcation on parchment" cannot protect liberty from power, as James Madison would argue.[24] But parchment was better than nothing, and better still would be a constitution printed so widely and so cheaply that you could carry a copy of it around, as Paine would later write, so that, when any disagreement might arise, people could "take the printed constitution out of their pocket, and read the chapter with which such matter in debate was connected." [25]

These advantages became clear only with experience. At the time, constitution-writing began out of necessity and urgency and to avert anarchy. On January 6, 1776, New Hampshire, whose royal governor had fled, adopted the first written constitution in what would soon become the United States. Its tone is rather reluctant: "we conceive ourselves reduced to the necessity of establishing A FORM OF GOVERNMENT to continue during the present unhappy and unnatural contest with Great Britain." But New Hampshire then did something still more radical: it decreed that this new constitution would not go into effect until it had earned the approval of the people. It was then ratified by the new state's provincial congress consisting of delegates from every town in New Hampshire. Also, it was not meant to last: it was set to be in effect only until the end of the war.[26]

South Carolina adopted its first constitution on March 26, 1776. On May 10, 1776, John Adams introduced a resolution into Congress calling on every other state to establish its own government and write its own constitution. Some delegates would have liked Congress to offer more specific instructions, a template, of sorts. "Would not a Uniform plan of Government, prepared for America by the Congress, and approved by the

Colonies, be a surer foundation of Unceasing Harmony to the whole?" asked Richard Henry Lee.[27] Instead, the details were left to the states.

Between 1776 and 1787, thirteen states wrote and adopted no fewer than twenty constitutions.[28] Drafts, revisions, and amendments, as well as arguments for and against, were printed in newspapers, pamphlets, and broadsides, by the thousands. Some thirty thousand men did the actual drafting and revising—serving as delegates in conventions or special congresses—but political participation in the process was far broader: about three hundred thousand men participated in constitution-making every two years, by way of reading and casting ballots. (About three in five white men could vote in the 1770s, given property requirements; by the mid-1780s, as many as nine in ten could vote, not least because property requirements were often ignored.)[29] Much of the rest of the population, which totaled four million people, played a part, too, enacting their approval or disapproval through petitions and lawsuits and informal complaints, and through folk rituals, from festivals to hooliganism. The "people out-of-doors," as they were called, gathered in mobs and crowds outside the halls of congresses, conventions, and legislative assemblies and exerted their influence.[30] The poor, especially, embraced ideas like those found in a pamphlet published in 1776, *The People the Best Governors*, whose author urged, "Let it not be said in future generations that money was made by the founders of the American states an essential qualification in the rulers of a free people." [31]

The free people wished to write their own constitutions, rather than have their legislatures write them, by holding special meetings. On May 20, 1776, four thousand Philadelphians turned up for a celebration of a resolution passed in the Pennsylvania Assembly, calling for a constitutional convention. "CONVENTIONS, my Fellow Countrymen, are the only proper bodies to form a Constitution," one Pennsylvanian wrote, and legislatures "are the proper bodies to make Laws agreeable to that constitution." [32] The *Pennsylvania Journal* printed this dialogue:

Q. Who ought to form a new Constitution of Government?
A. The people.
Q. Should the officers of the old constitution be entrusted with the power of the making of a new one when it becomes necessary?

A. No. Bodies of men have the same selfish attachments as individuals, and they will be claiming powers and prerogatives inconsistent with the liberties of the people.[33]

New Jersey held a constitutional convention on May 26 and ratified a constitution on July 2; Pennsylvania began its own convention in June. Virginia issued a declaration of rights on June 12 and a ratified a constitution on June 29. (It contained no amendment provision, leading Jefferson, in *Notes on the State of Virginia*, to describe it as insufficiently republican.)[34] On June 3, Adams wrote to Patrick Henry, telling him the order in which he thought everything ought to happen: "for every colony to institute a government; for all the colonies to confederate, and define the limits of the continental Constitution; then to declare the colonies a sovereign state." In the chaos of war, little was as predictable as Adams hoped, and he admitted to Henry his well-founded fear "that we shall be obliged to declare ourselves independent States, before we confederate, and indeed before all the colonies have established their governments." [35]

There was, in the end, very little to distinguish the acts of becoming states and adopting constitutions. Between April and July 1776, ahead of Congress and before the United States existed, American towns, associations, colonies, and states prepared more than ninety "declarations of Independence." [36] These propelled Congress toward independence. On June 7, Richard Henry Lee proposed, and John Adams seconded, a resolution "that these United Colonies are, and of right ought to be, free and independent States." [37] During the debate over the following days, delegates failed to arrive at any consensus and agreed to table the decision until the beginning of June, but in anticipation, they appointed Thomas Jefferson, John Adams, Roger Sherman of Connecticut, Robert Livingston of New York, and Benjamin Franklin as a committee to draft a declaration of independence.

Jefferson, thirty-three, had brought with him to Philadelphia Robert Hemmings, fourteen, a slave from Jefferson's plantation in Virginia. Hemmings was the first of Elizabeth Hemings's six children by John Wayles, who was also the father of Jefferson's wife, Martha. Robert Hemmings served as Jefferson's manservant during his time in Philadelphia, both in 1775 and in 1776. While the Second Continental Congress met, Jefferson rented a furnished parlor and bedroom on the

second floor of a three-story brick house; Hemmings likely slept in the hallway, or the garret, or a nearby stable. He dressed and shaved Jefferson, waited on him at table, and prepared his horse. Robert Hemmings attended him everywhere he went until Jefferson sailed to France in 1784, after which Jefferson would send for another child of Elizabeth Hemings, a young girl named Sally.[38]

Shaved and dressed each morning by Hemmings, Jefferson worked on the Declaration of Independence from the parlor of that brick house—submitting a draft on June 28. He was also drafting the preamble for the Virginia Constitution, and Adams was involved in drafting the constitutions of Virginia and New Jersey while avidly following—and recording in his diary—the goings-on in New Hampshire, South Carolina, and Maryland. In crafting the Declaration of Independence, they borrowed language and rhetoric from earlier declarations and from the earliest constitutions, too.[39]

To form a republican government is to reserve the right not only of violent revolution, Jefferson insisted in the Declaration, but also of the peaceable path of amendment. “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,” Jefferson wrote. But “whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it.”

To alter, like hemming a dress. To amend, to make better: free, fair, true, just.

Liberty Further Extended

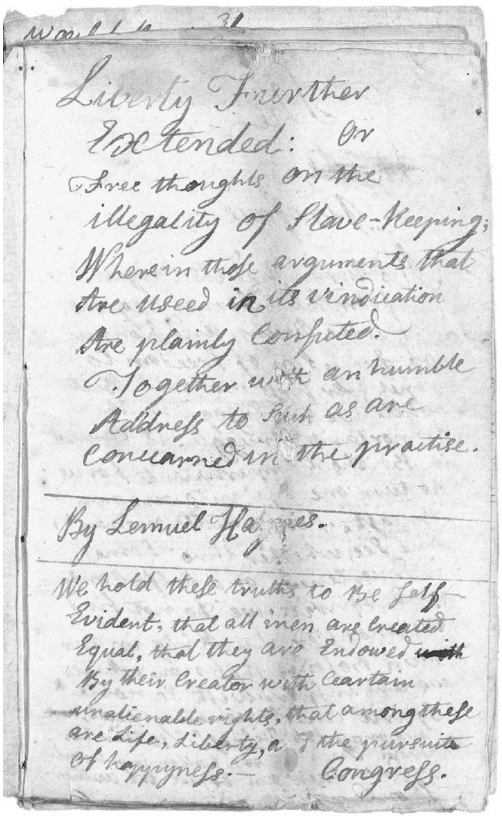
Joseph Pope began building his orrery in Boston when the United States declared independence, on July 4, 1776. James Bowdoin immediately took an interest, regularly visiting Pope’s house in the South End to monitor the watchmaker’s progress, and to study how the motions of the planets mimicked the workings of government.[40]

The Declaration of Independence inspired other philosophical projects, too. Lemuel Haynes, a twenty-three-year-old man who was the son of a

Black father and a white mother, copied out the Declaration's opening lines on the first page of a forty-six-page manuscript he wrote in 1776 and titled "Liberty Further Extended."

Haynes, born in Connecticut in 1753 and indentured into servitude as a boy, finished his service at the age of twenty-one in 1774, joined the militia, and then served in the Continental Army. The essay he wrote in 1776 is a meditation on the Declaration. More than that, it can rightly be considered a proposed amendment to it, a mending. Governments are instituted among men to secure their rights to life, liberty, and the pursuit of happiness, and *Whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it.* Haynes, in this essay, proposed just such an alteration. Affirming that "an affrican, has Equally as good a right to his Liberty in common with Englishmen," he declared that "Consequently, the practise of Slave-keeping, which so much abounds in this Land is illicit." [41]

Nor was Haynes alone in demanding a statement declaring slavery unconstitutional. Vermont's first constitution, drafted in 1777, prohibited slavery by turning it into a form of indentured servitude that would end, for men, at age twenty-one, and for women, at eighteen.[42] (At the time of its first constitution, Vermont was not a state but an independent republic; it joined the union in 1791.) Black men also frequently submitted petitions —"Petition after Petition," as one petitioner put it—to early state legislatures, in what can be considered their own declarations of independence. Petitioning is a right that English law guaranteed to everyone. People who couldn't vote, or hold office, still retained the right to petition.[43] In 1776 a man named Cuff, "now desiring to be made free," convinced his enslaver to emancipate him. In 1777 Cato, "an African by birth," filed charges against a Boston man, accusing him of having "attempted to sell him . . . as a slave & to transport him to foreign parts." Again and again people held as property declared themselves to be free.[44] In 1779 a couple in Boston freed a man named William "in Consideration of the Rights of Humanity." [45]


Liberty Further
Extended: Or
Free thoughts on the
illegality of Slave-Keeping;
Wherein those arguments that
are used in its vindication
are plainly confuted.
Together with an humble
Address to such as are
concerned in the practise.
By Lemuel Haynes.
We hold these truths to be self
Evident, that all men are created
Equal, that they are Endowed with
By their Creator with Ceartain
unalienable rights, that among these
are life, Liberty, & the pursuits
of happyness. Congress.

Lemuel Haynes, “Liberty Further Extended,” 1776

In January 1777 eight enslaved men—Lancaster Hill, Jack Peirpont, Peter Bess, Nero Funilo, Brister Slenfen, Newport Sumner, Prince Hall, and Job Lock—submitted a petition to the Massachusetts Provincial Government, headed by James Bowdoin, demanding their freedom, immediately, and asking the legislature to pass a law freeing anyone held in slavery at the age of twenty-one. They had, they insisted, “in common with all other Men, a natural & unalienable right to that freedom, which the great Parent of the Universe hath bestowed equally on all Mankind, & which they have never forfeited by any compact or agreement whatever.” [46] (James Bowdoin does not appear to have been persuaded by this argument; later that year, rather than freeing the last of his slaves, a man named Cyrus, he sold him, for twenty-three pounds.)[47] A petition submitted to the New Hampshire legislature in 1779, signed by nineteen men, made a similar appeal to fundamental law, asserting “that freedom is an inherent right of the human species” and “that private or publick tyranny and slavery are alike detestable to minds conscious of the equal dignity of human nature.”

They demanded an immediate end to slavery.[48] These are among America's oldest proposed constitutional amendments, and the longest delayed. New Hampshire did not formally end slavery until 1857.

Ninety-nine out of a hundred people in America

Because the men who wrote them had very little sense, especially early on, that these first state constitutions would last, they felt no real need to provide for amendment. The constitutions were, after all, emergency measures undertaken in wartime, expected to be replaced come peace. Written in haste, they relied on English common law, colonial charters, compacts, and covenants, but they were also experiments, building on the principles of republicanism: the consent of the governed, natural rights, and the sovereignty of the people. Most provided for a bicameral legislature, an elected executive, and an independent judiciary, with direct election of the lower house of the legislature and, in some states, of the upper house as well. Nearly all called for annual elections.

Most contentious and varied were the property requirements for voting. These rested on the theory that only men who were free of dependence on any other man possessed the independence of mind necessary to vote. (It was also in accordance with this theory that women were denied the vote.) Twelve of the first eighteen constitutions required voters to own either fifty acres of land or the equivalent in other quantifiable wealth; in four of these eighteen constitutions, men could vote only if they also paid taxes. Property requirements also differed for election for different offices and for holding office; the higher the office, the greater the property requirement to either vote for office or hold it. Even in states with such requirements, the amount of property necessary to vote was significantly lower than in England—about ten times lower—and a greater percentage of the adult male population of the United States owned property than did its counterpart in England, which meant that the early United States had the most broadly enfranchised population in the world.[49] This didn't just happen. It was the product of struggle. Poor men, farmers, and artisans demanded the right to vote, arguing that anything less violated republican principles. "Do not mechanicks and farmers constitute ninety-nine out of a hundred people in America?" asked a writer for the *Pennsylvania Packet*. "If these, by their

occupations, are to be excluded from having any share in the choice of their rulers, or forms of government, would it not be best to acknowledge the jurisdiction of the British Parliament, which is composed entirely of Gentlemen?" [50]

Pennsylvania's constitution, adopted in 1776, was the most radical of the early state constitutions, drafted by a convention of ninety-six delegates. Benjamin Franklin was elected president and served on the constitutional drafting committee with the brewer Timothy Matlack, who was known for his handwriting and for his radical republicanism.

Pennsylvania's constitution not only eliminated property requirements for voting but also targeted every trapping of aristocracy. There was no upper house of the legislature, only an assembly that elected the plural executive branch and that could remove justices from the state supreme court at any time. Proceedings of the assembly must be public; legislators served one-year terms; and bills were to be printed and publicly posted for a year for public comment, before the legislature could vote on them. A draft of the bill of rights stipulated that, because "an enormous Proportion of Property vested in a few individuals is dangerous to the Rights, and destructive of the Common Happiness of Mankind . . . every free State hath a Right by its Laws to discourage the Possession of such Property." During the convention's deliberations, delegates dropped this "enormous Proportion of Property" assertion. Another provision elided the distinction between a right to revolution and a right to amendment, stating that because "Government is or ought to be instituted for the common Benefit, Protection and Security of the People, Nation or Community," the people "hath an indubitable, unalienable and indefeasible Right to reform, alter or abolish Government in such a manner as shall be by that Community judged most conducive to the Public Weal." [51] This provision was accepted. The final draft of the constitution established a Council of Censors—essentially, a miniature constitutional convention—an elected body that would meet every seven years both to propose amendments and to review all recent laws to determine whether they conformed with "the principles of the constitution."

Four hundred copies of the constitution were printed and circulated for public comment on September 5, but it was not submitted to the people for ratification. Instead, the convention itself voted to adopt it, on September 28, decreeing that it should "remain in force . . . for ever unaltered, except

in such articles as shall hereafter, on experience, be found to require improvement, and which shall by the same authority of the people, fairly delegated, as this frame of government directs, be amended and improved for the more effectual obtaining and security the great end and design of all government." [52]

Five states, along with the Republic of Vermont, followed Pennsylvania's model, including its provisions for regular amendment.[53] But from the moment of the adoption of Pennsylvania's constitution, critics called for it to be revoked and rewritten.[54] They were alarmed at its excess of democracy, the unchecked tyranny of the majority. Its framers had failed to anticipate how vulnerable a unicameral or single-house legislature would be to demagogues and passing enthusiasms. "They have disgraced the name of Freedom in Pennsylvania," wrote one disgruntled citizen in the *Pennsylvania Packet*.[55] When John Adams first read Pennsylvania's constitution, he told Benjamin Rush, "The people of your state will sooner or later fall upon their knees to the King of Great Britain to take them again under his protection, in order to deliver them from the tyranny of their own government!" Another strong objection concerned the seven years' delay before any possibility of amendment; these critics found the constitution not too easy to amend but too difficult.[56] Still other critics urged a different amendment rule, arguing that every constitution must "be allowed to fluctuate, but no changes should ever be made in it without the consent of three fourths, or four fifths of the legislature, nor should any change ever affect the Bill of Rights." [57]

Pennsylvania's constitution, and the reaction to it, made clear that a commitment to the idea of constitutional amendment had emerged. But if constitutions could be amended, who was to do the amending? As ever, early state constitutions experimented. Most failed to include a formal amendment provision, and still less did they submit constitutions or amendments to the people for ratification (a practice that did not become widespread until the early nineteenth century); instead, they tried out different methods either to protect certain elements of government from legislative change, including supermajority requirements, or to allow for it. In some states, legislatures could amend constitutions; in others, a council of censors or a council of revision could do so. Except in New York, courts were not generally to be involved in crafting amendments, in determining

the constitutionality of laws, or in annulling laws deemed unconstitutional (though there were notable exceptions, instances where state courts did strike down laws as unconstitutional). And over time the possibility of amendment by legislative act was eliminated, on the theory that because a constitution is, among other things, a check on the legislature, amendment could be done, in one way or another, only by the people.[58] What this meant, and what it didn't mean, would come to a head in Massachusetts, where Joseph Pope was still steadily at work on his orrery.

A Door should be left open

With James Bowdoin elected as its president in May 1776, the Massachusetts legislature had immediately begun the process of devising a new constitution, only to meet with obstacles. Massachusetts seems, at first glance, an unlikely state to encounter trouble in devising a constitution. It had no end of possible drafters, not least among them John Adams. But Massachusetts also had a long history of popular resistance to established authority, and its town meetings were famously cantankerous, especially in the western part of the state, in the counties of Worcester, Hampshire, and Berkshire, counties that were more rural, and poorer, and less commercially oriented than the rest of the state, and that were resentful of the legislature that met in Boston.[59]

Even before the work began, the western town of Pittsfield, in Berkshire County, made two demands, both of which aimed to diminish the role of the legislature. First, the Pittsfield Town Meeting insisted that the constitution would have to be written by a body convened solely for the purpose—call it a constitutional convention—rather than by the state legislature, which could make law but not fundamental law. As the Pittsfielders put it, "If this fundamental Constitution is above the whole Legislature, the Legislature cannot certainly make it." Second, the town insisted that the constitution would have to be submitted to the towns for ratification because "the Approbation of the Majority of the people of this fundamental Constitution is absolutely necessary to give Life and being to it." These two innovations—the claim that constitutions have to be written by conventions, and that they must be ratified by the people—transformed constitutionalism.[60]

The state legislature obliged the Pittsfielders, but only to a point, appointing one delegate from every town to a drafting committee. But when the exigencies of war prevented that committee from meeting, the legislature proposed, in a letter to the town meetings, that it could draft the constitution itself. Ninety-seven town meetings replied; twenty-three objected to the plan, largely on the grounds that it failed to satisfy the two conditions stipulated by the town of Pittsfield. But some towns also cited the concern that if the legislature were to draft the constitution, it would retain for itself the power to amend it as well. The town of Concord, for instance, opposed any constitution drafted by the legislature "because a Constitution alterable by the Supreme Legislative is no Security at all." [61]

The legislature, bridling at this interference, went ahead and drafted the constitution itself but, acceding to one of Pittsfield's demands, sought ratification through a statewide referendum at which any male, propertied or not, being at least twenty-one years old, could vote. Towns were then to submit the results, yay or nay, to the legislature. Even in the very midst of war, this resulted in a flood of impassioned constitutional commentary.

One hundred and seventy-three towns, out of a total of some two hundred in the state, submitted returns to the legislature. The constitution was not well received. Many returns looked like this one, from the town then known as Norwich:

> the Voters Present—41
> those Voting for—00
> those Voting against Said Constitution as it now Stand—41[62]

The legislature had asked only for a count, but many towns, unbidden, offered an assortment of comments and proposed amendments; these were some of the earliest constitutional amendments in American history. They're also a good preview of sentiments that would be expressed by Anti-Federalists during the debates over ratifying the federal constitution.

Some Massachusetts towns objected to the process by which the 1778 constitution had been prepared and called for a true constitutional convention. Pittsfield explained its rejection of the constitution drafted by the legislature in a statement that epitomizes Americans' new philosophy of constitutionalism. The town began by declaring "an essential Distinction to be observed between the fundamental Constitution & Legislation." A

constitution creates a legislature that can pass laws “agreeably to it,” but a legislature “cannot give Life to the Constitution” because it is, instead, “the approbation of the Majority of the people at large that gives Life & being to it.” And for the same reason, Pittsfielders insisted, a free people reserve “a Right of Inspection Approbation rejection or Amendment” of any constitution.[63]

That most towns in Massachusetts agreed with this notion is evidenced by their willingness to propose amendments. Some towns proposed a different and more equitable system of representation. A number proposed eliminating the property requirement for legislators. (“Money ought not to be made a necessary Qualification,” wrote one town.) Some, like the town of Brookline, called for “a full and express Declaration of the Rights of the People,” the absence of which would become the chief complaint about the 1787 federal constitution, too.

Fifteen towns objected to the constitution’s exclusion from the right to vote of all “Negroes, Indians, and molattoes” and proposed extending suffrage to any man “being free, and twenty-one years of age.” Worcester objected that the restriction “deprives a part of the humane Race of their Natural Rights, merely on account of their Couler.” The town of Sutton elaborated on its objection by remarking on the manifest injustice of disenfranchising not only the “original Natives of the Land” but also “the poor innocent Affricans” who had been “cruelly brought from their native Land, and Sold here like Beasts” and “yet now by this Constitution, if by any good Providence they or any of their Posterity, obtain their Freedom and a handsome Estate yet they must be excluded [from] the Privileges of Men!” Sutton proposed an amendment that would have abolished slavery itself, urging that the constitution “say in express Terms that every Person within the State 21 years of age Shall have a Sole absolute Property in himself.”

No town objected to the restriction of voting to men, and the town of Beverly explicitly defended it, in a little essay that nicely summarized the prevailing view: “Women, what age soever they are of, are also considered as not having a sufficient acquired discretion, not for a deficiency in their mental powers, but from their natural tenderness and delicacy of their minds, their retired mode of life, and various domestic duties. These concurring, prevent that promiscuous intercourse with the world, which is necessary to qualify them for electors.”

Finally, but notably, the fiery townsmen of Lexington complained that the 1778 constitution was unamendable, except by the legislature itself. “It appears to Us, at least, of the highest Importance, That a Door should be left open for the People in this Matter,” the Lexington Town Meeting told the legislature, asking for “a Way explicitly pointed out, wherein they might, Legally and Constitutionally, propose, seek & Effect, any such Alterations or Amendments, in any future Time, as might appear to them Advantageous or Necessary.” Why include such a provision, a constitutional door? Because such a door would “be an happy Means, under Providence, of preventing popular Commotions, Mobs, Bloodshed and Civil War; which, too frequently, have been the Consequences of the want of Such an Opening.” [64]

Ratification failed, 1–5.[65] The people wanted that door left open.

Any Alteration of the Articles

Between 1776 and 1787, deliberations in the states established four elements as necessary for constitutional legitimacy: a constitutional convention, a bill of rights, a ratifying process, and an amendment procedure. Not every early state constitution included all four elements, but with each passing month, expectations for each of them grew.[66] These heightened expectations and particular requirements pressed upon Congress as it attempted to elaborate a frame of government for the confederated states. Three times Congress tried to devise such a constitution, and three times it failed as the delegates divided over questions of the powers retained by the states.

What Congress needed was a binding agreement among the states that would outline its own powers. In January 1776, Benjamin Franklin had proposed articles of confederation that included an amendment provision; ratification would require approval by a majority of the state legislatures. (While there were thirteen states, that majority would require seven.)[67] Had Franklin’s plan been adopted, the U.S. Constitution might never have been written, since his articles, unlike those that were adopted, met a reasonable standard for amendability. But practically, a confederation to which only seven of thirteen states agreed was no confederation at all.

On June 12, 1776, Congress appointed thirteen men to a committee charged with preparing Articles of Confederation. John Dickinson of Pennsylvania, a longtime reformer and moderate on the question of independence, was largely responsible for the first draft. After the committee made revisions, a draft went to Congress on July 12, where it was debated for more than a month. Populous states challenged the wisdom of the one state–one vote apportionment, without success. Much of the committee's draft was nixed, including every provision that gave Congress power over Western lands. Given the competing and unaligned interests of the states, the prospect of ratification seemed slight. "If it is debated, whether their slaves are their property, there is an end to the confederation," warned one Southerner. On August 20, instead of adopting the draft, Congress essentially tabled it and pressed on with matters relating to the war.[68]

By the fall of 1777, the states had declared their independence, and many had by now written their constitutions, well ahead of Congress doing the same. The states' position gave them leverage in negotiating a stronger relationship to the federal government, even as Congress, hoping to secure an alliance with France, experienced a new urgency about formalizing the confederation. Congress also wanted authority over what were known as "Indian affairs," which especially meant buying land and making treaties, with peoples who had their own constitutions.

Indian affairs

The many Native nations in the parts of North America that became the United States in 1776—and later—had their own fundamental laws: unwritten constitutions and practices akin to common law alongside covenants and treaties that were sometimes formalized in writing and through ceremonies and forms of record-keeping like wampum belts. In negotiations with American settlers and with the British, French, Dutch, and Spanish, Native nations deployed the arts of ceremony, ritual, and oratory for formalized exchanges, pledges, and treaties, often witnessed by thousands of people, to form what one legal scholar has called a "diplomatic constitution." In the colonial era, mistrustful of Americans, Native nations had often sought recourse with the crown, with some

success. After the United States declared independence and the war began, Congress hoped to secure alliances with Native nations, but many chose instead to fight on the side of the British.[69]

Even as Congress deliberated the Articles of Confederation, people who hoped the states would retain the power to maintain diplomatic relations with Native nations challenged congressional power. A provision that granted Congress "sole and exclusive right and power of . . . Regulating the Trade, and managing the Affairs with the Indians" had proven especially controversial; in its final form, it restricted this power to Indians "not members of any the States, provided that the legislative right of any State within its own limits be not infringed or violated." [70]

Even as the United States moved toward a formal confederation, the ancient Haudenosaunee, the people of the longhouse, a confederation whose constitution had been sealed by a belt of wampum hundreds of years before, collapsed. Decimated by disease and courted by both sides in the war, the confederacy split in early 1777. The Tuscarora and Oneida allied with the United States, the Onondaga, Seneca, Cayuga, and Mohawk with the British. The Ohio River, long the border between European settlers and Indian country, became a new kind of battleground. White Eyes and Killbuck, leaders of the Lenape (or Delaware), and Cornstalk, a Shawnee sachem, opened diplomatic relations with the Americans at Fort Pitt. Vigilantes killed Cornstalk, but the Lenape signed the Treaty of Fort Pitt in which the "aforesaid nation of Delawares, and their heirs," were guaranteed "all their territorial rights in the fullest and most ample manner" and were promised that they could "form a state whereof the Delaware nation shall be the head, and have a representation in Congress." That guarantee and that promise were never honored. And the treaty itself contained language that suggests that they would not be. "The Enemies of the United States have endeavored by every artifice in their power to possess the Indians in General with an opinion, that it is the design of the United States . . . to extirpate the Indians and take possession of their country," one of its articles read, as though to paint as libelous what was essentially true.[71]

During the war, if the United States did not declare a formal policy of eradication—the wanton murder of indigenous people—it nevertheless often encouraged white settlers and military renegades to pursue one. Despite Congress's bid for the exclusive power to engage in treaties with Native nations, states continued to attempt to exercise that power,

speculators continued to purchase land from Indians, and settlers engaged in raids and massacres as they drove west. The diplomatic constitution, such as it was, disintegrated into chaos. “We know not who to mind, or who to neglect,” Chickasaw chiefs would complain to Congress. Or as leaders of the Haudenosaunee would complain, the confusion over who, among the Americans, was authorized to engage in diplomacy with Native nations left them “like drunken men, reeling from side to side.” [72]

An immediate confederation

As Congress continued debating its own confederation, it added language to the Articles decreeing that each state retained “its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated” to Congress. To a clause that guaranteed the privileges and immunities of citizenship to all “free inhabitants” of the states, South Carolina delegates had suggested adding the word *white* between the words *free* and *inhabitants*, but that motion was defeated, eight states to two.[73]

The last article contained a provision for amendment, which required approval both by Congress and by the legislatures of every state. The Articles were to be inviolable, perpetual, and yet, by unanimity, alterable.[74] In November 1777, fifteen months after receiving the first draft, Congress finally approved the Articles. Ratification, like amendment, required a vote of approval from all thirteen states, which Congress hoped to achieve by March 1778.[75]

Congress did not ask the states to propose amendments to the Articles, but as happened in Massachusetts with its state constitution, they got them all the same. South Carolina’s assembly proposed twenty-one amendments. It also wanted the Articles to be easier to amend, proposing ratification of an amendment if eleven of thirteen states approved. New Jersey wanted Congress to have the sole power to regulate trade. Two hundred and fifty copies of the Articles were printed in New Hampshire so that town meetings could deliberate; their objections mainly concerned the calculation of taxation. Massachusetts proposed that the power of amendment be reserved to the states. New York wished that ratification would require not nine states’ approval but all thirteen. The March ratification deadline

passed, but by June, Congress began reviewing amendments proposed by the states, considering thirty-six proposed amendments in five days. Twenty-five received only one or two votes and just one received as many as five. Congress rejected all of them. “It seemed to be the Opinion of Congress that an immediate Confederation was of greater moment to the Interest of the States,” one delegate reported, “than any present Alteration of the Articles to accommodate the Opinion of particular States on the Amendments proposed.” Ten states ratified the Articles. Of the three holdouts, Delaware and New Jersey relented by 1779; Maryland refused until 1781.[76]

In all, it had been a crucial lesson. The Articles of Confederation, written in 1776 and revised in 1777, took so long to ratify that by the time they were adopted, they already needed amending, urgently, but the bar for amendment had been set too high. Congress, saddled with war debt and unable to raise revenue, had few funds and less power. In 1781 members of Congress proposed three amendments; all involved granting Congress new powers, and all failed. Twelve states approved an amendment granting Congress the power to tax imports, but Rhode Island, with less than 2 percent of the U.S. population, rejected it. One Virginian railed that “one little state can stop so important an object, against the opinion of all the others.” [77]

Proposed Amendments to the Articles of Confederation, 1781–86

1781	Empowering Congress to tax imports
1781	Granting Congress certain powers over the states
1781	Carrying the Confederation into effect and granting Congress additional powers
1783	Granting Congress temporary power to collect import duties
1783	Sharing expenses according to population
1784	Granting Congress temporary power to regulate commerce
1785	Granting Congress commercial powers
1786	A Grand Committee of Congress proposed seven amendments, viz.

Empowering Congress to regulate trade and tax imports and exports

Requiring states to contribute expeditiously and proportionately to federal expenses

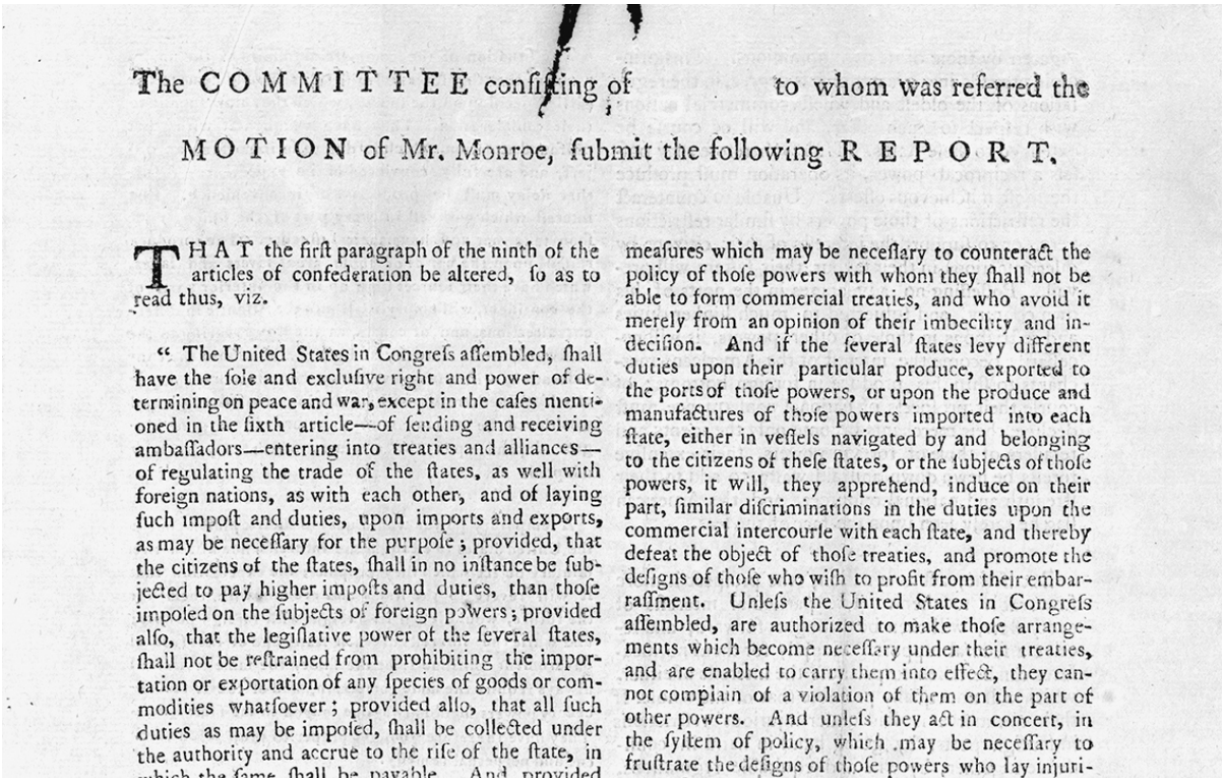
Empowering Congress to collect funds from states that fail to so contribute

Providing for payment of interest for states that contribute in advance

Requiring ratification by eleven states of any new regulations or revenue systems

Empowering Congress to declare what is and is not treason, piracy, or other felonies

Establishing a schedule for sessions of Congress



The COMMITTEE conſiſting of to whom was referred the MOTION of Mr. Monroe, ſubmit the following REPORT.

THAT the firſt paragraph of the ninth of the articles of confederation be altered, ſo as to read thus, viz.

"The United States in Congreſs aſſembled, ſhall have the ſole and excluſive right and power of determining on peace and war, except in the caſes mentioned in the ſixth article—of ſending and receiving ambaſſadors—entering into treaties and alliances—of regulating the trade of the ſtates, as well with foreign nations, as with each other, and of laying ſuch impoſt and duties, upon imports and exports, as may be neceſſary for the purpoſe; provided, that the citizens of the ſtates, ſhall in no inſtance be ſubjected to pay higher impoſts and duties, than thoſe impoſed on the ſubjects of foreign powers; provided alſo, that the legiſlative power of the ſeveral ſtates, ſhall not be reſtrained from prohibiting the importation or exportation of any ſpecies of goods or commodities whatſoever; provided alſo, that all ſuch duties as may be impoſed, ſhall be collected under the authority and accrue to the uſe of the ſtate, in which the ſame ſhall be payable. And provided

meaſures which may be neceſſary to counteract the policy of thoſe powers with whom they ſhall not be able to form commercial treaties, and who avoid it merely from an opinion of their imbecility and indeciſion. And if the ſeveral ſtates levy different duties upon their particular produce, exported to the ports of thoſe powers, or upon the produce and manufactures of thoſe powers imported into each ſtate, either in veſſels navigated by and belonging to the citizens of theſe ſtates, or the ſubjects of thoſe powers, it will, they apprehend, induce on their part, ſimilar diſcriminations in the duties upon the commercial intercourſe with each ſtate, and thereby defeat the object of thoſe treaties, and promote the deſigns of thoſe who wiſh to profit from their embarraſſment. Unleſs the United States in Congreſs aſſembled, are authorized to make thoſe arrangements which become neceſſary under their treaties, and are enabled to carry them into effect, they cannot complain of a violation of them on the part of other powers. And unleſs they act in concert, in the ſyſtem of policy, which may be neceſſary to fruſtrate the deſigns of thoſe powers who lay injuri-

From a report by a grand committee of the Continental Congress proposing seven amendments to the Articles of Confederation in 1781

By the 1780s, Americans, acting in the states, had cobbled together constitutions and, by way of experiment, had gropingly arrived at a set of republican principles about drafting, ratifying, and revising fundamental law. This set of ideas came from the people, like the townsmen of Pittsfield, as much as from their rulers.[78] And yet their delegates in Congress had devised Articles of Confederation that were, effectively, unamendable.

An useless Piece of Machinery

Back in Boston, where Joseph Pope kept tinkering with his orrery of brass and ivory, plotting orbits, and adjusting gears, James Bowdoin wondered what balance of powers and weighted checks and balances would be necessary for the proper operation of a constitution for the state of Massachusetts.

In February 1779, after the towns had rejected its constitution, the legislature asked the towns whether they supported the calling of a constitutional convention. The towns voted yes by a two-to-one margin, and with gusto. Once again, instead of simply reporting vote totals, many towns took the occasion to indict the legislature for having so long shilly-shallied. "By Delaying and Putting off the Forming a Bill of Rights and a free Constitution for this State," one western town complained, "we are Deprived of a Great Blessing viz Civil Government and Good wholsom Laws." More, it suspected that there was a conspiracy behind it, a plot by "Designing men" who hoped, by this delay, "to Lull People to Sleep, or Fatigue them other ways so as to obtain a Constitution to their own minds, Calculated to Answer their own Ends and wicked Purposes." [79]

Bowdoin's legislature had little choice but to call for a convention. It assembled in Cambridge, on September 1, 1779.[80] The 312 delegates included 143 from the three most radical western counties. In a victory for moderate and conservative delegates—especially wealthy eastern merchants—Bowdoin was elected president. He was also appointed to a thirty-man committee charged with preparing the constitution, and as chair of a three-man subcommittee—Bowdoin, Samuel Adams, and John Adams—charged with writing it.

As the delegates gathered and began their work, "A Freeholder" published in the *Boston Gazette* his recommendations for the convention,

expressing the popular understanding of the relationship between republicanism and constitutionalism. He listed four things the new constitution should do. First, “make the form of government as simple as possible . . . so that every man who can read English, may understand it.” Second, include a bill of rights “which should define in plain language, the alienable and inalienable rights of the people.” Third, “clearly define and limit the power of rulers.” And fourth, guarantee to the people “the power of removing rulers from their places, upon abuse of their authority.” [81] To a very considerable degree, the resulting constitution met these requirements.

Bowdoin wrangled the delegates through months of deliberation and ushered the document into being. But it was John Adams, calling himself a “sub-sub-committee of one,” who did the writing. “I made a Constitution for Massachusetts, which finally made the Constitution of the United States,” Adams would later boast, only slightly overstating his role.[82]

The constitution that Adams wrote for Massachusetts is the oldest written constitution in the world still in use, and more than any other state constitution, it served as the model for the U.S. Constitution. An elaboration of the model constitution Adams had proposed in 1776 in his *Thoughts on Government*, its preamble began: “We . . . the people . . . do agree upon, ordain and establish . . . ,” opening phrases that would be used again in Philadelphia in 1787.

Massachusetts’s new constitution also expressed a theory of government that Adams had for decades been pondering, a mechanical constitutionalism very closely related to Joseph Pope’s mechanical model of the solar system. (Even as he was serving as president of the Massachusetts Constitutional Convention, Bowdoin convinced the legislature to incorporate the American Academy of Arts and Sciences, arguing that the arts and sciences, like constitutions, “are necessary to the wealth, peace, independence, and happiness of the people”; Bowdoin, amateur astronomer, became its first president.)[83] In the main, Adams’s ideas accorded with Bowdoin’s understanding of the world, but as Bowdoin made clear in an address at the close of the convention, his priority was the operation of power. “A Government without Power to exert itself, is at best, but an useless Piece of Machinery,” he wrote, as if describing a clock that could no longer tell time, though he might equally have been describing the useless Articles of Confederation.[84]

With the Massachusetts Constitution, John Adams and James Bowdoin had built an excellent constitutional clock, a political orrery. But it fell to the people to wind and to mend it.

Ratification required approval by two-thirds of the towns. The convention printed nearly two thousand copies of the constitution and sent it to the towns with this instruction: “It is your Interest to revise it with the greatest Care and Circumspection, and it is your undoubted Right, either to propose such Alterations and Amendments as you shall judge proper, or, to give it your own Sanction in its present Form, or, totally to reject it.” [85] What less than two years before had been hotly contested—the people’s right to approve, reject, or amend the constitution—had become, by 1780, “your undoubted Right.”

Assented to by all

A core principle established in Massachusetts during its ferocious constitutional debates in the 1770s and ’80s is that a constitution has no authority over people who have no hand in writing, ratifying, or amending it. “Law to bind all must be assented to by all,” as one town meeting put it.[86] This raised the important questions of whether men who were denied the right to vote, and therefore were unable to participate in town meetings, were bound by the constitution, or whether there were ways other than by voting in a town meeting to assent to, or to amend, a constitution.

Once again the best evidence is to be found in petitions, a form of political participation open to all. In February 1780, Paul and John Cuffee, brothers from the coastal town of Dartmouth, submitted a petition to the Massachusetts legislature. The Cuffees were the sons of a Wampanoag woman from Cape Cod and an Akan man, born in West Africa, who had been sold into slavery in Massachusetts and was later manumitted. Both brothers had been born free. They owned a farm and had begun a whaling business. Because of their color, they could not vote. In their petition, which they submitted not only on their own behalf but on behalf of Black men who had been born into slavery, they began by noting the disadvantages of “having been deprived of enjoying the profits of our labor or the advantage of inheriting estates from our parents, as our neighbors, the white people

do.” They then argued that “having no vote or influence in the election of those that tax us,” they were subject to taxation without representation.[87]

Portrait purported to be of Paul Cuffee, artist unknown, c. 1810–20

Paul and John Cuffee did not participate in Dartmouth’s town meeting over whether to ratify the new state constitution. But they managed to participate in the debate all the same. At the time when the Cuffees submitted their petition to the state legislature, town meetings all over Massachusetts, including some near Dartmouth, were preparing objections to the new constitution’s property requirement—an estate worth sixty pounds, or an annual income of three pounds—for voting.[88] The town of Mansfield asked whether it could really be that “thousands of honest, good members of society shall be subjected to laws framed by legislators, the election of whom they could have no voice in?” [89]

The 1780 Massachusetts Constitution, unlike the failed 1778 constitution, said nothing about “Negroes, Indians, and molattoes.” In its new Declaration of Rights, it announced that “all men are born free and equal” and, borrowing from the Pennsylvania Constitution, stated that “all elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected.” (John

Adams, in his original draft, had included the word *male* before *inhabitants*, but this had been deleted during deliberation at the constitutional convention, and significantly, no one proposed adding the word *white*.)[90] Nonetheless, whether men who were not white could vote remained ambiguous. Paul Cuffee would later claim that, in response to their petition, the Massachusetts legislature had "passed a law, rendering all free persons of colour liable to taxation, according to the ratio established for white men, and granting them all the privileges belonging to other citizens"—including the right to vote.[91] Later historians have been unable to locate any such law passed in Massachusetts in the 1780s.[92] Other records claim that the state's supreme court issued this decision.[93]

Perhaps the best explanation is that Paul Cuffee meant that he and his brother, in their petition to the legislature, had told Massachusetts what its new constitution meant: they themselves had conducted an act not of constitutional amendment but of constitutional interpretation. When Paul Cuffee wrote that, in response to the petition, the State of Massachusetts had granted to "all free persons of colour . . . all the privileges belonging to other citizens," he meant that he had, in effect, told the state how to read its own constitution.

Nor was he alone in doing so. "All men are born free and equal," the new Declaration of Rights announced. Did those words also mean that slavery was unconstitutional? Not everyone was certain. Ellis Gray, who'd been a delegate at the constitutional convention, specified in his will in 1781 that "if my Negro Cato is not free by the Laws of the Land, it is my Will that he shall be so." [94] But people held in slavery read "All men are born free and equal" as an emancipation proclamation and insisted that the state read it that way, too. In the western town of Sheffield, a woman known as Mum Bet, born into slavery in 1744, learned about the new constitution and went to see a lawyer. "I heard that paper read yesterday, that says, all men are created equal, and that every man has a right to freedom," she told him. "Won't the law give me my freedom?" Testing the new constitution, she sued for her freedom and won. She changed her name to Elizabeth Freeman. In Massachusetts at least, slavery became unconstitutional because of the way Elizabeth Freeman and others read it.[95] In 1783, in *Commonwealth of Massachusetts v. Jennison*, the Massachusetts Supreme

Court ruled that slavery was “wholly abolished” with the state’s constitution and could “no longer be tolerated.” [96]

Pennsylvania had moved in the same direction, becoming, in March 1780, the first state to pass a gradual abolition law, ending slavery “in grateful commemoration of our own happy deliverance from that state of unconditional submission to which we were doomed by the tyranny of Britain.” [97] Like Massachusetts, Pennsylvania had taken part in a second wave of constitution-writing. Under the terms of the state’s 1776 constitution, the state was scheduled for its first seven-year evaluation by the elected Council of Censors in 1783. Critics, who were mainly wealthy eastern merchants, tried to call for a new constitutional convention where they hoped to adopt a constitution more like the one ratified in Massachusetts in 1780. “Constitutionalists” wanted to leave the 1776 constitution intact. So divided was the Council of Censors that a committee charged with reporting on “those articles of the constitution which are materially defective and absolutely alteration and amendment” issued both a majority report, endorsed by twelve members, and a minority report, endorsed by ten. The majority called for a convention to amend the 1776 constitution, proposing “such alterations as appear to us to be best calculated to secure to you the blessings of free and equal government.” They wanted to abolish the unicameral legislature, retract the legislature’s power to remove the judges of the state’s supreme court, remove term limits, and replace the plural executive with a governor. The 12–10 vote in favor of a convention fell short of the required two-thirds majority, and the council had no choice but to give the 1776 constitution another seven years’ trial.[98] By the time Pennsylvania’s Council of Censors was scheduled to meet again, in 1790, ideas about how to amend constitutions would have undergone yet another revolution.

Article X

In 1780, after Massachusetts circulated its proposed new constitution, two hundred towns were expected to submit returns documenting their votes on ratification. Only 181 returns survive in the state archives. It’s possible some were lost, but it seems likeliest that only 181 towns did, in fact,

submit returns. (There are all kinds of reasons a town might fail to hold a meeting, not least that the country was still at war.)

Some returns were straightforward, either approving or rejecting the constitution as written. Others approved the constitution only on condition that certain amendments were made. Still others never made entirely plain whether they approved or disapproved. This presented the legislature with a problem: how were these rather ambiguous returns to be tallied? Among the constitution's more controversial elements, especially for poor farmers in the western part of the state, was Article X, the amendment provision.

Article X required the legislature to ask the towns, every fifteen years, whether they wanted to amend the constitution. Seventy-nine towns objected to this provision, chiefly because they found it too restrictive. Article X, to their eyes, did not go far enough. Sixty-seven towns wanted the term to be shorter than fifteen years. ("The Time Perfixed for altering or Revising the Constitution ought not to be more than five years," one town recommended.) And twelve towns wanted the amendment process to begin *automatically* at the end of every fifteen years, that is, that it not be put to a referendum.

If only 181 towns submitted returns and 79, or two-fifths, failed to ratify Article X, Article X did not pass by the required two-thirds majority. The legislature appears to have decided to engage in some creative accounting.[99] On June 16, 1780, it simply declared the constitution, in its entirety and without amendment, ratified.[100] James Bowdoin had perhaps had enough of the disgruntled revolutionaries west of Worcester.

Right around the time when this happened, Joseph Pope decided to decorate the twelve corners of his orrery's mahogany cabinet with figures cast in bronze. (The casting may have been done by the silversmith Paul Revere and the carver Simeon Skillin Jr.) Pope's progress on the orrery, in the garret of his house, had been slow. The work was painstaking. And Pope could hardly spare many hours from his first-floor shop, where he built and repaired clocks and watches. Still, James Bowdoin professed himself "more and more pleased" with it as the years passed by. By adding figures cast in bronze, Pope chose to honor three men: Isaac Newton, who'd discovered the law of gravity; Benjamin Franklin, who'd experimented with electricity; and James Bowdoin, president of the Massachusetts Constitutional Convention.[101]

In Joseph Pope's conception of a constitutional order, expressed through the metaphor of a solar system, the towns in the farthest-flung part of the state, far to the west, were as distant as the planets of Neptune and Pluto. In Pope's orrery, Newton's bust sits on a plinth. Franklin, a standing figure, holds a lightning rod. Bowdoin leans on a column, topped with the figure of a sun, the center of the solar system, the center of government.

Materially Defective

Nearly as soon as the Articles of Confederation were ratified, in 1781, just after Massachusetts ratified its own constitution, the crippling inadequacies of the Articles became painfully obvious. And that they did not admit revision made matters considerably worse.

The United States negotiated peace with Britain in 1783. Under the terms of the Treaty of Paris, Britain ceded to the United States all its claims to territories east of the Mississippi River and south of the Great Lakes. These were lands of Native nations, but none of them were invited to the treaty negotiations. Congress, lacking funds to buy this land or an army to conquer it, decided instead to simply claim ownership, issuing grants to unceded land to American veterans in exchange for their service and selling vast swaths of it to speculators, who in turn went on to sell smaller plots to settlers who seized Indian lands, raided Indian settlements, and killed Indians.[102] That meant that while the War for Independence had ended, conflict with Indians had not.[103] That summer delegates from thirty-five Native nations met in a Wyandot settlement in Ohio to form a new Indian Confederacy aimed at halting the advance of the United States and pledging to sell no land unless the whole of the league consented. Thayendanegea, a Mohawk sachem who had stood with the British during the war, declared, "Let there be Peace or War, it shall never disunite us, for our Interests are alike nor Should any Thing ever be done but by the Voice of the whole." [104]

U.S. policy meant that an Indian war would be ongoing; the unamendable Articles of Confederation meant that Congress had no power to deal with such a war. Thayendanegea and other Native leaders, citing "ancient customs," in treaty-making, sought to exert their own power to enact binding agreements.[105] Between 1783 and 1786, Native nations signed six treaties with Congress and seven with individual states. These

treaties established boundaries, guaranteed treaty enforcement, and pledged that Native nations would have representation in Congress. In a treaty with the Cherokee in 1785, at a meeting attended by thirty-six chiefs and thousands of Cherokee, the United States pledged that "the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress." [106] But individual states and settlers, pursuing their interests, generally contested or ignored these treaties. George Washington complained in 1784 that Americans "roam over the Country on the Indian side of the Ohio—mark out Lands—Survey—and even settle them. This gives great discontent to the Indians, and will unless measures are taken in time to prevent it, inevitably produce a war with the western Tribes." [107] While the Americans struggled to strengthen their confederation, the Indian Confederacy resolved, at a meeting at a Wyandot settlement near Lake Erie in 1786, that "all treaties carried on with the United States should be with the general voice of the whole confederacy." [108]

Thayendanegea, portrait by Gilbert Stuart, 1786

Both Congress and the states were saddled with crippling war debts, totaling some $75 million (something like $2.5 billion in 2024). Disputes

between states remained unresolved as Congress had no power to resolve them. Congress had also to consider the insufficiency of the Articles of Confederation for controlling trade, not only with Indians but among the states: the thirteen states had thirteen different currencies. Members of Congress proposed amendments to the Articles of Confederation in 1784, 1785, and 1786, but every proposal failed. In 1786 twelve states approved an amendment granting Congress the power to raise revenue from tariffs. New York refused. One former Continental Army general wrote to Major General Henry Knox, “Every liberal good man is wishing New York in Hell.” [109] The situation had become desperate. By now, there were rumors that a federation of Indians was organizing and planning for war.[110]

Nor did Congress have the power to contend with domestic insurrections. In the spring of 1786, farmers in western Massachusetts, led by the Revolutionary war veteran Daniel Shays, protested a series of measures that they associated both with the 1780 constitution and with Bowdoin, who’d been elected governor in 1785. Devastated by the war, Massachusetts had lost its profitable West Indies trade and had lost, too, much of its fishing and whaling industries. The state government, deeply in debt, levied taxes and decreed that citizens had to pay them in hard currency. The tax burden amounted to a third of most farmers’ income. Many farmers, especially in the western part of the state, had no currency to pay, and because they also couldn’t pay poll taxes, they’d become disenfranchised. These were the very towns that had most ardently opposed the 1780 constitution as a conspiracy of wealthy Boston merchants to impoverish them and take away their liberty, not least by making it harder to amend than they would have liked. Modeling their movement on the resistance movement of 1774, these farmers began gathering in town meetings and county conventions and organizing direct action, aimed at the very institutions they associated with tyranny: the courts, which, under the terms of the new constitution, enforced the dreaded taxes. Armed men surrounded courthouses and stopped them from meeting. Shays said his goal was to “overthrow the present constitution.” [111]

That July the debate topic at Harvard’s commencement was “Whether the Happiness of a People depends upon the Constitution or upon the Administration of it?” [112] It was the question of the hour. The next month delegates from fifty towns met in the western county of Hampshire. They

listed seventeen grievances, many of which involved either amendments or demands for a new constitution. They wanted to abolish the upper house of the legislature and to move the state capital to the middle of the state.[113] (Moving capitals to more central locations was common at the time, but so long as Maine remained part of Massachusetts, Boston was in fact central.)

Bowdoin took a hard line against the uprising of western farmers. As to amending the 1780 constitution, he flatly refused. In September 1786 he declared that "the people solemnly agreed to support the Constitution for the space of fifteen years, and made ample provision for the revision of it at the end of that period, if it should then be thought necessary." But he made clear that in the meantime, the protest would be considered an insurrection that would be put down and the insurrectionists prosecuted. This was a matter the U.S. Constitution wouldn't take up until the aftermath of the Civil War.

At Bowdoin's urging, the legislature passed the Disqualification Act, barring anyone who participated in the insurrection from holding any public office, down to schoolmaster, and barring them, too, from voting.[114] Bowdoin also called out the militia. But the men who were called to put down the insurrection, who knew that the state had no money to pay them and, in any case, supported the rebels, didn't bother to show up. Bowdoin could scarcely call on an impotent and indebted Congress for aid.

That spring a hobbled Congress appointed a committee to recommend such amendments to the Articles of Confederation as were necessary, as Congress put it desperately, "for the purpose of obtaining from them such powers as will render the federal government adequate to the ends for which it was constituted." [115] The committee came up with a very long list. But its work was derailed when Virginia called for a convention of delegates to meet in Annapolis in September. This convention was meant to do the same work. But by September 11, 1786, a week after the convention was scheduled to begin, only twelve delegates had turned up, from only five states: New York, New Jersey, Pennsylvania, Delaware, and Virginia.[116] Not even Maryland, hosting the convention, had sent a delegation. The men who did turn up decided to call for another convention, and then they went home.[117]

In October 1786, when the Massachusetts delegate Rufus King arrived in New York to attend Congress, he wrote back to Bowdoin, "I found

congress deeply impressed with the Danger arising from a very extensive combination of savages." Diplomats representing the "United Indian Nations"—Iroquois, Cherokee, and Ohio nations—delivered an address to Congress denouncing the depredations of settlers and speculators, blaming Congress for their incursions, proclaiming "all partial treaties as void and of no effect," and warning that they would "be obliged to defend those rights and privileges which have been transmitted to us by our ancestors." [118] Congress's commissioners of Indian affairs had been little able to offer redress or to resolve boundary disputes. The states resented the interference of the federal government, and Native nations found the federal government too weak to honor any of its agreements or treaties. As one Muscogee diplomat reported of negotiations early in 1786, "the Commissioners & Gov. of Georgia quarrelld & thereby rendered themselves Completely ridiculous, in the eyes of the Indians." Or as one Cherokee chief told Congress, "We have held several treaties with the Americans, when Bounds was always fixt and fair promises always made that the white people Should not come over, but we always find that after a treaty they Settle much faster than before." The Creek called the people of the state of Georgia *ecunnaunuxulgee*, "people greedily grasping after the lands of red people." Both the commissioners of Indian affairs and the secretary of war Henry Knox urged Congress to adopt a policy of "fairly purchasing" Indian lands instead of simply seizing them and advised, "instead of a language of superiority and command; may it not be politic and Just to treat with the Indians more on a footing of equality?" [119] This advice was not heeded.

Shays's Rebellion impressed the urgency of change on those members of Congress who already supported revising the Articles of Confederation. But the diplomacy of Native nations and the visit of the United Indian Nations was even more convincing. In October 1786 Congress pledged troops to aid Governor Bowdoin in Massachusetts, but it had no power to compel anyone to serve. In December hundreds of Shaysites forced the closure of a court meeting in the western town of Springfield. Bowdoin conscripted a militia, funded by wealthy gentlemen, to put down the rebellion, which was accomplished by February 1787: four rebels were killed, twenty wounded; hundreds would be disenfranchised.[120]

By then, the Massachusetts legislature had lost faith in Bowdoin; the General Court voted to cut his salary in half (an act Bowdoin vetoed). That spring, when he ran for reelection against John Hancock, turnout broke

records, and although many of Hancock's would-be voters were disenfranchised by the Disqualification Act, Hancock won in a rout.[121]

In Congress on February 21, 1787, Rufus King introduced a resolution calling for a constitutional convention to be held in Philadelphia, beginning on the first Monday in May, its delegates to meet "for the sole and express purpose of revising the Articles of Confederation" so as to "render the federal constitution adequate to the exigencies of government, and the preservation of the Union." [122] King called for a revision. But it would turn out that the time had come not merely for amendment but for a wholly new constitution.

They know their sun and their stars

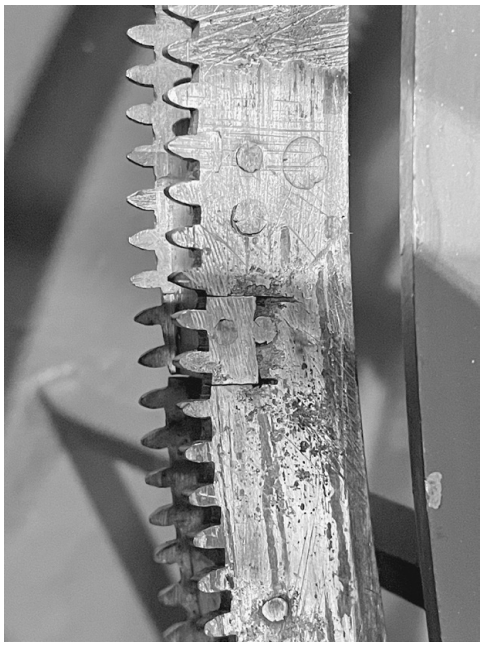
Fire struck Boston the month before the Constitutional Convention began in Philadelphia. On the evening of April 20, 1787, Dr. Benjamin Waterhouse and his dinner guest, James Bowdoin, eyeing the flames in the distance, feared the worst for Joseph Pope's magnificent orrery. Waterhouse rushed across town and found Pope, "pale and trembling," unable to remove the machine from the garret. "We could not cant the machine and pass it through the door, and so down the stairs, on account of the brass meridian," Wadsworth wrote. Pope had built a ship in bottle: it would not fit through the door. In the greatest of haste, even as the roof began to burn, Pope and Waterhouse called, desperately, for help. As men came to their aid, they broke down the door, knocked down the banisters that narrowed the stairwell, and wiggled the most magnificent model of the solar system ever built in the United States out of the inferno. "Much praise is due to those gentlemen who, by their exertions, preserved to the lovers of science this curious specimen of philosophick and mechanic ingenuity," the *Massachusetts Gazette* reported. Pope's house and everything else in it "were in a few minutes reduced to ashes." [123]

Bowdoin had the orrery carted to his mansion, where he displayed it in his drawing room, much admired, a wonder. He asked the fledgling American Academy of Arts and Sciences to assess its merit.[124] A "Committee for examining Machines" reported that the whole is "put in motion by turning a single winch," and "while the ingenuity of the Artist, display'd in the workmanship pleases, the plan itself so perfectly executed,

excites admiration." [125] At Bowdoin's urging, the legislature authorized a public lottery to raise money to purchase the orrery, after which it was removed to Harvard College, where it became the jewel of the college's collection of scientific instruments, housed in its famed Philosophy Chamber.

When delegates met in Philadelphia in 1787 and drafted a new federal constitution, they described federalism as a solar system, with the federal government its sun, and the states as so many planets. James Madison described the republic as if he were a mathematician, wielding a pencil and compass, etching a perfectly exact circle on a map of the United States, its center the nation's capital, or as if he were calculating the distance from the sun of its farthest planet. "As the natural limit of a democracy is that distance from the central point which will just permit the most remote citizens to assemble as often as their public functions demand," he wrote, "so the natural limit of a republic is that distance from the centre which will barely allow the representatives to meet as often as may be necessary for the administration of public affairs." [126]

For years afterward, Pope's celebrated orrery—built in the years between the drafting of the Declaration of Independence and the U.S. Constitution—remained a symbol of America's constitutional order. In 1794 a newspaper called *The Federal Orrery* would appear in Boston. Its motto was *Solemque suum sua sidera norunt*: "They know their sun and their stars." Its masthead featured a woodblock engraving of a sun surrounded by fifteen stars, for the then-fifteen states in the union. Explained the editor: "No spectacle can be more gratifying to the patriotism, nor more useful to the union of AMERICANS, than a political ORRERY, which exhibits to the naked eye of reason, the accordant motions of the FIFTEEN PLANETS, revolving, by the equal energy of state-projection, and federal attraction, around the SUN OF GOVERNMENT." [127]



A repair to the Pope Orrery

But Pope's orrery, like the U.S. Constitution itself, would turn out to never really have been in excellent working order. No machine is ever perfect. It may be that Pope had not understood that the brass gears could not hold the great weight they were asked to hold. But how to fix it? A constitution could be amended. But an orrery? A clockmaker was called in to repair it. He inspected the machine closely, took out his tools, drilled a hole, and plugged in a rivet. And still, as one observer explained, the "orrery would work all right up to a certain point when suddenly the whole solar system would give a tremendous jump." [128] And then it would stop. The moons would no longer orbit Saturn. Jupiter would no longer turn on its axis. And the earth would stand still.

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2

All Men Would Be Tyrants

Anne Willing Bingham, portrait by Gilbert Stuart, 1797. Bingham is holding a copy of *Voyage en Syrie et en Egypte* (1787), a testament both to her learnedness and to her friendship with the author, the French philosopher and historian Comte de Volney.

Woman is born free and remains equal to man in rights.

—Declaration of the Rights of Woman and of the Female Citizen, Paris, 1791, a failed amendment to the Declaration of Rights of Man and Citizen, 1789

"Our good ladies, I trust, have been too wise to wrinkle their foreheads with politics," Thomas Jefferson wrote from Paris to Anne

Willing Bingham in Philadelphia in May 1788.[1] But every brow was furrowed, even those of the ladies. That spring, as a new federal constitution was being debated, everyone had ideas about it, including Bingham, widely considered one of the most beautiful and most sophisticated women in the United States.[2]

Whatever Bingham thought of the Constitution, neither she nor any other woman in the United States had any power to amend it. Nor did women have any right either to reject or to assent to it, notwithstanding the republican commitment to the principle that "law to bind all must be assented to by all." The Constitution drafted in Anne Willing Bingham's Philadelphia in 1787 was written by men, for men and their posterity. No amendment has ever repaired that error. And a method of constitutional interpretation that looks only backward at the history of men will never repair it, either.[3]

Born in 1764, Anne Willing was the daughter of a man who once served as a judge. She did not herself become a judge. Nor would she have been allowed to study the law. She did, however, study classics as a girl, which was unusual; she must have had a lively mind. In 1780, at the age of sixteen, she married a Philadelphian named William Bingham, who made his fortune as a West Indian merchant and was possibly the richest man in the United States.[4] Between 1783 and 1786, they lived in London and Paris, where they socialized with Abigail and John Adams, Thomas Jefferson, the Marquis de Lafayette, and the leaders of British and French fashion and politics. Abigail Adams thought Anne Bingham was "the finest woman I ever saw" and admired both her intelligence and her disposition, though she was greatly troubled by Bingham's love of luxury, a trait Adams associated with frivolity, coquetry, and uselessness. In Philadelphia, beginning in 1786, Bingham's husband served as a delegate to the Continental Congress; he later took a seat in the U.S. Senate. At their lavish house on the corner of Third and Spruce Streets, the Binghams hosted what can only be described as a Federalist society. During the summer of 1787, while her husband was serving in Congress, which met in New York, Mrs. Bingham hosted delegates to the Constitutional Convention at her home in Philadelphia. She also held salons, modeling her gatherings—with guests who included Alexander Hamilton, John Jay, and George Washington—on the female-hosted salons of Paris.[5] Gilbert Stuart painted her portrait and, when he

designed a silver dollar, is thought to have used her as his model for "Liberty," making Anne Willing Bingham the very emblem of America itself.[6]

When Bingham left France in 1786, she had pledged to Jefferson that she would write to him from Philadelphia to offer her opinion on how it compared with Paris. Jefferson, at forty-four, remained in France with his daughter Martha, fifteen, and where, in July 1787, he was joined by his younger daughter, Mary, nine, known as Polly, and his dead wife's fourteen-year-old half-sister, Sally Hemings, whom Jefferson owned as a slave. (Sally Hemings was the younger sister of Robert Hemmings, notwithstanding the different spellings of their names.) On their way to Paris, the two girls, Polly and Sally, stayed with the Adamses in London. Sally, Abigail Adams wrote Jefferson, "is quite a child." [7]

In June 1787, with delegates to the Constitutional Convention meeting regularly in her parlor, Anne Willing Bingham wrote Jefferson the letter she had promised him and took the occasion to express her admiration for the involvement of Parisian women in political affairs—and her envy of them. "The Women of France interfere in the politics of the Country, and often give a decided Turn to the Fate of Empires," she wrote. "They have obtained that Rank and Consideration in society, which the Sex are intitled to, and which they in vain contend for in other Countries." [8] It seems she wished women had that kind of political influence in the United States. They did not.

There were no female framers of the U.S. Constitution. No woman served as a delegate to the Constitutional Convention in Philadelphia that summer or, in the coming months, to any of the ratifying conventions in the states. Men insisted that women ought to have no part in writing, ratifying, or amending the Constitution, that women could neither grant nor withhold their consent to a new federal government since they were governed not by legislatures but by their fathers and husbands. When Jefferson, forty-five, wrote to Bingham in May 1788, he and Hemings, fifteen, are thought to have begun a sexual relationship that would last for decades. (Slavery was illegal in Paris, but to become free, Hemings would have had to file a petition with the court.)[9] Sally Hemings did not consent to the U.S. Constitution; whether she consented to Jefferson is unknown. She was, in any event, a child. French politics were becoming more volatile, Jefferson

reported to Bingham. “Men, women, children talk nothing else,” even as Americans were debating the ratification of the Constitution. “You too have had your political fervor,” he added. But he trusted that American women were too detached from constitutional debate to wrinkle their foreheads over these matters and were instead “contented to soothe & calm the minds of their husbands returning ruffled from political debates.” [10] Was Sally Hemings soothing his?

Anne Willing Bingham seems unlikely to have been “contented to soothe & calm” the men who wrote and ratified the Constitution. Women complained. “The present custom of the world, especially in America, of excluding from any share in Legislation, is both unjust and detrimental,” a piece titled “The Ladies” asserted in a Boston newspaper in 1790. “It is certainly unjust to exclude from any share in government one half of those who considered as equals of the Males, are obliged to subject to laws they have no share in making!” [11] After the Constitution was ratified, only an amendment would ever be able to change that. Within Bingham’s bridling, and the bridling of everyone else left out of the Constitution as it was drafted in 1787, lies, if not the philosophy of amendment, then its spirit, restless and unruly.

We the Ladys

The rule of men over women is written into American constitutionalism. “A Government without Power to exert itself, is at best, but an useless Piece of Machinery,” John Adams had written in his diary, but “a Power without any restraint is Tyranny.” [12] In everything from plays and periodicals to novels and political pamphlets, power without restraint was represented as the tyranny of men over women and, in particular, as the act of rape. This was true in seventeenth-century England, and it was true in eighteenth-century America. The metaphor was both ubiquitous and elaborate. The act of revolution, an uprising against tyranny, was akin to defense against a rapist. Political consent was akin to sexual consent. A social contract was like a marriage contract.[13]

Gilbert Stuart pictured Liberty as Anne Willing Bingham, her tresses flowing, her breasts nearly exposed. America had long been figured as a

woman, and especially as a Native woman, naked and vulnerable. To imagine tyranny was to picture her being raped.

Rape is how tyranny was represented in one of the best-known engravings of the American Revolution. In 1774 a broadside that indicted the British government for its response to colonial resistance to parliamentary taxation had represented this act as rape. The engraving depicts America as a nearly naked Native woman being violently assaulted by the king's ministers. They hold her down. They lift her gown. "Behold America upon the ground, / Whilst deadly foes the wretched maid surround," an accompanying poem explains. The Earl of Mansfield, the chief justice of the King's Bench, in his judge's robes, binds her arms. Lord North, the prime minister, a copy of one of the Coercive Acts—the Boston Port Bill—poking out of his jacket pocket, pours tea down her throat, which she vomits at his face. The Earl of Sandwich, First Lord of the Admiralty, holds her feet and peers up the sheet that drapes her legs. On the ground, a torn and ragged piece of paper labeled "Boston Petition" has been cast aside. (The king and Parliament had refused a petition from the city seeking relief.) An ashamed, allegorical Britannia looks away.

America Swallowing the Bitter Draught. Broadside, Philadelphia, August 1774.

This engraving, first printed in London in April 1774 by Englishmen sympathetic to the American resistance movement, had been the most widely circulated representation of the colonists' struggle against parliamentary taxation. A Philadelphia printer retitled it, "The Persevering

Americans.” In Boston, Paul Revere had etched it onto copperplate and sold a thousand copies. A printer in Connecticut carved it into a wood block and printed it as the cover for his almanac for 1775. And once the war began, soldiers in the Continental Army had carved it onto their powder horns—the polished horns of cattle or oxen, where they stored their gunpowder: the picture of rape riling up their resolve, as if it were their very ammunition.[14]

But it wasn’t only this one engraving. Rape was the eighteenth century’s favorite metaphor for arbitrary authority, for tyranny, for government without consent. In speeches, sermons, and pamphlets, revolutionaries had described Britain as raping America.[15] One New England minister had asked his congregation how they could “hear the cries and screeches of our ravished matrons and virgins that had the misfortune to fall into the enemies’ hands, and think of returning to that cruel and bloody power which has done all these things?” [16] The idea had united Americans, formed them into a single body—a violated body politic—and justified their resistance to Britain.[17] On the eve of declaring their independence, insisting on their right to govern themselves, and writing their first constitutions, American revolutionaries, from rioters to soldiers to delegates to the Continental Congress, had pictured themselves and their country—land they had seized from Native peoples—as a naked woman, resisting rape.[18]

Rape wasn’t merely a metaphor. Once war broke out in 1775, British soldiers had fought not only on battlefields but in people’s very homes, seizing weapons, food, and livestock, quartering troops—and raping women. Soldiers had stopped Catherine Stone and Isabel Mitchell, a white woman and a Black woman, as they were walking down a street in Philadelphia, allegedly for questioning, then dragged them away and raped them. One woman had testified that a soldier “presented his Pistol at her & then charg’d his Bayonet against her Breast & Swore he would Run her thro the Heart.” Another told a New Jersey woman “he would Blow her Brains out if she did not go” with him.[19] On Long Island, two soldiers raped Elizabeth Johnstone while her toddler daughter “stood by crying.” Accused of the crime, the soldiers said, “she was a Yankee whore or a Yankee bitch and it was no great matter.” [20] A broadside published in Pennsylvania told this story: “WILLIAM SMITH, of Smith’s Farm, near Woodbridge, hearing the cries of his daughter, rushed into the room, and found a Hessian Officer attempting to ravish her, in an agony of rage and resentment, he instantly

killed him; but the Officer's party soon came upon him, and he now lays mortally wounded at his ruined, plundered dwelling." [21] Newspapers reported these stories again and again, less with sympathy for the victims of rape than in service of an argument about the nature of tyranny.

If tyranny was, metaphorically, rape, then revolution was its remedy, as John Locke argued in 1690 in *Two Treatises on Government*. But as the English political philosopher Mary Astell pointed out in her reply to Locke, in *Some Reflections upon Marriage*, first published in 1700, for actual rape, there was very little remedy, a woman raped by her husband having "no Redress, scarce Pity. . . . It being thought a Wife's Duty to suffer everything without Complaint." Asked Astell, "If all Men are born free, how is it that all Women are born slaves?" [22]

American framers of constitutions offered no answer. When, in the 1770s and '80s, American men wrote their first constitutions, they left women out. *If all Men are born free, how is it that all Women are born slaves?* Like the failure to abolish slavery, this omission was first criticized not decades or centuries later but at the very time it was made, as an error needing mending.

A Female Congress

It was not inevitable that women were left out of the Constitution in 1787. Nor was it entirely consistent with eighteenth-century political thought; it both was and wasn't. The constitutional exclusion of women could be said to follow from the common-law doctrine of coverture, under which married women were "covered" by their husbands: legally, they did not exist. A *feme covert* could not own property, agree to a contract, or sign a legal document. Because of the doctrine of coverture, a man could not be criminally charged with raping his wife; he possessed her body. (And by a similar logic, the father of an unmarried daughter, not the daughter herself, seeks a remedy if she is raped.)[23] But it could equally be said, and it was said, that the constitutional exclusion of women betrayed the emerging practice of constitutional republicanism that, at least for a time, contemplated the idea that women are part of the People.

On October 20, 1774, six days after issuing the Declaration and Resolves, the fifty-three men in Congress executed a document known as

the Articles of Association, announcing a boycott on all goods imported from or exported to Britain and any of its colonies.[24] Five days later a female congress of fifty-one women met in Edenton, North Carolina, to form an "honourable and spirited association" and resolve "not to drink any more tea, nor wear any more British cloth." (They would instead mend their old clothes.) They declared all this to be "a duty which we owe, not only to our near and dear connections who have concurred in them, but to ourselves." They signed their names to the document and sent copies to newspapers, including the *Virginia Gazette*.[25] This effort at representing themselves and forming their own congress earned them mainly mockery. A loyalist printer in New York published *A Dialogue Between a Southern Delegate and His Spouse.* A satire of Congress, it depicts a wife far more adept at politics than her husband. When he, the Southern delegate, tells her, "Never, Dear, with Politics, trouble thy Head," she wonders whether it wouldn't have been better if Congress had been exclusively comprised of women:

> *Wou'd! instead of Delegates, they'd sent Delegates Wives;*
> *Heavens! we cou'dn't have bungled it so for our Lives!*[26]

Early in 1775, after the declaration of the Edenton women was printed in London's *Morning Chronicle*, Americans' female Congress became the subject of a Hogarthian satire. An engraving titled "A Society of Patriotic Ladies" depicted the women of Edenton as, variously, ugly, seducible, uncouth (slurping out of a bowl), and neglectful of their children. (An unattended child sits on the floor, licked by a urinating dog.) The print takes specific aim at the capacity of women to draft and sign legally binding declarations. A Black woman in a kerchief carries a pot of ink on a tray, the artist here commenting at once on promiscuous racial mixing and on the hypocrisy of white women who demanded their own liberty while enslaving other women. Quills in hand, the bewigged white women are signing a parchment document—a constitution—that begins, "We the Ladys." [27]

Having heard the news, a London merchant named Arthur Iredell wrote to his brother, James, in North Carolina, inquiring, "Is there a Female Congress at Edenton?" James Iredell was a lawyer who would become North Carolina's foremost advocate for ratifying the U.S. Constitution; he

would go on to serve as one of the first justices of the U.S. Supreme Court. Two sisters of his wife, Hannah Johnston, had signed the Edenton Declaration. Her brother-in-law, in London, professed amusement. “We Englishmen are afraid of the Male Congress,” he wrote, noting that the ladies had, “ever since the Amazonian Era been esteemed the most formidable Enemies.” [28]

A female congress represented, to satirists, the excesses of revolution. To question the rule of a king over his colonies would surely one day lead, they jested, to questioning the rule of men over women. But the female congress had never been a joke.

In 1776 Abigail Adams, avidly following the course of events as the colonies moved toward independence and began writing constitutions, wrote to her husband in Philadelphia. “I long to hear that you have declared an independency,” she began, “and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies.” She could hardly have been clearer. And still she elaborated on this point, making plain exactly what she was asking for: “Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could.” And then she issued a threat that is very often read as a joke, because that is how her husband read it: “If perticuliar care and attention is not paid to the Laidies we are determined to foment a Rebelion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.” He knew her best, and he believed she was teasing. But then this was how men dismissed the political demands of women. “*Our good ladies, I trust, have been too wise to wrinkle their foreheads with politics*.”

Men used rape as a political metaphor, but for women the fear was real. *All men would be tyrants if they could.* The right to resist rape—to wage a revolution against tyranny—was a central tenet of republicanism; to a female writer, it illustrated the need for women to represent their own interests in any new government. John Adams wrote back to his wife on April 14, joking about the “Despotism of the Peticoat” in much the same satirical spirit with which English periodicals had greeted the female congress at Edenton. “As to your extraordinary Code of Laws, I cannot but laugh,” he wrote, with a dismissal worth reading word for word:

> We have been told that our Struggle has loosened the bands of Government every where. That Children and Apprentices were disobedient—that schools and Colledges were grown turbulent—that Indians slighted their Guardians and Negroes grew insolent to their Masters. But your Letter was the first Intimation that another Tribe more numerous and powerfull than all the rest were grown discontented.—This is rather too coarse a Compliment but you are so saucy, I wont blot it out. Depend upon it, We know better than to repeal our Masculine systems.[29]

Abigail Adams does not appear to have been amused.

Demands like hers weren't commonplace, but neither were they exceptional. Richard Henry Lee's sister, Hannah Lee Corbin, wrote to him (in a letter now lost) complaining that women with property of their own who were either widows or unmarried had no representation and, without it, ought not to be obligated to pay taxes. "The doctrine of representation is a large subject, and it is certain that it ought to be extended far as wisdom and policy can allow," her brother wrote back. "Nor do I see that either of these forbid Widows having property from voting." Acceding to the logic of his sister's argument about unmarried and widowed women of property, Lee wrote that he "would at any time give my consent to establish their right of Voting." [30]

No matter how serious were the pleas of women to be represented in the new forms of government erected in the 1770s and '80s, they were ridiculed and ignored, and their very remarks were most often unrecorded or, if recorded, later lost. Delegates to the Continental Congress and to the Constitutional Convention could not avoid discussing the institution of slavery, because they disagreed about it and had very different relationships to it. But nothing required them to discuss the common-law doctrine of coverture or the political status of women: they did not disagree about it, they had the same experience of it, and they benefited equally from it.[31]

The exchange between Abigail and John Adams is notable not only because it survives but because, for all that he dismissed her concerns, he, revealingly, answered them. The week after John Adams wrote to his wife, "We know better than to repeal our Masculine systems," he wrote to James Warren, president of the Massachusetts Provincial Congress, begging him to move quickly on the drafting of a new state constitution and asking him to remember that "there must be a Decency and Respect and Veneration introduced for all Persons of Authority, of every Rank, or we are undone." [32] Worried that the struggle for independence had "loosened the bands of

government every where"—between husband and wife, master and servant, rich and poor—Adams pressed Warren to be sure to get that new constitution written, with all the trappings of rank intact, the sooner the better. He soon afterward wrote to another friend in Massachusetts, insisting on the importance of property qualifications for voting, on the theory that lifting *any* restriction threatened the legitimacy of *all* restrictions. If poor men could vote, Adams speculated, "there will be no End of it. New Claims will arise. Women will demand a Vote. Lads from 12 to 21 will think their Rights not enough attended to, and every Man, who has not a Farthing, will demand an equal Voice with any other." [33] *Women will demand a vote.* The urgency with which Adams urged states to draft new constitutions came, in part, from his concern that a delay would lead to more radical demands.

The week that John Adams wrote to James Warren, Abigail Adams wrote to Warren's wife. Mercy Otis Warren was a political theorist, historian, poet, and playwright, most celebrated for her two-volume *History of the Rise, Progress, and Termination of the American Revolution.* She knew well the argument for female political equality. *If all Men are born free, how is it that all Women are born in chains?* These were arguments that Mercy Otis Warren had studied from girlhood with her brother, James Otis, a lawyer and leader of the resistance movement in the 1760s. In 1764 Otis had written a treatise called *The Rights of the British Colonies Asserted and Proved*. Like many eighteenth-century political theorists, he located the origins of popular sovereignty in the idea of an imagined state of nature, in which people agree to form a social contract, or compact, to establish a government, by constituting themselves into a body politic. For John Locke, it was plain that only men enter the social contract, that is, public life; women and children remain at home, in private life, where they are ruled by men.[34] But for Otis, locating the original social contract as having been formed in a state of nature necessarily establishes the political liberty of all, since if all were reduced to a state of nature, had not women and girls "as good a right to give their respectable suffrages for a new King as the philosopher, courtier . . . and politician?" Otis moved from this argument to an indictment of slavery: "The colonists are by the law of nature freeborn, as indeed all men are, white or black." And he insisted, too, borrowing from Mary Astell, on the unfinished nature of every government derived from a compact:

> Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature? If every man and woman born or to be born has and will have a right to be consulted and must accede to the original compact before they can with any kind of justice be said to be bound by it, will not the compact be ever forming and never finished, ever making but never done? [35]

Mercy Otis Warren might have had her brother's most famous essay in mind as she read Abigail Adams's letter, detailing her very frustrating exchange with her husband. "He is very sausy to me in return for a List of Female Grievances which I transmitted to him," Mrs. Adams complained to Mrs. Warren.[36] "I requested that our Legislators would consider our case and as all Men of Delicacy and Sentiment are averse to Excercising the power they possess," she told her, "yet as there is a natural propensity in Humane Nature to domination, I thought the most generous plan was to put it out of the power of the Arbitary and tyranick to injure us with impunity by Establishing some Laws in our favour upon just and Liberal principals." This her husband had laughed off.

Abigail Adams had had an idea. She asked Mercy Otis Warren "to join me in a petition to Congress." [37] They never sent that petition. Or at least, it's never been found. Maybe they sent it, and it was thrown away. It would have been tantamount to a proposed constitutional amendment. *As all men would be tyrants if they could, women are not bound by any Laws in which we have no voice, or Representation.*

Him or Her

Every constitution tells a story, offers a history, an account of its origins and authority. Early state constitutions invented the People by marrying political history to political philosophy.[38] By the People, constitutions meant the (free, white, property-holding) men who, resisting tyranny, formed new governments to whose power they gave their consent. South Carolina's provincial congress, for instance, explained how its existence followed from the right to resist tyranny: "Whereas the British Parliament, claiming of late years a right to bind the North American colonies by law in all cases whatsoever, have enacted statutes for raising a revenue in those colonies and disposing of such revenue as they thought proper, without the consent and against the will of the colonists," the colonists convened a legislature to

govern as “a full and free representation of the people of this colony.” [39] Virginia’s bill of rights referred to “all men” who “are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.” [40]

Who exactly were these “people”? Maryland’s constitution opened with a declaration “that all government of right originates from the people.” These were, specifically, “the people of this State.” But there were classes both within and without that category. Maryland’s constitution also referred to “the inhabitants of Maryland” (who are subject to common law), “the public” (whose interests are to be served by the government), “every man” (who ought to have the right to vote and the right to petition the legislature), “any person” (whose estate warrants protection), and “every freeman” (who has a right to remedy for injury, language specifically designed to clarify that no person held in bondage had any such right).[41]

That “the people,” in early state constitutions, was an invented category is illustrated by what happened in Delaware. Some five thousand loyalists in Delaware signed a petition objecting to the idea of a new constitution; sent to the Continental Congress, it was intercepted and destroyed before it arrived.[42] “The people” did not mean “the inhabitants of Delaware.” It meant certain men who constituted themselves as an independent state by an act of consent. Those who dissented or who were incapable of granting consent were not so constituted.

The People, in this sense—an idea so codified that it’s best capitalized—did not include poor men, the enslaved, or women. Early constitutions were wartime documents and their notions of peoplehood depended heavily on the idea of independence born both of property-holding and of capacity demonstrated by military service. Women made wartime sacrifices, too, and some calls for sacrifice specifically employed language to include women, like a 1777 New Jersey law that used “him or her” and “his or her”: “if any person having any blankets to sell, or such sufficiency as to enable him or her to spare a part without distressing his or her family . . . or if any commissioner shall have reason to believe that any person hath secreted his or her blankets.” [43] And women were wont to point out their contributions

to the war effort, as when Rachel Wells, a widow, wrote the Continental Congress, “I have Don as much to Carrey on the war as meney that Sett Now at ye healm of government & No Notice taken of me.” [44] No notice was taken.

To revise it and propose Amendments

“Our Federal Constitution is generally thought defective,” Benjamin Franklin, in Philadelphia, wrote Thomas Jefferson in Paris in April 1787, informing him that the convention “is to assemble here next Month, to revise it and propose Amendments.” [45]

At the time, Franklin was making other kinds of amends. He’d been named president of the “Pennsylvania society for promoting the abolition of slavery and the relief of free negroes unlawfully held in bondage.” Four days after writing to Jefferson, he signed his name to the society’s constitution, pledging, as did all its members, “to extend the blessings of freedom to every part of the human race.” [46] To join—to lead—the Pennsylvania Abolition Society was to engage in an act of anti-constitutionalism, vowing, in effect, to defy any state constitutions that sanctioned slavery.

The delegates trickled into town. James Madison, the thirty-six-year-old Virginian, arrived on May 5 and began keeping a journal on May 14, the day the convention was supposed to begin. Madison’s notes, of over five hundred pages, a day-by-day diary, summaries of speeches, and witty character sketches, would constitute the fullest record of the deliberations. This record is, of course, incomplete. Madison, writing furiously, was also participating and recorded only about 10 percent of what was said on any given day.[47] Then, too, it’s important to consider that he may have been taking notes quite specifically for Jefferson rather than for posterity. They were certainly not meant for the public. The delegates held their deliberations in secret—they even nailed the windows shut—and pledged not to reveal to the public anything that had happened at the convention for fifty years. Madison wrote most of the notes in the summer of 1787, though he didn’t finish this first draft until 1789. Later, as the weightiness of the proceedings grew, Madison would revise his notes, almost ceaselessly, for

decades, amending his very memory. The original notes tell one story, the revisions another.[48]

"Monday May 14 was the day fixed for the meeting of the deputies in Convention for revising the federal Constitution," Madison began. "On that day a small number only had assembled." (Two members of delegations from seven states were required for a quorum.)

The day Madison began his notes, Monday, George Washington reached Philadelphia. He stayed at the home of Robert and Mary Morris. (William Pierce, a delegate from Georgia, wrote character sketches of each of the delegates, e.g., "Robert Morris is a merchant of great eminence and wealth; an able Financier, and a worthy Patriot. He has an understanding equal to any public object, and possesses an energy of mind that few Men can boast of. Although he is not learned, yet he is as great as those who are.")[49]

On May 18, Friday evening, Washington and several other delegates, passing the time, attended a lecture at the college—the institution that would become the University of Pennsylvania. Washington wrote in his diary, "Went with Mrs. Morris & some other Ladies to hear a lady read at the College Hall."

That lady was Eliza Harriot, a famed "female genius" who had founded academies for girls and women and lectured on language and literature, female education, and female equality. She lectured in 1787 "On the Faculties of the Human Mind." She had come to Philadelphia that spring to be in the city for the Constitutional Convention. She began advertising her lectures on May 4, when the first delegates began to arrive. The subjects of her course of lectures, that May, included the work of Sir William Jones, a Welsh judge and an advocate for universal suffrage and the abolition of the slave trade. Jones's works, one printer reported, were "almost unknown and unheard of in this country, until they were introduced in a Course of Lectures read by a Lady in the University"—Eliza Harriot, in Philadelphia, on the very eve of the Constitutional Convention.[50] Harriot stated her views on politics and literature. Her opinions about a federal constitution went unrecorded. But they likely encompassed the views of Sir William Jones, that the right to vote should be universal and that slavery should be abolished.

At the convention, twelve states were to be represented by fifty-five men. Rhode Island refused to send a delegation, on the grounds that the

convention lacked the authority to amend the Articles of Confederation.[51] The delegates were wealthy, some modestly, some considerably. Scottish-born James Wilson was the most influential: at the convention, he would speak 168 times, more frequently and more pointedly than anyone else except Gouverneur Morris. It's Wilson, not Madison, who proved the most important architect of the Constitution.[52] Reported the shrewdly observant William Pierce: "He is well acquainted with Man, and understands all the passions that influence him. Government seems to have been his peculiar Study, all the political institutions of the World he knows in detail, and can trace the causes and effects of every revolution from the earliest stages of the Greecian commonwealth down to the present time. No man is more clear, copious, and comprehensive than Mr. Wilson, yet he is no great Orator." Alexander Hamilton was a better speaker, although, according to Pierce, "His manners are tinctured with stiffness, and sometimes with a degree of vanity that is highly disagreeable."

Twenty-three of the fifty-five were lawyers; the rest were merchants and wealthy farmers or plantation owners, along with a smattering of physicians. Overwhelmingly, they were British. Like other wealthy, educated men, they had married later, and had fewer children, than poorer men. Twenty-five were slave owners. About half had helped draft their state constitutions.[53] Their average year of birth was 1743, their average age forty-three. Most could not remember the French and Indian War, or the enormous pride in being British that attended it. They had come of age in the troubles. Franklin, eighty-one, was the oldest; Jonathan Dayton, twenty-six, the youngest. Franklin might have been elected president of the convention but for his infirmity. Instead, the delegates elected Washington, who was fifty-five.

On May 22 Franklin's sister Jane Franklin Mecom, seventy-five, wrote to him from Boston to express her hopes for the constitution being written "with the Asistance of Such a Number of wise men as you are conected with in the Convention." Mecom had lived a life of poverty. She married at fifteen; most likely she'd been seduced—likely raped and become pregnant and forced to marry her rapist. She'd given birth to twelve children, lost her husband and two of her sons to insanity, and raised her grandchildren and great-grandchildren. She'd suffered gravely in the Revolutionary War and witnessed the abuse of women at the hands of British soldiers. In the aftermath of Shays's Rebellion, she pleaded for peaceableness and the

laying down of arms. “I had Rather hear of the Sword being beat into Plow-Shares,” she urged her brother, just as he was taking his seat at the Constitutional Convention, “if by that means we may be brought to live Peaceably with won a nother.” [54] What might she have thought of a right to keep and bear arms? She never said. And no one asked.

Proceeding de novo

The convention reached a quorum on Friday, May 25, when at least two delegates from each of seven states had arrived. Immediately, they faced a series of challenges. The federal coffers were nearly empty. Poor farmers, artisans, and laborers were refusing to pay taxes and demanding the right to vote. Disputes continued between the states. War with Indians loomed in the north, south, and west; here and there, it had already begun. The United States’ chief source of wealth lay in its Western lands, but states, settlers, and speculators were everywhere encroaching on unceded, ancestral Native lands, and no matter what Congress might pledge, Native nations had little reason to trust Americans. As one member of Congress complained, “the Indians will hardly be prevailed on, by seeing only paper & parchments, to believe that the U. States are in fact the Sovereigns of that Country.” [55]

Silhouette of James Madison, c. 1790

Madison, thirty-six, very short, very earnest, and very well-read, arrived in Philadelphia with a plan in his pocket. For Madison, the inability of the federal government's real power to regulate "Indian affairs" was chief among the defects of the Articles of Confederation. But if the convention aimed to remedy those defects, it was also an indirect attempt to amend state constitutions. Many delegates sorely lamented democratic elements of the state constitutions, which included annual elections, term limits, weak executive branches, and popularly elected legislatures that were unchecked by either executive or judiciary. "None of the constitutions have provided sufficient checks against the democracy," complained the Virginia delegate Edmund Randolph.[56] James Wilson had been among the fiercest opponents of Pennsylvania's constitution; unable to amend his own state's constitution, he dedicated himself to the task of revising the federal one. Pennsylvania had a weak, plural executive; in framing the federal government, Wilson "moved that the Executive consist of a single person." Another Pennsylvania delegate, Gouverneur Morris, felt the same, and as the deliberations proceeded, he was among those speakers who recommended that any new federal constitution remedy the errors of Pennsylvania's. On the question of term limits, for instance, he warned that "a change of men is ever followed by a change of measures. We see this fully exemplified in the vicissitudes among ourselves, particularly in the State of Pena." [57] Pennsylvania's experience, like Virginia's, had also illustrated the problem of making a constitution too difficult to amend. As Madison complained about Virginia's, "though its defects are evident to every person, we cannot get it amended." [58]

On Tuesday, May 29, Randolph introduced what became known as the Virginia Plan, which had been chiefly drafted by Madison and Wilson in the days before the convention achieved a quorum, during meetings between the Virginia and Pennsylvania delegations. (Wrote Pierce: "Mr. Randolph is Governor of Virginia,—a young Gentleman in whom unite all the accomplishments of the Scholar, and the Statesman. He came forward with the postulata, or first principles, on which the Convention acted, and he supported them with a force of eloquence and reasoning that did him great honor.") The Virginia Plan provided for a strong central government of three branches with a powerful judiciary, a bicameral legislature with representation in both houses in proportion to population. The lower house would be elected by the people; members of the upper house would be

nominated by state legislatures and elected by the lower house of the national legislature. The president would be elected by the legislature. A "Council of revision," consisting of the president and the national judiciary, would review all laws passed by the legislature before they could take effect. The Virginia Plan required that the constitution be approved by Congress and then ratified by the people, i.e., "submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people to consider & decide thereon." It also included a mechanism for constitutional amendment. "Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."

Before the day was through, Charles Pinckney, of South Carolina, introduced a quite similar plan. (Pierce: "He is . . . in possession of a very great variety of knowledge. Government, Law, History, and Phylosophy are his favorite studies, but he is intimately acquainted with every species of polite learning, and has a spirit of application and industry beyond most Men.") The ideas in both the Virginia Plan and in Pinckney's draft, as Pinckney later wrote to John Adams, "all proceeded upon the idea of throwing out of view the attempt to amend the existing Confederation (then a very favorite idea of a number) & proceeding de novo—of a Division of the Powers of Government into legislative executive & judicial & of making the Government to operate directly upon the People & not upon the States."

No one disputed the necessity of an amendment provision, which is one reason it received, relatively speaking, little attention. But the nature of that discussion followed the themes of the rest of the debate, in which the lines of dispute fell between states with large populations (Virginia, Massachusetts, and Pennsylvania) and all the rest, and between states that depended on slave labor (every state south of Pennsylvania) and those that did not. Madison's Virginia had a free population of about four hundred thousand, roughly the population of Massachusetts and Pennsylvania, but an enslaved population of another three hundred thousand, the largest enslaved population in any state. Much in Madison's mind turned on this distinctiveness of population: he wanted proportionate representation in both houses, rather than equal suffrage, and he wanted to count enslaved

people in that calculation. That would make Virginia the nation's most powerful state.[59]

On June 5 the delegates entertained a proposal to modify the method of amendment proposed in the Virginia Plan, suggesting "that provision ought to be made for hereafter amending the system now to be established, without requiring the assent of the Natl. Legislature." This idea followed the philosophy of amendment so thoroughly explored in Massachusetts: the legislature, which is a creation of a constitution, should not wield the power of amending it. Massachusetts delegate Elbridge Gerry voted in favor of the proposal. "The novelty & difficulty of the experiment requires periodical revision," he said. "The prospect of such a revision would also give intermediate stability to the Govt. Nothing had yet happened in the States where this provision existed to prove its impropriety." Seven states voted in favor, and three (Virginia, South Carolina, and Georgia) against.

Early modifications to the Virginia Plan included the defeat of the council of revision and a change from the original plan, whereby the house would have elected the senate, in favor of election of senators by state legislatures. Then, too, small states voiced vigorous opposition to ending equal state suffrage, much to Madison's frustration. "If each State retained its Sovereignty an Equality of Suffrage would be proper, but not so now," Madison said. Delaware's delegates insisted they did not have the authority from their tiny state to approve any constitution that did away with equal suffrage. "Let our Govt be like that of the solar System," Delaware delegate John Dickinson said. "Let the Genl Govt be the Sun and the States the planets repelled yet attracted." [60] A political orrery. "The States were the planets, and ought to be left to move freely in their proper orbits," Dickinson said. He accused those who favored representation by population of wanting "to extinguish these planets"—to abolish the states altogether.

On Monday, June 11, the turning point of the convention, Roger Sherman, a Connecticut delegate, proposed a compromise in the impasse between big and small states: representation in the lower house would be in proportion to population and in the upper house there would be one vote per state "and no more." Edward Rutledge of South Carolina proposed that the representation in the upper house be instead calculated by their contributions to the federal treasury, arguing that "the States ought to have weight in the Gov^{t} in proportion to their wealth." South Carolina's great wealth, and the bulk of its population, consisted of property in persons. At

this point, arguments became so heated that the aged and ailing Benjamin Franklin urged moderation: “we are sent here to *consult*, not to *contend*, with each other; and declarations of a fixed opinion, and of determined resolution, never to change it, neither enlighten nor convince us.” But even that admonition could not diminish the passions of the participants.

Amendments therefore will be necessary

At just this juncture, James Wilson proposed that representation be calculated “in proportion to the whole number of white & other free Citizens & inhabitants of every sex & condition including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each state.” Several elements of this proposal are notable: the inclusion of women in the calculation of population (“of every sex”); the counting of enslaved Blacks at three-fifths the rate of free people; and the exclusion of Indians not taxed, or, in other words, Indians who were not citizens of the United States but who belonged to sovereign nations.

Slavery is not in the Constitution, in the sense that the word itself does not appear; the framers were loath to include so brutal a term in their charter of liberty. Wilson’s inclusion of women in the constitution—“every sex”—was surprisingly little discussed. Political representation by persons, rather than by property or property-holders, was a new idea, but to this point the idea that those “persons” included women had not found expression in any American constitution. None of the state constitutions, nor the Northwest Ordinance, nor the constitutions of the first states to enter the union after ratification (Kentucky in 1792 and Tennessee in 1796) included women or children in calculating representation. (The Northwest Ordinance, for instance, calculated representation by the number of “free male inhabitants, of full age.”) In 1804 a U.S. senator, citing Wilson’s language, would suggest—notably, in a letter to his wife—that “in the theory of our constitution women are calculated as political beings.” [61] Yet at the time, Wilson’s “of every sex” elicited no substantial discussion.[62]

Instead, the delegates took up the matter of the three-fifths clause. Elbridge Gerry protested that this was yet another scheme to bring wealth into the calculation. If representation was by population and not by

property, he said, “why then should the blacks, who were property in the South, be in the rule of representation more than the Cattle & horses of the North”? Massachusetts had abolished slavery; Virginia had not. And for this, was Massachusetts to grant greater political power to Virginia? Madison appears to have been the only delegate to reply to Gerry’s heated speech, yet his reply apparently proved persuasive. Motions in favor of calculating representation in proportion to population and counting slaves as three-fifths of other people—in both houses—passed.[63] Wilson’s language, including the representation of women (“of every sex”), would be sent on to the Committee of Style, charged with preparing a full draft of the constitution.[64]

The delegates now took up a resolution to do away with the stipulation that amending the constitution needed the consent of Congress. “Several members did not see the necessity of the Resolution at all, nor the propriety of making the consent of the Natl. Legisl. unnecessary,” according to Madison’s Notes. But Virginia delegate George Mason argued in favor of the resolution, stressing the importance of an amendment mechanism as a safety valve against revolution. “The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be,” Mason began. “Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence. It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account.” The convention approved the amendment provision but yet again postponed discussion of the provision that amendment be possible “without requiring the consent of the Natl. Legislature.” [65]

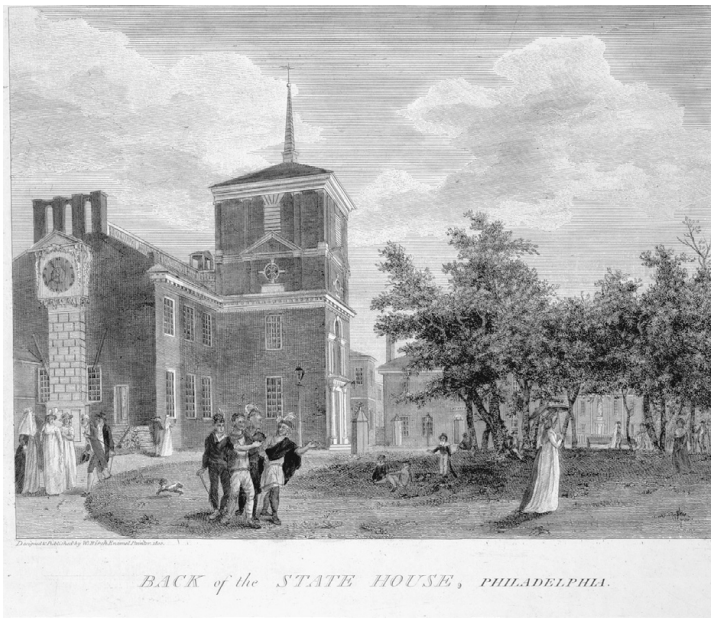
There then emerged an alternative to the Virginia Plan. William Paterson of New Jersey introduced what came to be called the New Jersey Plan, calling for equal representation of every state in a unicameral legislature, as had been the case under the Articles of Confederation. Like Dickinson, he feared the Virginia Plan involved the annihilation of the states, a solar system where the sun swelled to destroy the planets, a supernova. Three other small states—Connecticut, Delaware, and Maryland—supported the New Jersey Plan, even though, as John Lansing of New York pointed out, it was little more than an amendment to the Articles of Confederation while the Virginia Plan promised a wholly new constitution.

Notably, the New Jersey Plan failed to provide for amendment. But unlike the Articles of Confederation, it did guarantee the federal government treaty supremacy, with treaties to be made by Congress and disputes to be resolved by a federal judiciary.[66]

As the delegates debated these two plans, on June 18 they rejected another plan proposed by Alexander Hamilton but never formally introduced. Hamilton's plan involved a lower house of representatives elected to serve for three-year terms by all free men over twenty-one, and a senate, elected by an electoral college to serve for life. The president, too, would serve for life, and would also be chosen by an "electoral college." (Hamilton's proposal also included an amendment provision: "This Constitution may receive such alterations and amendments as may be proposed by the Legislature of the United States, with the concurrence of two thirds of the members of both Houses, and ratified by the Legislatures of, or by Conventions of deputies chosen by the people in, two thirds of the States composing the Union.") Though Hamilton in fact supported the Virginia Plan, he likely introduced his proposal—which essentially erected a monarchy and did truly end state sovereignty—to offer an extreme option designed to make the Virginia Plan seem, by contrast, moderate.

Free inhabitants

Even before the convention began its work in May, delegations from four Native nations were making their way to Philadelphia, en route to New York to meet with Congress. The United Indian Nations had proposed parleying with Congress earlier that spring for the purpose of negotiating a general treaty. The vast reaches of the North American continent belonged to Native peoples, and the near neighbors of the thirteen states, in particular, wielded considerable diplomatic powers. Native nations had also been led to expect that they would have representation in the legislature of a newly framed U.S. government. Delegates to the Constitutional Convention, meanwhile, aimed to grant the new federal government exclusive control over treaty-making.



Delegates from four Native nations in William Birch, *Back of the State House*, 1800

Sconetoyah, from the Cherokee Nation, reached Philadelphia on June 12. The next day a Report of the Committee of the Whole House outlined a slightly modified version of the Virginia Plan. When the convention adjourned that day, a number of delegates met with Sconetoyah, and he also met with Washington in an official diplomatic meeting at the Pennsylvania State House, where he pressed Washington on “the white people incroaching on their lands.” [67]

By June 18, all four Native delegations had arrived, led by Tobocah, from the Choctaw Nation; Muckleshamingo from the Chickasaw Nation; and Sconetoyah from Cherokee. The next day Madison delivered his only speech at the convention that squarely discussed Indians. He referred to state treaty violations, pointing out that “in several instances, the States have entered into treaties & wars with them.” And he also invoked the matter of white encroachments, though in a veiled fashion, by referring to various “encroachments on the federal authority.” [68] The delegates, in drafting the Constitution, treated Native nations as sovereign nations, to be dealt with by way of commerce and treaties like any other nations. When Georgia tried to have Native people counted in its population for purposes of representation, it failed. Instead, the convention specifically excluded from the calculation of population a category of “Indians not taxed”—that

is, people not subject to U.S. jurisdiction because they belonged to sovereign Native nations.

Yet the particulars of representation remained unresolved. Often forgotten is that much of this debate took place while the Native diplomats remained in the city. Day by day Madison lost support for his plan for proportionate representation in both houses. As Luther Martin of Maryland argued on June 19, “the separation from G.B. placed the 13 States in a state of Nature towards each other; that they would have remained in that state till this time, but for the confederation; that they entered into the Confederation on the footing of equality; that they met now to amend it on the same footing; and that he could never accede to a plan that would introduce an inequality and lay 10 States at the mercy of V^{a} Mass^{ts} and Penn^{a}.” Franklin proposed a compromise: “If a proportional representation takes place, the small States contend that their liberties will be in danger.” Both sides had to be willing to yield something.

On July 2 a new vote showed five states in favor of proportionate representation in both houses, five opposed, and one, Georgia, divided. A committee was formed to attempt to break the deadlock by crafting a compromise. It produced a report on July 5 that urged proportionate representation in one house and equal suffrage in the other. On July 9, discussing the report, New Jersey’s Paterson decried the three-fifths rule. “What is the true principle of Representation?” he asked. “It is an expedient by which an assembly of certain individuals chosen by the people is substituted in place of the inconvenient meeting of the people themselves. If such a meeting of the people was actually to take place, would the slaves vote? They would not. Why then should they be represented”? Madison then offered his reply. He had come to believe—or had come to believe it would be politically useful to argue—that the real division was not between large and small states but between free and slave states. He therefore proposed a different compromise, that in the House, “the States should be represented according to their number of free inhabitants” and in the Senate “according to the whole number, including slaves.” With this move, Madison unleashed, and presumably meant to unleash, support for proportionate representation in both houses from the Southern states. It worked. A delegate from North Carolina said that “it was high time now to speak out,” given that some people seemed to him to hope “to deprive the

Southern States of Representation for their blacks." [69] The *for*, in that sentence, carries a freighted burden.

Outside the hall, Benjamin Franklin and Henry Knox persuaded the delegations from the Cherokee, Choctaw, Chickasaw, and Creek Nations not to proceed to New York to meet with Congress, telling them it was out of session, and they all left Philadelphia by July 5. Congress had in fact been out of session since May 10, when it had lost a quorum because many of its members had left to serve in the convention. But Congress once again achieved a quorum on July 9, having recalled those convention delegates to New York. Congress then returned to consideration of the Northwest Ordinance to govern territory north and west of the Ohio River, which it passed on July 13. It pledged that "the utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and, in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress." But the ordinance in fact prescribed a path to both settlement and to statehood for non-Natives. It also barred slavery in the Northwest Territory, a concession to antislavery Northerners.[70]

In Philadelphia, discussion on the vexed subject of representation continued on July 11, when Pierce Butler and Charles Cotesworth Pinckney, from South Carolina, "insisted that blacks be included in the rule of Representation *equally* with the whites; and for that purpose moved that the words 'three-fifths' be struck out." That motion was defeated. James Wilson expressed dismay with any counting of slaves. "Are they admitted as Citizens? then why are they not admitted on an equality with White Citizens? are they admitted as property? then why is not other property admitted into the computation?" His fellow Pennsylvanian, Gouverneur Morris, was unconvinced of that necessity, declaring himself "reduced to the dilemma of doing injustice to the Southern States or to human nature, and he must therefore do it to the former. For he could never agree to give such encouragement to the Slave Trade as would be given by allowing them [the slave states] a representation for their negroes, and he did not believe those States would ever confederate on terms that would deprive them of that trade." The next day Morris observed that while "it is in vain for the Eastern States to insist on what the South[n] States will never agree to" (an end to the slave trade), "It is equally vain for the latter to require what the other States can never admit" ("a representation of Negroes").

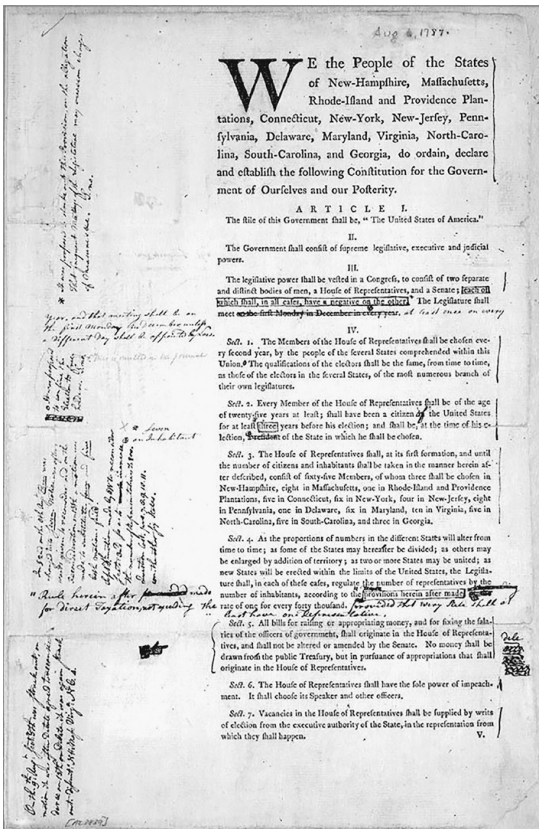
Not until July 16 did the convention adopt the compromise first proposed by Roger Sherman—the so-called Connecticut Compromise—in which representation in the lower house would be in proportion to population (a concession to the larger states) and include the three-fifths rule (a concession to slave states) and in the upper house representation would be equal among states (a concession to the smaller states). Madison was furious, believing the compromise to have been made by a "bare majority of States and by a minority of the people of the U[nited] States." This ill-considered compromise informed the method of electing the president, too. Gouverneur Morris objected to the legislature doing the electing. "He ought to be elected by the people at large," Morris insisted. George Mason objected that asking voters to choose the president would be like asking a blind man to judge colors. Might the state legislatures choose the president? That would give too much power to the bigger states. The solution—that the president would be chosen by an Electoral College in which the number of electors, per state, would be equivalent to the state's congressional delegation, thereby extending the Connecticut Compromise, designed for the legislative branch, to the executive branch—would be the subject of more attempts at amendment than nearly any other provision of the Constitution. Still more worryingly, the worst elements of the worst compromises at the convention would be written into the Constitution's amending provision.

An easier mode

There had been little quibbling with the idea that the Constitution needed an amendment provision. But quite how amendment should be exercised remained in some dispute till the very end of the convention. On August 6 the Committee of Detail circulated a printed draft that the convention debated for five weeks, until September 10. It covered seven pages, with a wide left-hand margin for making notes and proposing changes. It began, "We the People of the States."

It immediately elicited calls for amendment. As the August 6 draft included the three-fifths rule, Gouverneur Morris once more objected, stating the matter squarely: "The admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of

Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & damns them to the most cruel bondages, shall have more votes in a Govt instituted for protection of the rights of mankind, than the Citizen of Pa. or N. Jersey who views with a laudable horror, so nefarious a practice." He made a motion to insert the word *free* before the word *inhabitants*, in the article about representation. This motion was defeated.



Aug 6, 1787.

WE the People of the States of New-Hampſhire, Maſſachuſetts, Rhode-Iſland and Providence Plantations, Connecticut, New-York, New-Jerſey, Pennſylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and eſtabliſh the following Conſtitution for the Government of Ourſelves and our Poſterity.

ARTICLE I.

The ſtile of this Government ſhall be, "The United States of America."

II.

The Government ſhall conſiſt of ſupreme legiſlative, executive and judicial powers.

III.

The legiſlative power ſhall be veſted in a Congreſs, to conſiſt of two ſeparate and diſtinct bodies of men, a Houſe of Repreſentatives, and a Senate; [each of] which ſhall, in all caſes, have a negative on the other. The Legiſlature ſhall meet on the firſt Monday in December in every year.

IV.

Sect. 1. The Members of the Houſe of Repreſentatives ſhall be choſen every ſecond year, by the people of the ſeveral States comprehended within this Union. The qualifications of the electors ſhall be the ſame, from time to time, as thoſe of the electors in the ſeveral States, of the moſt numerous branch of their own legiſlatures.

Sect. 2. Every Member of the Houſe of Repreſentatives ſhall be of the age of twenty-five years at leaſt; ſhall have been a citizen of the United States for at leaſt three years before his election; and ſhall be, at the time of his election, a reſident of the State in which he ſhall be choſen.

Sect. 3. The Houſe of Repreſentatives ſhall, at its firſt formation, and until the number of citizens and inhabitants ſhall be taken in the manner herein after deſcribed, conſiſt of ſixty-five Members, of whom three ſhall be choſen in New-Hampſhire, eight in Maſſachuſetts, one in Rhode-Iſland and Providence Plantations, five in Connecticut, ſix in New-York, four in New-Jerſey, eight in Penſylvania, one in Delaware, ſix in Maryland, ten in Virginia, five in North-Carolina, five in South-Carolina, and three in Georgia.

Sect. 4. As the proportions of numbers in the different States will alter from time to time; as ſome of the States may hereafter be divided; as others may be enlarged by addition of territory; as two or more States may be united; as new States will be erected within the limits of the United States, the Legiſlature ſhall, in each of theſe caſes, regulate the number of repreſentatives by the number of inhabitants, according to the [rule] herein after made, at the rate of one for every forty thouſand.

Sect. 5. All bills for raiſing or appropriating money, and for fixing the ſalaries of the officers of government, ſhall originate in the Houſe of Repreſentatives, and ſhall not be altered or amended by the Senate. No money ſhall be drawn from the public Treaſury, but in purſuance of appropriations that ſhall originate in the Houſe of Repreſentatives.

Sect. 6. The Houſe of Repreſentatives ſhall have the ſole power of impeachment. It ſhall chooſe its Speaker and other officers.

Sect. 7. Vacancies in the Houſe of Repreſentatives ſhall be ſupplied by writs of election from the executive authority of the State, in the repreſentation from which they ſhall happen.

V.

Hamilton's annotations on the first page of the August 6 draft by the Committee of Detail

In a heated debate on August 22, the delegates took up the question of the slave trade. George Mason, a slave owner, declared it "essential . . . that the Genl. Government should have power to prevent the increase of slavery." Connecticut's Oliver Ellsworth, who noted that he "had never owned a slave," argued that "we ought to go farther and free those already in the Country." But South Carolinian Charles Pinckney argued that "if slavery be wrong, it is justified by the example of all the world," since "in all ages one half of mankind have been slaves." Elbridge Gerry warned that

the federal government ought to have "nothing to do with the conduct of the States as to Slaves, but ought to be careful not to give any sanction to it." South Carolina and Georgia made clear they would leave the union if the constitution ended the trade. Three days later delegates revised the language of this provision to read in such a way that it neither used the word *slaves* (lest that leave a stain on the constitution) nor name North Carolina, South Carolina, and Georgia (lest that offend people in those states). The antiseptic indirection read: "The migration or importation of such persons as the several States now existing shall think proper to admit, shall not be prohibited by the Legislature prior to the year 1808."

Regarding amendment, the August 6 draft included this clause: "This Constitution ought to be amended whenever such Amendment shall become necessary; and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for this purpose." Gouverneur Morris proposed on August 30 that "the Legislature should be left at liberty to call a Convention, whenever they please." This measure was defeated. But on September 10, as the Constitutional Convention neared the end of its work, Gerry, worried, asked for a change. "This Constitution . . . is to be paramount to the State Constitutions," he said. "It follows, hence, from this article that two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether."

Hamilton seconded Gerry's proposal but gave different reasons: he thought the draft as written made it too hard to amend the constitution. "It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation," he said. "It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new System." He proposed that a convention could be called by two-thirds vote in both houses of Congress.

Madison objected, finding this idea too vague. "How was a Convention to be formed?" he asked. How would it operate? Roger Sherman proposed adding a safeguard: "no amendments shall be binding until consented to by the several States." Wilson suggested this should read "by two-thirds of the several States." This was defeated. Then he proposed "by three-quarters of the several States." This passed, whereupon Madison introduced the tidied-up version:

> The Legislature of the U—S—whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S.

But now Rutledge of South Carolina began objecting, saying that he "never could agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property and prejudiced against it." In the spirit of the Connecticut Compromise, the convention made a concession to this objection by adding language guaranteeing that no amendment could abolish the slave trade before 1808. But if the slave states were to be pandered to, why not the small states? When the amendment provision was discussed on September 15, Sherman said he was worried that "three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate." There would be, then, only two ways the Constitution could not be amended: amendments could not interfere with slavery before 1808, and they could never alter apportionment in the Senate. Madison warned, "Begin with these special provisos, and every State will insist on them, for their boundaries, exports &c." But no more special exceptions were proposed.

At this late hour, Mason, who had grown increasingly leery of the constitution altogether, objected to the method of amendment as granting too much power to Congress, calling it "exceptionable & dangerous." Given that both modes of amendment depend on Congress, Mason warned, "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case." Gouverneur Morris and Elbridge Gerry then introduced yet another method of amendment: if two-thirds of the states demanded a convention, one would be held. Madison didn't think this made much sense—it raised the same problems as Hamilton's proposal—but he didn't exactly object, except to point out that "difficulties might arise as to the form, the quorum &c."

A bit of tinkering followed. Sherman's language about "internal police powers" was removed. And then a motion was made to approve what would be the final language of Article V. It prescribed two methods of introducing constitutional amendments (by congressional resolution or by application of

state legislatures for a convention), and two methods of ratifying them (by votes in state legislatures or by conventions in the states):

> The Congress, whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.

And it prohibited any amendment regarding the slave trade before the year 1808 and prohibited, forever, an amendment that would deprive any state, without its consent, of equal suffrage in the Senate. “This motion being dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question, saying no.”

Article V, in short, was saddled with the three most fateful compromises of the convention. It protected the slave trade. It granted both small states and slave states disproportionate power over the amendment process, since small states were overrepresented in the Senate, and slave states were overrepresented in the House. And it made the small states’ disproportionate power, in the form of equal suffrage in the Senate, unamendable.

I agree to this Constitution with all its faults

As the convention neared the end of its work, only forty-one delegates were left in sweltering Philadelphia. Perhaps, of an evening, they sought relief in the parlor of Anne Willing Bingham, where they unburdened themselves of the weighty discussions of the day.

On September 12, back in session, George Mason said he “wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose.” He suggested that the addition of such a preface “would give great quiet to the people,” and by copying from the declarations of rights in the state constitutions, it “might be prepared in a few hours.” Gerry so moved; Mason seconded. But the motion was defeated. Every state voted no except Massachusetts, which abstained. The delegates who had lasted this long were tired and ready to go home, and what Mason promised would take only a few hours would surely have taken not hours or days but weeks.

On September 17, 1787, the day the remaining delegates made ready to sign, Wilson read a speech written by Franklin, who was too infirm to deliver it. “I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them,” Franklin had written, but “I agree to this Constitution with all its faults, if they are such; because I think a general Government necessary for us, and there is no form of Government but what may be a blessing to the people if well administered, and believe farther that this is likely to be well administered for a course of years, and can only end in Despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic Government, being incapable of any other.” This constitution would do, Franklin believed, until it would no longer do.

Some misgivings were greater. A Quaker in Philadelphia who served as vice president of the antislavery society for which Franklin served as president, reported to his brother that “we entertained a hope” that the new constitution “would have been more conspicuous on the principles of Equity & moral Justice by a Provision against the iniquitous Slave trade, but the influence of the Southern Governmts has diverted them from that very important object.” [71]

Only thirty-nine of the original fifty-five delegates—not even three-quarters—signed the Constitution. (Even Randolph, who had introduced the Virginia Plan, refused to sign the final version.) Some delegates read the Constitution as violating the constitutions of their states, if only by asserting the constitutional supremacy of the federal government.[72] Others objected to specific provisions. Even those who did sign were discontented. Hamilton, finding the plan to be “better than nothing,” signed. Randolph refused “to promote the establishment of a plan which he verily believed would end in Tyranny.” He did not sign. Mason and Gerry, whose bill of rights had been defeated, steadfastly refused to sign. On September 28, Congress sent the constitution to the states for ratification.

Everyone knew it wasn’t perfect. “We are not to expect perfection in this world,” George Washington would write to the Marquis de Lafayette. “But mankind, in modern times, have apparently made some progress in the science of Government. Should that which is now offered to the People of America, be found on experiment less perfect than it can be made—a Constitutional door is left open for its amelioration.” [73]

In the 1770s and ’80s, Americans waged a revolution, declared independence, won a war, founded a nation, and wrote and ratified constitutions. They watched their ideas spread. In 1789 French revolutionaries drafted a Declaration of the Rights of Man and of the Citizen. “Men are born and remain free and equal in rights,” it proclaimed. “The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are liberty, property, security, and resistance to oppression.” In England, the Reverend Richard Price, an outspoken supporter of the American Revolution, embraced the French Revolution as an expression of the philosophy of amendment: “And now methinks I see the ardour for liberty catching and spreading,” Price wrote, “a general amendment beginning in human affairs.” [74]

Pigs or sheep

No man knew how long the new American Constitution would last, or how it would change. “When men put a machine in motion,” Washington told Jefferson, “it is impossible for them to stop it exactly where they would chuse.” [75] No woman was expected even to take notice of it. “I have mended Stockins this Day,” Maine midwife Martha Ballard recorded in her diary in the fall of 1787. While men debated their new constitution and began proposing amendments, she delivered babies and mended quilts and sheets and stockings. On the last day of the year, she wrote, in her diary, a prayer: “*now 1787 is Ended, it happy is if we are mended*.” [76] Not once did she mention the Constitution.

But many women did take notice, even if they kept their opinions to themselves. Days after the Constitution first appeared in newspapers, Mercy Otis Warren reported to Catherine Macauley, “Almost every one whom I have yet seen reads with attention folds the page with solemnity, & silently wraps up his opinions within his own breast.” [77] Warren, however, did not remain silent but instead published an attack on the Constitution. “It is sad the sex are doomed to slavery,” she wrote to her brother, when his wife gave birth to a girl, taking the occasion to warn him that the new Constitution might make men slaves, too.[78]

Anne Willing Bingham of Philadelphia had written to Jefferson in Paris that the women of France were the envy of American women because of

their influence in political debates, in which they defended the rights of women. We "are therefore bound in Gratitude to admire and revere them, for asserting our Privileges," Bingham wrote. But in France, as in England and America, no woman who made that assertion went unpunished. In 1791 the French revolutionary Olympe de Gouges published a revision of the Declaration of the Rights of Man and of the Citizen. She titled it the Declaration of the Rights of Woman and of the Female Citizen. "What gave you the sovereign right to oppress my sex?" she asked her male readers. Talleyrand, who had helped draft the Declaration of the Rights of Man and of the Citizen, could offer no answer: "To see one half the human race excluded by the other from all participation of government, was a political phenomenon that, according to abstract principles, it was impossible to explain." De Gouges asserted for an amendment: "Woman is born free and remains equal to man in rights." The English radical Mary Wollstonecraft wrote to Talleyrand to ask what the French constitution really meant if its understanding of the rights of man could not be extended to women: "If so, on what does your constitution rest?" In 1792, in *A Vindication of the Rights of Woman*, Wollstonecraft asked why, "when men contend for their freedom," and are "allowed to judge for themselves respecting their own happiness, it be not inconsistent and unjust to subjugate women?" Men, Wollstonecraft argued, treated women "as a kind of subordinate beings, and not as part of the human species," as if they were more like birds or dogs.[79]

Wollstonecraft's book had an immediate and striking effect in the United States, where it was published and excerpted and reviewed and sniped at and admired. If, as with the Female Congress of Edenton in 1774, men often greeted it with satire, many readers took it entirely seriously.[80] "The Rights of Women are no longer strange sounds to an American ear," Pennsylvania congressman Elias Boudinot observed in a Fourth of July speech in New Jersey in 1793. "They are now heard as familiar terms in every part of the United States." Boudinot, for one, hoped those rights would soon be codified "in a distinguishing code, the jurisprudence of the several states of the Union." [81]

That did not come to pass. Nor did the most impassioned advocates of rights for women survive either the extraordinary turbulence of revolutionary terror or the ordinary terrors of childbirth. In the 1790s, amid the growing violence, ferocity, and bloodthirstiness of the French Revolution, a Reign of Terror led to the execution of seventeen thousand

and the death in prison of some ten thousand more. Olympe de Gouges was executed by guillotine in 1793. Mary Wollstonecraft, who'd gone to Paris in 1792, found herself trapped there and under suspicion. She managed to escape in 1795 but died in London two years later, after giving birth to her daughter, Mary, who would one day, as Mary Wollstonecraft Shelley, write *Frankenstein*, a parable about a man who builds a machine and then abandons it.

In 1798, in honor of Mary Wollstonecraft, Charles Brockden Brown, an American novelist and political radical, published in Philadelphia a short story called "The Rights of Woman." In it, a young man goes to visit a learned lady—very obviously a fictional version of Wollstonecraft herself—and then, in her parlor, withdraws with her into a corner, where he asks her if she is a supporter of the new American Constitution.

"Pray, Madam, are you a Federalist?"

She answers that she finds his question preposterous, given that the Constitution "passes over women as if they were not":

> We are excluded from all political rights without the least ceremony. Law-makers thought as little of comprehending us in their code of liberty as if we were pigs or sheep.

She admired the idea of a constitution. "If to prefer a scheme of union and confederacy, to war and dissention, entitle me to that name, I may justly be stiled a Federalist," she admitted. But in much else that it did, "this constitution is unjust and absurd." In the end, she rejected it and denounced the men who wrote it as tyrants. "When I see myself, in my relation to society, regarded merely as a beast or an insect, passed over, in the distribution of public duties, as absolutely nothing, by those who disdain to assign the least apology for their injustice," she said, "it is not for me to smile at their tyranny, or receive as my Gospel, a code built upon such atrocious maxims." [82]

The learned lady of Philadelphia was, she concluded, no Federalist. And truly, no eighteenth-century American woman could have been, since under the 1787 Constitution, which women could neither ratify, reject, nor amend, women were no more than pigs and sheep, insects and beasts.

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3

Every Gentleman May Propose Amendments

A caricature depicting Thomas Jefferson and Sally Hemings, 1804

As a traffic tending to establish or continue the slavery of any part of the human species is disgraceful to the cause of liberty and humanity, . . . Congress shall, as soon as may be, promote and establish such laws and regulations as may effectually prevent the importation of slaves of every description into the United States.

—Failed amendment to the U.S. Constitution submitted to Congress by the Rhode Island Ratifying Convention, 1790

The invention of written constitutions introduced a dilemma. "The question Whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water," Jefferson wrote to Madison from Paris in September 1789. Jefferson, in France since 1784, had missed the Philadelphia convention, the ratifying conventions, and the inauguration of George Washington. Instead, witnessing the French Revolution, he had imbibed the political philosophy of French revolutionaries. He wrote to Madison that "no society can make a perpetual constitution," because "the earth belongs always to the living generation" and that therefore the United States ought to hold a new constitutional convention every nineteen years, once every generation.[1]

At the time Jefferson wrote this letter, Sally Hemings, now sixteen, was pregnant with his child, according to another child of hers by Jefferson, whom Jefferson named Madison.[2] Jefferson was preparing to return to the United States from Paris. Had sixteen-year-old Sally Hemings remained in France, the child supposed to have been in her womb would have been born free. According to her son Madison Hemings, Jefferson persuaded her to return with him to Virginia, on the promise that he would free any of the children she would bear by him.[3] How existing laws bind unborn children would have been on his mind.

Madison wrote to Jefferson that he disagreed with the proposition that constitutions have to be written every nineteen years, convinced as he was that constitutional conventions are "of too ticklish a nature to be unnecessarily multiplied." [4] Madison believed that Article V was a sufficient remedy to the problem of one generation of men binding another: the next generation of men could always amend. The weight of history has fallen on Jefferson's side of this argument. Most written constitutions don't last; around the world, their average lifespan is nineteen years.[5] In the 1780s there was no reason to believe that the U.S. Constitution would last very long, either.

Neither Jefferson nor Madison asked whether a generation of men has the right to bind a generation of women, even though women like Abigail Adams and Eliza Harriot and Olympe de Gouges and Mary Wollstonecraft were asking that question in letters, speeches, and treatises. The answer has implications into the twenty-first century: if women could neither ratify,

reject, nor amend the Constitution in the founding era, if the Constitution, in a fundamental sense, did not recognize women as persons, can it truly be said to bind their posterity? The same question can be asked of enslaved Black men, women, and children, like Sally Hemings, and the poor, and free Black men: could any of these people in any sense ratify, reject, or amend the original Constitution?

Between December 1787 and May 1790, nearly two thousand Americans served as delegates to ratifying conventions held in thirteen states. All were men and all were white, serving "in tumultuous and unsettled times," as one set of instructions to a delegate read.[6] Delegates were elected either by towns or by legislative districts; in most cases, the process mirrored electing the lower house of the state legislature, a process that defied majority rule since districts in the western, newer, and poorer parts of states tended to have fewer delegates, in proportion to population, than districts in the older, eastern, and richer parts. Property qualifications for voting meant that the poorest men were in many parts of the country simply ineligible to vote. But legislative malapportionment was a far greater factor in limiting the political power of opponents of the Constitution. Delegates from the most underrepresented districts voted *against* ratification by a 14-point margin. Delegates for the most overrepresented districts voted *for* ratification by a 25-point margin. In two states, Georgia and South Carolina, delegates representing barely more than 10 percent of the population controlled the ratifying conventions. In three states—South Carolina, New York, and Rhode Island—delegates who voted for ratification represented a smaller portion of the population than delegates who voted against it.[7]

Caesar Sankey was born in 1756 in Kittery, Maine, into the household of Andrew Neal, a Quaker, who the next year wrote a will in which he bequeathed to his son James, then twenty-one, "two thirds of my live Stock as Cattle Sheep and Swine, and my Negro Boy Called Cesar." [8] Andrew Neal died in 1758, when Caesar was two. By 1787, when Americans began debating whether to ratify the U.S. Constitution, Caesar Sankey was in his early thirties, a Revolutionary War veteran, married, and with children. What did he think about this Constitution? He had been born with the legal status of cattle, sheep, and swine. He had achieved his freedom. And then Maine had outlawed slavery. The proposed federal Constitution did not mention slavery by name—instead, it deployed twisted euphemisms to

avoid using the words *slave* and *slavery*—but it quite plainly failed to end human bondage.[9] And it said nothing to Caesar Sankey about whether he was a citizen or eligible to vote; it didn't say he wasn't and couldn't, and it didn't say he was and could.

He'd been raised a Quaker. The Neals were devout; they attended the Society of Friends meeting in Dover, New Hampshire, and also often held meetings for worship in their house. Through the 1760s and into the '70s, Quaker opposition to slavery had grown, and James Neal had allowed Sankey to work for wages, "laboring for himself," as Neal put it. In 1773, after Blacks in Boston petitioned the Massachusetts legislature for their freedom, the New England Yearly Friends Meeting had ruled that any Quaker owning slaves would be disowned. In March 1774 the Massachusetts legislature had passed a bill abolishing the slave trade, but then during the crisis over the Coercive Acts, the governor was removed from office before he was able to sign it. That spring Neal freed Sankey, who was now eighteen—maybe Sankey had to pay for his freedom, it's not clear—and that fall Sankey married Sarah Sharp: they joined the Dover Friends Meeting.[10] In January 1776 their son Simon was born. Soon Sankey enlisted; he fought in the war until 1781. In 1777 Neal used wages that Sankey had earned to buy, in Sankey's name, a house and a thirty-six-acre farm in the neighboring town of Berwick.[11] In 1779 Sankey and his wife and their children—by now they had at least two—were living in Portsmouth, New Hampshire, when twenty Black men—"Nero Brewster, and others, natives of Africa, now forcibly detained in slavery"—addressed a petition to the New Hampshire legislature declaring that "freedom is an inherent right of the human species" and asking "from what authority" other men "assume the power to dispose of our lives, freedom and property," arguing that no law could sanction such absolute tyranny.[12] The next year Massachusetts ratified a state constitution that declared, "All men are born free and equal."

In September 1787, when Congress sent the U.S. Constitution to the states, Maine was part of Massachusetts. In December 1787 the town of Kittery met to elect delegates to the Massachusetts Ratifying Convention, to be held in Boston beginning in January. Kittery elected two men. One of them was James Neal, Caesar Sankey's former owner, now a leading

Quaker and noted opponent of slavery.[13] Had Caesar Sankey headed out that wintry day and cast a vote to send Neal to the convention?

Nothing in Massachusetts's state constitution barred free Black men from voting. Black men could vote in other states, too. New York allowed "free male citizens" over twenty-one to vote, and so did Pennsylvania, whose 1776 constitution declared that "all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office." [14] Maryland's 1776 constitution guaranteed the right to vote to "all freemen, above twenty-one years of age, having a freehold of fifty acres of land," or thirty pounds of money, so long as they'd lived in the state for at least a year. In 1783 Maryland passed a law that, bowing to an antislavery demand, outlawed the importation of slaves but also, anticipating a wave of manumissions, barred newly freed men from voting. Still, Black men born free in Maryland, or emancipated before 1783, remained eligible to vote. The Black mathematician Benjamin Banneker, born free in Maryland in 1731, had enough property to vote.[15] Black men could also vote in North Carolina, Connecticut, and New Jersey, as long as they met property requirements, which were common although, in practice, almost impossible to enforce. In New Jersey, women were eligible to vote, too, if they owned property valued at fifty pounds. Only Georgia, South Carolina, and Virginia specifically restricted voting to "white" people.[16]

When the Massachusetts Ratifying Convention met in Boston, early in 1788, James Neal voiced his strenuous opposition to the Constitution, declaring that he was "obliged to bear witness against any thing that should favour the making merchandize of the bodies of men; and unless his objection was removed, he could not put his hand to the constitution." [17] Neal's speech set off a wave of arguments against the Constitution that nearly led to its defeat in Massachusetts, a state widely seen as ratification's turning point. No state's ratification was more important, and in no state had the Constitution been so far ratified by a narrower margin.

Americans nearly rejected the Constitution, and were it not for legislative malapportionment, they might well have done. Slavery haunted this debate, and not only in Massachusetts. At South Carolina's ratifying convention, Charles Cotesworth Pinckney, who owned more than two hundred people, expressed his opposition to adding a bill of rights by

pointing out that such statements “generally begin with declaring that all men are by nature born free” and “we should make that declaration with very bad grace, when a large part of our property consists in men who are actually born slaves.” [18] In Georgia, a Savannah merchant who, like Pinckney, had been a delegate to the Constitutional Convention, explained that the Constitution came without a bill of rights because “it would have been difficult in the extreme to have brought the different states to agree in what probably would have been proposed as the very first principle, and that is, ‘that all men are born equally free and independent.’” [19]

Did the U.S. Constitution bind Caesar and Sarah Sankey and their posterity? Rhode Island’s was the only ratifying convention to propose an amendment ending the slave trade. No ratifying convention formally proposed an amendment ending slavery itself. James Neal’s motion never even went to a vote. In the end, Neal voted against ratifying the Constitution. Not even the promise of a bill of rights met his objections—or, presumably, the objections of Caesar and Sarah Sankey. The concerns began with the presence of three words in the Constitution—*We the People*—and the absence of five: *All men are born free*.

Ratification was fraught. It was, after all, a political process, involving the usual deal-making, flummery, and chicanery. These words that bound or maybe didn’t bind everyone: Was their meaning fixed? Could any of those words be amended, or their meanings changed? The question of who could write, ratify, and amend the Constitution soon led to another: Who would interpret it?

Eating All or None

On September 17, 1787, the Constitutional Convention sent its signed copy of the Constitution to Congress in New York, with a letter from George Washington, something just shy of an endorsement. “That it will meet the full and entire Approbation of every State is not perhaps to be expected,” Washington wrote carefully, but “that it may promote the lasting Welfare of that Country so dear to us all and secure her Freedom and Happiness is our most ardent wish.” [20]

George Mason, who’d said he’d sooner chop off his right hand than sign the Constitution, left Philadelphia with a list of proposed amendments,

indicting the Constitution for essentially establishing an aristocracy. He sent that list to Richard Henry Lee, and Elbridge Gerry carried a copy to Massachusetts. Soon that list, like the Constitution itself, was printed, all over the country.[21] Mason, Lee, and Gerry were hoping to defeat ratification. But even the men who signed the Constitution, however much they hoped it would be ratified, weren't necessarily happy with it. James Madison regretted equal suffrage in the Senate; Alexander Hamilton had in fact wanted the president to serve for life and signed the Constitution only to avoid "anarchy and Convulsion"; Washington thought the House of Representatives was too small but took comfort in the "constitutional door" provided by Article V.[22]

The Congress that received the Constitution in New York on September 20, 1787, consisted of thirty-three members; ten had served as delegates to the convention. Even before they began considering the Constitution, there had been stirrings of unease. Was the Constitution even constitutional? Didn't it defy the Articles of Confederation? Article XIII of the Articles of Confederation stipulated that no amendment could be made to them "unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislatures of every state." This new Constitution, sent by the convention to Congress, defied these provisions. The convention, not Congress, had done the amending. Then, instead of amendments, the convention had transmitted to Congress a wholly new Constitution that, to be ratified, did not require the approval of Congress or even all thirteen states—only nine states' approval would be sufficient, leaving open the possibility that if four states failed to ratify, they could secede.[23]

Congress had reason to be miffed. Also, the ratification process, as outlined in the Constitution, made no provision for amendment, either by Congress or by the states. The convention did not invite Congress to amend the Constitution, and indeed, Congress had no authority to do so. (Congress "cannot constitutionally make any alterations," as Rufus King put it.) Congress was instead merely to send the Constitution to the states for ratification, without inviting them to amend it. But what instructions should Congress send to the states? On September 26, Massachusetts congressional delegate Nathan Dane, noting that "Congress cannot with propriety proceed to examine and alter the said Constitution proposed, unless it be with a view so essentially to change the principles and forms of it," moved that

Congress simply forward the Constitution to the states, along with George Washington's letter to Congress, without any advice from Congress. Dane did not favor the Constitution and was unwilling that Congress should send it with a note of approval. He said he'd be willing to debate the Constitution, but only if Congress were "to take it up by paragraphs." The next day Richard Henry Lee moved that Congress send the Constitution to the states with instructions designed to cast doubt on the convention's legitimacy, alerting the states that the Articles of Confederation limited "the power of Congress to the amendment of the present Confederacy of thirteen states, but does not extend it to the creation of a new confederacy of nine states."

Madison objected to Lee's motion, calling it "not respectful to the Convention." While some congressional delegates hoped to send the Constitution to the states with either congressional approval or disapproval, others wished Congress to remain neutral; still others insisted, fairly, that it simply wasn't possible "to send it out without approving or disapproving." But if Congress were to approve or disapprove of the Constitution, surely it was first necessary to "take it up by paragraphs." Lee insisted that it would be embarrassing for Congress to vote on a Constitution it hadn't examined and evaluated. But if Congress were to go through the Constitution paragraph by paragraph, Massachusetts's Nathaniel Gorman warned, "every gentleman may propose amendments." And that would take forever.

Here, for quite a time, Congress was stuck. Madison insisted that Congress had no authority to amend the Constitution: Congress had directed the convention to amend the Articles of Confederation and had thereby exercised, and exhausted, its power of amendment. (And indeed, as Madison pointed out, "The Convention was not appointed by Congress, but by the people from whom Congress derive their power.") Lee found the idea that Congress had to accept the Constitution as it was to be the "strangest doctrine he ever heard." It was, he said, "like presenting a hungry man 50 dishes and insisting that he should eat all or none."

Lee wished to introduce amendments. Madison, whatever his doubts about the Constitution, didn't want to hear them or to give an opportunity for the debates and divisions they would produce. But Virginian Edward Carrington supported Lee on this point: "If any gentleman has not made up his mind, he ought to have a liberty of amending." Lee delivered a speech in which he advocated prefacing the Constitution with a declaration of

rights of the very kind Mason had urged at the convention, “it having been found from Universal experience that the most express declarations and reservations are necessary to protect the just rights and liberty of mankind from the silent, powerful, and ever active conspiracy of those who govern.”

Lee, who had declined to serve as a delegate to the convention, believing it to conflict with his role as a member of Congress, wanted more changes, too—a total of twenty-seven amendments—structural changes, including the elimination of the office of the vice president, and representation in the Senate in proportion to population, as in the House, a change that, by undoing the Connecticut Compromise, would have involved starting the convention all over.[24]

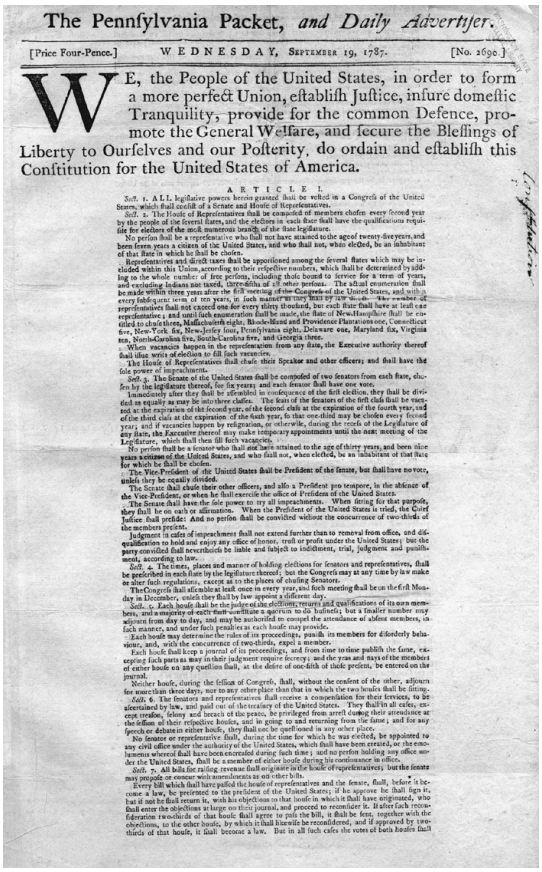
At this point, William Grayson had apparently had enough of what appeared to be a pointless debate and asked, reasonably, “If we cannot alter, why should we deliberate?” This view prevailed. After two days of heated disputation, Congress voted to send Washington’s letter and the Constitution to the state legislatures with the most noncommittal language possible, simply urging the states to submit these documents to elected delegates at a state convention.[25] Supporters of the Constitution managed to include within the transmittal the notation that this motion had been “approved unanimously,” which, as Lee well understood, they hoped the states would mistakenly read to mean that Congress had unanimously approved not the forwarding of the Constitution to the states but the Constitution itself. It was sneaky, but it worked.

There was a lot more sneakiness to come. All record of Lee’s proposed amendments was erased from the journals of Congress. No New York newspaper reported on Congress’s division, or even that it had debated amendments. The city’s printers were overwhelmingly Federalist. Lee wrote bitterly to George Mason, comparing Congress’s deliberations to the convention’s: “It was with us, as with you, this or nothing.” [26]

Rats and Anti-Rats

Congress did not propose amendments, either because it could not or because it would not. What about the states? At the start, it was by no means clear that they could or would propose amendments. All that was clear was that Federalists very much hoped that they would not.

The question of whether the states could propose amendments was raised first in Pennsylvania, which seemed likely to become the first state to ratify the Constitution, mostly due to the eagerness of certain members of the state legislature who sought “the glorious opportunity of being foremost in its adoption.” Even before the convention adjourned, its Pennsylvania delegates had read the Constitution aloud to the legislature (which met in the same building). By September 19, six Philadelphia printers had published the Constitution in their newspapers. By September 25, the legislature had ordered the printing of three thousand copies of the Constitution, including one thousand in German. Even before Congress, meeting in New York, decided to forward the Constitution to the states, George Clymer had introduced a motion into the Pennsylvania legislature calling for a ratifying convention. But what if Congress proposed amendments? another legislator asked. Congress can’t do that, answered Clymer’s cousin Daniel. Nor, he went on, could a Pennsylvania ratifying convention propose amendments, because if it could, why would the whole country “submit to the amendments and alterations to be made by a few inhabitants of Pennsylvania?” [27]



The Pennſylvania Packet, *and Daily Advertiſer.*

[Price Four-Pence.] WEDNESDAY, SEPTEMBER 19, 1787. [No. 1690.]

WE, the People of the United States, in order to form a more perfect Union, eſtabliſh Juſtice, inſure domeſtic Tranquility, provide for the common Defence, promote the General Welfare, and ſecure the Bleſſings of Liberty to Ourſelves and our Poſterity, do ordain and eſtabliſh this Conſtitution for the United States of America.

ARTICLE I.

Sect. 1. ALL legiſlative powers herein granted ſhall be veſted in a Congreſs of the United States, which ſhall conſiſt of a Senate and Houſe of Repreſentatives.

Sect. 2. The Houſe of Repreſentatives ſhall be compoſed of members choſen every ſecond year by the people of the ſeveral ſtates, and the electors in each ſtate ſhall have the qualifications requiſite for electors of the moſt numerous branch of the ſtate legiſlature.

No perſon ſhall be a repreſentative who ſhall not have attained to the age of twenty-five years, and been ſeven years a citizen of the United States, and who ſhall not, when elected, be an inhabitant of that ſtate in which he ſhall be choſen.

Repreſentatives and direct taxes ſhall be apportioned among the ſeveral ſtates which may be included within this Union, according to their reſpective numbers, which ſhall be determined by adding to the whole number of free perſons, including thoſe bound to ſervice for a term of years, and excluding Indians not taxed, three-fifths of all other perſons. The actual enumeration ſhall be made within three years after the firſt meeting of the Congreſs of the United States, and within every ſubſequent term of ten years, in ſuch manner as they ſhall by law direct. The number of repreſentatives ſhall not exceed one for every thirty thouſand, but each ſtate ſhall have at leaſt one repreſentative; and until ſuch enumeration ſhall be made, the ſtate of New-Hampſhire ſhall be entitled to chuſe three, Maſſachuſetts eight, Rhode-Iſland and Providence Plantations one, Connecticut five, New-York ſix, New-Jerſey four, Pennſylvania eight, Delaware one, Maryland ſix, Virginia ten, North-Carolina five, South-Carolina five, and Georgia three.

When vacancies happen in the repreſentation from any ſtate, the Executive authority thereof ſhall iſſue writs of election to fill ſuch vacancies.

The Houſe of Repreſentatives ſhall chuſe their Speaker and other officers; and ſhall have the ſole power of impeachment.

Sect. 3. The Senate of the United States ſhall be compoſed of two ſenators from each ſtate, choſen by the legiſlature thereof, for ſix years; and each ſenator ſhall have one vote.

Immediately after they ſhall be aſſembled in conſequence of the firſt election, they ſhall be divided as equally as may be into three claſſes. The ſeats of the ſenators of the firſt claſs ſhall be vacated at the expiration of the ſecond year, of the ſecond claſs at the expiration of the fourth year, and of the third claſs at the expiration of the ſixth year, ſo that one-third may be choſen every ſecond year; and if vacancies happen by reſignation, or otherwiſe, during the receſs of the Legiſlature of any ſtate, the Executive thereof may make temporary appointments until the next meeting of the Legiſlature, which ſhall then fill ſuch vacancies.

No perſon ſhall be a ſenator who ſhall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who ſhall not, when elected, be an inhabitant of that ſtate for which he ſhall be choſen.

The Vice-Preſident of the United States ſhall be Preſident of the ſenate, but ſhall have no vote, unleſs they be equally divided.

The Senate ſhall chuſe their other officers, and alſo a Preſident pro tempore, in the abſence of the Vice-Preſident, or when he ſhall exerciſe the office of Preſident of the United States.

The Senate ſhall have the ſole power to try all impeachments. When ſitting for that purpoſe, they ſhall be on oath or affirmation. When the Preſident of the United States is tried, the Chief Juſtice ſhall preſide: And no perſon ſhall be convicted without the concurrence of two-thirds of the members preſent.

Judgment in caſes of impeachment ſhall not extend further than to removal from office, and diſqualification to hold and enjoy any office of honor, truſt or profit under the United States: but the party convicted ſhall nevertheleſs be liable and ſubject to indictment, trial, judgment and puniſhment, according to law.

Sect. 4. The times, places and manner of holding elections for ſenators and repreſentatives, ſhall be preſcribed in each ſtate by the legiſlature thereof; but the Congreſs may at any time by law make or alter ſuch regulations, except as to the places of chuſing Senators.

The Congreſs ſhall aſſemble at leaſt once in every year, and ſuch meeting ſhall be on the firſt Monday in December, unleſs they ſhall by law appoint a different day.

Sect. 5. Each houſe ſhall be the judge of the elections, returns and qualifications of its own members, and a majority of each ſhall conſtitute a quorum to do buſineſs; but a ſmaller number may adjourn from day to day, and may be authorized to compel the attendance of abſent members, in ſuch manner, and under ſuch penalties as each houſe may provide.

Each houſe may determine the rules of its proceedings, puniſh its members for diſorderly behaviour, and, with the concurrence of two-thirds, expel a member.

Each houſe ſhall keep a journal of its proceedings, and from time to time publiſh the ſame, excepting ſuch parts as may in their judgment require ſecrecy; and the yeas and nays of the members of either houſe on any queſtion ſhall, at the deſire of one-fifth of thoſe preſent, be entered on the journal.

Neither houſe, during the ſeſſion of Congreſs, ſhall, without the conſent of the other, adjourn for more than three days, nor to any other place than that in which the two houſes ſhall be ſitting.

Sect. 6. The ſenators and repreſentatives ſhall receive a compenſation for their ſervices, to be aſcertained by law, and paid out of the treaſury of the United States. They ſhall in all caſes, except treaſon, felony and breach of the peace, be privileged from arreſt during their attendance at the ſeſſion of their reſpective houſes, and in going to and returning from the ſame; and for any ſpeech or debate in either houſe, they ſhall not be queſtioned in any other place.

No ſenator or repreſentative ſhall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which ſhall have been created, or the emoluments whereof ſhall have been encreaſed during ſuch time; and no perſon holding any office under the United States, ſhall be a member of either houſe during his continuance in office.

Sect. 7. All bills for raiſing revenue ſhall originate in the houſe of repreſentatives: but the ſenate may propoſe or concur with amendments as on other bills.

Every bill which ſhall have paſſed the houſe of repreſentatives and the ſenate, ſhall, before it become a law, be preſented to the preſident of the United States; if he approve he ſhall ſign it, but if not he ſhall return it, with his objections to that houſe in which it ſhall have originated, who ſhall enter the objections at large on their journal, and proceed to reconſider it. If after ſuch reconſideration two-thirds of that houſe ſhall agree to paſs the bill, it ſhall be ſent, together with the objections, to the other houſe, by which it ſhall likewiſe be reconſidered, and if approved by two-thirds of that houſe, it ſhall become a law. But in all ſuch caſes the votes of both houſes ſhall

The first authorized printing of the Constitution, September 19, 1787

Not every member of the Pennsylvania legislature was so keen to rush into things. Advocates of the Constitution wanted to move quickly; their opponents understood the advantage of delay. On the afternoon of the vote on George Clymer's motion, nineteen members of the legislature failed to turn up when the session resumed, leaving that body short of a quorum. Although the sergeant at arms was sent to round up the missing legislators, they refused to return. The next day, when Congress's instructions arrived from New York, the sergeant at arms, aided by his clerk and several supporters of the Constitution, tried again, for hours, to collect the renegade lawmakers, who dodged them on the streets of Philadelphia, ducking into doorways. Only by force was a quorum obtained, whereupon a vote was taken, and passed, to call for a ratifying convention.[28] Other states soon followed.

Meanwhile, the debate about whether to ratify this new Constitution was waged in the pages of the nation's newspapers. It wasn't as much of a

debate as it might have been since, although there were more than ninety newspapers in the country at the time, only twelve were willing to publish essays critical of the Constitution.[29] This lopsidedness didn't reflect public sentiment, which was much more closely divided. Instead, it reflected only that Federalists controlled most of the presses.

Privately, Federalists agonized over the Constitution. "I do not think we are more inspired, have more wisdom, or possess more virtue, than those who will come after us," George Washington wrote to his nephew that November.[30] He placed his faith in Article V. Publicly, though, Federalists depicted a nation in crisis and called for a quick ratification of the Constitution, emphasizing at once its imperfections and its amendability—after ratification, that is. They would brook no amendment before ratification.

Opponents of the Constitution, dubbed "Anti-Federalists," wanted to slow down the process, to consider amendments, and even to start all over again with a second constitutional convention. Why, asked an Anti-Federalist who used the pen name Old Whig, "is a constitution which affects all of the inhabitants of the United States, which is to be the foundation of all laws and the source of misery or happiness to one quarter of the globe; why is this to be so hastily adopted or rejected that it cannot admit of a revision?" [31] Anti-Federalists didn't like being called "Anti-Federalists," fairly enough, since they were truly the advocates of a federal government, a confederation of the states, while the so-called Federalists advocated a national one. (Elbridge Gerry proposed calling the two sides "Rats" and "Anti-Rats," for ratifiers and anti-ratifiers, warming to the idea of describing his enemies as vermin.) Edmund Randolph, who had refused to sign the Constitution, called for "every citizen of America . . . to have a full opportunity to propose through his representatives any amendment." [32] To Federalists, this boded chaos.

The Anti-Federalist label is deceptive in more ways, too. Federalists not only supported the Constitution but subscribed to a particular set of ideas about politics and government, commerce and diplomacy. An "Anti-Federalist," however, was anyone who objected to the Constitution, on any ground. Anti-Federalists didn't necessarily agree about much else. Most Anti-Federalists favored reserving more powers to the states and granting fewer powers to the federal government. They feared concentrations of

power and believed the Constitution threatened the practices that popular government had fostered during and after the Revolution, including annual elections, and much broader representation than was outlined in the Constitution. Many also wished for a declaration that would guarantee individual rights. Others objected to the Constitution's slavery provisions or found the procedure for amendment unworkable. Anti-Federalism contained multitudes.[33]

Madison, writing in January 1788—by which time Anti-Federalists had offered up all manner of objections to the Constitution—likened the nation to a very sick patient who calls in a team of physicians, who unanimously agree on a prescription to improve his constitution. "The prescription is no sooner made known, however, than a number of persons interpose . . . , assure the patient that the prescription will be poison to his constitution, and forbid him, under pain of certain death, to make use of it," Madison wrote. The patient is America, and the physicians, in this metaphor, are the self-styled Federalists. The interfering men who advise against the urgently necessary prescription and instead call for other remedies are the Anti-Federalists, who can agree neither the illness nor on its remedy.[34] Meanwhile the patient languishes.

There were two ways to answer the Anti-Federalists' chief demand, which was for a bill of rights. One way was to insist that, because a written constitution is not exhaustive and there exist many fundamental rights, principles, and customs that are law even if they are not written down, adding a list of rights simply made no sense. "A Bill of Rights is only an acknowledgement of the pre-existing claim to rights in the people," said a delegate at Virginia's ratifying convention. "They belong to us as much as if they had been inserted in the Constitution." [35] The other way to answer this complaint was to emphasize the importance of Article V: ratify now, amend later, became their watchword.

Most Federalists offered both answers. On October 6, 1787, James Wilson publicly defended the Constitution and countered Anti-Federalist arguments—the first convention delegate to do so—in an address at the Pennsylvania State House, published soon afterward in every state except Delaware. Wilson's speech set the pattern for Federalist argument. He made three major points. First, the Constitution, unlike the state constitutions, did not need a bill of rights because under state constitutions "every thing which is not reserved is given" but under the Constitution, "everything

which is not given, is reserved." That is to say, under the terms of the federal Constitution, the people and the states gave to the federal government only certain enumerated powers but retained all the rest of their rights. *Listing* those rights was not only "superfluous" but would be dangerous because it would imply that they were limited. Second, the equal suffrage of states in the Senate (which, at the convention, Wilson had opposed) was an example of the wonderful "mutual concession and accommodation" that had prevailed at the convention. Third, any defects in the Constitution could be addressed by way of future amendment, under the terms of Article V, which contributed to making this Constitution "the best form of government which has ever been offered to the world." [36] No speech on the Constitution proved more influential.

Yet conspiracy-minded critics doubted that Article V could ever work, or even that it was ever meant to. "The way to amendment is, in my conception, shut," declared Patrick Henry.[37] And Anti-Federalists took from Wilson's speech that this constitution was something new, a text in which every word mattered, which far from quieting the demand for a bill of rights, amplified it. Powers not specifically granted to the government were reserved to the people. If they weren't written down, the government didn't have them. But, instead of convincing Anti-Federalists that this meant the Constitution didn't need a bill of rights, it convinced them that it did, that language mattered in this document, more than it mattered in any state constitutions, which tended to be vague and were generally understood as temporary.[38] The Constitution is not written plainly. "There is a certain darkness, duplicity, and studied ambiguity of expression running thro' the whole Constitution," warned one Maine printer.[39] It needed clarity: amendments, and emendation. "Unless there were a Bill of Rights," George Mason said, "implication might swallow up all our rights." [40] The fight to come would be, then, a fight over words.

The Care of Truth

Most objections to the Constitution had to do either with the powers granted to the new federal government or with the failure of the Constitution to guarantee the rights of the people. Anti-Federalists believed that the convention had exceeded its authority, that the federal government had too

much power relative to the states, that the federal judiciary would prove tyrannical, and that Congress ought not to have the power to tax. There were other objections, different in nature, too, but these were the headliners.

Anti-Federalists came in many varieties. George Mason explained to Jefferson that he had refused to sign the Constitution partly because of the "precipitate, & intemperate, not to say indecent Manner, in which the Business was conducted, during the last week of the Convention"—that is, when the convention acceded to the prohibition on ending the slave trade before 1808.[41] Anti-Federalists also included Quakers, who opposed both slavery and bearing arms, and free Blacks, who opposed the Constitution's position on slavery and the slave trade.

Benjamin Workman, an immigrant from Ireland, argued in Philadelphia *Freeman's Journal* that a bill of rights containing a declaration of religious freedom would address all these objections but that, without it, Americans could expect only disunion. What if rebelling slaves crossed state lines? "Suppose that the negroes of Georgia, or some of the southern states, prompted by the love of sacred liberty, shall attempt to free themselves from cruel slavery, by a noble appeal to arms," Workman asked. And if Congress ordered the men of Pennsylvania to suppress such a rebellion, what would be the response of a Quaker from Pennsylvania who, on religious grounds, opposed both bearing arms and slavery itself? [42] Powerless to amend this Constitution, he was equally unable to obey it.

Ratify now, amend later, Federalists answered, again and again. The prospects for a swift ratification seemed, at first, fair, maybe even good. But in Pennsylvania, Anti-Federalist delegates demanded amendments first. Hungry men presented with fifty dishes did not wish to choose between eating all or none. The state, in fact, seemed to risk descending into political violence. It had taken force, after all, to gather a quorum of legislators to the Pennsylvania State House to vote on the question of calling for elections to choose delegates for a ratifying convention. And when that election day came, on November 6, 1787, a mob showed up at the boardinghouse where the Anti-Federalist members of legislature lodged and called for them all to be hanged.

Pennsylvania's ratifying convention finally opened on November 21. Among the delegates, Federalists outnumbered Anti-Federalists by a margin of nearly two to one, 44–24. This hardly reflected public sentiment; instead, it was the result of legislative malapportionment. A thousand more men had

voted for the twenty-four Anti-Federalist delegates than had voted for the forty-four Federalist ones. In the western and poorly represented part of the state, where copies of the Constitution had yet even to arrive, Federalist victories had been narrow, and turnout had been extremely low: only about one-sixth of eligible voters showed up to vote, and very few men even knew, on election day, what they were voting for. “In a month’s time there will not remain 500 people in all Pennsylvania in favor of the new government, except those who expect offices under it,” wrote one disgruntled Anti-Federalist.[43] So determined were Federalists to control the press that no report of the attack on Anti-Federalists appeared in any newspaper; nor did any speech given by Anti-Federalists appear in the official journal of the debates held in the convention. Instead, they survive only as printed in the *Pennsylvania Herald* by Alexander Dallas, who was then fired by the *Herald*’s owner after Federalists canceled their subscriptions to protest his publication of those speeches.[44]

On the first day the Pennsylvania convention reached a quorum, and James Wilson rose to deliver an endorsement. Among the Constitution’s many virtues, he said, was its amendability: “the people may change the constitutions whenever and however they please.” [45] But the ratify-now-amend-later argument did not win that day; instead, the convention lasted for weeks, with the determined Anti-Federalist minority dissenting on every point. On December 12, when Benjamin Rush said the Constitution was divinely inspired and that God had proclaimed “thou shalt not reject the new federal government,” Anti-Federalist Whitehall, calling for amendments, “regretted that so imperfect a work should have been ascribed to God.” Whitehall also presented to the convention a petition from central Pennsylvania’s Cumberland County, calling for amendments. He then formally proposed fifteen amendments—a motion that Federalists not only voted down but refused to record in the convention’s journal. The next day the convention voted to ratify, 46–23.[46]

Three less populous states had or were already well on their way to ratifying nearly as quickly as they could assemble conventions, and with hardly any real disagreement, seemingly eager to earn the relief from debt and an unstable currency that a national government promised. Delaware debated for a matter of hours and became the first state to ratify, on December 7; New Jersey spent a week, ratifying on December 18;

Georgia's debate, at the start of January, lasted barely a day.[47] Opposition arose in Connecticut, where one in four delegates voted against ratification. One Connecticut delegate—William Williams, a former member of the Continental Congress who had signed the Declaration of Independence—would, in a Hartford magazine, propose an amendment that took the form of a ninety-five-word insertion into the preamble:

> We the people of the United States, *in a firm belief of the being and perfection of the one living and true God, the creator and supreme Governour of the world, in his universal providence and the authority of his laws; that he will require of all moral agents an account of their conduct, that all rightful powers among men are ordained of, and mediately derived from God, therefore in dependence on his blessing and acknowledgment of his efficient protection in establishing our Independence, whereby it is become necessary to agree upon and settle a Constitution of federal government for ourselves, and* in order to form a more perfect union &c.[48]

This amendment did not carry the day, although versions of what would become known as "God amendments," and later "Christian amendments," would be regularly introduced into Congress. In the end, Williams voted to ratify. In the states, declarations of religious freedom were cherished; catechisms in constitutions were not. "Civil Governours go miserably out of their Province, whenever they take upon themselves the Care of Truth," the English radical Richard Price had written in a widely read tract in support of the American Revolution.[49] Other Connecticut delegates' objections were quieted by Article V which, as one delegate pointed out, "provides a remedy for whatever defects it might have." [50]

The day Connecticut became the fifth state to ratify, Massachusetts's far more contentious convention opened in Boston. "All our hopes are on Massachusetts," as one Federalist put it. If the Constitution could win there, it could win anywhere.[51]

To pack a Convention

In no state in the union had more men spent more time debating constitutions and constitutional proposals than had the citizens of Massachusetts. In town meetings in 1776, 1777, 1778, 1779, and 1780, they had deliberated and voted on the Provincial Charter, the right of the legislature to propose a constitution, the Articles of Confederation, the first

state constitution, and a second state constitution. On each of these six occasions, after heated and often lengthy discussion and debate, town meetings had submitted formal reports, and unbidden, many had also proposed amendments.[52]

Compared to the men of Pennsylvania, the men of Massachusetts had a long time to ponder the Constitution before voting on it. The first printed copies arrived in Boston on September 25, 1787; ten days later it had been printed in every newspaper in the state, after which the legislature formally transmitted copies to every town in the state.[53] And relative to many other states, the debate in the pages of Massachusetts's newspapers was searching and rigorous. Anti-Federalists, given column inches, offered the usual objections, citing the necessity of a bill of rights, calling the Constitution aristocratic, expressing outrage at equal state suffrage in the Senate (asking why Delaware, for instance, with its tiny population, should have the same number of senators as populous Massachusetts). And Massachusetts Anti-Federalists objected, too, to the three-fifths clause, since it would give outsize political power to slave states.

Federalism was strong in Massachusetts, especially among merchants. But everyone understood that the compromises made at Philadelphia almost singularly disadvantaged the Commonwealth, as the most heavily populated free state. As a big state, it lost political power to smaller states by the equal state suffrage in the Senate. As a free state, it lost political power to slave states by the three-fifths clause. Massachusetts was so divided on ratification that, at first, it couldn't even decide on how to consider the question. Should the Constitution be submitted to towns (which would have led to its almost certain defeat), or should the state hold a convention? Federalists in the state legislature, following the lead of their political kin in Pennsylvania, explicitly hoped "to pack a Convention whose sense would be different from that of the people." But Anti-Federalists had learned the lesson of Pennsylvania, too. In amendments to the motion to hold elections for delegates to a convention, Anti-Federalists secured a delay—moving the proposed convention from December to January—and received assurance that additional copies of the Constitution would be distributed to every town, and their receipt verified. Then when elections were held, they made sure of a high turnout so as not to fall to the political rout that Anti-Federalists had met in Philadelphia. Legislators from western towns and the eastern district of Maine had a long-practiced absenteeism, unwilling to

bear the expense of travel to Boston, and lodging, for meetings of the General Court. But the tumult of Shays's Rebellion had left them newly committed to turning up. In 1786, 190 legislators showed up; in 1787, in the wave of men elected in opposition to the rule of Governor Bowdoin, who was replaced by John Hancock, 266 did. And a record-breaking 364 delegates attended the ratifying convention in 1788, making this assembly the largest convention held in any of the thirteen states.

Some twenty delegates to the Massachusetts Ratifying Convention had fought alongside Daniel Shays in 1786. So closely was Anti-Federalism aligned with support for Shays's Rebellion that at least one newspaper proposed calling opponents of the Constitution "Shayites." [54] Towns elected delegates whose positions they already knew. Much of the strongest Anti-Federalist sentiment came from the province of Maine (which was fighting to separate from Massachusetts, to no avail). When one town in Maine elected a man who turned out to support the Constitution, it held another meeting and replaced him. In another Maine town, voters discussed the Constitution for seven hours, and not one of them supported it. William Widgery from New Gloucester, Samuel Thompson from Topsham, and James Neal from Kittery would all avow Anti-Federalist principles loudly.[55]

Anti-Federalist support was stronger at the time than it would appear in retrospect because of the lasting and disproportionate influence of the eighty-five essays published anonymously but written by James Madison, Alexander Hamilton, and John Jay. These essays, later known as the Federalist Papers, originally appeared in the pages of New York newspapers between October 1787 and May 1788, aimed at persuading the Anti-Federalists in New York to change their minds. Supreme Court justices cite the Federalist Papers more than any other historical source, but this practice is recent. (Citations to the Federalist Papers began to really rise only in the 1950s.)[56] In the spring of 1788 Hamilton had the essays collected and published as a two-volume book, but by that time the battle for ratification was all but over. Earlier, during the heat of the ratification campaign, only twenty-four of the eighty-five essays were published outside New York.[57]

It's less that the pieces written by Madison, Hamilton, and Jay had an influence on the debate in Massachusetts than that the debate in Massachusetts had an influence on the pieces written by Madison, Hamilton, and Jay. In January 1788, Madison, eying the state of affairs in

Massachusetts, elaborated on Article V in Federalist no. 43. He argued that the convention in Philadelphia had crafted a mechanism for amendment that was neither too difficult nor too easy but was, in fact, perfect: “It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.” [58]

If a vote had been taken when the Massachusetts convention opened on January 10, 1788, the keenest observers guessed that ratification would have failed, 144–192. Federalists, therefore, sought to delay a vote and proposed examining the Constitution paragraph by paragraph.[59] That approach, as the Anti-Federalist Amos Singletary, a Baptist who had never attended any school, complained, favored the wealthy, learned Federalists: “These lawyers, and men of learning, and moneyed men, that talk so finely, and gloss over matters so smoothly, to make us, poor illiterate people, swallow down the pill, expect to get into Congress themselves; they expect to be the managers of this Constitution, and get all the power and all the money into their own hands, and then they will swallow up all us little folks, like the great leviathan, Mr. President; yes, just as the whale swallowed up Jonah.” Rufus King, serving at the convention, complained to James Madison about men like Singletary: “Their Objections are not directed against any part of the constitution, but their Opposition seems to arise from an Opinion, that is immoveable, that some injury is plotted against them, that the System is the production of the Rich, and ambitious; that *they* discern its operation, and that the consequence will be, the establishment of two Orders in the Society, one comprehending the Opulent & Great, the other the poor and illiterate.” [60]

Paragraph by paragraph the Federalists went. On January 17, discussing requirements for officeholding in Article I, Section 2, they veered into requirements for voting (not specified in the Constitution). Samuel Thompson insisted “the poor man has generally as much integrity as a rich man.” From there they considered the calculation of representation and, necessarily, the three-fifths clause. “Our negroes are free, but those of other States are not,” remarked one delegate, asking “whether five smart negro slaves are to be equal to three of our children.” [61] This matter occasioned, over the coming days, much lament that the three-fifths clause advantaged the Southern states. When one delegate, on January 18, opined that “though

slaves are reckoned five equal to three now, yet in a few years slavery must be abolished," he was corrected that the Constitution made no such promise and that if any Southern man heard that Northerners believed this, "he would call us pumpkins." It was at this point that James Neal of Kittery, Caesar Sankey's former owner, first spoke: "We shall all suffer for joining them"—meaning the slave states—"when they allow the slave trade." [62]

On January 25 Neal spoke at length for the first time, and it's here that his speech raises the question of whether he was speaking, in some sense, on behalf of Caesar Sankey, a man who had once been his property. Article I, Section 9, forbade Congress from abolishing the slave trade: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight." The debate that day also applied to Article V, insulating the slave trade from amendment: "no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article." Neal rose in opposition to both provisions, leading other delegates to weigh in with a still broader objection about the Constitution, complaining "that there was not even a provision that the negroes ever shall be free." [63]

Federalists had tried to cut this argument off. "I consider this as laying the foundation for banishing slavery out of this country," James Wilson had said at Pennsylvania's ratifying convention in December, even though he admitted that "the period is more distant than I could wish." [64] "Is the importation of slaves permitted by the new Constitution for twenty years?" Madison asked rhetorically in Federalist no. 38, published on January 15. "By the old, it is permitted forever." [65] He continued this argument in Federalist no. 42, published a week later. "It ought to be considered as a great point gained in favor of humanity, that a period of twenty years may terminate forever within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy." [66]

These arguments had not quieted James Neal, who wasn't just any delegate. "I know him to be a Man of influence in the Circle of Friends," a keen observer of the convention wrote from Boston to Philadelphia, about the community of Quakers. "I suppose he will prejudice the minds of a great Part of that fraternity against the Constitution." [67]

And at that, Samuel Thompson gave a speech: “Shall it be said, that after we have established our own independence and freedom, we make slaves of others”? He even went so far as to attack George Washington, under whose hand the Constitution had been submitted to the states for ratification. “O! Washington, what a name has he had! How he has immortalized himself!—but he holds those in slavery who have a good right to be free as he has.” Insisted Thompson, “If the southern states would not give up the right of slavery, then we should not join with them.” Delegate Isaac Backus, a Baptist minister from Middleborough, attempted to answer these objections, arguing that “the step taken in this article, towards the abolition of slavery, was one of the beauties of the Constitution. They observed that in the confederation there was no provision whatever for its ever being abolished; but this constitution provides, that Congress may, after 20 years, totally annihilate the slave trade.” [68] But Neal refused to back down. He raised the issue again the next day. And opponents of slavery brought it up again and again, as when they again “deprecated the slave trade in the most pointed terms.” Neal said that, on this ground alone, he could not vote to ratify.[69]

It had by now become clear to Federalists that they could not win ratification in Massachusetts outright. They therefore decided to look with favor upon possible amendments, in the hope of securing something like a conditional ratification: the state would approve the Constitution but only while strenuously recommending certain amendments, including a bill of rights. But they needed someone other than a leading Federalist to introduce this idea. On January 31, with Anti-Federalists once again raising the question of the slave trade, John Hancock, the president of the convention who had failed to show up until only the day before, at last spoke. He had agreed to do so in order to propose a slate of amendments that had been supplied to him by leading Federalists. (For doing this service to Federalists, Hancock was promised the vice presidency and dangled the presidency since, if Virginia did not ratify the Constitution, George Washington would have been ineligible.)[70] Nor were these arguments confined to the convention itself. The protection of the slave trade “ought to be expunged,” wrote one newspaper commentator, “or . . . we ought not to vote to give life to a constitution, which at its first breath will be branded

with eternal infamy, by having a stamp of slavery and oppression upon it."[71]

The ratification of the Constitution hinged on the vote in Massachusetts. On January 31, 1788, that vote seemed as though it might turn on a set of views that may well have entered the state's ratifying convention by way of people like Caesar and Sarah Sankey. But recommending amendments—chiefly in the form of a bill of rights—changed everything. An ardent Anti-Federalist from Scituate proclaimed that the amendments were "of such a generous, such a catholic nature and complexion," that he had decided to change his mind, and vote for the Constitution.[72]

On February 4, as the convention neared its final vote, Isaac Backus rose again, addressing Hancock. "Much, sir, hath been said, about the importation of slaves into this country," he began. "But let us consider where we are, and what we are doing." No man was more opposed to slavery, he said, but he had to admit that the Constitution, on this score, was better than the Articles of Confederation, because the Constitution left each state the power to do as it would: "each State is at liberty now to abolish slavery as soon as they please." [73] Also, the federal government could end the slave trade by amendment; it just couldn't do that until 1808. Citing Article V was, as ever, the Federalists' best strategy. Rufus King rose to the task, challenging the delegates "to propose an instance, in any other national constitution, where the people had so fair an opportunity to correct any abuse which might take place in the future administration of the government under it."

Once amendments were on the table, twenty delegates switched from nays to yeas. On February 6, 1788, in what became known as the Massachusetts Compromise, the convention voted 187–168 to ratify, along with recommending nine amendments. Ninety-nine towns that had failed to send anyone to the state legislature in 1786 had now sent delegates to the convention in 1788: they cast sixty-three votes against ratification and only thirty-six in favor.[74] Caesar Sankey's hometown of Berwick, whose three delegates had all voted no, held a celebration all the same, toasting Hancock and the four states that had ratified already and praying that "the other seven strings, be added to the harp." They did not toast the nine amendments.[75]

Without those nine amendments, ratification would have failed in Massachusetts. And if the Constitution had failed there, it would likely have failed in Virginia and New York and possibly New Hampshire. The close vote in Massachusetts had also changed the nature of ratification. Federalists who had opposed amendments now saw that they were, politically, not only expedient but essential. Why try to convince Anti-Federalists to accept the Constitution as it was if they could dangle the prospect of amendments instead? [76] Before Massachusetts, no states had formally recommended amendments. After Massachusetts, every state but Maryland did. The era of all or none had ended. Still, Madison believed that "the amendments are a blemish." [77]

Your New System of Government

Native nations, who were greatly to be affected by the United States' new Constitution, had no role in its ratification. Yet they were hardly without views about it. Having been for so long subject to chaos, confusion, and violence at the hands of settlers and the states, they generally favored, or at least in diplomatic communication professed some hope in, a newly strengthened federal government. In 1789, for instance, leaders of the Haudenosaunee sent a message to George Washington: "We the Sachems, Chiefs, and Warriors of the Five Nations Assembled . . . Congratulate You upon Your New System of Government by which You have one Head to Rule Who we can look to for redress in all disputes which have arose or which may arise between Your people and ours." The Cherokee Nation wrote, "We rejoice much to hear that the great Congress have got new powers, and have become strong." [78]

Native nations hoped to establish with the United States the ancient custom of treaty-making and diplomatic ceremony, on firmer ground. But they also disagreed about the new Constitution and its likely consequences, as is illustrated in a report by the Muhheakunnuk, or Mohican, sachem Hendrick Aupaumut. Acting as an emissary for the United States, Aupaumut embarked on a journey through Ohio, where he met with leaders of many Native nations, most of whom expressed a great many doubts about the Constitution. The United States did not need to seek the ratification of these Native peoples for the new Constitution, but

Aupaumut's account offers something like what that ratification debate might have looked like had it happened.

Aupaumut reported the common complaint that "the white people have taken all our lands from us, from time to time, until this time, and that they will continue the same way, &c." He insisted that the white people "have new Laws their own, and by these Laws Indians cannot be deceived as usual," and he described the nature of representation in the new Congress: "I told them, the United Sachems will not speak wrong. Whatever they promise to Indians they will perform. Because out of 30,000 men, they chuse one men to attend in their great Council Fire—and such men must be very honest and wise, and they will do Justice to all people."

But Aupaumut's reassurances proved unpersuasive. Referring to whites as "big knives," a Lenape leader named Big Cat told Aupaumut that if the United States was interested in ending war, then it ought to use its "power in withdrawing the Big knifes from the forts which stands on our land," since only then would he believe that it had "power to govern the hostile Big knifes, and that you mean peace." [79]

The United States did not withdraw the big knives.

Why should we adopt an imperfect thing?

As Americans debated the proposed Constitution, by no means did all Federalists concede the necessity of a bill of rights or any other amendments. "That the proposed Constitution will admit of amendments is acknowledged by its warmest advocates; but to make such amendments as may be proposed by the several States the condition of its adoption would, in my opinion amount to a compleat rejection of it," George Washington wrote that spring.[80] Nor were Anti-Federalists gulled by Federalists' ratify-now-amend-later strategy. When New Hampshire's convention opened in February, Anti-Federalists refused to entertain ratification with recommendatory amendments, and Federalists managed only narrowly to call for an adjournment to plot a new course. In February the legislature of Rhode Island—a state that had refused to send delegates to the convention in Philadelphia—voted down a motion to call for a convention and instead, in March, conducted a statewide referendum, in which Rhode Island's citizens voted down ratification handily, 2,708–237, partly due to the

sizable number of Quakers in the state, who objected to the Constitution's slavery provisions.[81] In April, in Maryland, Federalists enjoyed a comfortable majority and voted down a motion even to read a list of proposed amendments. When Maryland ratified 63–11, Federalists toasted "speedy ratification . . . without amendments," but the dissenting minority, silenced at the convention, went on to publish its recommended twenty-eight amendments.[82]

Hugh Henry Brackenridge, who had served in Pennsylvania's ratifying convention, mocked the Constitution's critics, in *The American Museum* magazine, by suggesting their objections were ridiculous. The Constitution lacked a bill of rights. So what? It also didn't guarantee a man the right to shave his beard or explain how "to take the measure of a man's breeches" or specify that the president of the United States "shall be of the male gender." Were these omissions really problems? Brackenridge asked. "What shall we think if, in progress of time, we should come to have an old woman at the head of our affairs? What security have we that he shall be a white man? What would be the national disgrace if . . . a vile negro should come to rule over us?" [83] These possibilities were, to Brackenridge, absurd. Amendments to clarify that the president of the United States must be a man, and white? They were as unnecessary as a bill of rights. The original meaning of the Constitution was plain. Or was it? Or was it plain only to the men who wrote and ratified it and more ambiguous to everyone else?

South Carolina ratified in May, five days before the first appearance of the last Federalist Papers, numbers 78 to 85, written by Hamilton. In Federalist no. 84, following the argument earlier made by James Wilson, Hamilton argued against a bill of rights, insisting that it was "not only unnecessary in the proposed constitution, but would even be dangerous." Unnecessary because nothing in the Constitution granted the government the powers from which the people wished to have rights reserved: "Why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" And dangerous because enumerating rights risked limiting them. Moreover, the "constitution is itself, in every rational sense, and to every useful purpose, a BILL OF RIGHTS."

In Federalist no. 85, Hamilton raised the question Anti-Federalists had asked persistently: "Why should we adopt an imperfect thing? Why not

amend it and make it perfect before it is irrevocably established?" Because it was impractical to add binding amendments now, since the whole would then need to be recirculated, new conventions held, and all thirteen states ratify, whereas amending later would require the approval of only nine states. "The chances are as thirteen to nine in favor of subsequent amendment," Hamilton advised. Also, amending now was nothing less than "the extreme of imprudence" and would "expose the Union to the jeopardy of successive experiments, in the chimerical pursuit of a perfect plan." [84]

Weeks later New Hampshire reconvened and became the ninth state to ratify. According to the terms set by the convention, the Constitution had now gone into effect. Practically, unanimity seemed essential, or failing that (no one knew what way "Rogue Island" would go), New York and Virginia had to ratify for the Constitution to achieve legitimacy. Both of those states first met in June. And what happened at those conventions would convince most remaining no-amendments Federalists to change their minds.

Virginia had always looked challenging for Federalists, not least because two of its delegates at the Constitutional Convention—George Mason and Edmund Randolph—had refused to sign the document. In Philadelphia, both men had expressed reservations so grave that they had both stated support for calling for "another general Convention," as Mason put it. Randolph had said at the convention that "State Conventions should be at liberty to propose amendments to be submitted to another General Convention which may reject or incorporate them, as shall be judged proper." He had urged a different ratification process, with state conventions "having power to adopt reject or amend; the process to close with another General Convention with full power to adopt or reject the alterations proposed by the State Conventions, and to establish finally the Government." In explaining their refusal to sign the Constitution, Mason and Randolph had cited the lack of an amending convention as a necessary culmination of the ratification process. "This Constitution has been formed without the knowledge or idea of the people," Mason said. "A second Convention will know more of the sense of the people, and be able to provide a system more consonant to it." But Charles Pinckney of South Carolina observed that "Conventions are serious things, and ought not to be repeated," and the motion was defeated, with not a single state voting in its favor.[85] Soon after the close of the Philadelphia convention, Richard Henry Lee, another Virginian, had written to Samuel Adams, asking why

“indispensable amendments” proposed at the state conventions might not be “returned With a new plan to Congress that a new general Convention may so weave them into the proffer’d system as that a Web may be produced fit for freemen to wear?” By May 1788, though, Lee had decided against a second convention, urging instead that Virginia simply secede from the union if, two years after ratification, any amendments it proposed had not been ratified.[86] Madison, unsurprisingly, found the idea of a second convention terrifying, writing to Randolph in April that it would be “utterly irreconcileable in the present state of things with the dictates of prudence and safety.” [87]

“The plot thickens fast,” George Washington wrote to the Marquis de Lafayette on May 28, anticipating the conventions in Virginia and New York. “A few short weeks will determine the political fate of America for the present generation, and probably produce no small influence on the happiness of society through a succession of ages to come.” [88]

The way to amendments is, in my conception, shut

By the time Virginians met in Richmond, beginning on June 2, 1788, the terms of the debate had changed. The convention would last three weeks and would be consumed with a single question, not whether to accept or reject the Constitution but whether to secure amendments now (“previous amendments”) or later (“subsequent amendments”). Edmund Randolph, Virginia’s governor, who had refused to sign the Constitution, nevertheless now offered his support for the sake of the union. He had wanted amendments, but he had come around to the idea that ratification must come first. Fiery Patrick Henry warned that once the Constitution was ratified, “the way to amendments is, in my conception, shut.” He was unmoved by the arguments of Randolph, and of Federalists in the convention, including Madison. Virginia was both the most populous and the wealthiest state. The union could not survive without it; therefore Virginia should insist on exactly the Constitution it wanted. More, adopting first and then amending, Henry said, was an absurdity. “Is your rage for novelty so great that you are first to sign and seal, and then to retract?” he asked. “You go into a dungeon—for what? To get out. Is there no danger, when you go in, that the bolts of federal authority shall shut you in?”

To counter him, Federalists again offered the prospect of amendments not quite now but not altogether later, either—something in between previous and subsequent. What if the convention could agree to a set of amendments that the First Congress would need to vote on, when first it met? Henry still found this ridiculous: "Tyranny submitted to in order to be excluded by a subsequent alteration, are things totally new to me." Virginia's Anti-Federalists tried, secretly, to plot with Anti-Federalists in New York, attempting to collaborate on a list of "necessary Amendments," but carrying letters between Richmond and Poughkeepsie took too long to make any real collaboration possible.[89]

On the question of slavery, Federalists took the occasion to point out the hypocrisy of slave-owning Anti-Federalists. Mason and other Virginians who wanted an end to the slave trade would have benefited financially from such an act. Unlike South Carolina and Georgia, which wanted to import slaves, Virginia had more slaves than it needed, but so long as the Atlantic trade remained open, their market value was low. Closing the trade would have raised their prices. At the Virginia convention, Mason complained both that the Constitution prohibited closing the trade for twenty-one years and that it contained no provision explicitly sanctioning a property in people. "It is far from being a desirable property," Mason said, but "there ought to be a clause in the Constitution to secure us that property, . . . the loss of which would bring ruin on a great many people." A Federalist asked how Mason could possibly dislike the Constitution both "because it does not prohibit the importation of slaves, and because it does not secure the continuance of the existing slavery," asking, "Is it not obviously inconsistent?" Patrick Henry heatedly proposed that the "general welfare" and "common defense" provisions of the Constitution in fact gave Congress the power to emancipate all slaves immediately. They might "liberate every one of your slaves if they please," he warned.[90]

Virginia did not propose any amendments relating to slavery or the slave trade. When the Virginia convention held a vote on June 25 to ratify with previous amendments, it failed, 80–88. A vote for unqualified ratification (with a committee to propose subsequent amendments) passed, 89–79. Thirty-year-old James Monroe was among those who voted against ratification, with thirty-two-year-old John Marshall among the ayes. The committee then proposed forty-one amendments, and the convention passed forty of them.[91] Madison was discouraged, asking, "Will not every State . . .

think herself equally entitled to propose as many amendments?" [92] But Anti-Federalists in Virginia still wanted a second convention—to ratify those forty amendments.

Numbers of New Yorkers, as elsewhere, opposed the Constitution on the ground that it sanctioned slavery. Here's the kind of amendment Hugh Hughes, of Dutchess County, wanted: "Should the new constitution be sufficiently corrected by a substantial bill of rights, an equitable representation, . . . and relinquishing every idea of drenching the bowels of Africa in gore, for the sake of enslaving its free-born innocent inhabitants, I imagine we might become a happy and respectable people." Meanwhile, he went on, "I have no idea of marching 500 or 1000 miles to quell an insurrection of such emigrants as are proposed by the new constitution, to be introduced for one and twenty years." [93]

New York's convention of sixty-five delegates, dominated by Anti-Federalists, opened in Poughkeepsie on June 17. Over the course of its long deliberations, it would hear word on June 24 that New Hampshire had ratified, and on July 2, news of Virginia's ratification, with Anti-Federalists failing to achieve previous amendments—news that delighted Federalists and greatly undermined New York's Anti-Federalists, a party led by two men who had walked out of the Philadelphia convention, John Lansing and Robert Yates. In New York, they planned to hold out for a bill of rights (as previous amendments, which they called conditional amendments), Lansing announcing that "every amendment which I am convinced will have the tendency to lessen the danger of invasion of civil liberty by the central government will receive my sincere approbation." Melancton Smith, fighting the old fight, asked, "Why not amend, and then adopt?" But when Anti-Federalists proposed ratification "on condition" of certain amendments, Federalists countered by proposing ratification "in full confidence" of certain amendments. Smith decided to support this motion, and it passed, 31–29; the convention then ratified the Constitution by a vote of 30–27. New York recommended more amendments than any other state: fifty-six. And, by a unanimous vote, it called for a second constitutional convention to ratify them. "We, the members of the Convention of this state . . . have deliberately and maturely considered the Constitution proposed for the United States," they wrote, in a letter sent to the governors of every other state. "Several articles in it appear so exceptionable to a majority of us, that nothing but the fullest confidence of obtaining a revision of them by

a general convention, and an invincible reluctance of separating from our sister states, could have prevailed upon a sufficient number to ratify it, without stipulating for previous amendments." [94] On the night of July 26, a Federalist mob celebrating the state's ratification attacked—and destroyed—the printing house of the New York Anti-Federalist printer Thomas Greenleaf.[95]

In North Carolina, even the eloquent James Iredell, defending the Constitution chiefly on the grounds of its amendability—"one of the greatest beauties of the system"—could not prevail. (In 1774 Iredell's wife had participated in the infamous Female Congress.) North Carolina's convention adjourned, unable to ratify yet equally unable to reject the Constitution, instead suggesting only that it would not ratify until the Constitution had been amended. Like Virginians, North Carolina slave owners wanted the slave trade abolished immediately, and yet they also believed the Constitution granted Congress the power of immediate emancipation, which they feared. "I heartily wish that more could have been done," Iredell said, advocating an immediate end to the slave trade. James Galloway said he worried that Northerners meant to do away with slavery altogether, but "it is impossible for us to be happy if, after manumission, they are to stay among us." [96]

North Carolina would not ratify until it held a second convention, in November 1789.[97] Still more reluctant was Rhode Island, which steadfastly refused to hold a convention, well after the inauguration of the first president, the meeting of the First Congress, and the first convening of the Supreme Court. Not until March 1790 would Rhode Island delegates deliberate. Yet there, too, amendments lay at the center of the debate. Article V, one delegate said, was the best thing in the Constitution and "ought to be written in Letters of Gold." No, said another, regarding the way Article V prohibited any amendments ending the slave trade before 1808, "he is sorry it was ever written in Letters with Ink." [98] Rhode Island became the only state whose recommended amendments, at ratification, included the abolition of the slave trade, "as a traffick tending to establish or continue the slavery of any part of the human species, is disgraceful to the cause of liberty and humanity." [99] But by the time Rhode Island proposed amendments, Congress had already convened, deliberated, and sent a list of proposed amendments to the states.

A little frothy garnish

Federalists mocked the continued hue and cry for amendments or, worse, another convention. “Heaven forbid any conventions for a while!” exclaimed a writer in the *Philadelphia Federal Gazette*. “I dread the work of fifteen hundred reformers in the present fluctuation of sentiments. If we must at all amend, I pray for merely amusing amendments: a little frothy garnish.” [100]

But amendments were more than a garnish, and they demanded attention. In the fall of 1788, a Richmond printer issued a thirty-two-page pamphlet called *The Ratifications of the New Federal Constitution, Together with the Amendments Proposed by the Several States*.[101] Madison read it and sent a copy to Jefferson, describing it as “a collective view of the alterations which have been proposed for the new Constitution.” [102] It was a useful guide, one that Madison would study closely.

Several states had explicitly divided their proposed amendments into two types: alterations in the structure of the government and declarations of rights. Both types were called “amendments,” but they meant different things. Alterations included structural adjustments like better distinguishing the separation of powers, limiting the jurisdiction of the federal courts, and constraining the power of the presidency by measures like limiting a president to a single term. Rights included such guarantees as the freedom of the press and trial by jury.[103]

The Federalist strategy was to appease the demand for rights and avoid discussing alterations. Exactly how this played out would have enormous consequences for the future amendability of the Constitution since what was under debate included the nature of amendments, the manner of their ratification, and the editorial method by which any ratified amendments would be added to the Constitution.

Overwhelmingly, the states proposed far more alterations than rights. Four early states—Connecticut, Delaware, Georgia, and New Jersey—ratified without proposing amendments. Maryland refused to formally recommend amendments—adjourning before allowing the minority report to enter the record—but those proposed by William Paca were printed in a newspaper, the *Maryland Journal*.[104] The remaining nine states proposed nearly two hundred amendments. Because many of these amendments had

multiple provisions, they're more meaningfully counted as 292 separate proposals. Eliminating duplicates, though, that number can be reduced to 102. Eighty-one of this number call for alterations, and twenty-one seek rights. Alterations and rights met entirely different fates. Nineteen of the twenty-one rights were eventually consolidated and ratified as part of the ten amendments that later became known as the Bill of Rights. None of the eighty-one alterations were ever ratified.[105]

Article V provides two methods to amend the Constitution: two-thirds of the states can "call a Convention for proposing Amendments" or else two-thirds of both houses of Congress can propose amendments. (In either case, any amendments would then have to be ratified, either by the legislatures of three-quarters of the states, or by the votes of three-quarters of special state ratifying conventions.) Anti-Federalists believed that the surest way to give the fullest play to both alterations and rights was to call for a convention. In a letter issued on July 26, 1788, chiefly written by John Jay, and circulated to the legislatures of the other twelve states, the New York convention stated that parts of the Constitution "appear so exceptionable to a Majority of us, that nothing but the fullest confidence, of obtaining a Revision of them, by a General Convention, and an invincible reluctance to separating from our Sister States, could have prevailed upon a sufficient Number to ratify it, without stipulating for previous Amendments." Only the Virginia legislature voted in favor of a second convention, the other states barely doing so much as to refer the question to a committee.[106] The convention strategy failed.

Under these circumstances, action on the amendments would have to come from the First Congress. During elections held the fall of 1788, the vote turned on amendments, as Anti-Federalists attempted to elect senators and representatives sympathetic to immediate constitutional revision. In Pennsylvania, Anti-Federalist candidates vowed to amend the Constitution, while Federalists charged them with intending "not to amend but to destroy." In Massachusetts, Elbridge Gerry described rights as so essential to the Constitution that "to defeat amendments of this description, must be in effect, to defeat the Constitution itself," while Federalists called their opponents "amendment mongers," "sticklers for amendments," and "amendmentites." In Virginia, the Anti-Federalist legislature elected two of its own—Richard Henry Lee and William Grayson—to the Senate, elbowing out James Madison, after Patrick Henry urged that "no person

who wishes the constitution to be amended should vote for Mr Madison to be in the senate." [107]

Madison was opposed to amendments, but what he really objected to was alterations. He believed the structure of the Constitution offered the best protection against tyranny. Any changes to its structure risked upsetting the intricate system of checks and balances that provided this protection. That structure, he believed, guaranteed rights. He therefore had long opposed adding a bill of rights, not entirely or only for the usual James Wilson reasons (it wasn't necessary, and it was potentially dangerous) but for a simpler reason: lists of rights don't work. Structures, not words, protect rights.[108] In Federalist no. 48, first published on February 1, 1788, Madison concluded that "a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." [109] Jefferson disagreed: "A bill of rights is what the people are entitled to against any government on earth," he'd written to Madison in December 1787.[110] Yet on that point, Madison remained unconvinced. "Experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed," he wrote to Jefferson in October 1788. "Repeated violations of these parchment barriers have been committed by overbearing majorities in every State." [111]

But for Anti-Federalists, parchment barriers mattered because of the specificity and power of language. Where Madison and other Federalists took refuge in structure, Anti-Federalists cherished language. "Let us then insert in the first page of this constitution as a preamble to it, a declaration of our rights," wrote one Anti-Federalist. "We do not by declarations change the nature of things, or create new truths," wrote another, but "we give existence, or at least establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forget." [112] Those were mere words, said Federalists, including the lexicographer Noah Webster, who called a bill of rights "a useless form of words" since "Liberty is never secured by such paper declarations . . . nor lost for want of them." [113]

Madison never really changed his mind on this point, but after New York and Virginia threatened a second convention, he began to consider the necessity of adding a bill of rights as a means of avoiding that outcome.[114]

After losing his bid to serve in the Senate, he ran for a House seat, in a very close contest that Patrick Henry had contrived to make more difficult by carefully outlining the district in which Madison ran. To win that seat, Madison had very little choice but to promise to support "the most satisfactory provisions for all essential rights." True, he admitted, he had formerly opposed amendments, but "circumstances are now changed," and with the Constitution ratified, it could safely be amended. "Poor Madison got so Cursedly fright[e]ned in Virginia that I believe he has dreamed of amendments ever since," joked Robert Morris.[115] Madison won, defeating James Monroe 1308–972.[116]

Nationally, the Anti-Federalists met with little success. In the Senate, Federalists outnumbered Anti-Federalists twenty-two to two (Rhode Island and North Carolina, not having ratified the Constitution, sent no one to Congress), and in the House Federalists enjoyed a margin of fifty-nine to ten. Still, Anti-Federalists called for Congress to undertake, as its very first order of business, amending the Constitution; Federalists mocked these calls.[117] President Washington, in his inaugural address on April 30, delicately offered support for amendments, warning against, in revealing language, "every alteration which might endanger" the government but supporting "the characteristic rights of freemen." [118] He was, in other words, on message.

Amendmentites

Inaugurated in New York on March 4, 1789, the First Congress took a month to reach a quorum on April 6.[119] On May 4, Madison made good on his campaign promise, notifying Congress that he intended to present a list of amendments. Over the next two days, Virginia and New York having submitted applications for a second convention to the newly elected Congress, Congress entertained these applications and tabled them, on the grounds that not until more states submitted such applications would it be necessary to consider them.[120]

On June 8, Madison rose to introduce his proposed list of amendments for discussion in the House as a committee of the whole. Many members objected. Congress was too busy, they said. Also, it was too early. "Our

constitution, sir, is like a vessel just launched, and lying at the wharf," said James Jackson of Georgia. "She is untried, you can hardly discover any one of her properties; it is not known how she will answer or helm, or lay her course. . . . In this state, will the prudent merchant attempt alterations? Will he employ workmen to tear off the planking and take asunder the frame? He certainly will not." He wanted all talk of amendments postponed until March 1, 1790.[121] Madison said that any such delay would leave people suspicious that the Federalists' pledges to amend had been insincere.[122]

Among his reasons for proposing amendments, Madison explained, was so that "those who have been friendly to the adoption of this constitution, may have the opportunity of proving to those who were opposed to it, that they were as sincerely devoted to liberty and a republican government, as those who charged them with wishing the adoption of this constitution in order to lay the foundation of an aristocracy or despotism." He proposed only declarations of rights. But he didn't want them added to the beginning or the end of the Constitution, as a separate document; he wanted them woven into the text itself. He proposed, for instance, that "in article 1st, section 10, between clauses 1 and 2, be inserted this clause, to wit: No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."

Madison proposed no structural alterations. "I should be unwilling to see a door opened for a reconsideration of the whole structure of the government, for a reconsideration of the principles and the substance of the powers given," he explained, "because I doubt, if such a door was opened, if we should be very likely to stop at that point which would be safe to the government itself: But I do wish to see a door opened to consider, so far as to incorporate those provisions for the security of rights." As to his changed view on a bill of rights, he explained that he'd never thought adding one would be dangerous, though he didn't think it was from the federal government that tyranny was likely to come; it was "in the body of the people, operating by the majority against the minority."

Plenty of Federalists remained unconvinced.[123] Fisher Ames, a Massachusetts congressman, wrote to a friend that if Madison's amendments were meant as a remedy for what ailed the Constitution, "it is rather food than physic. An immense mass of sweet and other herbs and roots for a diet drink." [124] Did the fabric of the Constitution need patching?

“We are too busy at present in cutting away at the whole cloth, to stop to do any body’s patching,” Georgia’s Abraham Baldwin wrote.[125] And plenty of other Americans wished for amendments that had no place on Madison’s list. On June 15, Benjamin Rush wrote to John Adams—now vice president—alerting him that “many pious people wish the name of the Supreme Being had been introduced somewhere in the new Constitution.” [126] One of Madison’s proposed amendments was a declaration of religious freedom: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.” It did not mention God. A door had at last been opened. But not every door.

Milk & Water Propositions

Anti-Federalists, who had virtually no voice in Congress, considered Madison’s proposed amendments to be little more than a canny distraction, the political equivalent of pointing to the sky and crying out, “Look, a bird!” They’d wanted so much more than a bill of rights, but they feared, rightly, that ratifying a bill of rights, which they wanted, would mean diverting all efforts toward securing alterations.[127] Also, why this particular set of rights? Americans tend to think of the first ten amendments separately, by number, and as if rights came that way. They talk of the First Amendment, or the Second, or the Fifth. But they didn’t come that way. They came as a set, and that set was different, and disputed.[128] Madison’s list of twelve amendments contained forty-two distinct rights. He talked a lot about the Magna Carta, and he also insisted that he’d devised his list by attending to the amendments proposed—and in some cases demanded—by state ratifying conventions.[129] Only four of the sixty-three provisions listed in the Magna Carta found a place in the final bill of rights, and for the most part Madison ignored amendments proposed by the ratifying conventions—not only those that proposed structural alterations but also those that proposed rights. Instead, the amendments on Madison’s list came from state constitutions and state bills of rights (which contained, on average, thirty-five rights), which themselves in many cases came from colonial bills of rights.[130] Madison’s list, in other words, had a very long pedigree, but he’d

also made his own selections, ordering a meal, as it were, from many menus.

George Mason called Madison's proposed amendments "Milk & Water Propositions"; Pennsylvania congressman George Clymer said that Madison was like a physician who gave his patient a placebo.[131] Madison insisted that his amendments represented those "most strenuously required by the opponents to the constitution," but Aedanus Burke, an Irish immigrant from South Carolina, questioned whether they were "anything like the amendments" demanded. "All the important amendments were omitted," he argued, while those included were "not those solid and substantial amendments which the people expect." Another member of Congress said they were of no more value than "a pinch of snuff." [132]

Congress didn't really begin to discuss Madison's proposed amendments until July 21, during what Madison described as "a moment of leisure," when James Jackson again said any talk of amendments would be a "mere waste of time." Madison was by this point seriously worried Congress would finish its first session without taking action, but at the urging of Fisher Ames, the proposal went to a House Committee of Eleven, with one member from each state, charged not only with evaluating Madison's proposed twelve amendments but also with reconsidering all those advanced by the ratifying conventions. Only one of the eleven, Aedanus Burke of South Carolina, had voted, in his state, against ratification. One week later, on July 28, that committee offered its report, essentially endorsing Madison's proposal, with some changes, including deletions, additions, and reorderings. The House entertained the report as a committee of the whole. Yet once more, the members devoted a great deal of time to arguing about whether they had time to deal with this matter. They decided that they did, and a committee began debate.[133]

Let us then insert in these pages

The first and most momentous debate Congress had made about amending the Constitution was not about what amendments to make but about how to make them. Would changes be woven into the fabric of the existing text, the cloth mended? Would they be incorporated? Or would they be added as a kind of supplement or appendix, after the end of it, pinning a tail on a

donkey? Anti-Federalists had specifically wanted to incorporate changes, demanding that a declaration of rights be inserted at the top of the Constitution. “Let us then insert in the first page of this constitution as a preamble to it, a declaration of rights,” one Virginian had demanded.[134] The subsequent decision to reject this suggestion would have vast consequences, the first of many steps that made the original text of the Constitution seem inert, unalterable, an artifact, a fossil, trapped in time.[135]

Madison strongly favored—indeed assumed—that the amendments would be incorporated. He had presented a list of twelve amendments, not to be appended to the end of the Constitution but to be “ingrafted” into it, interwoven into the text, such as: “That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit, The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.” [136] Madison’s first amendment would have preceded the preamble to the Constitution. He wanted the document to begin, not with “We the People,” but with a declaration, a pithy statement of the chief principle of the philosophy of amendment:

> That all power is originally vested in, and consequently derived from the people. That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.

Madison, who believed that mere parchment was no barrier to tyranny—structure, not language, halted tyranny—wanted his amendments incorporated into the Constitution so that they would become part of it, not something separate from or additional to it. The select committee had agreed, though it found Madison’s pre-preamble wordy and cumbersome and whittled it down to a single clause, to be inserted before “We the People”: “Government being intended for the benefit of the people, and the rightful establishment thereof being derived from their authority alone . . .” The select committee, in other words, deleted the sentence in Madison’s amendment—about the “indubitable, unalienable, and indefeasible right to

reform or change their government”—that would have celebrated and guaranteed the right not only to revolution but to amendment.

That incorporation represented not only Madison’s view but the view of people who proposed amendments is plain. Several of the ratifying conventions, in fact, had specified “that some words should be struck out, and the sentenced altered.” [137] Amendments made outside of ratifying conventions took that same form. In the spring of 1788, when a group of Anti-Federalists calling themselves the Society of Western Gentlemen proposed a list of thirty-three amendments, they offered up instructions on where and how in the Constitution they would be incorporated, article by article. They wanted, for instance, to eliminate the three-fifths clause, the presidential veto, and Congress’s power to tax. They wanted federal judges to be appointed to seven-year terms, Congress to be elected annually, and religious tests for office. And they proposed three amendments to Article V, two of them making it easier to amend the Constitution (“Congress to call a constitutional convention on application of majority of states” and “Proposed amendments to be adopted when approved by two-thirds of states”) and one lifting all restrictions on amendment. (“Deletion of prohibition of amendments dealing with foreign slave trade before 1808 and equal representation of states in Senate”). For clarity, the society also printed a “revised Constitution,” with each of these changes properly incorporated in the right spots.[138]

When Congress discussed the report of the select committee, Roger Sherman, who had been a member of that committee and who had always opposed amendments, took a stand against incorporating them into the text of the Constitution. “We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric,” he said. Amending, then, wouldn’t be so much “mending” the fabric—as if to admit that it needed repair—as adding to it, an accumulation of clauses. Also, Sherman insisted, the amendments were fundamentally different than the text itself. “We might as well endeavor to mix brass, iron and clay,” he said. Jackson agreed. He preferred to leave the original Constitution “inviolate,” so as not to be “patched up from time to time, with various stuffs resembling Joseph’s coat of many colors.” No one had bothered to amend the Magna Carta, he pointed out. Then too, others wondered, what would happen to the copies of the Constitution already printed? They would be obsolete. And publishing a new, amended version would distort the

historical record, making it seem as though the convention in 1787 had written not the document it did write, but this other version, that it did not write. Incorporating amendments, Sherman insisted, amounted to repealing the entire Constitution and substituting a new one. “If we have this power, we may go on from year to year, making new ones,” Jackson warned.

Both sides agreed that the Constitution ought to remain “whole.” They disagreed on what this meant. The supplementalists believed “whole” meant intact, as originally written; the incorporationists believed “whole” meant all in one place. “There is a neatness and propriety in incorporating the amendments into the constitution itself,” Madison said. “In that case the system will remain uniform and entire.” The incorporationists argued that incorporating was the method set out in Article V, which said nothing about adding appendices but instead described amendments as “valid to all intents and purposes, as part of the constitution.” John Vining said that if Sherman’s motion were adopted, the Constitution would look like a badly written letter, with “more matter attached to it in a postscript than was contained in the original composition.” Elbridge Gerry warned that if the amendments were added as appendixes, “we shall have five or six constitutions, perhaps differing in material points from each other” and it would “require a man of science to determine what is or is not in the constitution.” A Constitution with attachments would be embarrassing, contradictory, and finally, illegible—“a maze of perplexity,” said Gerry. Incorporation advanced clarity, “a plainness and simplicity of style . . . which should be easily understood.” Madison agreed that incorporation would make the Constitution easier to read, arguing that “when the amendments are interwoven into those parts to which they naturally belong . . . we shall the be able to determine its meaning without references or comparison.” Putting amendments at the end demoted them. Gerry offered the view that if the supplementalists were to prevail, the very act of amendment would have failed, since if “it is the opinion of gentlemen than the original is to be kept sacred, amendments will be of no use, and had better be omitted.”

The supplementalists prevailed, apparently because they threatened to reject the amendments if the incorporationists didn’t stand down. Madison, who greatly regretted this vote, called it “an unavoidable sacrifice to *a few* who knew their concurrence to be necessary.” [139]

The debate over the content of the amendments was less heated than that over the form with which they would be adopted. Yet heated it was. Incorporationists had many objections, including that a Constitution with attachments would contradict itself: some portions of the original document could be read as contradicting provisions made in the attachments. Gerry, outraged that Madison had ignored all the structural amendments proposed at ratifying conventions, introduced a motion that all those be considered. This was defeated. “There has been more ill-humour & rudeness displayed to day than has existed since the meeting of Congress,” South Carolina’s William Smith wrote on August 15. He blamed the Anti-Federalists, especially Gerry, who “have thrown difficulties in the way of these Amendmts. merely because they can’t carry alterations which wd. overturn the Governmt.” [140]

One by one, Congress went through Madison’s proposals, mostly approving them. But on August 18, Gerry again introduced a motion to set aside Madison’s proposals and consider, instead, every amendment proposed at the ratifying conventions. Thomas Tudor Tucker, Smith’s South Carolina colleague, supported Gerry, arguing that if this were not done, the discontented would have no choice but to call for a second constitutional convention, which might, he feared, “sever the union asunder.” [141] Gerry’s motion was defeated. To Pennsylvania congressman Frederick Muhlenberg, it had all been so much politics. “Those who have heretofore been & still profess to be the greatest Sticklers for Amendments to the Constitution of the U.S. have hitherto thrown every Obstacle they could in their way & by lengthy Debates & numberless Amendts. which they know full well neither 2/3ds of Congress nor 3 fourth of the different Legislatures would ever adopt,” he wrote to Benjamin Rush on August 18. “It is obvious their Design was to favour their darling Question for calling a Convention.” [142]

On August 19, during a heat wave, when the House considered the report of the committee of the whole, Roger Sherman yet again—now for the third time—argued against incorporating the amendments and urged, instead, supplementing. This topic was the only subject relating to amendments discussed that day. With Sherman, the only member who had served in every congress since the time of the Stamp Act, warning that incorporation seemed something like a step toward another convention, the House this time voted in his favor. Debate ended on August 23. “We have at last so far got through the wearisome business of amendments,” Benjamin

Goodhue wrote home to Massachusetts. He hoped that “we may never hear any more of it.” [143]

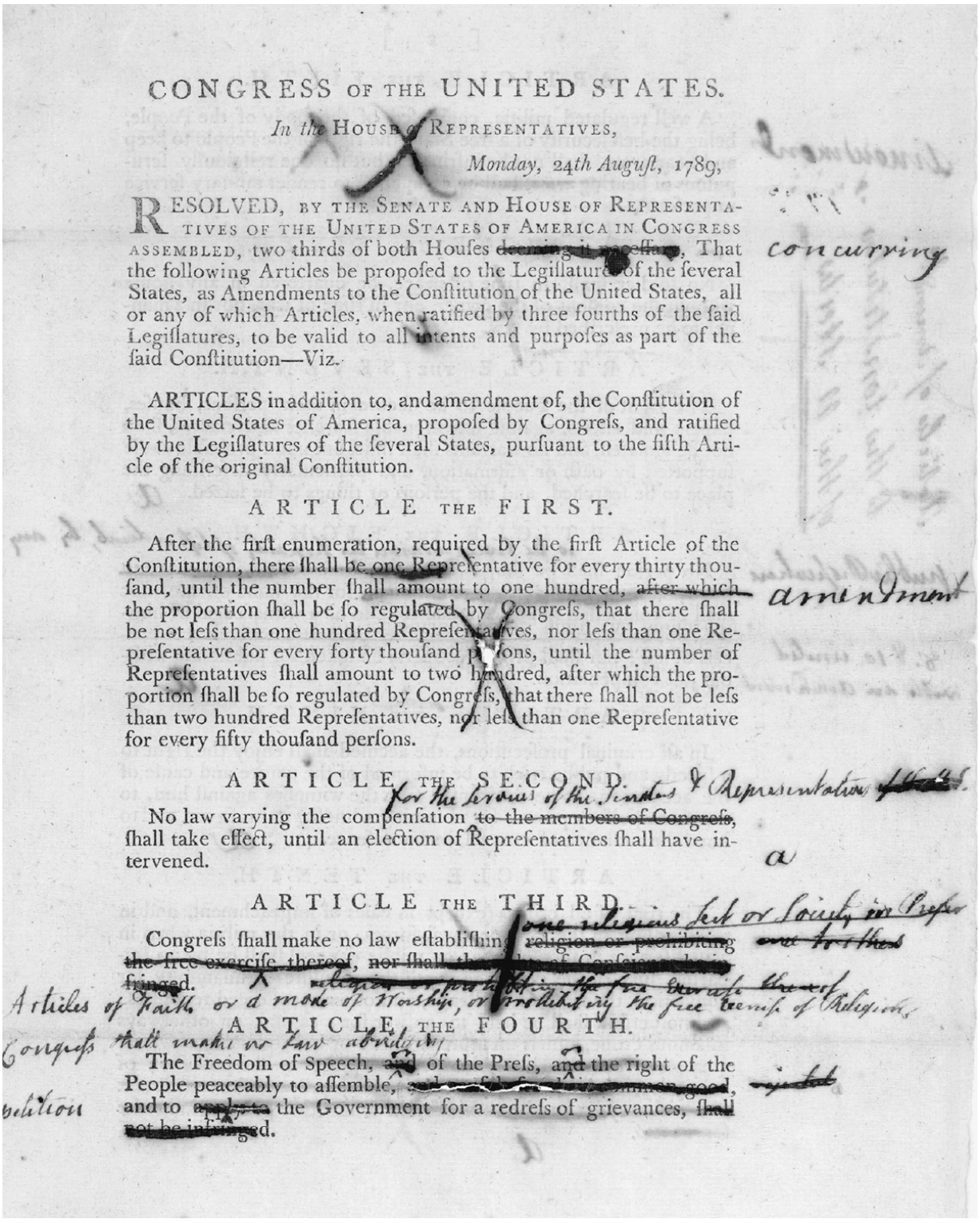
The Nonesense they call Amendments

The House sent seventeen amendments to the Senate. On August 25, 1789, the Senate took them up. Robert Morris, who the night before had written a letter in which he referred to “the Nonesense they call Amendments,” moved to postpone the discussion till the next session; this motion failed.[144] Begun on September 2, Senate discussion lasted only a week, chiefly condensing the proposed amendments from the House’s seventeen back to twelve, though a different twelve from those proposed by Madison. A Federalist effort to eliminate the freedoms of speech and of the press was unsuccessful, as was a proposal “for not allowing the militia arms” which, though passed by a majority, failed to meet the required two-thirds threshold. Other alterations made by the Senate generally weakened the amendments. Richard Henry Lee described the changes as having left the amendments “much mutilated and enfeebled.” [145]

Madison, who was appalled by the Senate’s changes, was expected to stand in their way, but instead, serving on a six-man joint committee, he acquiesced. In conference, the House and the Senate settled their differences, and then Congress, by a vote of 37–14, sent a list of twelve amendments to the president, who on October 2, 1789, sent them to the states for ratification.

The next day Quakers from Pennsylvania, New Jersey, Delaware, Maryland, and Virginia submitted a petition to Congress, begging for an immediate end to the slave trade, an amendment that would have violated Article V. Congress sent the petition, and others, to a committee, whose report was discussed over the course of a week, and then issued a report from the committee of the whole, which determined that Congress indeed could not restrict the trade before 1808 and moreover that “Congress have no authority to interfere in the emancipation of slaves, or in the treatment of them within any of the States, it remaining with the several States alone to provide any regulations therein, which humanity and true policy may require.” At this point, James Madison intervened and urged that the reports of the select committee and the committee of the whole simply be entered

into the record rather than discussed, lest even a discussion should incite "the apprehensions of the southern states." Madison's motion carried as "the best method of putting an end to the business." [146]



CONGRESS OF THE UNITED STATES.

In the HOUSE OF REPRESENTATIVES,

Monday, 24th Auguſt, 1789,

RESOLVED, BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, two thirds of both Houſes deeming it neceſſary, That the following Articles be propoſed to the Legiſlatures of the ſeveral States, as Amendments to the Conſtitution of the United States, all or any of which Articles, when ratified by three fourths of the ſaid Legiſlatures, to be valid to all intents and purpoſes as part of the ſaid Conſtitution—Viz.

ARTICLES in addition to, and amendment of, the Conſtitution of the United States of America, propoſed by Congreſs, and ratified by the Legiſlatures of the ſeveral States, purſuant to the fifth Article of the original Conſtitution.

ARTICLE THE FIRST.

After the firſt enumeration, required by the firſt Article of the Conſtitution, there ſhall be one Repreſentative for every thirty thouſand, until the number ſhall amount to one hundred, after which the proportion ſhall be ſo regulated by Congreſs, that there ſhall be not leſs than one hundred Repreſentatives, nor leſs than one Repreſentative for every forty thouſand perſons, until the number of Repreſentatives ſhall amount to two hundred, after which the proportion ſhall be ſo regulated by Congreſs, that there ſhall not be leſs than two hundred Repreſentatives, nor leſs than one Repreſentative for every fifty thouſand perſons.

ARTICLE THE SECOND.

No law varying the compenſation to the members of Congreſs, ſhall take effect, until an election of Repreſentatives ſhall have intervened.

ARTICLE THE THIRD.

Congreſs ſhall make no law eſtabliſhing religion or prohibiting the free exerciſe thereof, nor ſhall the [illegible] of Conſcience be infringed.

ARTICLE THE FOURTH.

The Freedom of Speech, and of the Preſs, and the right of the People peaceably to aſſemble, and to apply to the Government for a redreſs of grievances, ſhall not be infringed.

The first page of proposed amendments to the proposed amendments, September 9, 1789

Is this a free contry?

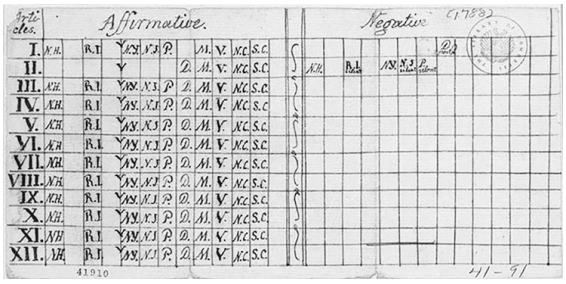
In the fifteen years between the Declaration and Resolves in 1774 and the First Congress's approval of the first amendments to the Constitution in 1789, Americans won independence, founded republican governments, and established the principles of written constitutions, popularly drafted and popularly ratified and open to amendment. They also settled on a notion of "the People" that included poor white men and excluded women, the enslaved, Black men, and "Indians not taxed." There was, in 1789, every reason to believe that the Constitution would be subject to frequent and vigorous amendment and that, like the several state constitutions that had already been completely rewritten, it would likely soon be replaced.

When the twelve amendments went to the states, New Jersey ratified all but the amendment on congressional salaries (which would, in a bizarre twist, be resurrected and ratified in 1992 as the Twenty-Seventh Amendment). Maryland ratified all twelve in December. When North Carolina finally ratified the Constitution, it ratified all twelve amendments—and asked for eight more. New Hampshire, Delaware, and South Carolina each ratified all but one. Three states ratified none: the legislatures of Massachusetts and Connecticut failed to hold a final vote, and Georgia decided that amendments were unnecessary.[147] Rhode Island joined the union in 1790 and ratified all but congressional salary. Vermont became a state in 1791 and ratified all twelve. Virginia, divided in its support of the proposed amendments, postponed debate and did not ratify any until the end of 1791, becoming, at that point, the tenth state to ratify, thereby clearing the three-quarters bar. The amendments on congressional apportionment and congressional pay failed, but the remaining ten succeeded and were renumbered.

These ten, like those that followed, would come to be very closely associated with their numbers, an artifact of the decision to append them rather than incorporate them into the text. Americans care about the First Amendment, the Second, and the Fifth, especially. Few remember, or can identify, the Third or the Seventh. But far more obscure are all those amendments that failed, including those that—had women and people of

color been among the those involved in the process of drafting, ratifying, and amending constitutions—would surely have had more of a hearing.

Of the many proposed amendments that failed, none were of greater moment than the calls to abolish slavery. Most of these calls were made not from the floors of ratifying conventions or in the pages of newspapers but in the form of petitions sent to legislatures. Yet they are among the loftiest of late eighteenth-century constitutional texts. They express, perhaps, the views Caesar Sankey might have put forward, if he'd been a delegate to Massachusetts's ratifying convention: How can a constitution to which I cannot assent bind me and my posterity?



Follow for extended description

Thomas Jefferson's tally of votes on the first twelve amendments to the Constitution, 1789–91

Americans had devised a whole new political theory, the philosophy of amendment. A pattern had begun to appear in the fabric of the new nation's history. Americans had, over more than two decades of war and argument, and not without a certain Machiavellianism, written and ratified state constitutions, Articles of Confederation, and finally a new federal constitution. That Constitution had survived its first trial and emerged with a Bill of Rights pinned to its tail. Any further amendments, too, would be added at the end, rendering the original text itself somehow inviolate. But neither appended to the Constitution nor incorporated into it were the demands that can still be found in scattered archives, not on parchment but on paper made of rags.

In October 1788 a group of Black men submitted a petition to the governor and legislature of Connecticut. They addressed it to "All mankind." Its authors described themselves as "Africas Blacks that ar now In the Chaine Bondage." It is an essay on tyranny. "We and our children and our Brothers ar takend By fose of vialince and carred whear thay Suffer an

Addisanl Sufrans wher wee ar Beaten." They asserted their rights and asked the government to "grant us a Liberration." They sought alterations. They criticized "eni Law"—any constitution—that sanctioned slavery, asking, "is this a free contry" and "is this to Be Rite and justes"? And they answered, about such a constitution: "No it murder." [148]

A clue to the meaning of the Constitution

The practice of written constitutionalism led to the invention of amendment, a way to correct, alter, or improve the text, but it also raised other dilemmas: How is the text to be interpreted? Who is to do the interpreting? And what sources ought to be consulted? At no point in American history have these questions ever been fully answered, but they are inseparable from the dilemma of amendment. The Constitution established a procedure for its own amendment; it did not dictate the method by which it ought to be interpreted. Amendment was difficult; interpretation was uncertain.

Before 1776, the colonists had been familiar with constitutional disputation, arguing with Parliament and the king, and watching parliamentarians and justices argue with one another about what was "constitutional" and what was "unconstitutional." But they hadn't done that by disagreeing about the words on parchment, since England's constitution is unwritten; they'd done that by arguing about customs, traditions, structures, and principles. How were those methods to apply to a written constitution?

At the convention in 1787, no one gave any evidence of expecting anyone in the future to consult their deliberations to deduce the meaning of anything in the Constitution, and in fact that would not have been possible: the delegates had pledged to keep their deliberations secret for fifty years—until, that is, 1837—and they honored that pledge.[149] During the ratification debates, Anti-Federalists had raised concerns about how the Constitution would be interpreted, but the Federalists had insisted that while "no compositions, which men can pen," are without ambiguity, the true authors of the Constitution were the people themselves, who could both amend it and interpret it by way of "universal jurisprudence." [150] Or as Hamilton had written in Federalist no. 83, "The rules of legal interpretation are rules of *common sense*." [151]

The new government inaugurated, both Congress and the Court groped toward a method of constructing the meaning of the Constitution. Each new dispute brought about more disagreement about how to do it and who was supposed to. “We are in a wilderness without a single footstep to guide us,” Madison wrote to Jefferson, as the First Congress gathered in June 1789.[152] Congress, from its opening days, very quickly realized that, notwithstanding the excellent work of the committee of detail, the Constitution inevitably lent itself to contradictory interpretations.[153] Madison proposed, “We ought always to consider the constitution with an eye to the principles upon which it was founded,” but that begged the question of what those principles were.[154] Members of Congress in any event did not consider what they called “the Constitution” to be limited to the words written on those sheets of parchment.[155] Early Americans talked about their Constitution the way the English talked about theirs, less as a bucket of words than as a bag of principles.[156] The methods of interpretation required to resolve a dispute over its meaning, then, did not come from the methods used to interpret written texts, or at least not only from those methods.

To the degree that early Americans did interpret the Constitution as a text, they had models. As Protestants, they considered any claim to an exclusive authority to interpret the meaning of scripture to be an act of religious oppression. That, after all, was what the Reformation had been about. And they were equally influenced by eighteenth-century political thought, which involved suspicion of the exclusive authority of justices to interpret the law. “The interpretation of laws is an evil,” wrote the Italian philosopher Cesare Beccaria, whose 1764 treatise *On Crimes and Punishment*, translated into English by 1767, was widely read.[157]

Against these cautions and suspicions, American lawyers had abundant practical experience with reading written legal instruments that were *not* constitutions: wills, statutes, deeds, and contracts. Here the custom was to determine *intent*, though the word meant two different things and applied differently to different types of documents. For statutes, the intent, or meaning, was to be determined by the text itself; for wills and contracts, the intent of the parties might require consulting additional documents. In one sense, the question was: Which was the Constitution? If the Constitution was more like a will or a contract than a statute, determining the intention

of the parties would seem to apply, but who exactly were those parties? Weren't they the People themselves? [158]

On these questions, Americans were divided, and in the 1790s, their answers aligned with an emerging partisan divide. Federalists (like John Adams and Alexander Hamilton) considered the Constitution akin to a statute, while Republicans (led by Thomas Jefferson) believed it to be more like a contract. In 1791, when Hamilton, now secretary of the Treasury, proposed establishing a national bank, his critics, led by Jefferson, now Washington's secretary of state, indicted that proposal as unconstitutional. Hamilton had attended the Constitutional Convention, and Jefferson had not, and if those deliberations were to bear on the interpretation of the Constitution, Jefferson was at a decided disadvantage.

Madison had revised his notes in the summer of 1789 in anticipation of sharing them with Jefferson upon his return from Paris in 1790. By 1791, Jefferson had read the (revised) notes, and in great secrecy, his nephew had begun to copy them for him. To object to Hamilton's proposed bank, Jefferson paraphrased Madison's notes (without citing his source), insisting that the power to incorporate had been considered by the convention, and rejected. He had come to believe, reading the notes, that Hamilton wanted to turn the republic into a monarchy, a misperception of which Madison did not disabuse him.[159]

With every political dispute of the 1790s, the unsettled questions of how to interpret the Constitution, who should do it, and what sources were relevant to such an interpretation were raised all over again. In debating the constitutionality of a treaty negotiated by John Jay in 1795, which Hamilton and Washington favored and Madison and Jefferson opposed, Hamilton insisted that the only way to read the Constitution was to read its words and no more, as if it were a statute. "Whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought in the instrument itself, according to the usual & established rules of construction," Hamilton wrote in 1791, dismissing the idea of consulting any other evidence, including the official journals of the convention, which Washington had just made public by depositing them in the State Department. Said Hamilton, "Arguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected." [160]

In 1795 the idea that "the opinions and constructions of those persons who had framed and proposed the Constitution, opinions given in private, constructions unknown to the people when they adopted the instrument, should, after a lapse of eight years, be appealed to," struck the Republican Albert Gallatin as preposterous. In Congress, Madison confessed himself surprised that anyone would look to the convention's records for "a clue to the meaning of the Constitution" and said he could not imagine "a single instance" in which that would ever be necessary.[161]

Nevertheless, by now Madison was revising the notes to better accord with his own emerging political preferences, adding whole new sheets of paper and erasing other passages by scraping the paper with a razor.[162] Publicly, he suggested that the records of the ratifying conventions were a more legitimate source of authority in interpreting the treaty clause. But members of Congress who took this position were upbraided by other members, generally Federalists, for introducing "extraneous sources," on the argument that reconstructing "the opinion which prevailed when the Constitution was adopted" could never be conclusive and in any case was inappropriate since the point was instead to determine "the true meaning" of the Constitution and, if that proved elusive, to resolve ambiguities "by practice or by amendments." [163]

Outside of Congress, plenty of Americans found this entire debate to be riddled with sophistry. A poor farmer in Massachusetts, writing a furious denunciation of the Jay Treaty debate, concluded that while "the Federal Constitution by a fair construction is a good one principally," it is nevertheless "much like a fiddle with but a few strings, but so fixed as that the ruling majority may play any tune they please upon it." [164] As the two-party system emerged in the 1790s, this language—suspicion of a broad reading of the Constitution and a wish to limit the powers of the federal government—would become hallmarks of Jeffersonian Republicanism.

As to what Sally Hemings believed about the original intentions of men who made promises, it is impossible to say. Pregnant in Paris, she seems to have lost her first child, though the records are disputed. She bore a child in 1795, Harriet, who died in 1797. Jefferson ran for president in 1796 and, placing second to John Adams, became, awkwardly, his vice president. He made regular trips home to Monticello. Hemings's son Beverly was born in 1798, and another daughter the following year.[165] Her brother Robert

Hemmings formed a family of his own: he married an enslaved woman named Dolly; they had two children. In 1794 at Monticello, Jefferson signed a document that arranged for Hemmings's manumission—"in future he shall be free and of free condition"; he was the first person Jefferson ever freed.[166] Every person Jefferson freed was a member of the Hemings family.

The conflict between Federalists and Republicans reached a peak in 1798, when a Federalist Congress passed the Alien and Sedition Acts with the aim of suppressing political opposition. To defeat them, Madison and Jefferson secretly wrote the Virginia and Kentucky Resolutions arguing that the acts were unconstitutional because they violated "the plain intent and meaning" by which the Constitution "was understood and acceded to by the several parties." They insisted that the Constitution was "compact under the style and title of a Constitution" and could be read like a contract (rather than like a statute, or common law). Under this reading, the records of the ratifying conventions—and the amendments proposed by those conventions—*were* relevant, though only so long as one accepted the theory that the United States was a league of states formed by compact rather than a federal government constituted by the people.[167]

The number of ways to change the Constitution appeared to be increasing: the Virginia and Kentucky Resolutions proposed that the states should have the authority to interpret the Constitution and also to nullify acts of Congress. The doctrine of original intent, to the degree that it existed in the 1790s, supported the political agenda of one political party over another and buttressed arguments that advanced the power and rights of the states.

Jefferson urged Madison to publish the notes in 1799—"their effect would be decisive," he told him—but Madison declined, worried that before considering publication, every passage ought to "be examined with an eye to use" to which it might be put, gently suggesting that those uses were quite unlikely to always accord with Jefferson's political preferences. In particular, the notes did not in any way support the idea that the Constitution was merely a compact of states.[168] Madison withheld publication of his notes, insisting that they were no more than historical interest since, as he explained, "as a guide in expounding and applying the provisions of the Constitution, the debates and incidental decision of the Convention can have no authoritative character." He decided to hold off

publication until after his death or at least, he wrote, “till the Constitution should be well settled by practice.” [169] That day has not come.

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Follow for extended description

The Fifteenth Amendment and Its Results, 1870

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Part Two

The Contest over Interpretation, 1803–1896

Mr Sumner presented a memorial of the Pennsylvania Anti-Slavery Society, and a memorial of the Philadelphia Female Anti-Slavery Society, praying such an amendment to the Constitution of the United States as will forever prohibit every State from making any distinction in civil rights and privileges among citizens of the United States on account of race, color, or descent.

—Failed amendment to the U.S. Constitution introduced into the Senate, by petition, 1866

Jubilation in the House, January 31, 1865

THE DAY THE HOUSE OF REPRESENTATIVES WAS SCHEDULED TO VOTE ON an amendment to the Constitution prohibiting slavery anywhere in the United States, thousands of spectators in topcoats and top hats headed to the newly renovated U.S. Capitol building. The Capitol's massive cast-iron dome, which had taken eleven years to construct, was only just nearing completion. Inside, as spectators crossed the central rotunda, looking up, they saw little but scaffolding: an Italian artist who had earlier worked at the Vatican was painting on the dome's canopy, 180 feet above the floor, as if the Capitol were the Sistine Chapel, a fresco called The Apotheosis of Washington: Washington, having ascended to the heavens, sits next to Liberty, who holds the Constitution.[1] It might better have been called The Apotheosis of the Constitution.

Charles Remond Douglass, twenty, and with a brisk military bearing, made his way across the rotunda to the House galleries. It is not known whether he looked up, peering through the scaffolding at the painting in progress. A Union soldier, he'd served first in the 54th Massachusetts Volunteer Infantry and then as a first sergeant in the Fifth Massachusetts

Cavalry. There was no room to sit. The hall was packed and hot—steaming, sweating—even in the middle of winter. Congress had never been more crowded, more expectant, hands wringing, hearts racing. “I wish that you could have been here,” he wrote to his father, Frederick Douglass.

The elder Douglass had been born into slavery in 1818, escaped in 1838, and become the nation’s leading abolitionist, its most admired Black statesman, and one of the world’s finest orators.[2] No single American had done more to call upon the federal government to end slavery. In Douglass’s lifetime, the Constitution had been fought over, fought for, and fought against. It had been burned in effigy. But not once had it been formally amended. Amendment is a plant that seems to have withered almost as soon as it sprouted, choked by the weed of slavery. After the ratification of the first ten amendments in 1791, the U.S. Constitution had been amended only twice: in 1795 the Eleventh Amendment restricted lawsuits against states filed by citizens of other states, and in 1804 the Twelfth Amendment separated the election of the president and the vice president. And then, for six tumultuous and violent decades, as the nation divided over slavery, abolitionists burned the Constitution and declared it to be “covenant with death,” even as the South seceded and wrote its own constitution, insisting that it was restoring the original intention of the framers, the Constitution remained—on paper—unchanged. Instead, the Supreme Court asserted and exercised its exclusive authority to interpret it.

In this era, the sole formal constitutional amendment that had gotten so far as to pass Congress not only didn’t end slavery, it protected it by prohibiting any amendment from abolishing it. Passed on March 2, 1861, it read, “No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.” Had it been ratified, it would have become the Thirteenth Amendment.[3]

Only the start of the war averted that amendment. On September 22, 1862, Abraham Lincoln had pledged that in exactly one hundred days, on New Year’s Day 1863, he would sign an Emancipation Proclamation, declaring “all persons held as slaves within any State, or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free”—freeing, that is, all slaves held in the Confederate states. “The first of January is to be the most

memorable day in American Annals," Frederick Douglass had answered. The Emancipation Proclamation was essentially a military maneuver, a wartime measure, and many in Congress doubted its constitutionality. Still, Americans counted the days. "The cause of human freedom and the cause of our common country, for these two causes are now one and inseparable and must stand or fall together," Douglass declared on day ninety-six. And when the "Day of Days" came—"I never, in my life, felt more certain that I was doing right than I do in signing this paper," Lincoln said, holding his pen—Blacks all over the country, from Northern cities to Union Army camps, shouted and prayed and sang and danced, a day of jubilee.[4]

Emancipation had been proclaimed; it had not been constitutionalized. Abolitionists and women's rights advocates had fought, beginning in 1863, for what female suffragists called "A NEW CONSTITUTION in which the guarantee of liberty and equality to every human being shall be so plainly and clearly written as never again to be called in question." Women had submitted petitions to Congress with more than four hundred thousand signatures, seeking an end to slavery by constitutional amendment.[5] Finally, on this day, January 31, 1865, Congress was slated to vote on that amendment: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The Senate had already passed the amendment, and the House had once before voted it down. But after a great deal of horse-trading and deal-making, a handful of Northern Democrats who'd earlier opposed the amendment were expected to switch their votes.

Roll was called as the clock tolled three. With every *aye*, the crowd roared. Eleven congressmen switched their earlier *nays*, and the Thirteenth Amendment passed 119–56, clearing the two-thirds bar with a scant two votes to spare. From the galleries, and from the House floor, people screamed and wept, shouted and embraced. "The tumult of joy that broke out was vast," one newspaper reported. "Thundering, and uncontrollable."[6] Men threw their hats, women their handkerchiefs. "Such rejoicing I never before witnessed, cannons firing, people hugging and shaking hands," the younger Douglass wrote to his father, "(white people I mean)." He'd seen Black people celebrate, but he had never seen *this*.[7]

"The one question of the age is *settled*," a California member of Congress wrote to his wife, about the moment the clerk called the vote. "Glory enough for one session, yes, even for a life." Another wrote home, "we can now look other nations in the face without shame." The next morning, the *New-York Tribune* ran the front-page story with a five-line headline:

FREEDOM TRIUMPHANT.
Commencement of a New Era.

DEATH OF SLAVERY
The Constitutional Amendment Adopted.
Grandest Act Since the Declaration of Independence.[8]

The Thirteenth Amendment, ratified by the end of 1865, ended chattel slavery. It extended the power of the federal government. And it established, too, the wholly new idea that federal constitutional amendment could be used as a tool of national social reform. On its heels, the Fourteenth Amendment, ratified in 1868, guaranteed equal protection of the laws, due process, and birthright citizenship. "Fellow citizens," Frederick Douglass said in a speech in Cincinnati, celebrating the ratification of the Fifteenth Amendment in 1870, guaranteeing Black men the right to vote, "I appear before you tonight for the first time in the more elevated position of an American citizen." [9]

The Thirteenth, Fourteenth, and Fifteenth amendments represented and also revealed the limits of the amendment as mending, as moral progress. How the changes abolitionists sought came to take the form of constitutional amendment is a tangled story whose origins lie not in the halls of Congress but in meetings in cities and states across the country, in convention halls: in constitutional conventions, where states wrote and rewrote their constitutions; in "colored conventions," where Black Americans organized campaigns for emancipation, citizenship, and equal rights; in women's rights conventions, where women, too, made new demands upon the constitutional order; and in secessionist conventions. The great political work, the great constitutional work, of the nineteenth century happened in convention after convention after convention. And when Americans could convene no more, they went to war.

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4

Let Us Examine the Word *White*

James Madison addressing the Virginia Constitutional Convention, 1829–30. The artist George Catlin painted individual portraits of each delegate before depicting the entire convention. The men's heads are oversize so they would be identifiable.

Mr. JAY moved that the word white *be stricken out.*

—Failed amendment to the New York Constitution introduced at the state constitutional convention, 1821

Between the ratification of the Twelfth Amendment in 1804 and the Thirteenth in 1865, the U.S. Constitution went unaltered in any formal sense, principally because any conceivable change threatened to upset the fragile balance between slave and free states that had been established by the constitutional compromises of 1787 and renegotiated in the fraught congressional bargains that followed: the Missouri Compromise of 1819

and the Compromise of 1850. Despite the absence of formal federal constitutional amendments, few eras in American history have been more marked by constitutional change. One historian has called these decades "an era of permanent constitutional revision." [1] In truth, the amending hiatus between the Twelfth and Thirteenth amendments was no hiatus at all but instead a contest between competing agents of constitutional revision. White men meeting in state constitutional conventions asserted that it was they who wrote, amended, and interpreted constitutions, while in dissenting conventions held all over the country, Black people, women, and Native nations challenged that authority.[2] And in Washington, the Supreme Court asserted a power to interpret the Constitution, exclusively.

Between 1800 and 1865, thirty-six states, eighteen just entering the union, held conventions and ratified new or amended constitutions.[3] In those sixty-five years, only six years passed in which no state in the United States held a constitutional convention.[4] Vermont wrote its first constitution in 1777 and held constitutional conventions in 1786, 1793, 1814, 1818, 1822, 1828, 1836, 1850, and 1857.[5] In one ten-year period, 1844–53, more than half the states in the country held constitutional conventions.[6] In 1850 delegates met in constitutional conventions in Ohio, New Mexico, New Hampshire, Maryland, Indiana, and Michigan, as well as Vermont.[7]

The ubiquity of constitutional conventions in the antebellum era deepened Americans' commitment to amendment as both an idea and a practice. "A Convention is the provided machinery of peaceful revolution," argued the Pennsylvanian George Dallas, a former U.S. senator, in 1836. "It is the civilized substitute for intestine war; the American mode for carrying out the will of the majority, 'the unalienable and indefeasible right to alter, reform or abolish their government, in such manner as they think proper.'" (The Pennsylvania legislature was, at the time, considering a convention bill.)[8] The very act of assembling, the convention itself, became the symbol—the visible enactment—of the sovereignty of the People. "These political conventions are a very great advantage to the people," a delegate to one state convention said in 1853.[9] Or as the Supreme Court of Indiana put it in 1855, "A constitutional convention of eminent citizens is the substitute for the armed mob of other countries." [10]

State constitutional conventions democratized state constitutions, including by eliminating property requirements for voting, even as the white, male delegates who met at those conventions introduced the words *white* and *male* into their constitutions, excluding everyone but themselves from the full practice of citizenship. These were the wages of majoritarianism. In response, the people excluded from those meetings, defying the tyranny of the majority, held their own conventions, in which they drafted, ratified, and amended constitutions and statements of purpose, organized petition campaigns, and proposed amendments to the federal and state constitutions. Denied the right to participate in the formal process of drafting and amending state constitutions, they held their own deliberations, promulgated their own interpretation of constitutional clauses, and devised their own philosophy of amendment.

Black men held "colored conventions," where elected delegates gathered in what can properly be considered extraconstitutional conventions. Between 1830 and 1861, Black delegates met in forty-nine state conventions, two regional conventions, and eleven national conventions.[11] Native nations held conventions, too. Sometimes they adopted their own national constitutions. "WE, THE REPRESENTATIVES of the people of the Cherokee Nation, in Convention assembled," a Cherokee constitutional convention wrote in 1827, "do ordain and establish this Constitution for the Government of the Cherokee Nation." [12] Sometimes they nullified state laws, and sometimes they asserted their rights under their interpretation of the U.S. Constitution. "We as a tribe, will rule ourselves," a convention of Mashpee Indians declared in 1833, "and have a right to do so, for all men are born free and equal, says the Constitution of the country." [13] Women held the first women's rights convention in 1848, the year political revolutions spread across Europe. By 1860, they'd held nineteen conventions, ten of them national.

In antebellum America, conventions operated as the dominant mechanism of constitutional reform, of constitutional expression, and even of anti-constitutionalism. The militant abolitionist John Brown held a convention that wrote a constitution. And when the Southern states seceded, they too held conventions and wrote constitutions. Second only to voting, conventions served as the prevailing method of political participation and of social reform. Americans in these years invented the presidential nominating convention: the first one was held in 1831, and with only one

exception, every major party has since that year nominated its presidential candidate at a convention.[14] In 1835 Andrew Jackson issued the call for a nominating convention in a letter to the American people that celebrated the very practice of convening: “I consider the true policy of the friends of republican principles to send delegates, fresh from the people, to a general convention.” [15] Utopian societies, religious sects, and temperance associations held conventions and wrote constitutions. So did everyone from debtors in a debtors’ prison in New York to squatters in a mining camp in Wisconsin.[16]

But federally, judicial review displaced amendment as the chief method of revising the Constitution.[17] In 1803, the year Congress sent the Twelfth Amendment to the states for ratification, the Supreme Court for the first time declared an act of Congress unconstitutional, in *Marbury v. Madison*. In that case, Chief Justice John Marshall, a Federalist, sought to defeat all other then-current theories of constitutional interpretation, including that advanced by Madison and Jefferson in the Virginia and Kentucky Resolutions. Congress cannot decide whether a law is or is not constitutional, Marshall insisted; nor can states decide what laws passed by Congress are or are not constitutional. Only the Supreme Court can decide what the Constitution is and what it means. By this mechanism, Marshall insisted, the Court does not *alter* the Constitution; it *prevents* change.

Marshall’s opinion in *Marbury* is an essay on the nature of fundamental law. One of two things is true, Marshall wrote: “the Constitution is either a superior, paramount law, unchangeable by ordinary means,” or else “it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.” If the second were true—if Congress could alter the Constitution, “then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.” But instead, the first is true, and the Constitution can be altered only by extraordinary means—Article V. As a consequence, if Congress passes a law that alters the Constitution, it is no law at all but is, instead, void, and it is the duty of the Court to declare it to be so. “This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society,” Marshall concluded.[18]

The Court again asserted its power to decide the constitutionality of acts of Congress in 1819 in *McCulloch v. Maryland*, in which Marshall found that a congressional law incorporating a national bank did not violate the Constitution, even though "we do not find the word 'bank' or 'incorporation'" in the Constitution, because such legislation is among Congress's implied powers. "By this tribunal alone can the decision be made," Marshall wrote in *McCulloch v. Maryland* in 1819. "On the Supreme Court of the United States has the constitution of our country devolved this important duty." [19] Even when the Court was not overturning a state law or an act of Congress, in other words, it was exercising its power to revise the Constitution by reading it differently.[20]

James Madison was irked by Marshall's opinion in *McCullough*. "I have always supposed that the meaning of a law, and for a like reason, of a Constitution, so far as it depends on Judicial interpretation, was to result from a course of particular decisions, and not these from a previous and abstract comment on the subject," he complained privately. He had still not published his notes, but when asked, he was willing to offer his reminiscences about the Constitutional Convention of 1787. As for the Supreme Court's assertion of its exclusive power to interpret the Constitution—and, in effect, thereby to alter it—Madison wrote that "few if any of the friends of the Constitution" in 1787 could have anticipated "that a rule of construction would be introduced as broad & as pliant as what has occurred" in *McCullough*. "A regular mode of making proper alterations has been providently inserted in the Constitution itself," he went on. Article V was the only means to alter the Constitution, Madison insisted, and he hoped that "no innovations may take place in other modes," including Congress's assertion of new powers.[21]

For all the revision of state constitutions and for all the contention over the interpretation of the federal Constitution, not a few commentators remarked, even from the floor of Congress, that very few people seemed to know the Constitution very well or to rely on any defensible system of reasoning for its interpretation. As the governor of New York remarked in 1847, "No one familiar with the affairs of our government, can have failed to notice how large a proportion of our statesmen appear never to have read the Constitution of the United States with a careful reference to its precise language and exact provisions, but rather, as occasion presents, seem to

exercise their ingenuity . . . to stretch both to the line of what they, at the moment, consider expedient." [22] It was ever thus.

All the same, when the Frenchman Alexis de Tocqueville toured the United States in the 1830s, he reported that ordinary Americans were exceptionally familiar with American law: "I scarcely ever met with a plain American citizen who could not distinguish, with surprising facility the obligations created by the laws of Congress from those created by the laws of his own State; and who, after having discriminated between the matters which come under the cognizance of the Union and those which the local legislature is competent to regulate, could not point out the exact limit of the separate jurisdictions of the Federal courts and the tribunals of the state." [23] This knowledge displayed, among other things, Americans' ongoing suspicion of government, the federal government in particular, and of the power of the judiciary. Suspicion, however, does not convey the sentiment of bitterness and betrayal expressed by William Grimes after he escaped slavery. "If it were not for the stripes on my back which were made while I was a slave," he wrote, describing his scars from whippings, "I would in my will, leave my skin a legacy to the government, desiring that it might be taken off and made into parchment and then bind the Constitution of glorious, happy and free America." [24]

The contest over the meaning of the Constitution and the authority to interpret it came to a head in 1857 when, in *Dred Scott v. Sandford*, the Supreme Court, ignoring the constitutional interpretation promulgated at Black conventions, upheld the constitutionality of slavery and ruled that people of African descent are not and can never become American citizens and, moreover, have "no rights which the white man was bound to respect." Frederick Douglass denounced "this devilish decision—this judicial incarnation of wolfishness" and argued that "slavery lives in this country not because of any paper Constitution, but in the moral blindness of the American people." Countering the Court, and building on arguments made by Black delegates over nearly three decades of Black conventions, he offered an annotated version of the preamble to the Constitution:

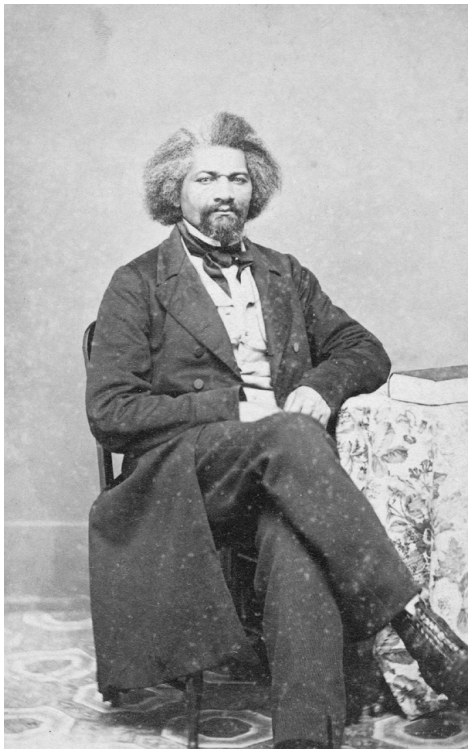
> We, the people—not we, the white people, not we, the citizens, or the legal voters—not we, the privileged class, and excluding all other classes but we, the people; not we, the horses and

> cattle, but we the people—the men and women, the human inhabitants of the United States, do ordain and establish this Constitution.[25]

Douglass, not the Court, eventually won this argument. But it required an army.

This excess of southern representation

There was only one truly significant attempt to amend the U.S. Constitution by Article V before the Civil War: the attempt to abolish the Electoral College. Like Joseph Pope's orrery, the Electoral College had never quite worked properly. The Twelfth Amendment, which separated the election of the president and the vice president, attempted an early repair, but it wasn't enough. Every presidential election, and the admission of every new state to the Union, only further illustrated the nature of the problem which, like nearly everything else in the United States before the Civil War, was inextricable from the problem of slavery.



Frederick Douglass in 1863

When Thomas Jefferson defeated John Adams in the election of 1800, Federalists blamed their loss of the presidency and, more broadly, their diminishing political power, on the three-fifths clause, which gave slave states disproportionate representation in Congress and therefore in the Electoral College, too. The defeated president's son, John Quincy Adams, believed that "this excess of southern representation decided the fate of the last election for President and Vice President of the United States; the same event must inevitably follow every contest in which the interests of the North and those of the South shall be at variance." The purchase of the Louisiana Territory from France in 1803—more than eight hundred thousand square miles, nearly doubling the size of the United States—seemed likely to bring more slave states into the Union. Critics of Jefferson also questioned the constitutionality of the Louisiana Purchase. Jefferson had believed its annexation required a constitutional amendment. (In an early draft, his proposed amendment guaranteed Native sovereignty—"The rights of occupancy in the soil, and of self-government, are confirmed to the Indian inhabitants, as they now exist" [26]—but he deleted this sentence in the version he sent Congress.)[27] Jefferson's advisers and the Senate itself considered the amendment unnecessary, and it was never voted on. But New England Federalists were outraged by the annexation, and extremists even suggested that the only solution was to secede from the Union and form "a new confederacy." "There will be . . . a separation," Massachusetts senator Timothy Pickering predicted in December 1803, "the white and black population will mark the boundary." Said one Connecticut senator, "The Eastern States must and will dissolve the Union and form a separate government of their own, and the sooner they do it the better." [28]

By 1802, the story of Jefferson's Black family with Sally Hemings had been exposed in the press.[29] During his campaign in 1800 and again in 1804, Jefferson refused to address the charges, though visitors to Monticello could not help but take note. ("The story of black Sal is no farce," wrote one visitor in 1811, by which time Hemings had given birth to two more children, including a boy that Jefferson named Madison. "That he cohabits with her and has a number of children by her is a sacred truth—and the worst of it is he keeps the same children slaves—an unnatural crime which is very common in these parts.")[30] New Englanders took to calling Jefferson "the Negro president," an allusion both to the rumors of his

relationship with Sally Hemings and to the calculation that only the disenfranchised and enslaved Black population of the South had given Jefferson the Electoral College votes needed to win the White House.[31]

Massachusetts rejected the Twelfth Amendment.[32] Then on June 13, 1804, two days before New Hampshire was set to vote on it, a vote that would secure its ratification, William Ely, a Federalist member of the Massachusetts legislature, proposed a new federal amendment. Ely wanted to amend the Constitution to abolish the three-fifths clause, making representation and taxation proportionate only to "the number of their Free Inhabitants." Ely's amendment was heralded all over Massachusetts during Fourth of July orations and was meant to be the centerpiece of the fall presidential campaign. But the death of Alexander Hamilton, former secretary of the Treasury, on July 12—the result of a wound sustained during a duel with Aaron Burr, vice president of the United States—dominated newspaper coverage and swept the Ely amendment from the headlines.[33]

Jefferson won reelection in November. On December 7, two days after the last votes were cast, Timothy Pickering introduced Ely's amendment into the U.S. Senate.[34] He had some support. If the Constitution "is to be altered, justice requires that the article authorizing the representation of slaves should be the first to receive amendment," said one congressman. But Pickering's proposal had far more opponents.[35] "If the gentlemen wish to shake the Constitution to pieces," asked one senator, "why not go at once to a simple democracy?" [36] But Pickering continued to contemplate seceding from the Union and forming a Northern Confederacy.[37] When Jefferson imposed an embargo against Britain in 1807 and especially after the United States went to war with Britain in 1812, New England Federalists blamed the financial hardship caused by the embargo and the war on Jefferson, on his party and its dominance, and by extension, on the three-fifths clause. Their opposition had little or nothing to do with disapproval of slavery; they opposed only the political disadvantages that accrued to themselves.

In 1814, the situation reached something of a crisis when New Englanders, in a circular letter sent from a town in western Massachusetts, called for "a convention of all the northern and commercial states . . . for procuring such alterations in the federal constitution, as will give to the

northern states a due proportion of representation." [38] Twenty-six delegates from five New England states met in a convention in Hartford for three weeks. The convention was dominated by moderates who were determined to quell the calls for disunion rather than to inflame them. Instead of recommending secession, they proposed seven amendments to the Constitution. First on the list was the abolition of the three-fifths clause.[39] The amendments reached Congress just as news arrived of General Andrew Jackson's triumph over the British in the Battle of New Orleans, which ended the war. None of the amendments were acted on.[40]

Unable to *diminish* the power of slave states by amending the Constitution to abolish the three-fifths clause, Northerners hoped at least to prevent the *increase* of that power by prohibiting the extension of slavery to new states entering the union. This became an issue in 1818, when Illinois applied for statehood. Like Ohio and Indiana, which had entered the union in 1803 and 1816, Illinois, as part of the Northwest Territory, was bound by the Northwest Ordinance's prohibition against slavery: "There shall be neither slavery nor involuntary servitude in the [Northwest] territory." Congress decreed that Illinois had to write a constitution "not repugnant," by which it meant it would be allowed to enter the Union only as a free state. But when Illinois held its first constitutional convention in 1818, in Kaskaskia, then the capital, eighty miles south of St. Louis, its thirty-three delegates, many of whom were immigrants from Kentucky, Tennessee, and the Carolinas, found freedom difficult to agree on.[41] Only after fierce debate, and by a vote of 17–14—this was the sole issue contested at the convention—did they approve a prohibition on slavery, as Article VI —"There shall be neither slavery nor involuntary servitude in this state"— to which they added language that allowed for all manner of unpaid, coerced labor, forms of slavery by another name. Illinois entered the Union as a free state, but thirty-four members of Congress, all Northerners, voted against its admission, arguing that Illinois was free in name only.[42]

Illinois turned out to be merely a rehearsal for the conflict that would arise when Missouri, part of the Louisiana Purchase, applied to enter the union as a slave state. That conflict was eventually resolved by the admission of Maine, hiving off from Massachusetts, as a free state, thus maintaining the balance between free and slave states. The Missouri Compromise also drew a line across the Louisiana Territory at 36º 30'

latitude, with slavery prohibited above that line but allowed below it. Yet that scarcely ended the constitutional questions at stake, which included not only the status of slavery in the states but the status of free Black people.

In 1820, at a constitutional convention in St. Louis, Missouri devised a constitution that allowed slavery, restricted suffrage to "every free white male citizen of the United States who may have attained to the age of twenty-one years and who shall have resided in this state one year before an election," and decreed that the legislature "shall have no power to pass laws for the emancipation of slaves, without the consent of their owners, or without paying for them," and "it shall be their duty, as soon as may be, to pass such laws, as may be necessary, to prevent free negroes and mulattoes, from coming to and settling in this state, under any pretext whatsoever." [43] These measures—the restriction of the franchise to white men and instructions to legislatures to ban the entry into the state of free Blacks—had lately become features of constitutions in free states as well. Both Ohio and Maryland had instituted restrictions on Black immigration in 1807.[44] Connecticut, in its 1818 constitution, became the first and only New England state to restrict voting to "every white male citizen." [45] Kentucky, South Carolina, and Georgia also banned the immigration of free Blacks. In 1819, following the instructions in its 1818 constitution, the Illinois legislature passed a series of Black Codes, restricting the movement and abolishing the rights of free Blacks in the state. (Black people in Illinois could not vote, serve on juries, or own property.) But when Missouri's constitution went to Congress for approval, Northerners argued that the prohibition on Black immigration was unconstitutional since free Blacks, as citizens of the United States, were protected under the U.S. Constitution's Article IV, Section 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

With the privileges and immunities debate, questions about the constitutionality of racial distinctions were added to questions about the constitutionality of slavery. "Color no more comes into consideration to decide who is a citizen than size or profession," declared New Hampshire senator David Morril during the debate over Missouri's proposed constitution. "You may as well say a tall citizen shall not settle in Missouri, as a yellow citizen shall not." But South Carolina representative Charles Pinckney dismissed those who objected to Missouri's constitution as suffering from "a total want of knowledge of the distinction which has,

from time immemorial, existed in the civilized world, between the black and white race." In the end, Congress accepted the state's constitution, with the proviso that no part of it could be construed to violate the privileges and immunities clause.[46]

Discontent with the Electoral College did not end with the death of the Federalist Party. In Andrew Jackson's first annual message to Congress, on December 8, 1829, he asked the legislature to pass a constitutional amendment. "I consider it one of the most urgent of my duties to bring to your attention the propriety of amending that part of the Constitution which relates to the election of President and Vice-President," he said, and then, backing the idea of amendment itself: "Our system of government was by its framers deemed an experiment, and they therefore consistently provided a mode of remedying its defects." Jackson proposed to abolish the Electoral College, to "remove all intermediate agency" between the will of the people and the election of the president and vice president.[47]

Jackson's interest in this amendment was self-interest. In the presidential election of 1824, he'd won the popular vote but lost the election. Jackson had earned 152,901 votes and John Quincy Adams 114,023, and he'd bested Adams in the Electoral College, too, 99–84, but because two other candidates split the remaining 78 votes between them, Jackson had not won a majority. Under the terms of the Twelfth Amendment, the decision went to the House, where the Speaker, Henry Clay, managed a win for Adams who, once inaugurated, named Clay as his secretary of state in a move that became known as the "corrupt bargain."

Even before that election, members of Congress had introduced constitutional amendments making the presidential election more responsive to the popular will. The first attempt, amending the Constitution to require electors to be elected by districts within every state, came in 1806, a call that was then regularly renewed.[48] Amendments proposed to institute a direct popular vote—e.g., "That the Constitution of the United States ought to be so amended, that the People of the several States, authorized to vote for members of the most numerous branch of the Legislature in each State, shall vote directly for the President and Vice President of the United States, and that a plurality of votes shall determine the choice"—were first introduced in 1825, in the form of both bills and petitions. At the start of 1826, seventeen different measures to this end were introduced into Congress, so many that, on March 8, a Maine congressman

introduced an amendment proposing that amendments could be considered only once every ten years, beginning with 1830.[49]

Abolishing the Electoral College and electing the president by popular vote would have meant a loss of political power for both small states and slave states. It would also have rewarded states with the broadest electorate. The proposed amendment never went to a vote in either house. Meanwhile, in the states, the electorate was reconstructed.

The Future Amendments Committee

In 1787 no one could have predicted that a federal constitutional convention in the United States would become unthinkable but that, in the states, conventions would be as regular as rain.[50] No one predicted it, but everyone noticed it. "America is, at the present day, the country in the world where laws last the shortest time," Tocqueville wrote in 1833 in *Democracy in America*, even before amendment fever reached its pitch. "Almost all the American constitutions have been amended within the course of thirty years: there is therefore not a single American State which has not modified the principles of its legislation in that lapse of time." [51]

Americans held conventions to amend their constitutions to make them more democratic. "The first principle of our system," Andrew Jackson insisted in 1829, "is that the majority is to govern." [52] In truth, this principle had been scarcely honored in early state constitutions: Americans did not elect their U.S. senators (who were elected by state legislatures); nor did they elect the president (who was elected by the Electoral College); nor did they elect Supreme Court justices (who were and are nominated by the president and confirmed by the Senate); nor, at the start of the nineteenth century, did they elect delegates to the Electoral College (who were chosen by state legislatures). Much the same was true in the states, where legislatures, not voters, elected governors, and governors appointed judges, and in any case, most states restricted voting to men who owned property.

Efforts to alter these arrangements at the federal level—which included proposed amendments not only abolishing the Electoral College but also reapportioning representation and requiring Supreme Court justices to retire at age sixty-five—all failed. In the states, these efforts nearly all succeeded.

When Virginia proposed to write a new constitution in 1816, Jefferson gladly supplied a list of what he considered to be the truly essential changes:

> The sum of these amendments is, 1. General Suffrage. 2. Equal representation in the legislature. 3. An executive chosen by the people. 4. Judges elective or amovable. 5. Justices, jurors, and sheriffs elective. 6. Ward-divisions. And 7. Periodical amendments of the constitution.[53]

These were, on the whole, the very amendments that most state conventions adopted.

Between 1816 and 1821, six states entered the union—Indiana, Illinois, Mississippi, Alabama, Missouri, and Maine—and none had a property requirement, a development that set a standard for new states and put pressure on old states to drop their existing requirements. In 1800 every state except New Hampshire and Vermont had some form of a property requirement for voting. By 1865 none did. Between 1824 and 1828 alone, the number of voters more than doubled, growing from less than 400,000 to 1.1 million.[54] At the start of the century, in a majority of states, delegates to the Electoral College were elected by state legislatures.[55] By 1824 voters themselves elected those delegates in eighteen out of twenty-four states.[56] In 1800 voters elected their own governors in only seven states. By 1853 voters in all thirty-one states elected their own governors.[57] And by 1860 eighteen states mandated the election, rather than the appointment, of judges.[58]

Changes made in the states had a domino effect, partly because of how extensively one constitutional convention influenced another. Kansas relied on Ohio's constitution; California relied on Iowa's.[59] There was, in fact, a great deal of borrowing, encouraged not only by newspaper reports of convention proceedings but also by the migration of Americans from one state to another, carrying constitutional ideas in their luggage, and by the printing and widespread distribution of compilations of constitutions. When New York delegates met in convention in 1821, they were able to refer to a manual that had been specially printed for the convention, containing digests of twenty-four state constitutions.[60] The government supplied every delegate to Pennsylvania's 1837 convention with a printed compilation of state constitutions, a practice that became commonplace.[61] At California's

constitutional convention in 1849, the explorer Lansford Hastings offered his opinion that all anyone really needed to do, to write a state constitution, was to read a book "containing the Constitution adopted by the wisdom of the age in which the framers lived—sanctioned by long experience—pronounced superior to any ever adopted in the known world. . . . the best book extant on human rights and human government—the Constitution of the United States." [62] There was, in fact, an actual book: *The Book of the Constitution. Containing the Constitution of the United States; a Synopsis of the Several State Constitutions; with various other Important Documents and Useful Information*, first published in New York in 1833.[63] But in truth, instead of borrowing from the U.S. Constitution, most states borrowed from the constitutions of other states, Northern states relying on New York's as a model, and Southern states on Virginia's.[64]

Follow for extended description

A constitutional convention in Topeka, Kansas, 1855

Some delegates to conventions objected to all that borrowing. Michigan had drafted a constitution in 1835 and entered the union in 1837. At an amending convention in Michigan in 1850, delegate Robert Crouse complained about all the references made to other state constitutions. "We are not sent here to telegraph from one end of the Union to the other, from Maine to California, for constitutions upon which to model our own," he

said, “but to make those few amendments to our excellent constitution which people require.” [65]

If states borrowed from the constitutions of other states, they were in no real position to be informed by the records of the state conventions, which, although not secret, were almost as unavailable and even more unreliable than the records of the 1787 federal convention. Records of state constitutional conventions often took decades to appear in print. Connecticut’s 1818 convention’s records were not published until 1991. Some records seem never to have existed. (Oregon’s 1857 convention left no trail.) Others were simply lost. The records of a Nebraska convention were stored in a cracker box until they disappeared. What reports did survive were riddled with errors, omissions, and misrepresentations.[66]

Yet the records that do survive document delegates across the country confronting common problems, including the inevitable consequence of population growth: legislative malapportionment. Early constitutions tended to grant favor—and fuller representation—to the most settled parts of states, generally in the east. As state populations grew and dispersed, those apportionment schemes needed to be updated, but in most states the only way to make that change, or any other, was to call a convention to amend the constitution. But only legislators—the very elected officials who benefited from malapportionment—could make that call.[67] A whole slew of conventions, then, made a priority of amending their constitutions to make it easier to amend their constitutions.[68] As one delegate to a convention in North Carolina explained in 1835: “For 30 or 40 years, the West had been seeking a Convention and the East had been opposing it. It was natural, that having had so much difficulty in succeeding, the West should provide an easier mode of calling Conventions in future, and that the East, from policy, should want to make it as difficult as possible.” [69]

Making amending a constitution easier meant different things in different states. The highest bar to amendment was set by states in which either a proposed amendment or a call for a convention to consider amendments had to pass the legislature by a two-thirds or even a three-quarters supermajority, often in consecutive legislative sessions. This could take years or even decades. In 1805 the Pennsylvania legislature dismissed calls for a convention, arbitrarily deeming the number of petitions submitted asking for one to be simply not enough. It drew the same

conclusion in 1821, decreeing that "a sufficient number of petitions have not been presented to induce the legislature to originate any proceedings to test the opinion of the people on the subject." [70] (The legislature relented only in 1837.) Rhode Islanders, who didn't have a constitution—the state operated under its colonial charter—started campaigning for a convention in 1792; they didn't get one until 1824, and then it proved unable to get anything done. In a state where only two in five white men were eligible to vote, the disenfranchised held an extralegal people's convention in 1841 and wrote their own constitution, after which the state finally held a convention, and then for a while Rhode Island had two dueling constitutions, and martial law, until a third convention led to the ratification of yet another constitution in 1842, granting the right to vote to any male resident of the state who could pay a dollar in poll tax.[71]

Conventions also altered the mode of ratification. Before 1812, no state outside New England had sought popular ratification for a constitution, and by 1826, only two had done so. Legislatures tended to oppose popular ratification; conventions tended to favor it. In 1857, after Minnesota entered the Union, Congress required that new states put their constitutions to a popular vote. Still, as late as the 1870s, only six states of what had been the Confederacy had submitted a constitution to the people for ratification by popular referendum.[72]

Amendment battles were hard fought. John Randolph was among the elder statesmen who served as delegates to Virginia's constitutional convention in 1829. Randolph, complaining about "all this *hammering* at fundamental law," opposed every single change to Virginia's constitution, especially a new and easier procedure for amendment. "I should as soon think of introducing into a marriage contract a provision for divorce," Randolph scoffed. Amendment, to Randolph, could lead only to anarchy and an ever-changing, never-stable constitution. "Can anyone believe that we, by any amendments of ours, by any of our scribbling on that parchment, by any amulet, any legerdemain—char—Abracadabra—of ours can prevent our sons from doing the same thing?" This new constitution, he predicted, would not last twenty years. (He was right; Virginia held another convention in 1850 and adopted a new constitution in 1851.)[73]

Reformers wanted to eliminate consecutive-session requirements for calling conventions, but they especially wanted to eliminate supermajority

requirements.[74] “It is anti-republican—it is anti-democratic,” said a delegate at Pennsylvania’s 1837 convention. “If . . . our government is based upon the fundamental principle that the majority shall govern, to what end should this convention decide that, for the future time, in making any changes in the fundamental law of the state, the vote of more than a majority of the legislature shall be required?” [75] Some reformers wanted to wrest the power to propose amendments from the legislature altogether and simply put the question of calling an amending convention to a popular vote at regular intervals.[76] “Suppose, Sir, your Legislature should be made up of men, that from year to year, and for ten years, should deem it unnecessary to revise the constitution, and if for ten, why not for twenty, or even for a hundred years?” one delegate asked at a Maine convention in 1819. “Is it more safe to trust the people with the right of revising, or to give their rulers unlimited power? Every man acquainted with history can easily answer.” [77] Seven states—Indiana, New York, Michigan, Maryland, Ohio, Iowa, and Virginia—adopted these periodic revision mechanisms. New York’s 1846 constitution, for example, decreed that voters be asked, every twenty years, “Shall there be a convention to revise the constitution and amend the same?” [78]

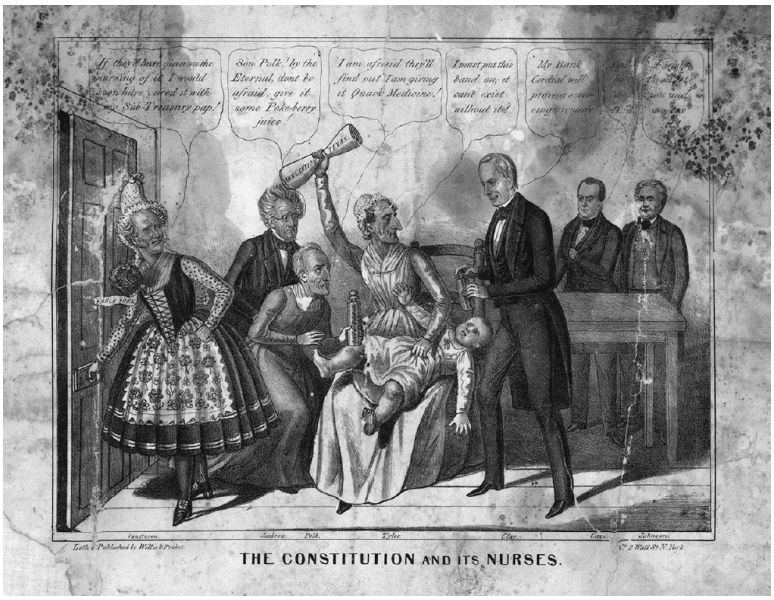
The era of permanent constitutional revision was also an era of continual constitutional celebration, the heralding of the sovereignty of the people as embodied in their right to amend their constitutions or even to destroy their governments. By 1850, over half of all state constitutions included some form or another of a statement—borrowed, adapted, and customized—that “the people . . . have the inherent, sole, and exclusive right . . . of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness.” [79] A commitment to amendment deepened. Many men meeting in many meetings made very many changes to their state constitutions, including making amending easier because they believed that more and quicker amending would be needed in the future. Conventions in both New York (1846) and Indiana (1851) formed future amendments committees.[80] (In Virginia, John Randolph mocked fellow delegates’ “very great anxiety to provide for *futurity*.”)[81] This commitment echoed Jefferson’s own view, that no constitution can bind the unborn and that therefore constitutions ought to be revised every nineteen years, once in a generation. “We are engaged in

the creation of a government which is not only for ourselves but which we proudly say is to be handed down to our posterity to be a rule of action for them," an Ohio delegate said in 1850. "Yet posterity have no hand in making this government. They are not parties to the compact. They give no assent to its provisions. Is it not justice then to declare that when we deliver it into their hands, they shall have the privilege to say whether or not they will be bound by it?" It was then necessary, he declared, indeed, "it is the duty of every man, in framing the organic law, to leave it so open to change, that it never can become anything else than the free, voluntary consent of the people." [82] Or as a delegate in Louisiana in 1845 put it, "We are constantly improving in the science of government, as in all else, and we ought not to tie either our own hands or the hands of those who are to come after us." [83]

In this fretting over the future, there was more going on than a restatement of Jefferson's opinions about the dead hand of the past. Amendment, which in the eighteenth century held strongest associations with mending, repair, and moral improvement, came, in the industrializing nineteenth century, to be most closely associated with technological progress. In their state constitutional debates, Americans were advancing a much more elaborated philosophy of amendment than that which had prevailed in the 1780s and '90s. "We live in an age of progress," William Steele said at Indiana's amending convention in 1850. "The very purpose for which we were sent here was to make improvements in our system of government, to avail ourselves of all the lights which the experiences of other States and of our own furnishes us, in order to make our organic law as perfect as it is possible to make it, and as consistent with the theory and practice of free government as it is in our power to do. But when we have done all this, shall we say that we have arrived at the farthest point in the progress of improvement—that no further advance can be made—that we have attained perfection—that there will hereafter be no necessity for alteration—that we are to remain stationary and seek no further advance in the science of government?" [84]

In decades that saw the development of the telegraph, the canal system, the railroad, the power loom, and the factory, those who argued that constitutions ought to be easier to amend often invoked a new set of ideas about machines. To those who might object to constitutional change, the pace of technological change was offered as evidence. "Let them look at the

progress that has been made in the arts and sciences, in mechanics, in agriculture, in morality, and then say if they have reason to expect that those who may survive for that period, or those who are now pursuing their onward course, are likely to retrograde from what we are now," Isaac Preston said at Louisiana's convention in 1845. "Those who are to come after us, advancing, as the world is, in morality, in peace and tranquility, and in the repudiation of vices which have been too common in our day, will certainly know better how to govern themselves than we can." [85] Making provisions to put the question to voters on a regular schedule was itself dictated by the pace of technological change. To a delegate at Michigan's 1850 convention, ten years between votes on conventions seemed too long, given the speed of progress. "For within the last ten years, such has been the rapid improvement in the mechanical arts, the scientific professions, the electric telegraph, together with California coming into the Union, etc., that in my opinion, this period would be best." [86]



The Constitution as a baby, fretted over by Nurses Van Buren, Jackson, Polk, Tyler, Clay, and more, 1844

And there was, too, if less frequently stated in constitutional conventions, another kind of progress to plan for and to constitutionalize: moral reform. This was the view of Elisha P. Hurlbut in his 1845 *Essays on Human Rights and Their Political Guarantees*. "Whenever the majority of the people rise up and demand a reformed Constitution, it is their right to

have it—and they will have it," Hurlbut wrote. In the act of convening the people to deliberate on fundamental law, he saw the prospect of moral improvement, "great progress in the cause of human rights and liberty." The work of revising a constitution, he insisted, "is a work of reform in the errors of the past, based upon a broader and more enlightened experience." He subscribed to the theory of a convention as a peaceful revolution, capable of implementing a series of reforms "so broad and comprehensive, so enlightened and liberal, so pure and just, as to amount to a revolution—a great and peaceful moral revolution, in the mode of administering the powers of Government. . . . Let the revolution come." [87]

And the revolution came. But it wasn't peaceful, and it wasn't the revolution in human rights that Hurlbut predicted.

All free white male persons

A great many of the conventions that took place before the Civil War involved adding the word *white* to state constitutions. At the federal convention in Philadelphia in 1787, after draft language proposed calculating representation "in proportion to the whole number of white & other free Citizens & inhabitants," the words *white* and *free* had been deleted in revision. But in new and amended state constitutions, when describing who was eligible to vote, the words *white* and *free* and *male* were inserted: in West Florida in 1810, in Louisiana in 1812, in Indiana in 1816, in Mississippi in 1817, in Connecticut and Illinois in 1818, and in nearly every other state thereafter.[88] Who were the People who could assemble, ordain, establish, and amend? They were, in newly precise state constitutional language, "all free white male persons of the age of twenty-one years who are citizens of the state." [89] By 1840, "universal suffrage" meant that all poor white men could vote.[90] By the end of the 1840s, in a union of thirty-one states, Black men could vote without restriction in only four: Maine, Massachusetts, Vermont, and Rhode Island.[91]

No word was more fiercely debated at state constitutional conventions than the word *white*. And no convention was more influential than the meeting of 126 delegates in Albany in 1821. Unlike most, New York's proceedings were recorded and reported in detail—every roll call recorded and nearly every speech fully transcribed—and published serially in the

New York American and other newspapers. A compilation of four different reporters' accounts then appeared as a book of nearly four hundred pages.[92]

New Yorkers—an electorate that at the time included Black men—had voted for a constitutional convention by a margin of three to one, primarily on the promise of extending suffrage by eliminating a property requirement. Black men had for the most part been excluded from voting by the property requirement; if it were lifted, they would all be eligible to vote—unless a racial restriction were introduced. No Black men served as delegates to the convention, but Black New Yorkers submitted a petition to the convention asking it to "incorporate a provision in the constitution preventing the legislature from passing any laws interfering with their rights" or their ability to "exercise the right of suffrage." [93] Reviewing the petition, one delegate declared that Black people "are a peculiar people, incapable, in my judgment, of exercising that privilege with any sort of discretion, prudence, or independence," and warned that if their petition were to be granted, it would "soon be followed up by a demand to be represented in this hall by their own colour." [94]

Delegate Peter Jay was the son of John Jay, who had helped draft New York's first constitution in 1777. Like his father, Peter Jay had become active in a growing antislavery movement. At the convention, he declared that he had no intention of voting to restrict suffrage in a convention called to extend it. "I do not believe your constituents have authorized you to disenfranchise them," he scolded his fellow delegates, "and these blacks are your constituents as well as men of fairer complexions. They have many of them voted to give you your seats here." Black men, Jay insisted, "were born as free as ourselves, natives of the same country, and deriving from nature and our political institutions, the same rights and privileges which we have." As to the idea that the "African race" was inferior to any other, Jay conceded that some people might once have taken that idea seriously, but "this idea has been so completely refuted, and is now so universally exploded, that I did not expect to have heard of it in an assembly so enlightened as this, nor do I now think it necessary to disprove it." [95]

The importance of this decision was not lost on the delegates, who admitted that this question, of all those debated, was "most interesting to the public." [96] Robert Clarke noted that neither the state's original constitution nor the U.S. Constitution included the word *white*: "No, sir, our

venerable fathers entertained too strong a sense of justice to countenance such an odious distinction." And as to introducing it, he asked, "Is this just? Is it honest? Was it expected by our constituents? Will it not fix a foul stain upon the proceedings of this Convention which time will not efface?" [97] Not to mention, Clarke went on, restricting the vote to "white" men was simply impractical: "He had seen slaves whiter than their masters." [98] Finally, Clarke pointed out that when Missouri submitted its constitution to Congress, New York's legislature had sent a unanimous resolution to its congressional delegation instructing them "to prevent any state from being admitted into this union, which should have incorporated in her constitution any provision denying to the citizens of 'each state all the rights, privileges, and immunities of citizens of the several states.'" [99] How, now, could New York itself craft a constitution that defied its own congressional instructions?

New York's debate turned to the philosophy of amendment itself. How could dropping a property requirement but adding a racial one be understood as progress? Wasn't it instead, as one delegate suggested, regression? "If we adopt the principle of this proviso," he warned, "I hope and believe, that our posterity will blush, when they see the names recorded in favour of such a discrimination." [100] But another delegate suggested that if posterity were to blush, it could simply amend the state's constitution again: "if the time should ever arrive when the African shall be raised to the level of the white man—when the distinctions that now prevail shall be done away—when the colours shall intermarry—when negroes shall be invited to your tables—to sit in your pew, or ride in your coach, it may then be proper to institute a new Convention, and remodel the constitution so as to conform to that state of society." [101]

When "Mr. JAY moved that the word *white* be stricken out," the motion passed narrowly, 63–59.[102] But in the end, the convention voted in favor of lifting the property requirement for white men but adding one for Black men: "no man of colour, unless he . . . shall be seized and possessed of a freehold estate of the value of two hundred and fifty dollars . . . shall be entitled to vote at such election." Overnight, some thirty thousand Black men in the state lost the right to vote.[103]

They fought back. The editor of a Black newspaper, *Rights of All*, declared that New York's constitutional convention had acted illegally in

restricting suffrage to whites, much as it would have if it had required that all voters be six feet tall.[104] Black men began calling for their own conventions, from Maine to California, to plan for abolition, emancipation, and equal rights. In 1830 twenty-six Black delegates from seven states—Pennsylvania, Maryland, Connecticut, New York, Rhode Island, Virginia, and Delaware—held the first Free People of Color convention at the AME Bethel Church in Philadelphia. Richard Allen, Bethel's minister, called for a general convention to be held in his church in June 1831.[105] Delegates at that next meeting planted the seeds of the convention movement: they established a convention fund to plan for future meetings, ruled that the Declaration of Independence and the Constitution ought to be read at every meeting, and set as their objective the overturning of "the many oppressive, unjust and unconstitutional laws, which have been enacted in different parts of the Union, against the free people of colour." [106] If they could not vote on constitutions, they would insist on their right to interpret them.

Nullification Castle

Despite the hundreds of constitutional conventions held in the states before 1860, there were hardly any formal calls for a federal constitutional convention; in fact, there were only three. All three came in the 1830s, and all concerned a doctrine known as nullification.[107]

In 1828 Southerners were unhappy with a tariff imposed by Congress, believing it to be an attempt by Northerners opposed to slavery to punish—and impoverish—the South. At the request of the South Carolina legislature, the South Carolinian John C. Calhoun, John Quincy Adams's vice president, secretly authored a denunciation of the tariff in which he argued that any state had a right to nullify an act of Congress that it considered to be a violation of the U.S. Constitution. Citing the Virginia and Kentucky Resolutions and arguing that "the constitution has made us a *community* only to the extent of our common interest, leaving the States distinct and independent, as to their peculiar interests," Calhoun carefully laid out an argument that the states possessed the power to declare acts of Congress unconstitutional. They could do this by a "veto" that Calhoun called an act of "interposition" (a term that Southerners would use after 1954, as part of the effort to resist *Brown v. Board of Education*). In the

whole Constitution, Calhoun observed, “there is not an opposing interest, throughout the whole that is not counterpoised.” But then what is the check against a federal law that places an unequal burden on a single state or on a minority of states? Article V amendment is no check to that form of tyranny: a single state or a minority of states cannot use Article V, which requires three-fourths of the states. Under these circumstances, for a state suffering under an unfair act of Congress to propose an amendment to overturn it “would be perfectly idle.” A state’s power to declare an act of Congress unconstitutional is not expressly provided for in the Constitution, but surely, Calhoun argued, this power is implied, in exactly the same way that the Supreme Court’s power to declare acts of Congress unconstitutional is implied. He proceeded to strike down objections by elaborating on the similarity of these two implied powers, state interposition and judicial review. To the objection that interposition “rests on mere inference without any express provision in the Constitution, and that it is not to be supposed —if the Constitution contemplated the exercise of a power of such high importance—that it would have been left to inference alone,” Calhoun simply pointed to “the power of the Supreme Court to declare a law unconstitutional,” which is surely “among the very highest and most important, that can be exercised by any department of the government,” and the Constitution does not make “any express provision to justify its exercise.” Both powers rest “on mere inference,—but an inference so clear, that no express provision could render it more certain.” The two powers are quite similar, except that the case for state interposition, Calhoun continued, is the better claim. “The deduction in the one case is not clearer than the other; but if we refer to the nature of our Constitution, the right of the state stands on stronger grounds than that of the court.” [108]

Calhoun made his case. Among the earliest proponents of his doctrine was the South Carolina writer Maria Henrietta Pinckney. She lived in a house that came to be called Nullification Castle.

Born in 1774, Maria Henrietta Pinckney was the eldest daughter of Charles Cotesworth Pinckney, who’d served at the Constitutional Convention in Philadelphia in 1787, to which he brought three enslaved people—Jenny, George, and Fortune—and where he’d been instrumental in securing the Constitution’s concessions to Southern slave owners. “Considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make,” he’d told

South Carolina's legislature during the ratification debates of 1788. Pinckney's mother died when she was eight, after which she was raised by her aunt Harriott, who became the fourth-largest slave owner in South Carolina. Pinckney, who never married, was known as "a woman of masculine intellect." When her father died in 1825, Pinckney and her sisters, Harriott and Eliza, inherited the family estate, which included the Pinckney Mansion in Charleston, several plantations, and hundreds of human beings, including—so great was the family's commitment to states' rights—a boy they had named "Larry State Rights." [109]

Pinckney insisted that the states were sovereign entities that, in ratifying the Constitution, had merely compacted into a league of states, reserving to themselves the rights to determine whether a federal law was constitutional and to secede from the union. In 1830, at fifty-six, Pinckney wrote a series of statements about nullification from Pinckney Mansion's first-floor library, beginning with *The Quintessence of Long Speeches, Arranged as a Political Catechism: By a Lady*. ("Quintessence" was a joke; the pamphlet digested the endless speeches delivered by men into a short question-and-answer catechism.)[110]

Calhoun, shunned by Andrew Jackson, resigned from the vice presidency and instead sought and gained a seat in the U.S. Senate. Congress passed another tariff in 1832. As the nullification crisis intensified, Pinckney Mansion, "Nullification Castle," became the meeting place of its leaders, with Maria Henrietta Pinckney and Harriott Pinckney as both hosts and provocateurs; they were known as the family's "Great Politicians." In response to the new tariff, the South Carolina legislature considered enacting an ordinance of nullification. "Our Aunts themselves cannot be more anxious to see the Nullifying law passed than I am," wrote one niece. Maria Henrietta Pinckney knew and was close to Calhoun during the time when she was reading political theory, writing the *Political Catechism*, and elaborating a theory of nullification—before he had devised his. He surely read it when it was published and likely read one of many draft versions, too.[111]

In November 1832 a convention called by the South Carolina legislature met in Columbia, deemed the Tariff Law unconstitutional, and insisted that it could be made constitutional only if it were to pass in the form of an amendment to the U.S. Constitution, ratified by the necessary three-fourths of the states. (Two of Maria Pinckney's first cousins served as delegates.)

The convention adopted the ordinance of nullification, declaring the tariff laws of 1828 and 1832 “null, void, and no law, nor binding upon this State.” [112]

For both supporters and opponents of the tariff, the answer to nullification was constitutional amendment. Andrew Jackson, despite his support for states’ rights, resoundingly denounced the theory of nullification, partly on the argument that it defied the philosophy of amendment. “*Perpetuity* is stamped upon the Constitution by the blood of our Fathers—by those who achieved as well as those who improved our system of free Government,” Jackson wrote in December 1832. “For this purpose was the principle of amendment inserted in the Constitution which all have sworn to support and in violation of which no state or states have the right to dissolve the Union.” If those who opposed the tariff did not have enough states in support of their position to effect an Article V amendment, then so be it. Nullification, Jackson insisted, was a form of insurrection, rebellion, and treason that unless defeated could lead only to civil war.[113]

Jackson pronounced the nullification doctrine itself unconstitutional and threatened to implement the Tariff Law by force if necessary. When South Carolina insisted on its right to secede, Jackson fortified Castle Pinckney, a coastal fort named after Maria Pinckney’s grandfather, in anticipation of a military conflict. The crisis ended only with a begrudging compromise: Congress in 1833 passed a less stringent tariff bill, but not before three Southern states called for a constitutional convention. In December 1832, South Carolina asked Congress to call a “Convention of the States.” The Georgia legislature sent Congress a formal call for a federal constitutional convention a week later.[114] Alabama followed in January, lamenting South Carolina’s nullification ordinance and calling for a convention “to propose such amendments to our Federal Constitution as may seem necessary and proper to restrain the Congress of the United States from exerting the taxing power for the substantive protection of domestic manufactures.” [115]

New Englanders considered secession in 1814. Southerners tried to nullify a federal law in 1832, and when that failed, they sought to call a constitutional convention. These episodes would remain the closest the country came to disunion before the Southern secession of 1860–61. But

they illustrated, too, the fragility of union, the experimental, contested, and contingent nature of the power to interpret and to amend the Constitution.

Judge Story

The nullification crisis called renewed attention to another agent of constitutional interpretation: the people. But how were they to educate themselves about the Constitution and such tangled issues as interposition and judicial review? At the time, the Constitution was not much taught in schools. In 1796 a New England Federalist had published *A Plain Political Catechism Intended for the Use of Schools*, the very sort of primer that had been a model for Maria Pinckney.

Q. Does the Constitution of the United States thus secure the liberties and provide for the happiness and prosperity of the community at large?
A. Certainly; for what country has ever flourished for the time, equal to this, since the adoption of the federal constitution? And whatever defects it may have, they are all harmless; because the constitution itself provides for its amendments. [116]

This was not inaccurate, but it was hardly clarifying.

But the first textbooks about the Constitution weren't printed until the 1820s, and they were lawbooks. Much constitutional debate was challenging for most Americans to follow. In 1833 Daniel Webster argued, on the floor of the Senate, against the nullifiers' use of the phrase "constitutional compact" to refer to the Constitution, on grammatical grounds as much as political ones: "in our American political grammar, *CONSTITUTION* is a noun substantive; it imports a distinct and clear idea of itself; and it is not to lose its importance and dignity, it is not to be turned into a poor, ambiguous, senseless, unmeaning adjective, for the purpose of accommodating any new set of political notions." [117] That was nicely said, but as the electorate was fast expanding to include poor white men, the overwhelming majority of whom had hardly any education at all, Webster's grammar lesson might have been something less than helpful.

In 1833 Joseph Story published a three-volume lawbook called *Commentaries on the Constitution*, the first attempt to systematically describe what's in the Constitution and what isn't and how to read and interpret it. He was committed, too, to making his work available to more than law students. The next year he published *The Constitutional Class Book: Being a Brief Exposition of the Constitution of the United States*, in which he insisted that the Constitution "is the language of the People, to be judged of according to the common sense, and not by mere theoretical reasoning." Soon afterward he published *A Familiar Exposition of the Constitution of the United States, Containing a Brief Commentary on Every Clause*, in which he aimed to make his constitutional analysis "intelligible to every class of readers, by embodying them in plain and unambitious language." [118]

The Massachusetts-born Story had studied at Harvard before becoming a lawyer and member of the state legislature. Madison nominated him to the Supreme Court in 1811, when Story was only thirty-two. A close ally of Chief Justice Marshall (one biographer declared they "may be considered one and the same person"), Story opposed everything that John C. Calhoun proposed, from the compact theory of the Constitution to states' rights to the doctrine of nullification. A nationalist committed to federal supremacy, Story repeatedly insisted that it was the people, not the states, who are sovereign and who created the Constitution. "It may be altered and amended and abolished at the will of the people," he wrote. "In short, it was made by the people, made for the people, and responsible to the people." [119] He was, however, no democrat. Story loved the classics and deference to authority, and he was troubled by the pace of change and the spirit of improvement—especially the rise of manufacturing—of the age in which he lived. He mistrusted the people, regretted sectionalism and partisanship, feared for the Union, and despised the turn in American politics that led elected officials to seek popular favor. By 1818 he was so distressed at the rise of majority rule that he predicted that in his lifetime he would "live to see many of our best institutions crumble in the dust." At the Massachusetts Constitutional Convention of 1821, he rose to speak, resolutely, against eliminating property requirements for voting.[120]

Story hoped to devise a set of uniform rules for constitutional interpretation, work he pursued as a professor of law at Harvard starting in 1829. His two-volume *Commentaries on the Constitution* began as a series

of law school lectures.[121] Regretting the many different rules of interpretation that had "often been shifted to suit the emergency; and the passions and prejudices of the day, or the favor and odium of a particular measure," Story set about offering a coherent system.[122] He stated his rules squarely: To resolve an ambiguity in the text, consider the structure, design, and history of the Constitution. Remember that the Constitution was a compromise, and give its words an interpretation "consistent with their legitimate meaning" by referring to records like those of the state ratifying conventions. But be warned that those records may point you in different directions, since the states disagreed, and delegates in any given convention disagreed, too. Alas, don't assume that delegates who opined about a clause in the Constitution had necessarily read it. Then, too, many earlier interpretations of constitutional clauses "have since silently died away," and in any case, "nothing but the text itself was adopted by the people." Because the people made the Constitution, for their own benefit and protection, it ought not to be construed strictly or narrowly, "as if it were subversive of the great interests of society," but rather expansively and broadly, as its object is the common good. The Constitution's construction should be fixed, uniform, and permanent, "not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever." The Constitution is supreme law and cannot ever be made to answer to a state constitution. Finally, read a constitution as if a constitution makes sense:

> Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.[123]

One of the most illuminating remarks Story ever made about the Constitution, one that casts light, too, on his rules for interpreting it, came when he said, "I once saw a book advertised, entitled, 'New Views of the Constitution.' I was startled! What right has a man to start *new* views upon it?" [124]

Indian Nullification

New views there were everywhere, especially on the floors of convention halls and in the pages of petitions submitted to Congress. Even the doctrines of nullification and secession spread.

John Ross, c. 1841

There would be no U.S. constitutional convention in the 1830s, ’40s, or ’50s, but the Cherokee Nation, the Choctaw Nation, and the Seneca Nation all held constitutional conventions in these years, beginning with the Cherokee, who in 1827 held a constitutional convention presided over by Cherokee chief Koo-wi-s-gu-wi, John Ross.

Born in 1790 to a Cherokee mother and a Scottish father, Ross had served as an Indian agent and fought in the Creek War under Jackson. A prosperous ferry and plantation owner, he was also, like many wealthy Cherokees, a slave owner. In 1817 he’d been elected to the Cherokee National Council and in 1827 to its constitutional committee. The convention met in New Echota, the capital of the Cherokee Nation, within the state of Georgia. The constitution it devised—“WE, THE REPRESENTATIVES of the people of the Cherokee Nation, in Convention assembled, . . . do ordain and establish this Constitution for the Government of the Cherokee Nation”—was modeled on the U.S. Constitution, with three

branches of a republican government. It also replicated the exclusions by race and sex that had become nearly universal in state constitutions: “All free male citizens (except negroes, and descendants of white and Indian men by negro women, who may have been set free,) who shall have attained to the age of eighteen years, shall be equally entitled in vote at all public elections.” And it defined the Nation’s borders beyond amendment: “The boundaries of this Nation shall forever hereafter remain unalterably the same.” [125]

In 1828 Ross won election as the nation’s principal chief, a position he would hold for decades. He and other Native leaders insisted on their own reading of the Constitution, which was that it could not apply to Native nations because they had never joined the union and remained sovereign, having “never surrendered” their “right to self Government.” As Ross explained, “Our treaties of relationship are based upon the principles of the federal constitution,” and any action by the states violated the principle of federal supremacy.[126]

If Andrew Jackson would not stand for John C. Calhoun–style nullification, he would not stand for John Ross–style Native sovereignty, either. Jackson pursued a policy known as Indian removal—forcibly relocating Native people from their ancestral lands east of the Mississippi to the so-called Indian Territory, in what is now Oklahoma. He, and the State of Georgia, fought Cherokee sovereignty in the courts, and he fought it with the U.S. Army. Marshall, in 1831, in *Cherokee Nation v. Georgia*, declared Indians “domestic dependent nations.” [127] The next year, in *Worcester v. Georgia*, the Court found in favor of an understanding of the Constitution advanced by Native nations when it ruled that the Cherokee Nation was sovereign and that Georgia had no right to interfere in its affairs, since relations between Indians and the United States were the province of the federal government, not the states: “The Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force.” [128] The decisions of the Court did little to diminish Jackson’s determination to remove the Cherokee. Ross fought back, resisting removal and protesting a removal treaty signed by a minority of Cherokee in 1835. During the forced-march removal to Indian Territory in the winter of 1838–39, Ross’s wife, like thousands of other Cherokee, died in the misery of the Trail of Tears.

The Cherokee strategy of resisting removal by establishing sovereignty through the act of holding a convention and drafting and ratifying a constitution failed. Seeking relief from the Supreme Court failed, too. From Indian Territory, another generation of Cherokee would attempt, in years to come, to enter the Union as a state. That, too, would fail. From Massachusetts, the Mashpee tried something different: they attempted nullification.

In 1833 Mashpee Indians living within the boundaries of Massachusetts held a "national assembly" and submitted a petition to that state's legislature, seeking independence from the guardianship under which the tribe had been placed. The Mashpee had been resisting the authority of the Massachusetts government for decades, seeking to rule themselves. In the 1830s, their most eloquent advocate, a Pequot minister named William Apess who had been adopted into the tribe, argued their case in a tract published in 1835 as *Indian Nullification of the Unconstitutional Laws of Massachusetts, Relative to the Marshpee Tribe*.[129] Apess, who had published an autobiography in 1829 and was a well-known speaker across New England, had urged the Mashpee to draft a "Nullification Proclamation," in imitation of South Carolina. "Signed by seventy-nine males and ninety-two females on the plantation, and in behalf of seventy-nine males and thirty-seven females who are absent and will not return to live under the present laws," the Mashpee, comparing themselves to the Cherokee, demanded self-rule. "While ye are filled with the fat of our fathers' land, and enjoy your liberties without molestation, will not this Honorable Body be as benevolent to us poor Mashpee Indians who are sighing and weeping under bondage, as ye are to poor Cherokees and have we not ground under the weight of degradation long enough?" Decrying as unconstitutional the laws under which the Mashpee were governed by guardians appointed by the state, the Mashpee proposed to write their own laws: "We, the Mashpee Tribe, also pray for a grant of the liberties of the Constitution, to form a municipal code of laws amongst ourselves, that we may have a government that will be useful to us as a people." [130] In 1840 an act of the Massachusetts legislature made Mashpee an independent parish: if the Mashpee hadn't exactly succeeded in nullifying a state law, they had achieved a measure of autonomy, by way of convention—and petition.[131]

The petition, like the extraconstitutional convention, was among the best tools available to people not included among the People. But they were

quite different methods. The convention was chiefly the bastion of men, while the petition—a form of pleading—was a tool more often wielded by women. The American Anti-Slavery Society had begun a petition drive in 1834, sending petitions to Congress calling for the abolition of slavery, many signed by tens of thousands of people. Seven out of ten signers of antislavery petitions were women.[132] Abolitionists and equal rights reformers sent petitions not only to Congress but to the states, too. In 1838 "Forty Thousand Citizens, Threatened with Disenfranchisement" submitted a petition to Pennsylvania's amending convention, pleading with delegates not to add the word *white* to the suffrage requirements in the state's constitution.[133]

From writing petitions, female abolitionists proceeded to holding their own conventions. The first national convention of antislavery women met in New York in 1837, bringing together some two hundred women from ten states. One in ten delegates were Black women. "To attend a Female convention!" one delegate wrote. "Once I should have blushed at the thought." [134] Campaigning against slavery and for an end to the Black Codes also brought many women into the cause of women's rights. Wrote the South Carolina abolitionist Angelina Grimké: "Since I engaged in the investigation of the rights of the slave, I have necessarily been led to a better understanding of my own." [135] By the 1840s, women were petitioning state constitutional conventions to demand the vote for themselves. In 1846 Eleanor Vincent, a mother of nine and likely pregnant at the time, was the first of six New York women to sign a petition submitted to the state constitutional convention in Albany, declaring that "the present government of this state has parted from the true democratic principles upon which all just governments must be based by denying to the female portion of community the right of suffrage and any participation in forming the government and laws under which they live." [136]

Female petitions to state constitutional conventions were uniformly ignored. Many were probably not even recorded, and chances are that many more once existed than now survive.[137] Southerners in Congress found a way to ignore female petitions, implementing in 1836 a gag rule, under which any petition on the subject of slavery was automatically tabled. In 1839, when John Quincy Adams presented a petition calling on Congress to

pass a constitutional amendment prohibiting slavery in any new state, it was tabled.[138]

Joseph Story insisted that the Constitution had been written so as to be "intelligible to every class of readers," and that reading it required a straightforward application of common sense. But when people who were not included in the original Constitution attempted to offer their own interpretations of its meaning, constitutional doors kept slamming in their faces.

A mere record of the dead

John Marshall died in 1835, having led the Supreme Court—defined the Court—for thirty-four years. Joseph Story, grieving, lingered in the chief justice's old room, mourning its "noiseless gloom." (When Court was in session, the justices all lived in the same boardinghouse in Washington.) Story had been expected to replace Marshall as chief justice, but Andrew Jackson, knowing Story's contempt for democracy, called him "the most dangerous man in America." Story considered stepping down. "I seem a monument from the past and a mere record of the dead," he sighed.[139]

Marshall, who in his lifetime had purchased hundreds of slaves, did not free any of them in his will, with the exception of a man named Robin Spurlock, who had been given to him as a wedding present. (Marshall freed Spurlock only on condition that he leave Virginia, and all of his family, which Spurlock refused to do.) But in an 1830 codicil, he did express a "preference for preserving the families together as near as may be," something that his cousin Thomas Jefferson, who freed only Hemingses, did not do. At Marshall's death, Jackson passed over Joseph Story and appointed Roger Taney to the chief justiceship. Taney, born in Maryland, had inherited slaves from his father, and his wife brought them to their marriage. Unlike Marshall, Taney freed some of these people. He believed slavery to be wrong. He also did not believe that the Constitution prohibited it.[140]

Abolitionists knew they had nothing close to the sweeping power both in Congress and in state legislatures necessary to amend the Constitution. To propose an amendment to the Constitution to end slavery implied that the Constitution sanctioned slavery, and that ending slavery therefore

required a constitutional amendment. They would have preferred simply to declare slavery unconstitutional, that is, to interpret the Constitution in such a way as to argue that it did not and had never sanctioned slavery. To do that, they would have to defeat the slaveholders' interpretation of the Constitution. As their devotion to slavery led Southerners to advance bolder arguments about states' rights, they still more forcefully claimed that the Constitution was a contract, or compact; that records beyond the text were therefore relevant to its interpretation; and that the states retained the authority to interpret it. This they insisted they could do by way of historical research into the "intent" of the framers.[141] Right about when they came to this view of the matter, James Madison died, and his widow published his notes on the Constitutional Convention.

Madison, the last surviving delegate to the Constitutional Convention, died at the age of eighty-five in 1836. When the delegates' fifty-year vow of silence expired in 1837, Madison's widow, Dolley, arranged for the publication of his considerably amended notes. They appeared in print in 1840, advertised on the title page, "Now published from the original manuscripts." [142]

Madison's Notes proved, if proof was needed, that no resolution to the growing conflict between the states was to be found in discovering the original intent of the framers of the Constitution. Madison's detailed account of the disputes with delegates from South Carolina and Georgia, who threatened to walk out if concessions to slavery were not made, convinced many abolitionists that the Constitution was "a proslavery compact." [143]

It was for this reason that the abolitionist William Lloyd Garrison would burn a copy of the Constitution, grind its ashes under his heel, and invoking Isaiah 28:15, call it a "covenant with death" and "an agreement with Hell." [144] But it was possible to read Madison's Notes differently, paying attention not to the concessions to the slave states but to the objections to those concessions, and to how fervently many delegates had spoken out against slavery. By the mid-1840s, many abolitionists had elected to argue that the Constitution simply did not sanction slavery and that therefore no amendment was necessary to end it: slavery, they argued, was *already* unconstitutional. Frederick Douglass, breaking with Garrison, would take this position, too.

Few other paths remained open to them. John Quincy Adams came up with an idea for getting around the gag rule: attacking the "slave power" by proposing an amendment to abolish the Electoral College. In 1841 Adams presented to Congress a petition from Pennsylvania calling for a constitutional amendment to "cause the President and Vice President to be elected by a direct vote of the people; and also to abolish all representation of property in the Government of the United States." [145] "Representation of property" meant counting enslaved human beings—property—as three-fifths of a person, for the purposes of representation. Framing the amendment in these terms allowed it to go to a committee rather than be automatically tabled under the terms of the gag rule. Still, as would be the case over not decades but centuries, sectional divisions and the requirements of Article V made eliminating the Electoral College by constitutional amendment impossible.

It is a rule of American history that when amendment becomes impossible, the risk of insurrection rises. In 1843 fifty-eight delegates from seven states met in Buffalo for the National Convention of Colored Citizens. Samuel H. Davis presided. Davis, born free in Maine in 1810 and educated at Oberlin College, argued that Black Codes violated the U.S. Constitution, with its guarantee of "freedom and equal rights to every citizen." The question was how to overturn the codes. Black Americans who gathered in a national convention could not, like South Carolina, nullify laws. They refused to "remove" from the United States. They could not appeal to the U.S. Supreme Court. "What shall we do?" Davis asked. "We have petitioned again and again, and what has been the result?" If not petitioning, then what? "Shall we then look to the abolitionists and wait for them to give us our rights?" Davis had no patience either for pleading or for waiting when the Constitution guaranteed rights, and they were there, he believed, for the seizing. "We, ourselves, must be willing to contend for the rich boon of freedom and equal rights." [146]

Twenty-seven-year-old Henry Highland Garnet, who had escaped from slavery as a child, rose to deliver "An Address to the Slaves of the United States of America." He spoke for an hour and a half, recounting the history of slavery in the United States and the efforts of abolitionists to end it. But as Davis had argued that free Black men would have to take action in the North, Garnet told enslaved Black men in the South that "the time has come when you must act for yourselves." His advice: "Go to your lordly

enslavers and tell them plainly, that you are determined to be free." They might kill you, but they would not kill all of you. "Brethren, arise, arise!" Garnet urged, as his audience fell to tears. "Strike for your lives and liberties," he shouted. "Rather die freemen than live to be slaves. Remember that you are FOUR MILLIONS!" [147] Despite their tears, the convention's delegates, by the margin of a single vote, deemed Garnet's address too incendiary to endorse and refused to publish it. But they did pass a resolution declaring that "by the second section of the fourth article of the Constitution of the U.S."—the privileges and immunities clause—Black people are citizens of the United States.[148]

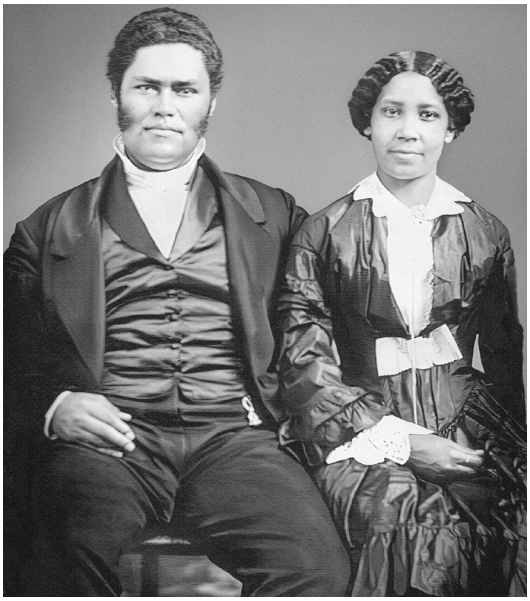
In the fabric of American constitutionalism, they had chosen the sturdiest thread. When you can't amend the Constitution, you can insist on your reading of it. Here the United States appeared to have arrived at a constitutional impasse. By the 1840s, Joseph Story had all but given up on the Union. Few men could "make a stout & strong resistance to the inroads of a low & mischievous Democracy," he wrote in 1842. "For my own part, I think that we have fully tried the Experiment of a Representative Republic; & that it is a failure on our part. The vital principles of the Constitution are uprooted & disregarded in the blind fury of party spirit. I look now to the dissolution of the Union as inevitable, & at no very distant period." [149] He died less than three years later.

When the questions of the constitutionality of slavery and the matter of Black citizenship went to the Supreme Court, it was not Joseph Story but Roger Taney who would decide them, in an opinion that overruled every act of constitutional interpretation put forth at Black conventions. As for constitutions, "the people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense," Story had written. Black Americans listened and read, and Taney ignored them.

At War with the Constitution

Mary Jane Richardson was born in Memphis in 1820, the fifth of nine children. Her parents, Elijah Richardson, a blacksmith, and Diza Morris, who'd been born in South Carolina, were both free, although years later their son Alfred would be kidnapped into slavery.[150] Growing up, Mary

Jane met a man named John Jones, his shoulders as broad as hers were narrow: in photographs, they share a certain serene resolve.



John Jones and Mary Jane Richardson Jones, 1849

John Jones had been born on a plantation in North Carolina in 1816. He never went to school. When he was a boy, his mother, a free Black woman, placed him in an apprenticeship, partly to prevent his father, who was white, from selling him into slavery. Eventually, he was apprenticed to a tailor in Memphis, where he met Mary Jane Richardson and fell in love. Not long afterward her family moved to Illinois, a state that was nominally free. Jones planned to follow them there as soon as he could. In 1837 the Richardsons were living in Alton, Illinois, when a proslavery mob shot and killed the printer and pastor Elijah Lovejoy for his outspoken abolitionism. Mary Jane, seventeen, always remembered the day she watched Lovejoy's "sad and silent funeral procession" pass by her father's house.[151]

Constitutional change can sometimes begin with a love story, a family story, the daily striving and struggling to get by and even, to make things better. But a new spirit of amendment grew among abolitionists like Mary Jane Richardson and John Jones.

In 1841, when John Jones, about twenty-four, finished his apprenticeship and saved one hundred dollars, he moved to Alton to marry twenty-year-old Mary Jane Richardson. They had a baby, Lavinia, in 1843,

and two years later they moved to the very new settlement of Chicago.[152] To travel, under Illinois's Black Codes, they first had to get papers certifying that they were free.

> Know ye, that John Jones a person of color, about twenty seven years of age, five feet ten inches high, mulatto complexion, has exhibited, presented and filed, in the Office of the Clerk of the Circuit Court . . . a CERTIFICATE, duly authenticated, of FREEDOM, as such person of color. Has a scar over the left eyebrow, a scratch across the cheek bone, a scar on the left shin bone, a tailor by trade.[153]

Their stagecoach was stopped when they were suspected of being runaway slaves. They arrived in Chicago in 1845, a city that was still barely more than a small town. Its population in 1840 was less than five thousand; it would increase to nearly thirty thousand by 1850. Jones opened a shop at his house, at 119 Dearborn, advertising as "J. Jones, Clothes Dresser and Repairer." He learned to read, studying with a local abolitionist. In Chicago, the Joneses led a decades-long campaign to make the state and the nation truly free. They hosted meetings; they housed refugees and fugitives. Jones later made the perilous journey back to Tennessee to buy Mary Jane's brother Alfred out of slavery for $800. Their work required organizing. It required breaking the law by providing relief to men, women, and children fleeing slavery. It required meeting in political conventions. It required constitutional argument. It required defying laws passed by Congress and a decision made by the U.S. Supreme Court. And in the end, it required constitutional amendment.[154]

John Jones attended Black conventions in Alton and Chicago, and he'd been in Buffalo when Henry Highland Garnet called for insurrection and Samuel Davis had asked, "What shall we do?" Likely Mary Jane Richardson Jones went with him. She "was at his side in his every endeavor and accomplishment," their granddaughter later wrote.[155]

Early in 1847, Illinoisians debated holding a convention to revise the state's constitution. Jones wrote a petition on behalf of Black men, asking the state legislature to "repeal all laws making a distinction among people on account of color." In response, the Illinois Senate's judiciary committee in March issued a unanimous report rejecting the petition, telling Jones that "if he is not content with the provisions of our laws, Africa, the land of his birth, a climate congenial with his nature, lies open before him, where he may use his powers of self-government"—go back to Africa, in short—and

pledging that under the terms of the state's constitution, Blacks in Illinois were excluded from the right to vote "and ever will be." [156]

One hundred and sixty-two delegates met to revise the Illinois Constitution. "We are the sovereignty of the State," said one delegate. "We are what the people of the State would be, if they were congregated here in one mass-meeting. We are what Louis XIV said he was, 'We are the State.'" [157] But John Jones, in a scathing indictment of that convention, disputed both its authority and its definition of the People. He called the amendments it had proposed "anti-republican and repugnant to the Constitution of the United States, and subversive of the inalienable rights of man." He objected to an amendment that inserted the word *white* into the Illinois Constitution. "Let us examine the word white," Jones wrote, begging the convention to expunge it. "Is it not time that the great fundamental principle, that all men are equal in their natural rights, was settled in this country?" [158]

Daniel Whitney, a delegate born in New York, moved to delete the word *white* from the requirements for suffrage; that motion was resoundingly defeated, 8–137. Although the convention had by no means been called over the question of the Black franchise—the controversial issue on the table, this time around, concerned banking—the constitution devised that spring and summer banned free Blacks from moving to the state, by a vote of 87–55. And a motion to prohibit the legislature from ever extending the right to vote "to negroes or mulattoes of African blood" passed, 60–51.[159]

In a series of newspaper articles, John Jones attempted to convince voters not to ratify the new constitution, basing his argument on his reading of American constitutional history. "We maintain that our claims to the rights of citizenship are founded on an original agreement of the contracting parties, and there is nothing to show that color is a bar to the agreement," he insisted. Yes, slavery existed in 1787, but "the darkness of the 18th century has gone by, and we live in the 19th, and in a Republic, too, wherein men understand the principles of government, and a man is regarded as a man whether his face be black or white." Illinois's new constitution, he asserted, is "anti-republican, and even unconstitutional." The framers of the 1776 Articles of Confederation, the 1787 U.S. Constitution, and the 1818 Illinois Constitution had not used the word *white*, he pointed out, so why should delegates to this new state convention? [160]

Illinois's amended constitution, submitted to the public at the next election, in 1848, was ratified, 60,585–15,903. Article XIV, the ban on Black immigration, submitted to voters separately, passed by a slightly smaller majority, 50,261–21,297.[161] Jones then published an essay denouncing the new constitution, calling the Black exclusion amendment "at war with the Constitution . . . because it attempts to prohibit natural-born citizens of the United States from settling in this state on account of the color of their skin." [162]

In 1848, a year of revolutionary change across Europe—the toppling of monarchies from Italy to Austria—Black abolitionists were undertaking their own revolution.[163] John Jones was elected one of Illinois's two delegates to the Great National Convention of Colored Freemen of the United States, to be held in Cleveland, the first Black convention in which women were allowed to participate in deliberation; Frederick Douglass was elected president, and Jones vice president.[164] In Cleveland, Black convention delegates would celebrate "the spirit of the age . . . the upward tendency of the oppressed throughout the world." [165] Surely a great amendment in human affairs was underway.

A declaration of sentiments

In 1848 three hundred delegates, mostly women, mostly white women, gathered for the first women's rights convention at Wesleyan Chapel in the village of Seneca Falls in upstate New York. Their meeting marked the beginning of the women's movement in the United States, a movement that was at once a moral crusade and a political protest and that would require, in the end, more than one constitutional amendment to meet its goals. The meeting had been organized by thirty-two-year-old Elizabeth Cady Stanton, daughter of a justice on the New York Supreme Court. Her mother was a Garrisonian abolitionist. In 1840 Elizabeth married Henry Stanton, a radical abolitionist with whom she would have seven children; for their honeymoon, they traveled to London for the World Anti-Slavery Convention, where the female delegates were seated separately and were not allowed to speak. Cady Stanton, with the Quaker abolitionist Lucretia Mott, who also attended that meeting in London, set about studying law and preparing to adapt the methods of abolitionist and Black conventions to the

cause of women's rights. In 1847 the Stantons settled in Seneca Falls, and when Mott soon afterward visited her sister, who lived nearby, Elizabeth Cady Stanton went to see her: "I poured out that day the torrent of my long accumulating discontent with such vehemence and indignation that I stirred myself, as well as the rest of the party, to do or dare anything." They together dared to write an announcement for a women's rights convention.[166]

Those who gathered in Seneca Falls in July 1848 were experienced reformers, women from the abolitionist and temperance movements. In advance of the first day, Cady Stanton had drafted a Declaration of Sentiments. Modeled on Jefferson's Declaration of Independence, it began, "We hold these truths to be self-evident: that all men and women are created equal." Borrowing from decades of writing that would later come to be called feminist, it offered a blistering revision to Jefferson's account of the history of tyranny: "The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her." [167]

The Declaration of Sentiments demanded education for girls and women, the establishment of married women's property rights, an end to coverture, and the admission of women "to all the rights and privileges which belong to them as citizens of these United States." Its resolution on suffrage—"it is the duty of women of this country to secure to themselves their sacred right to the elective franchise"—was the only one of eleven resolutions that did not pass unanimously, and its narrow passage required the particular intervention of convention organizer Elizabeth Cady Stanton and of Frederick Douglass.[168] It would take women decades to achieve any of the demands put forward at Seneca Falls, but the movement to achieve them had begun.

Weeks after attending the women's rights convention in Seneca Falls, Douglass traveled to Cleveland for the national Black convention, where a woman whose name was recorded only as "Mrs. Sanford" became the first woman to speak at a Black convention. "We ask for the Elective Franchise," she said on behalf of Black women.[169] No resolution was passed advocating what she proposed, but the delegates did debate whether to vote on a proposed resolution in favor of women's rights. Some delegates insisted it wasn't necessary since they'd already passed resolutions in favor of

“colored persons . . . and they considered *women persons*.” Douglass then proposed amending a resolution to make clear that “the word persons . . . be understood to include *woman*.” This motion passed, “with three cheers for woman’s rights,” the delegates stating that they “fully believe in the equality of the sexes,” and they further resolved to “invite females hereafter to take part in our deliberations.” [170] But in no meaningful sense had the convention actually supported female suffrage or incorporated it into the demands of the convention movement. Future state and national Black conventions routinely excluded women: one New York convention went so far as to strike the name of “Miss Barbary Anna Stewart” from the roll of delegates, “several gentlemen objecting to it on the ground that this is not a Woman’s Rights Convention.” A threatened boycott of the Ohio state convention in 1849, led by Jane P. Merritt, resulted in the convention passing a resolution “inviting the ladies to participate,” but only very seldom were Black women allowed to serve as delegates at Black conventions.[171]

Nor did Black women generally participate in women’s conventions, which were overwhelmingly dominated by white women. Social reform and the convention movement did bring together abolitionists and women’s rights activists, who, as was the case with Frederick Douglass, were often the same people. “Right is of no sex, Truth is of no Color” appeared as the motto of Douglass’s newspaper, *The North Star*. At the first national women’s rights convention, held in Worcester, Massachusetts, in 1850, Sojourner Truth spoke, and the convention resolved “that the cause we are met to advocate, the claim for woman of all her natural and civil rights, bids us remember the million and a half of slave women at the South, the most grossly wronged and foully outraged of all women.” [172] But, on the whole, women’s rights conventions were white, and Black conventions were male.

The Black convention in Cleveland in 1848 had been a particularly crucial one, as efforts of abolitionists to stop the extension of slavery into newly acquired territories had assumed new urgency. At the start of 1848, the United States acquired more than 300 million square acres of land under the terms of the Treaty of Guadalupe Hidalgo, ending the war with Mexico. The top half of Mexico became the bottom third of the United States. (California, New Mexico, Nevada, and Utah, most of Arizona and Colorado, and parts of Oklahoma, Kansas, and Wyoming were all part of this acquisition.) The Missouri Compromise would not survive this

acquisition, yet neither of the two major-party candidates for president, the Whig Zachary Taylor and the Democrat Lewis Cass, pledged to prohibit slavery in these new territories.

It was this convention that brought Jones, appointed vice president to Douglass's president, to a national stage. With the U.S. presidential election only two months away, Jones, a veteran of political fights and constitutional arguments in Illinois, urged his fellow abolitionists to abandon moral suasion in favor of party politics. Jones drafted a preamble to a resolution endorsing the newly formed third party, the Free Soil Party, a statement that "American slavery is politically, as well as morally, an evil of which this country stands guilty" and "the two great political parties of the Union have, by their actions and nominations, betrayed the sacred cause of human freedom." The party endorsement failed, but the preamble passed.[173]

Within the meaning of the U.S. Constitution

In Congress, guns were drawn on the House floor over what to do about the territories acquired in 1848, the so-called Mexican Cession. In 1849 delegates from Southern states met in a convention in Mississippi to denounce the Wilmot Proviso, a proposal to prohibit slavery in any territory acquired from Mexico. In June 1850, with the question still unresolved, 175 delegates from nine slave states, including Jefferson Davis from Mississippi, met in a convention in Nashville to affirm the constitutionality of slavery and to consider seceding from the Union.[174] The threat they posed led Congress to reach the Compromise of 1850, in which California would enter the union as a free state, New Mexico and Utah would be able to decide for themselves on the question of slavery, and Congress would pass a formidable Fugitive Slave Law.

"The fugitive slave law was passed on a Saturday night," Mary Jane Jones later recalled, about hearing the news in Chicago, "and on Sunday . . . the friends of freedom chartered cars enough to send every fugitive slave from here and around the country, out of this country and into Canada." [175] Days later Blacks in Chicago held a mass meeting at the AME church.[176] John Jones then renewed the campaign against Illinois's Black Codes, writing and circulating a petition calling for "the immediate and total repeal of all laws now existing upon the statute books of this State, whereby

discriminations are made among the people on account of their complexion." [177] *Frederick Douglass' Paper*, announcing a new national convention, called the Fugitive Slave Act "the most cruel, unconstitutional and scandalous outrage of modern times." [178] In Chicago, Mary Jane Jones hosted John Brown and Frederick Douglass and fugitives traveling on the Underground Railroad. As her granddaughter later wrote, "It was she who stood guard at the door when these pioneer abolitionists were in conference —with the slaves huddled below in her basement." [179]

One hundred and forty delegates, including Jones, met in Douglass's hometown of Rochester, New York, in July 1853. Douglass and Jones were elected vice presidents. "Within the meaning of the United States Constitution," Jones wrote in a statement, "we are American citizens." [180]

The debates for so long held on the floors of Black convention halls, state by state, broke out onto the national stage. In May 1854 Congress passed the Kansas-Nebraska Act, crafted by the U.S. senator from Illinois Stephen Douglas, repealing the Missouri Compromise and allowing new states formed out of the "Nebraska territory" to decide for themselves whether they would allow or prohibit slavery. Frederick Douglass then went to Illinois in hopes of debating Stephen Douglas on the subject of the Kansas-Nebraska Act. That debate did not come to pass. Instead, Douglass addressed an audience in Chicago's Metropolitan Hall that surely included Mary Jane and John Jones, at whose house he was likely a guest. The U.S. Constitution, he declared, "knows no man by the color of his skin. The men who made it were too noble for any such limitation of humanity and human rights." He offered a brief history: "The word white is a modern term in the legislation of this country. It was never used in the better days of the Republic, but has sprung up within the period of our national degeneracy." [181]

In Illinois in 1856, Jones served as president of a state convention in Chicago, where he organized a campaign against a state law banning the immigration of all Blacks, free or slave.[182] He organized a repeal association to overturn Illinois's Black Codes. At a state convention in Alton, he helped shape a Declaration of Sentiment that included a reading of the Constitution, insisting, in sovereign prose, "that it was intended to establish justice, therefore opposed to injustice; to promote domestic tranquility, therefore opposed to domestic turmoil; to promote the general

welfare, therefore opposed to the general misery, to secure the blessings of Liberty to ourselves and posterity, and not eternal slavery." [183]

Jones and Douglass made their case. But the word *white* had entered the legal lexicon. The first American legal dictionary, published in 1839, defined a citizen as "one who, under the constitution and laws of the United States, has a right to vote for representatives of congress and other public officers, and who is qualified to fill offices." [184] By 1854 that dictionary included an entry explaining that "all natives are not citizens of the United States; the descendants of the aborigines, and those of African origin, are not entitled to the rights of citizens. . . . No one is a citizen who is not white." [185] What began as a proposed constitutional amendment had become a definition.

Dred

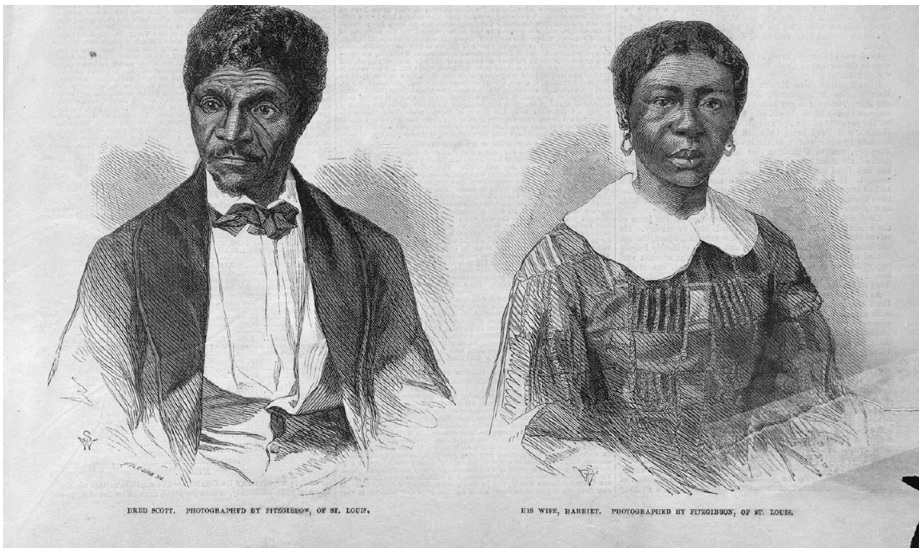
What did the words in the Constitution mean? Was the writer of a dictionary to decide? Could the states decide? Could Congress decide? By 1857 the Constitution was seventy years old, a human lifetime. The men who had drafted it were dead. Was history to be used to discover the meaning of words these men had written in 1787? Or philosophy? Or some other method of inquiry?

The question had been brought to Roger Taney's Supreme Court by Harriet Robinson and Dred Scott. Dred Scott, born into slavery in Virginia about 1799, had filed a suit first in Missouri, in 1846, and then, in 1853, in a federal court, insisting that he was free because he had been in both Illinois and the Wisconsin Territory, and in both places, slavery was illegal. He and his wife Harriet Robinson Scott had filed a suit as well. Filing freedom suits appears to have been her idea; winning would have secured the freedom of the couple's two surviving children. And Harriet Scott, having been born in Pennsylvania, had a stronger claim. They won in a lower court, but when the Missouri Supreme Court overturned that ruling, the Scotts sent their daughters into hiding and filed an appeal.[186]

Freedom suits were common in the courts, but the Scotts' case took on broader significance when Taney read the case as turning on a single question: "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed

and brought into existence by the Constitution of the United States, and as such become entitled to all of the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?"

In *Dred Scott v. Sandford*, Taney wrote the Court's 7–2 decision, two hundred pages long and issued on March 6, 1857, arguing that the answer to this question was no. Following Marshall, Taney began with the assumption that it was the Court, and no one else, who decided what the words in the Constitution meant. And then he insisted that the only way to make such a judgment was to argue from a narrow historical record: "The change in public opinion and feeling in relation to the African race which has taken place since the adoption of the Constitution cannot change its construction and meaning," he wrote, dismissing, for instance, the construction placed on the Constitution by abolitionists like John Jones. Instead, he insisted, "it must be construed and administered now according to its true meaning and intention when it was formed and adopted." That meant referring to the Constitution itself, to the notes on the convention as recorded by James Madison, and to the Federalist Papers.



Dred and Harriet Scott, 1857

Taney's reading of these documents led him to conclude that the framers of the 1787 Constitution believed that people of African descent have "no rights which the white man was bound to respect" and therefore that they "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and

privileges which that instrument provides for and secures to citizens of the United States." Taney went still further, arguing that the Missouri Compromise violated the Fifth Amendment since it deprived slave owners of their property, a property affirmed by the Constitution itself. He therefore struck down the Missouri Compromise as unconstitutional, declaring it void.[187]

Taney's method rested on the notion that the intent of the framers of the Constitution was perfectly knowable and that the meaning of the words in the Constitution was unchanging. "No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted," he wrote. To interpret the Constitution was not to change it; the only way to change it was by way of Article V. "If any of its provisions are deemed unjust," he wrote, "there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption." The Constitution, Taney wrote, "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers." [188]

Dred was the first time since *Marbury* that the Court had overturned a law passed by Congress. Taney's method of constitutional interpretation erased from any possible consideration the political will of people who were disenfranchised by the Constitution. His opinion also struck down every constitutional claim made in every Black convention held in the United States since 1830. Abolitionists across the country denounced it. Frederick Douglass dismissed "this edict of Taney" as an act of despotism, and his constitutional analysis as nonsense, "a most scandalous and devilish perversion of the Constitution, and a brazen misstatement of the facts of history." Douglass also accused Taney of, in effect, amending the Constitution by way of a novel interpretation, in defiance of the framer's original intent and meaning: Taney purported to find in the Constitution words that were not there: *slavery* and *white*.[189] At a Black state convention in Troy, New York, in September 1858, delegates adopted a resolution calling the decision "a foul and infamous lie, which neither black men nor white men are bound to respect," denying that the Court had the authority to

issue the ruling, and declaring that "we *are* citizens of the State of New York, and, consequently, of the United States . . . the edict of Judge Taney to the contrary notwithstanding." [190]

Taney may have insisted that only the nine justices on the Court had the authority and knowledge to discover the meaning of the words in the Constitution. Black abolitionists believed otherwise. Taney had his framers, and they had theirs. "No it murder," Black men had written in 1788, in that long-ago petition to the Connecticut legislature addressed to "All Mankind." If the only evidence that mattered to constitutional interpretation was history and tradition, it was Taney whose collection of the evidence was woefully incomplete.

Frederick Douglass, delivering a speech about the decision, invoked Joseph Story. "The well known rules of legal interpretation bear me out in this stubborn refusal to see slavery where slavery is not, and only to see slavery where it is," he said. The word *slavery* was not in the Constitution. The rules of interpretation told us that "the intention of legal instruments must prevail; and that this must be collected from its words," he went on, all but paraphrasing Story. "It has told us that language must be construed strictly in favor of liberty and justice." They told us that "there is another rule of law as well of common sense, which requires us to look to the ends for which a law is made, and to construe its details in harmony with the ends sought." Applying those rules, he reread the preamble:

> *"We, the people"—not we, the white people—not we, the citizens, or the legal voters—not we, the privileged class, and excluding all other classes but we, the people; not we, the horses and cattle, but we the people—the men and women, the human inhabitants of the United States, do ordain and establish this Constitution . . .*

Their Duty to resist & change

Much has been written about the coming of the Civil War and its causes. But it was fundamentally a war over the nature of constitutional change. How can the Constitution be changed? Amendment or judicial interpretation, and when those methods fail: insurrection. Insurrection came first, from the North.

Mad-eyed John Brown had long been willing to bear arms in what he called a "war against slavery," including in Bloody Kansas. "I want to have

the enquiry everywhere raised," he'd written to Frederick Douglass in 1854. "Who are the men that are undermining our truly republican and democratic institutions at their very foundation?" In 1856 he and his followers in Kansas had pledged themselves to preserve the "right and liberties of the Free State citizens of Kansas." But after Taney's ruling, Brown gave up on the Constitution altogether. He began planning an attack on the U.S. arsenal at Harpers Ferry, Virginia, to supply enslaved men in the South with guns to foment a revolution across the South. At some point, he stopped in Chicago. "The first time I ever met John Brown he came to our house one afternoon with Fred Douglass," Mary Jones later said, "and they stayed up until late and John Brown stayed all night." She disagreed with Brown's plan. "I did not think he was right," she said, and "I did not believe he could ever do what he wanted to do." [191]

In 1858, at Frederick Douglass's house in Rochester, Brown drafted a new constitution. Its opening lines both defied Taney's opinion and drew upon the declarations of Black conventions: "We, citizens of the United States, and the oppressed people who, by a recent decision of the Supreme Court, are declared to have no rights which the white man is bound to respect, together with all other people degraded by the laws thereof, do, for the time being, ordain and establish for ourselves the following Provisional Constitution and ordinances, the better to protect our persons, property, lives, and liberties, and to govern our actions." He told Douglass he wished him to be the new government's first president. He then headed to the town of St. Catharines, Ontario, where he met with Harriet Tubman and secured her support. The next month in Chatham, Ontario, Brown and his band of thirty-four Black men and twelve white men held a secret convention in which they debated and approved the new constitution.

On the Fourth of July 1859, the date Brown had originally planned for the attack, he drafted "A Declaration of Liberty by the Representatives of the Slave Population of the United States of America." It was written on sheets of paper pasted to a bolt of cloth, wound around a wooden dowel, like an ancient scroll. Biblical. "We hold this truth to be self-evident," he wrote, "That it is the highest Privilege, & Plain Duty of Man; to strive in evry reasonable way, to promote the Happiness, Mental, Moral, & Physical, elevation of his fellow Man." He asserted that governments are instituted "to secure equal rights, privileges, & justice to <u>all</u>; <u>Irrespective of Sex</u>; or <u>Nation</u>," and that whenever a government fails to meet those ends (as for

instance when they “have refused to grant Petitions presented by numerous & respectable Citizens, asking redress of grievances imposed upon us, demanding our Liberty & natural rights”), then “it is the right of the People, to alter, Amend, or Remoddel it,” and moreover it is “their Duty to resist & change such Government.”

With his Declaration of Liberty and Provisional Constitution, Brown aimed to replace the nation’s founding documents with revised editions. But he was prepared to ratify these documents with force of arms. He and five Black men and a dozen white men raided the Harpers Ferry arsenal in October 1859; everything went wrong, and they were all, in the end, captured or killed. At Brown’s trial in Virginia nine days later, the prosecution introduced the Provisional Constitution as evidence that Brown had committed treason for having “attempted to break down the existing Government of the Commonwealth, and establish on its ruins a new Government.” Brown’s defense pointed to his constitution’s Article XLVI, which explained that nothing in the Provisional Constitution was to be “construed so as in any way to encourage the overthrow of any State government”; instead, its entire purpose was “amendment and repeal.” [192]

If the Constitution was a machine, in the minds of the framers, John Brown did not take out a wrench or a screwdriver to tinker with it. He took out a gun and a seven-foot pike. Here, Brown insisted, was not a new constitution but a series of violent improvements, long overdue. Nearly a century overdue. Ameliorations. Corrections. Adopted at a convention. Amend and repeal, amend and mend, stitch the world together again. He was hanged.

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5

The Whole Rebellion Is Beyond the Constitution

Members of the jury pool for the trial of Jefferson Davis, 1867

> *No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.*
>
> —Failed amendment to the U.S. Constitution, passed by the Senate and by the House in 1861

Jefferson Davis, the half-blind ex-president of the Confederate States of America, leaned on a cane as he hobbled into the courtroom on the

third floor of the federal courthouse in Richmond, Virginia, on May 13, 1867, two years after Appomattox.[1] "A gaunt and feeble-looking man," one reporter wrote, describing Davis, fifty-eight. He wore a soft black hat and a sober black suit; he looked like a corpse.[2] Only days before, a reporter who met Davis on the boat ride to Richmond had written that "his step was light and elastic." [3] But in court, facing trial for treason, Davis gave every appearance of being bent and broken. He'd spent two years in a military prison. He wanted to be released. A good many Americans wanted him dead. "We'll hang Jeff Davis from a sour apple tree," they sang to the tune of "John Brown's Body." [4]

Jefferson Finis Davis was born in Kentucky in 1808. *Finis*. The end. As Robert Penn Warren would remark many years later, Davis "dropped the middle name, probably as early as he was put to his Latin, but who can so easily throw away his fate?" [5] He would be a man better known for his end than for his beginning.

Davis had been first elected to the Senate from Mississippi in 1845. "Cold as a lizard," Sam Houston called him.[6] A West Point graduate, he had fought in the Black Hawk War and the Mexican War and served as secretary of war under Franklin Pierce. He believed the Constitution had established only a compact between states. He believed in slavery, states' rights, and secession, three ideas in one. Every state had a right to secede, he insisted in his farewell address to the Senate in 1861, and Mississippi had every reason to: "She has heard proclaimed the theory that all men are created free and equal, and this made the basis of an attack upon her social institutions; and the sacred Declaration of Independence has been invoked to maintain the position of the equality of the races." Because the principles of equality and liberty threatened Mississippi's "social institutions," by which Davis meant slavery, Mississippi, he feared, was to be "deprived in the Union of the rights which our fathers bequeathed to us." [7] Two weeks later Davis was elected president of the Confederacy. The cornerstone of the new government, his vice president Alexander H. Stephens said, "rests, upon the great truth that the negro is not equal to the white man." [8] These claims, like the argument for secession, were to be tested in the trial of Jefferson Davis for treason, where he was to face a jury drawn from a pool of twelve white men and six Black men: they would be the Constitution's newest interpreters.

The Civil War, Reconstruction, and even the trial of Jefferson Davis recast the Constitution, marking the end of an era and establishing the United States as the world's first multiracial democracy. Seven hundred thousand people had died in a war that lasted four wretched, miserable, terrifying years. "The whole Rebellion is beyond the Constitution," the constitutional scholar Francis Lieber wrote in 1864. "The Constitution was not made for such a state of things." [9] Decades before the war, Lieber had written a treatise called *Legal and Political Hermeneutics, Or Principles of Interpretation and Construction in Law and Politics*, a closely argued guide for citizens on the methods of reading legal documents, including constitutions. "Seek for the true spirit, which pervades the whole constitution," Lieber advised.[10] During the war, he would offer a new philosophy of amendment. Unlike the framers, who wrote about the Constitution as a machine—a machine John Brown had attacked with a gun and a pike—Lieber described the Constitution as a creature, a living thing whose "unplastic form is no longer able to contain the swelling life within"—a living, *pregnant* thing.[11] (Lieber notably rejected Darwinism, which he described as an attempt to "prove to you that your grand-mother was a hideous gorilla." [12] His notion of a living constitution had nothing to do with evolution.)

A constitutional amendment as Liberty's, or Columbia's, baby, 1866

In the 1860s and '70s the U.S. Constitution was rewritten. As Thurgood Marshall would one day say, "While the Union survived the Civil War, the Constitution did not." [13] By the end of Reconstruction, in 1877, the Constitution of 1787 cast a shadow nine decades long. But as W. E. B. Du Bois would later point out, the Civil War was unconstitutional, and so too were the Thirteenth, Fourteenth, and Fifteenth amendments, "if one means by 'constitutional' something provided for in that instrument or foreseen by its authors or reasonably implicit in its words." But this is hardly a sensible way to understand the meaning of constitutionalism, Du Bois argued: "No more idiotic program could be laid down than to require a people to follow a written rule of government 90 years old, if that rule had been definitely broken in order to preserve the unity of the government and to destroy an economic anachronism." [14] Something had withered and died, and something else had been born. The Civil War gave birth not only to new amendments but also to a new hermeneutics of interpretation and revised a philosophy of amendment.

The Union Gone

Abraham Lincoln, the lanky, log-splitting idealist from Illinois, was elected president on November 6, 1860, without having won a single Southern state. Many in the South simply refused to accept the outcome. “The election of Lincoln is the dissolution of the Union,” a Charleston newspaper announced under the headline “THE UNION GONE!” and urged citizens, “The sooner we arm and organize the better.” [15] Southerners believed that Americans opposed to slavery were now committed enough, and powerful enough, to end it.[16] On November 13 the South Carolina legislature called for a convention to consider secession.

Could a constitutional amendment avert civil war? For decades, even as the states amended their constitutions again and again, Americans had steered clear of federal amendment. Hoping to avert the looming crisis over slavery in the form of nullification and secession, Congress had worked out a series of compromises over slavery and nullification in 1819, 1832, 1850, and 1854. So fearful had some white Southerners become of amending the U.S. Constitution that by 1850 a member of Congress from North Carolina had proposed an amendment to Article V providing “that no amendment shall be made, the object or tendency of which is to abolish, or in any way affect, the institution of slavery in any State, without the concurrence of all the States in which such institution may exist.” [17] And then in 1857 the Supreme Court had stepped in with *Dred Scott*, rewriting the Constitution by fatefully rereading it according, Taney said, to the original intentions of its framers.

By November 1860, when Lincoln was elected, three generations had passed since the last time the Constitution had been amended, with the Twelfth Amendment in 1804. For all their ceaseless amending of state constitutions, Americans had never tried to end slavery by amendment; neither passage in Congress nor ratification in the states would have been within reach. Nor was there ever any real chance that secession could be avoided by a federal constitutional amendment, but people tried all the same. In Congress, Northern Democrats hoped to appease the South by amending the Constitution in line with Southern demands. On December 3, 1860, when the Thirty-Sixth Congress opened its second session, outgoing president James Buchanan urged Congress to pass a clutch of constitutional

amendments aimed at recognizing “the right of property in slaves,” the duty of the federal government to protect this right, and “the right of the master to have his slave who has escaped from one State to another restored and ‘delivered up’ to him.” [18]

Buchanan’s fellow Democrats proceeded to do exactly as he’d asked, sending more than one hundred quisling amendments to a committee chaired by Ohio representative Thomas Corwin.[19] On December 18, the day after South Carolina’s secession convention opened, Kentucky senator John J. Crittenden introduced a five-part proposal, known as the Crittenden Compromise, that would have done everything Buchanan requested and one thing more: it provided that “no future amendment” could ever abolish either slavery or the three-fifths clause.[20]

On December 20, South Carolina’s convention voted to secede, 169–0. Amid the chaos, petitions submitted to Congress by citizens and especially by religious groups called for amendments either prohibiting slavery or at least not sanctioning it. One group of citizens from Michigan submitted a petition “remonstrating against any constitutional amendment or compromise except on the basis of the abolition of slavery,” while another group from the same state begged that “no attempt be made to amend the Constitution of the United States during the continuance of the present unusual excitement in the country.” [21] And still Congress continued to debate appeasement amendments. On December 24, Jefferson Davis offered up his proposal, the only constitutional amendment he ever introduced in his long career. It would have established ownership of human beings as a constitutional right, guaranteed the extension of slavery to the territories, and reinforced the fugitive slave clause. “Property in slaves, recognized as such by the local law of any of the States of the Union, shall stand on the same footing in all constitutional and Federal relations as any other species of property so recognized,” Davis’s amendment read.[22]

There were more desperate proslavery ideas, too, including a proposal, introduced by Tennessee congressman Andrew Johnson, that half the judges on the Supreme Court should be from slave states, and half from free states.[23] Like the Crittenden Compromise, most efforts at appeasement included what are sometimes called never-never amendments, provisions that amendments protecting slavery “shall forever be irrepealable and unamendable” and that “no amendment shall be made to the Constitution

which will authorize or give to Congress any power to abolish or interfere with slavery." [24] The position of Democrats in Congress who wished to conciliate secessionists, then, was the abdication of the very idea of amendment, the *forbidding* of amendment.

Secession Conventions, 1860–62

1860–62	South Carolina
1861–62	North Carolina, Florida
1861	Georgia, Virginia, Alabama, Arkansas, Mississippi, Texas, Louisiana

(Tennessee seceded without calling for a constitutional convention)

Even as Democrats in Congress offered the suggestion that, in the matter of human bondage, the Constitution was to sanction it, and then become unamendable, Southerners at secession conventions proposed what might be called blackmail amendments, laying out the terms under which they would agree to remain in the Union. At Alabama's convention in early January, delegates opposed to secession issued a minority report advocating a series of amendments along the lines of the Crittenden Compromise and including a never-never amendment, but the firebrand secessionist William Lowndes Yancy thundered that "no amendments of the Constitution . . . can afford any, the least, inducement to consider even a proposition to reconstruct our relations with the non-slave-holding States." [25] Alabama seceded four days later. Within the week, at Georgia's secession convention, delegates proposed nine "indispensable amendments to the Constitution of the United States" whose immediate ratification, they said, was the only condition under which Georgia would remain in the Union. These included those proposed in Congress, with some notable additions: "The Supreme Court having decided that negroes are not citizens of the United States, no person of African descent shall be permitted to vote for Federal Officers, nor to hold any office or appointment under the government of the United States." [26] Georgia seceded the next day. And so it went.[27] Mississippi having seceded, Jefferson Davis delivered his farewell address to the Senate on January 21. Three days later delegates to Louisiana's secession convention in Baton Rouge moved "to fix upon and determine what

amendments of the Constitution of the United States are necessary and proper to secure the rights of the slaveholding States of the Union.” [28] This motion was defeated the next day, 24–106.[29] Louisiana seceded on January 26.

The Union was gone.

No amendment shall be made

In January 1861, as the South seceded, Francis Lieber, a curly-haired, Prussian-born professor of history and political science, began his course of lectures on the modern state at Columbia College of Law.[30] The law school had opened only three years before, and it didn’t quite yet have a home: classes were held in rented rooms at a building at Lafayette Place, across the road from an African burial ground that had closed in 1795 and contained the remains of fifteen thousand Black New Yorkers who built New York and whose memory was daily being forgotten as the city grew up on top of their graves. Their coffins bore the marks of their beliefs, beads and brass tacks, and their bones bore the marks of their suffering, bowed and broken limbs and musket balls lodged in rib cages. Many had been carried from West Africa; they were buried with hundreds of shells in hopes of going home. “The shells stand for the sea,” it was said. “The sea brought us, and the sea shall take us away.” [31]

Night after night, across from that graveyard, Lieber lectured by gaslight on the Constitution and inquired into the constitutionality of secession. He likened the experience to an ocean voyage, telling his students he felt “much like a man obliged to discourse on navigation, aboard a threatened craft, in foul weather, when the ghastly foam of breakers is espied, and the turmoil on the shoal is heard to the leeward.” [32] The ship of the modern state was running aground.

By the start of February, all seven states of the lower South had seceded. They insisted on their right to withdraw from a Constitution that, according to their reading of the original intent of its framers, was no more than a compact. “What is the Constitution of the United States?” Professor Lieber asked.

> Do the States form a league? Or is the Constitution a pact, a contract—political partnership of contracting parties? Do we live in a confederacy? and if so, in a confederacy of what degree of unitedness? Or is the Constitution a framework of government for a united country—a political organism of a people, with its own vitality and self-sufficing energy? Do we form a union, or an aggregate of partners at pleasure? [33]

Lieber believed the Constitution had established a national government, and he believed secession to be treason and that any contention that the Constitution was a contract was altogether without historical proof.[34]

On February 9 delegates from the seceding states met in a convention in Montgomery, Alabama, formed the Confederate States of America, and elected Jefferson Davis as their president. In another convention, they drafted a new constitution to make explicit what the framers in 1787, they argued, had always intended. The Confederate Constitution forbade the passage of any "law denying or impairing the right of property in negro slaves." This new frame of government, Alexander H. Stephens declared, "has put at rest forever all the agitating questions relating to our peculiar institutions—African slavery as it exists among us—the proper status of the negro in our form of civilization," by establishing "that slavery, subordination to the superior race, is his natural and moral condition." [35]

In his inaugural address as president of the Confederacy, Davis invoked Taney's opinion in *Dred Scott* and his original-intent method of constitutional interpretation. The Confederacy's constitution, Davis insisted, differed from the U.S. Constitution only "in so far as it is explanatory of their well-known intent"—to sanction slavery. But there were more differences, too, including the fact that the Confederate Constitution had not been popularly ratified. Davis, in his address, celebrated secession as an expression of the will of the people through "a peaceful appeal to the ballot-box." [36] But no state in the Confederacy, except Texas, submitted the new constitution to the people for ratification.[37]

Eight slave states—North Carolina, Virginia, Maryland, Delaware, Kentucky, Tennessee, Arkansas, and Missouri—had yet to secede (and four never would). Beginning on February 4, 131 delegates from twenty-one states met in a peace conference at Washington's Willard's Hall, an old theater. John Tyler, the former American president, served as presiding officer. The convention proposed seven amendments, including the Crittenden Compromise, which extended the 36°30' all the way to

California, but Virginia wished to extend that line to any territory "now held or hereafter acquired," which would have allowed, for instance, extending slavery to Cuba, Mexico, or Nicaragua, if conquered or acquired by the United States. The Crittenden Compromise passed, but without the "hereafter" clause. A never-never amendment also passed, twelve states to seven. (Indiana, Iowa, and all five New England states voted against it.) None of these proposed amendments had any chance at ratification. The convention adjourned on February 27. In a measure of the weakness of Tyler's own commitment to amendment, the next day he delivered a public address in Richmond, calling on his home state, Virginia, to secede.

Between January and March 1861 the legislatures of six states—Illinois, Indiana, Kentucky, New Jersey, Ohio, and Virginia—asked Congress to call for a constitutional convention, hoping to keep the Union together; most resolutions, like New Jersey's, urged "forbearance and compromise." But appeasement had not exhausted itself. One element of the Crittenden Compromise, a never-never amendment introduced by Ohio representative Thomas Corwin—"No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State"—found sufficient support in Congress. On February 28 it passed the House 133–65, and on March 2, two days before Lincoln's inauguration, it passed the Senate 24–12.[38]

Abolitionists considered the Corwin amendment an abomination, and really, it was more an anti-amendment than an amendment. Ohio congressman John Bingham called it a tool of "perpetual despotism" that undermined the Constitution by striking "at the inherent right of the people to alter or amend it at their pleasure." [39] But Lincoln endorsed it and, in his inaugural address, vowed not to interfere with slavery where it already existed, even though he objected to its extension. If there were to be amendments, Lincoln said, he'd rather Congress not propose them: "to me the convention mode seems preferable, in that it allows amendments to originate with the people themselves." Still, as for the constitutionality of secession, Lincoln agreed with Francis Lieber. "Plainly, the central idea of secession is the essence of anarchy," he said.[40] Anarchy came.

Illegal, unjuridical, unphilosophical, and unethical

On April 12, 1861, Confederate forces fired on the U.S. garrison at Fort Sumter, off the coast of Charleston, South Carolina. Two days later Lieber forwarded a copy of his lectures on the Constitution to Lincoln's secretary of state, William Seward. Seward read them, and Lincoln read them.[41] And then Lieber, taking a leave of absence from Columbia, went to Washington, where he propounded not only a theory of secession as treason but also a manual on the laws of war and a treatise on the philosophy of amendment.

Lieber, a man unopposed to self-flattery, considered himself America's leading political philosopher. "My work belongs to the list which begins with Aristotle, and in which we find the names of Thomas More, Hobbes, Hugo Grotius, Pufendorf," he puffed.[42] In truth, his work proved enormously influential. (Into the 1950s, graduate students in at least one seminar on American political thought were required to read his *Civil Liberty and Self-Government*.)[43] Born in Prussia in 1798, the tenth of twelve children, he'd studied in Berlin and Jena, where he earned a PhD in mathematics. He fought in the Battle of Waterloo, was wounded fighting for Greek independence, and was twice imprisoned for his political beliefs, once for a year, before emigrating to the United States in 1827.[44] Landing in Boston, he took up teaching and literary work. In the 1830s he conducted research for Alexis de Tocqueville. Sometimes referred to as a German Tocqueville, he published, beginning in 1829, the best-selling *Encyclopaedia Americana*. In 1832 he became an American citizen. He spent much of his academic career studying American citizenship.[45]

In Boston, Lieber befriended Charles Sumner and advanced abolitionist views, writing in 1835 in a book called *The Stranger in America*, "I hold slavery to be philosophically, an absurdity, (man cannot become property,) morally a bane both to the slave and his owner; historically, a direct violation of the spirit of the times we live in, and, with regard to public economy, a great malady, to any society at all advanced in industry." [46] Unable to secure an academic appointment in the North, he reluctantly accepted a professorship at South Carolina College (now the University of South Carolina). Lieber and his wife, Mathilde Oppenheimer, moved there with their very young family; their oldest son, Oscar, was five years old.[47]

For his inaugural lecture in South Carolina in 1835, Lieber denounced the school of thought that "considers everything, which has been handed down through generations, as lawful, good, wise, and not to be touched; perhaps not even to be judged and freely examined, merely because it has been handed down." This view of change would inform, too, his understanding of the Constitution.[48] "The Constitution is not a deity," he wrote rather daringly.[49]

A strong nationalist and an equally strong republican, Lieber wrote a string of books during his years in South Carolina, including a popular textbook, *On Civil Liberty and Self-Government* (1853), but one of his most influential works was *Legal and Political Hermeneutics, Or Principles of Interpretation and Construction in Law and Politics*, published in Boston in 1839, the year before Madison's Notes on the Constitutional Convention first appeared in print.

Lieber introduced German hermeneutics into American law. (His wife nicknamed the book "Hermy.")[50] The work also reflects the influence on Lieber of his intimate friendship with Joseph Story. The two men had become friends when Lieber lived in Boston, and they remained close correspondents. (Story spent only part of the year in Washington, when the Court was in session.) Story had also contributed all eighteen of the major legal essays that appeared in Lieber's thirteen-volume *Encyclopaedia Americana* (work he did for free, out of his love for Lieber).[51] After Lieber moved to South Carolina, the two men maintained a lively correspondence, and when Lieber traveled, he regularly met with Story, reading drafts and portions of his books. "Last Saturday, I was at Cambridge," he reported to his wife Mathilde in 1839, "and read to Judge Story my chapter on the Judge, Juror, Advocate, and Witness, and he said it was by far the best he had ever seen upon these important subjects." (Lieber's credibility on this point is perhaps to be doubted, since in the same letter he boasted that Story was working hard to find someone to endow a professorship for him at Harvard's law school, and "wanted me there beyond any <u>man</u> in America, and they must have me.")[52]

He'd written the book not only for lawyers but for citizens. Having himself spent a year in a Prussian jail as a political dissident, Lieber believed the capacity for reading legal documents was a requirement of every citizen of a republic.[53] Lieber, who claimed (in error) to have coined

the words *nationalism*, *internationalism*, and *individualism*, brought to his theory of interpretation not only German hermeneutics but also fluency in German, Italian, English, Spanish, Greek, Latin, and French and knowledge of Chinese, Danish, Russian, Swedish, Hebrew, and Sanskrit.[54]

Interpretation, Lieber argued, is "the discovery of the true sense of words," which requires determining "that meaning which those who used them were desirous of expressing." The book is a set of rules and principles to use to interpret many different kinds of evidence, from conversations and speeches to diaries, statutes, and treaties. He had a strikingly organic conception of the law. "A code is not a herbarium, in which we deposit law like dried plants," Lieber wrote. "Let a code be the fruit grown out of the civil life of a nation, and containing the seed for future growth." Yet he had surprisingly little to say about constitutions, and most of what he said was comparative, with attention to the constitutions of Prussia, Belgium, Sweden, Brazil, and France; he said hardly anything at all about the U.S. Constitution. As to what he did say, beyond that constitutions should be interpreted "closely," it came down to this: "liberty is not decreed in so many words on parchment," since parchment "may be eaten by the worms, may be torn by any daring hand"; liberty is decreed by constitutions only insofar as their words are "the pronouncing and solemn expression of that which lives within the nation," its "living essence." It was always possible to offer what Lieber called a "faithless interpretation": "The constitution of the United States bestows prerogatives upon the president, which might deprive the people of all liberty, the moment they should become indifferent enough to allow it." The best rule, therefore, was to "seek for the true spirit, which pervades the whole constitution, and interpret in good faith accordingly." [55]

That Lieber declined to offer more precise methods of constitutional interpretation, in a lengthy and otherwise comprehensive treatise on legal hermeneutics, is best explained by the fact that he was writing from South Carolina shortly after the nullification crisis. During his years in South Carolina, he wrote a great deal that he did not publish, including a series of letters to John C. Calhoun, opposing nullification and states' rights, letters he did not send. "It is not the *North* that is against you," Lieber wrote Calhoun, "it is mankind, it is the world, it is civilization, it is history, it is reason, it is God, that is against slavery." [56] He hated the South. "I loathe it

from the inmost of my heart," he wrote.[57] Yet year in and year out, he remained, unable to secure an academic appointment in the North.

For all that Lieber and his wife opposed slavery, they bought, hired, or rented out at least five people during their twenty-one years in South Carolina. In 1836 Lieber bought a thirteen-year-old girl named Elsa for $475 and insisted on buying her mother, Betsy, for $675, to keep the two together. In his diary he listed the "reasons why we bought them," including "it is no injustice to have slaves where slavery exists and emancipation does not happen"; also "We believe it will be cheaper for us"; and his wife wanted "to thoroughly educate the slave women." [58] Elsa died in 1841, giving birth to a child who was white. (The baby also died.)[59] Yet it may have been Lieber's close knowledge of slavery that made him, later, such an ardent opponent of it.[60]

Had Lieber publicly propounded his antislavery views while living in South Carolina, he would have lost his appointment. Having kept them quiet, he lost his friendship with Sumner.[61] But while he was unwilling to publicly oppose slavery, he did publicly oppose secession, as in his lectures on the Constitution in 1851, after South Carolina threatened to leave the Union. In an address for a Fourth of July celebration in Greenville that year, he celebrated the Union ("there has never been a Union of free States like ours, cemented by a united representation of the single States, and of the people at large, woven together into a true Government like ours"), warned of war ("no great institution, and, least of all, a country, has ever broken up or can break up in peace"), and mocked secession as about as good a remedy for political disagreement as cutting your throat is a remedy for a migraine.[62]

Lieber campaigned for the presidency of the college but was denied the post on the suspicion that he was an abolitionist. In 1856, finding his political situation untenable, he resigned and left South Carolina for New York, leaving behind his oldest son, twenty-six-year-old Oscar. The next year, just before the Supreme Court issued its decision in *Dred Scott*, a decision Lieber called "illegal, unjuridical, unphilosophical, and unethical," he finally secured his long-sought faculty position in the North, at Columbia. He had, by now, been denounced across the South. On November 7, 1860, when the *Charleston Mercury* announced Lincoln's election on its front page, a story about Lieber appeared just below it, titled

“DR. LIEBER A RENEGADE.” It noted that he had “dishonored himself by becoming an Abolitionist” and reported that a literary society at South Carolina College, which counted John C. Calhoun and Jefferson Davis among its members, had disenrolled him. Later, the club would take his portrait down from the wall and throw his bust out the window.[63]

Secessionists considered secession merely an exceptionally radical form of amendment—the “abolish” in the phrase “to alter or abolish.” But when South Carolina seceded, Lieber declared secession unconstitutional. He then set about revising his treatise on legal hermeneutics.[64] To a passage in which, in the 1839 edition, he had remarked on the postal service’s banning of the transmission of abolitionist literature through the mail, he added, in 1860, this question: “Where is it to stop?” [65]

The Lieber Code

In June 1861, Lieber traveled to Washington and, on behalf of Columbia, visited the White House to deliver an honorary degree to Lincoln. That fall, back at Columbia, he began teaching a new course at the law school, “The Laws and Usages of War.” The *New York Times* reprinted each of his lectures; they were picked up by newspapers all over the North.[66] Even as Lieber meditated on the laws of war, his sons took up arms, one for the Confederacy, and two for the Union. “Behold in me the symbol of civil war,” Lieber wrote.[67] By June 1862 his son Oscar had died of injuries sustained while fighting in the Confederate Army, while another son had lost an arm fighting for the Union. That summer Lincoln’s administration called on him to prepare an essay, distributed to Union troops, called *Guerrilla Parties Considered with Reference to the Laws and Usages of War*.[68] If the Union were to conduct the war lawfully, the laws it would obey would be laws devised by Lieber.

In September, Lincoln issued a Preliminary Emancipation Proclamation, announcing that as of New Year’s Day 1863, he would declare the freedom of all people held as slaves in any state “in rebellion against the United States.” It was a military measure, an act of war. The month before it was to go into effect, Lincoln’s secretary of war, Edwin Stanton, telegrammed Lieber in New York, calling him back to Washington. There Lieber adapted

his Columbia lectures for the War Department, moving from the specific urgent request—to establish a policy with regard to emancipated and escaped slaves and Black soldiers—to a wholesale code of law. When, on New Year's Day, Lincoln issued the Emancipation Proclamation, Jefferson Davis and Southern newspapers denounced it as an attempt to incite a slave rebellion. The Confederate Congress entertained a retaliatory resolution that "all rules of civilized warfare should be discarded in the future defense of our country." [69] Lieber, meanwhile, was completing work on a manual of 157 provisions, published in May 1863 as a thirty-six-page *Code for the Government of Armies in the Field, as Authorized by the Laws and Usages of War on Land* (1863). It was issued by Lincoln to the Union Army as General Orders Number 100 but is better known as the Lieber Code.[70]

The Lieber Code called for restraint in war. "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another, and to God," Lieber wrote. The Lieber Code, like his later philosophy of amendment, was avowedly nationalist. "To save the country is paramount to all other considerations," he wrote in Article 5. He argued for the vigorous pursuit of victory: "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief." He called for treating rebel soldiers not as criminals but as lawful combatants, insisting that this "does in no way imply a partial or complete acknowledgment of their government." Any escaped slave, whether from a rebel state or not, was to be "immediately entitled to the rights and privileges of a freeman"; color could not bar a soldier from combat (moreover, "the law of nations knows no distinction of color"); and anyone who sold a Black soldier into slavery was to be put to death. Lieber wrote, "To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave a human being." [71]

Francis Lieber, c. 1860

Lieber is best remembered for the Lieber Code; it became the model for later laws of war, including the Geneva Conventions. Yet nearly as critical, if not to the war, then to the peace, were Lieber's hermeneutics of constitutional interpretation and his philosophy of constitutional amendment. "The simple fact is," he wrote to Charles Sumner, "the Constitution stops short some five hundred miles this side of civil war like ours." [72] Lieber sought to close that distance.

This altered society

In the spring of 1863, long before members of Congress and even many abolitionists reached this conclusion, Lieber had become convinced of the need for a series of constitutional amendments to end slavery, guarantee Black citizenship, redefine treason, and reconstruct the nation. He was particularly keen to establish the implications, under the laws of war, for the former Confederacy. He wrote a note to himself: "Amendment of Constitution. Either you must execute, banish, burn, etc. Or You must carry off as the prize of victory a change of the Constitution." [73] The war had cost so much. Mass executions of the leaders of the defeated Confederacy would

be a terrible, terrible thing. Instead, the victor's spoils, Lieber believed, should come in an altered—an improved—Constitution.

The Emancipation Proclamation freed only those people held as slaves in the rebel states. What of slaves in the rest of the country? Many abolitionists had maintained that no amendment would be necessary for a general emancipation, because, as they argued, the Constitution had never sanctioned slavery and therefore did not need to be altered to end it. But now that it *could* be changed—the South no longer held the ability to defeat ratification—there was little reason it *shouldn't* be. In October 1863 an abolitionist from Missouri speaking at a mass meeting at the Cooper Institute reportedly said that "if the Constitution of the United States recognized slavery—though he did not believe it did—he wanted it amended." In December, the abolitionist Wendell Phillips delivered a lecture on that same stage in which he insisted on the power of amendment. "You may say, we have no power so to amend the Constitution," he expected his audience to complain. But, he countered, the people do retain that power, conjuring the most extreme amendments he could think of: "You could make Lincoln hereditarily President; if you chose, give it to his son. You could make the Senate hereditary; you could give women the ballot; you could take it from men under fifty; you can do anything." [74]

Phillips proposed two amendments. First, "Hereafter, there shall be neither slavery nor involuntary servitude in any State of this Union." And second, "No State shall make any distinction among its citizens on account of race and color." [75]

The constitutional arguments made at decades of Black conventions had at last been heard. Lincoln asked his attorney general, Edward Bates, to inquire into the constitutional question that had, since 1829, dominated Black conventions: "Are colored men Citizens of the United States?" Bates answered, definitively, yes, concluding, "If I have succeeded in placing upon impregnable grounds of law & logic, the proposition that a person may be a citizen without being white, that is all I aimed at." [76] He'd followed the logic of Black abolitionists like John Jones, in Lincoln's home state of Illinois. In 1864 Jones published *The Black Laws of Illinois and a Few Reasons Why They Should Be Repealed.* The state's 1848 constitution "declares that all men are born free and independent and have an 'indefeasible' right to enjoy liberty and pursue their own happiness," Jones wrote, "but this section denies the colored man equal freedom, to settle in

this State." Moreover, the U.S. Constitution "declares that the citizens of each state shall be entitled to all the privileges and immunities of the several states." But are not Black people citizens? "If being natives, and born on the soil, of parents belonging to no other nation or tribe, does not constitute a citizen in this country, under the theory and genius of our government, I am at a loss to know in what manner citizenship is acquired by birth." [77] And now the U.S. attorney general agreed.

Lieber believed the time had come for a cache of amendments. Early in 1864, he circulated to members of Congress an essay that offered both a philosophy of amendment and seven proposals that he believed necessary to secure the future of the Union after the defeat of the Confederacy.[78] He began by articulating the idea of amendment as peaceful revolution, the Constitution's means "to prevent violent eruptions." The Constitution was alive, Lieber argued, "and the condition of life is change" and for constitutions, as for people, "cessation of change is death." This, in 1865, was particularly freighted language. Death, at the time, was everywhere. The dead lay on battlefields and in graveyards, rotting and decayed; on church altars and in funeral parlors, embalmed and pallid and waxen as candles, dire illustrations of the consequences of constitutional failure.[79] *Cessation of change is death.*

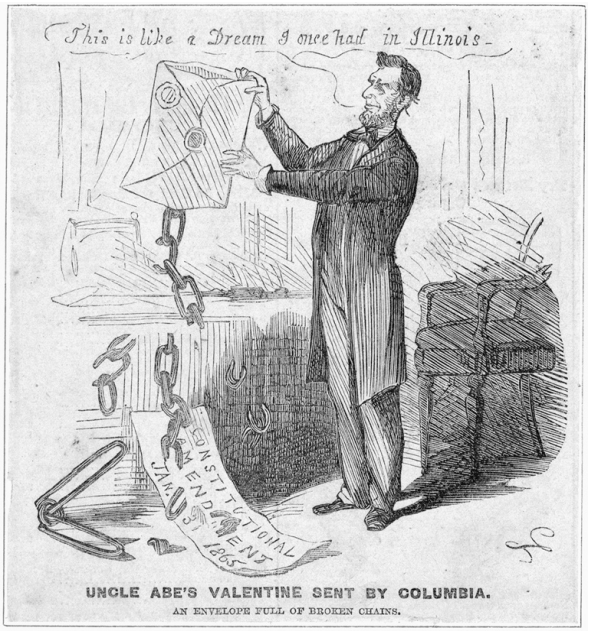
To those who would defer to the framers and their original intent, as if they were divinely inspired, Lieber countered that men who wrote the Constitution were instead "finite and imperfect beings; men like ourselves, to whom the future state of our country was not revealed." And in any case, such deference to the past was nonsense: "Shall a House not be repaired, though it have become ever so damp, simply because an ancestor built it?" Amendment rests on a theory of change, he argued, and "no country or people of antiquity or modern times has changed in circumstances and condition, in national consciousness, and in a great public opinion," as the United States in the last sixty years. Echoing the rhetoric of progress so frequently heard at state constitutional conventions, he offered a litany of changes:

> The extension of our territory from sea to sea, the magnitude of our commerce, the unparalleled growth of our population, the internal union and mutual necessity of all its parts, our relation to foreign nations, our literature, our school systems, our wealth, and our knowledge of far greater though undeveloped wealth; the consciousness of nationality on the one hand, and the development, on the other, of an extravagant idea of State rights; the

outspoken disgust at slavery, its dangerous character here, and its exaltation as a blessing there—who can tell all the changes which have taken place, for weal or woe, within the last half century in this country?

Amid this flurry of change, slavery stood as a "deplorable anachronism." And then the war itself offered "sufficient proof that practical changes have taken place" that plainly required "changes in the political framework of society." Lieber wished the country were in a position to hold a second constitutional convention, to start all over again. But neither the times nor the country would allow it.[80]

Lieber's seven proposed constitutional amendments, published as *Amendments of the Constitution Submitted to the Consideration of the American People*, included an amendment prohibiting slavery in the United States.[81] "Let us have no 'slavery is dead,'" Lieber wrote Sumner as the Thirteenth Amendment awaited passage in the House. "It is not dead. Nothing is dead until it is killed." [82] So many men had gone to their deaths on so many battlefields. So many had lingered and suffered. Might not this one great evil, the cause of it all, be finally dispatched?



Follow for extended description

The Thirteenth Amendment as a valentine from Lincoln, February 1865

On January 31, 1865, the House passed the Thirteenth Amendment and sent it to the states for ratification.[83] Lieber, on hearing the news in the

morning, “was so excited that he could not shave.” [84] John Jones’s long fight to repeal Black laws in his home state finally came to an end when the Illinois legislature became the first state to ratify the Thirteenth Amendment. Illinois also, at last, repealed its Black Codes. In Chicago, Jones, now an old man, ignited the fuse on a cannon that was fired to celebrate, with a thundering blast, the conclusion of a campaign he had begun, decades before, with a whisper.[85]

To stamp treason as treason

Slavery had ended, but not the war.

A desperate and haggard Jefferson Davis fled Richmond, the capital of the Confederacy, on April 2, 1865, as the city fell to advancing Union troops. During the war, the Confederacy had used the federal courthouse in Richmond as the government’s headquarters. Davis and his cabinet had used the courtroom as a war room, covering its walls with maps while they plotted battles and moved troops. The judge’s chambers had served as Davis’s presidential office. As Confederate forces retreated, they set fire to the city. The courthouse, built of brick and granite, was one of only a handful of buildings to survive the blaze.[86]

Seven days after Richmond fell, Robert E. Lee surrendered to Ulysses S. Grant at Appomattox. Davis, meanwhile, headed south, apparently hoping to escape to Mexico.[87] Lincoln hoped that Davis, and other Confederate leaders, might manage to cross the border, because what to do with them, if captured, would present all kinds of problems. “I’m bound to oppose the escape of Jeff. Davis,” Lincoln is alleged to have told General William T. Sherman, “but if you could manage to have him slip out unbeknownst-like, I guess it wouldn’t hurt me much.” [88]

On April 11, Lincoln gave a speech from the White House in which he touched on a series of questions his administration was facing at war’s end, including two issues generally seen as a matched pair: amnesty for white men who had fought for the Confederacy, and voting rights for Black men who had fought for the Union. “If universal amnesty is granted to the insurgents I cannot see how I can avoid exacting in return universal suffrage, or at least suffrage on the basis of intelligence and military service,” Lincoln said. John Wilkes Booth, a Shakespearean actor in the

crowd that night, seethed, “That means nigger citizenship.” [89] Three days later Booth shot and killed Lincoln. “That even this should befall us!” Lieber wrote, devastated, laying the blame where he believed it belonged: “It is Slavery! Slavery!” [90]

Jefferson Davis in 1859

Jefferson Davis was suspected of having orchestrated Lincoln’s assassination. Lieber hastened to Washington. He stayed at the home of Attorney General James Speed, who had replaced Edward Bates, and met with Secretary of War Stanton; with Seward, who, at home in bed, had been stabbed by one of Booth’s co-conspirators; and with Lincoln’s successor Andrew Johnson, who was besieged by a parade of Confederates seeking pardons.[91] On May 2, Johnson issued a proclamation charging that Lincoln’s assassination had been “incited, concerted, and procured by” Davis and five other Confederate agents and offering a reward of $100,000 for Davis’s capture, for the purpose of bringing him to trial.[92] Lieber was especially keen to see that happen, despite the fact that Lincoln, had he lived, would almost certainly have issued an amnesty to “bind up the nation’s wounds,” as he’d promised in his Second Inaugural Address.[93]

Booth, wounded and hounded, hiding in a barn not many miles from Washington, was shot and killed on April 26. In July, four people convicted of participating in a conspiracy to assassinate Lincoln, his vice president, and his cabinet were hanged in Washington. Union troops captured Davis in Georgia on May 10 as he attempted to sneak out of a tent cloaked in his wife's shawl. He was carried to a military prison in Virginia.[94] A rope-maker from Illinois wrote to Johnson, volunteering to make the rope to hang him. Captain Henry Wirz, who had served as commander of the infamous Confederate prison in Andersonville, Georgia, where thirteen thousand Union soldiers died of starvation and exposure, had been captured three days before Davis. He was charged with murder and with conspiring with Davis and others "traitorously and in violation of the laws of war to impair and injure the health and to destroy the lives . . . of large numbers of federal prisoners." Tried before a military commission, Wirz was found guilty on both counts and hanged in Washington on November 10, 1865.[95]

From the start, the prosecution of Jefferson Davis was more complicated.[96] "I never cease to regret that Jeff. Davis was not shot at the time of his capture," the dauntless and uncompromising Radical Republican and Massachusetts senator Charles Sumner said.[97] Sumner and Stanton wanted Davis tried, like Wirz, for war crimes before a military commission and a jury of Union soldiers.[98] During the war, the military, operating under the Lieber Code, had conducted nearly one thousand war crimes trials.[99] In a cabinet meeting in July, Johnson, persuaded by Lieber, decided he wanted Davis tried not for war crimes but for treason.[100] That same day Stanton appointed Lieber to head an Archive Office, charged with collecting the records of the Confederacy. Lieber fully expected to find evidence showing a "perfect connexion" between Davis and the assassination. This evidence was not forthcoming.[101]

Much appeared to turn on the definition of treason. If Davis couldn't be convicted of treason, the *Philadelphia Inquirer* remarked, "we may as well . . . expunge the word at once from our dictionaries." [102] The Constitution defines treason against these United States as consisting "only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." In 1842 Joseph Story argued that for a crime to be treason, "it is not necessary, that it should be a direct and positive intention entirely to subvert or overthrow the government. It will be equally treason, if the

intention is by force to prevent the execution of any one or more general and public laws of the government, or to resist the exercise of any legitimate authority of the government in its sovereign capacity." [103] The definition of treason had been modified by Congress in 1862, but there remained ambiguity about the difference between treason, rebellion, and insurrection. It had been with this in mind that Lieber had in 1864 drafted and circulated an insurrection amendment, which foreshadowed Lieber's drift toward authoritarianism: "It shall be a high crime directly to incite armed resistance to the authority of the United States, or to establish or to join Societies or Combinations, secret or public, the object of which is to offer armed resistance to the authority of the United States, or to prepare for the same by collecting arms, organizing men, or otherwise." [104]

While Congress entertained that amendment proposal, Lieber hoped trying Davis for treason would "stamp treason as treason" and bring Davis to the gallows.[105] "I am anxiously looking forward to Jefferson Davis's Trial," he wrote Sumner at the close of Wirz's trial. But "suppose he is not found guilty; is he not, in that case, completely restored to his citizenship, and will he not sit by your side again in the Senate? And be the Democratic candidate for the next presidency? I do not joke." [106]

Keeping Davis from holding office again—even from seeking the presidency—would require either convicting him or passing another constitutional amendment. The question was how either could possibly be accomplished.

The right of this Government to exist

Andrew Johnson, who succeeded to the presidency at Lincoln's death, pursued a policy known as Presidential Reconstruction, welcoming the former Confederacy back into the Union and pardoning Confederate leaders. The states that had seceded held new constitutional conventions to reenter the Union, but they also began passing Black Codes, all but reestablishing slavery through racial statutes.

Presidential Reconstruction Conventions, 1864–66

1864 Virginia, Louisiana, Arkansas

1865 Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina

1866 Texas

Jefferson Davis, like other high-ranking Confederate officers and officials, was not eligible for the pardon Johnson issued in May 1865. Republicans and Northerners wanted the Davis trial to happen fast. “If you promptly put Davis on trial for treason your popular triumph will be complete,” Indiana governor Oliver Morton wrote to Johnson in November 1865, urging him to “stand firm by the doctrine that rebellion is treason, that treason is a crime, that a state cannot secede.” [107] The trial of Davis, the *Philadelphia Inquirer* agreed, was needed “to render traitors infamous, and to have it judicially settled that Secession is illegal.” [108] But U.S. attorney general James Speed, belying his name, wanted to slow things down. Americans were still mourning Lincoln and all they had lost in the war. Speed, cautious by nature, wanted temperatures to cool. More, he worried that Davis would use his trial to advance the cause of the Confederacy, and like Lieber, he was especially worried about the consequences were Davis to be acquitted.

Bringing Davis to trial risked handing a rather stunning victory to the defeated Confederacy. To a charge of treason, Davis was expected to argue that he had forfeited his American citizenship when Mississippi seceded from the United States, and you cannot commit treason against another country. Were a jury to acquit him on this defense, some feared, Davis’s trial would have established the constitutionality of secession. Worse, the men involved in the prosecution had towering political ambitions and were unwilling to risk losing so prominent a case.[109]

The first hurdle the prosecution faced had to do with venue. Legal authorities disagreed about whether a military commission could conduct a trial for treason.[110] For the sake of both fairness and political legitimacy, it seemed safest to conduct the trial in a civilian court. That would require holding the trial where Davis had allegedly committed the crime, which meant Richmond. But what jury in the former capital of the Confederacy would possibly convict Davis of treason?

Lieber had in 1864 proposed a constitutional amendment, quite a draconian one, to deal with this problem, too: “Trials for Treason or Sedition shall be in the State or district in which they shall have been

committed unless the administration of justice in the respective State or district shall have been impeded by the state of things caused by the commission of the criminal acts which are to be tried." [111] That is to say, you shouldn't have to try someone for treason in a state where you can't convict anyone of treason. That proposal went nowhere. A doctrine called "constructive presence" that dated to the 1807 trial of Aaron Burr might have been construed to allow for holding the trial in a Northern state—Indiana governor Oliver Morton, for instance, volunteered to try Davis in his state, where the Confederate Army had marauded.[112] But Speed, exercising the greatest possible caution, resolved that the case would be tried in Richmond, partly because Salmon P. Chase, chief justice of the U.S. Supreme Court, attended the U.S. circuit court in Richmond. (At the time, Supreme Court justices rode circuit.) Chase, a former U.S. senator and governor of Ohio, was best known for, one, his abolitionism (people called him "the attorney general for fugitive slaves") and, two, his ambition (he was, it was said, as "ambitious as Julius Caesar"). In 1864, even while serving as Lincoln's secretary of the Treasury, he had sought the Republican nomination for president, after which Lincoln accepted his resignation and appointed him to the Supreme Court.[113] Speed hoped Chase's presence on the bench at the Davis trial, alongside the district court judge, would provide the proper degree of authority and solemnity.[114]

But while Speed expected to conduct the prosecution himself, he assigned the case to the federal district attorney for the Eastern District of Virginia, Lucius H. Chandler, who had virtually no trial experience. Having moved to Virginia from Maine and never having joined the Confederacy, Chandler was one of only two lawyers in all of Virginia who, by November 1865, had not been disqualified due to disloyalty.[115] Speed appointed the learned Massachusetts lawyer and father of twelve William Evarts to assist him. Evarts, nearly as ambitious as Chase, was quite happy to have been put on retainer by the government for what he called "the greatest criminal trial of the age." [116] But Evarts left the legwork to Chandler, who, it turned out, had either no idea how to do it or no inclination.

Given that all Southern lawyers had lost their licenses, Davis instructed his wife Varina to hire the celebrated New York trial lawyer and proslavery Southern sympathizer Charles O'Conor.[117] "I have not left a stone unturned under which there crept a living thing," O'Conor liked to say about how he

prepared for trial.[118] O'Conor was the most famous lawyer in the United States; he was also despised by Blacks for his proslavery, pro-Confederacy views. An editorial in a Black newspaper from San Francisco maintained that he was "as great a traitor as Jeff Davis." [119] O'Conor's strategy for his new client was to delay a trial for as long as possible, while the national mood cooled. Luckily for O'Conor, this was what Speed wanted, too.

But everything about the delay alarmed Lieber. "The trial of Jeff. Davis will be a terrible thing," he wrote. "Volumes—a library—of the most infernal treason will be brought to light," but "Davis will not be found guilty, and we shall stand there completely beaten." [120] Frederick Douglass blamed the president, predicting that "Davis would never be punished, simply because Mr. Johnson had determined to have him tried in the one way that he could not be tried, and had determined not to have him tried in the only way he could be tried." [121] And even if he were tried, any verdict would be appealed to the Supreme Court, which, in the aftermath of *Dred Scott*, can hardly be said to have enjoyed the public trust. Asked *Harpers Weekly*, "Does anybody mean to assert that the right of this Government to exist is a question for a court to decide?" [122]

Equal protection

If the trial of Jefferson Davis proceeded at a slow and stumbling pace, the amending of the Constitution seemed to proceed faster than anyone could have imagined. "Whole generations of time are now crowded into the span of a few years," said an Indiana congressman. "Growth, development, progress, are the expressive watchwords of the hour." [123] As Lieber put it more vividly, "I, for one, would never have dared to believe it possible that but yesterday a Taney could give his opinion boldly and an Abolitionist was treated like a leprous thing, and that to-day" a member of Congress can declare "that the Constitution of the United States never acknowledged man as property. I rub my eyes, and say, 'Where are we?'" [124]

Aside from the urgent matter of the states that belonged to the Confederacy reentering the Union, a leading question confronting Congress at the end of the war had to do with the citizenship status of people who had supported the Confederacy and also of people who were not white. For

Lincoln, and for Lieber, the fates of these two groups of people were linked: amnesty for Confederates required equal citizenship for Blacks. This quid pro quo arrangement also seemed politically possible, Confederate amnesty pleasing Democrats and equal citizenship, Republicans.

The hitch was making it happen. Beginning in July 1865 and continuing for nine months, the *National Anti-Slavery* adopted as its motto, and printed in every issue, a call for a colorblind constitutional amendment:

PROPOSED AMENDMENT OF THE UNITED STATES CONSTITUTION.

No state shall make any distinction in civil rights and privileges among the naturalized citizens of the united states residing within its limits, or among persons born on its soil of parents permanently resident there, on account of race, color, or descent.[125]

This amendment, if ratified, might have been read to guarantee Black men the right to vote throughout the United States, at a time when Black men could vote in only five states, all of them in New England.[126] And many Radical Republicans were not persuaded that the former Confederates could be trusted to be loyal to the Union, no matter how many oaths they were required to take. One South Carolinian warned Thaddeus Stevens: "If you value the safety of the government, and the peace, freedom and happiness of the people, trust them not, though they be willing to swear fealty and devotion morning, noon and night!" [127]

The Thirty-Ninth Congress began its second session on December 4, 1865. In elections that fall, two former Confederate senators and four Confederate congressmen were elected to Congress. And the Georgia legislature elected Alexander H. Stephens, former vice president of the Confederacy, to the Senate. The clerk refused to call their names at roll call, and they were never sworn in, but their presence made abundantly clear the need for measures keeping former Confederates "from positions of public trust of, at least, a portion of those whose crimes have proved them to be enemies to the Union, and unworthy of public confidence." [128]

In 1865 and early 1866, reports reached Washington that calls for secession were "rampant again" in the South and that white Southerners

were “more out & out rebels than they were in 1861.” [129] Ex-Confederates founded the Ku Klux Klan in December 1865. “Treason does, under existing circumstances, not appear odious in the south,” former Union major general Carl Schurz reported, and “there is as yet among the southern people an *utter absence of national feeling*.” Reports circulated widely about the suppression of freedom of speech. “Northern men have been subjected to the *Gun* knife the *pistol* the rope & tar & feathers for opinion sake all over the South,” one correspondent informed Ohio senator John Sherman.[130] Southern states began passing Black Codes, restricting the rights of freed people. Equally common were reports of white Southerners’ violent campaign to reduce newly freed Black Americans, as one Union commander testified, “to a condition which will give the former masters all the benefits of slavery.” [131]

The public was by now clamoring for a means to disqualify ex-insurrectionists from office and to guarantee equal rights regardless of race. Groups of citizens from all over the country presented petitions to Congress urging security “against a renewed attempt to secede” and “against, any distinction on account of color or descent,” many signed by hundreds of people from Illinois, Indiana, Maine, Massachusetts, New Jersey, New York, Ohio, and Wisconsin.[132] One hundred and fifty-one citizens of Bucksport, Maine, submitted a petition requesting that the House “impose such conditions upon the Rebel States, as shall punish treason—at least with ineligibility to office and loss of power, and reward loyalty with confidence and honor.” [133] Other petitions adopted different language: one asked Congress to devise a constitutional amendment providing “that no person who has been engaged in the late rebellion shall ever be eligible to any office of honor, trust, or profit under the government.” [134]

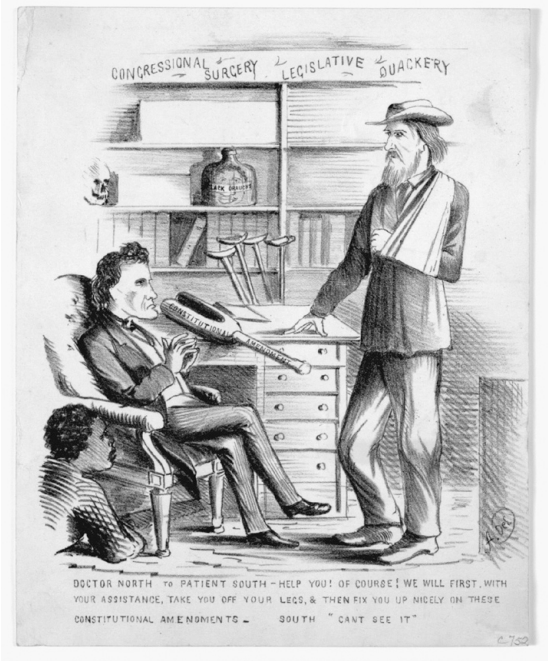
Haunted by their terrifying losses in the war, Congress faced the challenge, according to Massachusetts senator Henry Wilson, of depriving the leaders of the former Confederacy, as well as any future insurrectionists, of power in such a way, and with such permanence, that “the curse of civil war may never be visited upon us again.” [135]

The day anticipated by the framers of the Constitution has

come

With the Fourteenth Amendment, the Thirty-Ninth Congress founded the United States anew. No other amendment so wholly recast the original document, and none has had more consequences for American political and constitutional development. The amendment has five sections, each of enormous weight, each the product of compromise.

Early in 1866, Congress began considering proposals to guarantee the equal citizenship of freed people alongside proposals to disenfranchise or disqualify Confederal rebels and to recast congressional apportionment, given that the Thirteenth Amendment effectively abolished the three-fifths clause. Thaddeus Stevens proposed a constitutional amendment consistent with the one printed in the *National Anti-Slavery Standard*: "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color." Ohio Republican and longtime abolitionist John Bingham introduced his own amendment proposal on December 6, empowering Congress "to pass all necessary and proper laws to secure all persons in every State of the Union equal protection in their rights of life, liberty, and property." The next week the House and Senate established a fifteen-man Joint Committee on Reconstruction that operated, effectively, as a second constitutional convention.[136] One of its tasks would be to reconcile these two very different versions of what would become part of the Fourteenth Amendment: Stevens's more radical antidiscrimination amendment, and Bingham's more moderate equal protection amendment.[137]



Follow for extended description

A Southern view of the North offering proposed constitutional amendments as a crutch offered only after amputating the legs of the South, 1866

On January 25, 1866, Bingham rose to argue for the importance of his equal protection provision, in one of the greatest speeches ever delivered in Congress. He began by celebrating the Thirteenth Amendment, ratified the year before:

> Mr. Speaker, the Constitution of our country has been amended. The day anticipated by the framers of the Constitution has come, when there are none but free citizens in the Republic—the bond having become free. The day of the freedman's deliverance has come, not without suffering, not without sorrow, not without martyrdom, not without broken altars and broken hearts, not without storm and tempest, such as had not been since man was upon the earth; not without darkness, thick darkness that might be felt, and fire running along the ground. Though in terror, though in anguish, the day has come, and all are free in the Republic by the sovereign will of the whole people.

And with what result? "Simply this, that the Constitution must be amended!" Because without amendment, the "late rebel States" would not grant to the freed people all the immunities and privileges of citizenship nor guarantee to them the equal protection of the laws. Bingham agreed with the resolutions passed, over decades, at Black conventions, pointing out that "whenever the word 'white' as a condition of the elective franchise" had

been inserted into state constitutions, that put those states in violation of the U.S. Constitution. “I believe that the free citizens of each State were guaranteed, and intended to be guaranteed by the terms of the Constitution, all—not some, ‘all’—the privileges of citizens in the United States in every state.” [138]

As Congress debated these different approaches to what would become the Fourteenth Amendment, the Joint Committee on Reconstruction heard testimony from 145 witnesses, including military leaders, elected officials, federal judges, former Confederates, and Black freedmen. It sought to determine whether the readmission to the Union of the states of the former Confederacy “should only be granted upon certain conditions and guarantees which would effectually secure the nation against a recurrence of evils so disastrous as those from which it had escaped at so enormous a sacrifice.” [139] A representative example from its more than eight hundred pages of testimony is that of J. W. Alvord, who worked for the Freedmen’s Bureau. He was questioned about conditions in Virginia and in other Southern states.

Q. Now state what, among the rebel people, is the general feeling towards the Government of the United States.
A. It is hostile, as it seems to me, in the great majority of the southern people. I mean that part of them who were engaged in the rebellion. There is evidently no regret for the rebellion, but rather a defence of it. . . .
Q. What great object do they seem to contemplate in their being readmitted to Congress by their senators and representatives?
A. They seem to suppose that by re-admission they can get political power and obtain again the supremacy which they once had, and with the exception of slavery, they expect to be still a prosperous and dominant portion of our government. Slavery they have given up in the old form, but they want to subdue and keep in a low place the negroes, by some compulsion which it seems to

me they are trying to effect not only privately but by all the legislation that I learned of or witnessed.[140]

From across the South, the testimony tended in the same direction. To the question, "If they could have their way would the rebel people generally remain in the Union?" a tax commissioner answered, "No; I think they have a stronger aversion and dislike of the Union than when they seceded." [141] Asked what accounted for this aversion in Mississippi, a major general answered, "Their greatest antipathy seems to arise from the fact that the negro has been employed against them, and that they cannot control them now as they please." [142]

The joint committee inquired, too, into the delay in the prosecution of Jefferson Davis. It called the Virginia judge presiding over the case, John C. Underwood, a New York–born abolitionist and Radical Republican appointed to the bench by Lincoln in 1864. Underwood, in his tenure, would issue a series of rulings protecting equal rights, declaring in one opinion that "all distinction of color must be abolished." [143] Despised by white Virginians, he had not been quiet about his views regarding the villainy of Jefferson Davis. (He said, for instance, that he intended to sell Davis's Mississippi plantation to ex-slaves for a half-dollar an acre.)[144] The committee asked Underwood whether any jury in Virginia would convict Davis of treason. "Not unless it is what is called a packed jury," he answered. The committee then summoned Robert E. Lee, who offered a similar assessment:

Q. Suppose the jury should be clearly and plainly instructed by the court that such an act of war upon the United States, on the part of Mr. Davis, or any other leading man, constituted in itself the crime of treason under the Constitution of the United States; would the jury be likely to heed that instruction, and if the facts were plainly in proof before them, convict the offender?

A. I do not know, sir, what they would do on that question.

Q. They do not generally suppose that it was treason against the United States, do they?

A. I do not think that they so consider it.[145]

The obstacles to trying Davis for treason only further convinced the committee of the need to disqualify insurrectionists. This measure would go hand in hand with guarantees of equal protection regardless of race and with another critical adjustment: reckoning with the consequences of the end of the three-fifths clause.

Thaddeus Stevens arrived with a proposed amendment making representation proportionate not to the population of a state but to the number of eligible voters. As Seward had told Congress, "When the Great Amendment was passed"—the Thirteenth—unfortunately "a clause was not coupled with it, adjusting the rule of representation." [146] With the end of slavery, Black people now counted toward representation not as Three-Fifths of a person but as five-fifths, yet they still could not vote; unless the basis of representation were amended, the Southern states, as they reentered the Union, would have even greater political power than they had before the war. Stevens's proposal gave these states an incentive to grant the right to vote to Black men (and women, until Roscoe Conkling added the word *male* to the proposed amendment). Other proposals were more explicit, apportioning representation in the states to exclude from the count "negroes, Indians, Chinese, and all persons, not white, who are not allowed the elective franchise" under their state's constitutions.

The proposals on the table sorted into three possibilities. Stevens's amendment barred discrimination on the basis of race, color, or creed and tied representation to enfranchisement. "That is the one I love," Stevens said, "that is the one which I hope, before we separate, we shall have educated ourselves up to the idea of adopting, and that we shall have educated ourselves up to the point of ratifying." [147] A second proposal used the eligible electorate to calculate representation but offered no further obstacle to discrimination. (Sumner called this proposal "a political obscenity.")[148] A third was a version of Bingham's equal protection amendment. Weeks passed as the committee and Congress debated these competing proposals. Meanwhile Congress passed a Civil Rights Bill, containing several of the provisions in the working amendment. When Johnson vetoed it, Congress, for the first time in American history, overrode the veto.

By April, Stevens had proposed an additional section to an omnibus amendment, Section 3, disenfranchising until 1870 anyone who had taken "part in the late insurrection." When Stevens opened the floor for debate on May 8, he suggested about Section 3 that "among the people I believe it will be the most popular of all the provisions," confessing that he himself found it too lenient: "Here is the mildest of all punishments ever inflicted on traitors." [149] Section 3 passed the House on May 10, but in the Senate, it was rewritten. On May 23 Michigan senator Jacob Howard said that he "should prefer a clause prohibiting all persons who have participated in the rebellion, and who were over twenty-five years of age at the breaking out of the rebellion, from all participation in offices, either Federal or State, throughout the United States." New Hampshire senator Daniel Clark proposed limiting the measure to previous oath-takers: "That no person shall be a Senator or Representative in Congress or permitted to hold any office under the Government of the United States who, having previously taken an oath to support the Constitution thereof, shall have voluntarily engaged in any insurrection or rebellion against the United States, or given aid or comfort hereto." [150] Ultimately, the Senate chose to disqualify from federal or state office anyone who had taken an oath to support the Constitution, then participated in an insurrection against it. There followed much discussion of who exactly was to be disqualified. One version specifically stated that "the President and Vice-President of the late Confederate States of America so-called . . . are declared to be forever ineligible to any office under the United States." [151] This was abandoned in favor of more generic language.

The Fourteenth Amendment passed the Senate on June 8 and was concurred in by the House five days later. Nearly all Republicans voted for it, and nearly all Democrats against. Congress sent the Fourteenth Amendment to the states on June 13, 1866. It occasioned no celebrations either in Congress or outside it. It was the product of a grueling political battle, of strenuous and painful compromise, and its ratification was by no means assured.

The Fourteenth Amendment was revolutionary, both in its scope and in its complexity. It also lacked Stevens's antidiscrimination language and came without any guarantee of voting rights.[152] Wendell Phillips and some other Radical Republicans refused to support it, denouncing it as "a mean

and cowardly abandonment of the negro." [153] In Southern states, Section 3 turned out to be particularly contentious. It had been drafted and voted on without their participation. It was humiliating. It was degrading. Southern legislators objected strenuously to Section 3. The Texas legislature decried the Amendment as involving the "loss of our honor as a people, and our self respect as individual men"; the Arkansas legislature complained that Section 3 would lead to the disqualification of "many of our best and wisest citizens"; and the North Carolina legislature proposed an alternative amendment, omitting Section 3. With the Fourteenth Amendment, said one North Carolinian, Congress wanted Southerners "to drink our own piss and eat our own dung." [154] With the exception of Tennessee, every state in the former Confederacy refused to ratify it.

The Mistrial

The long-delayed trial of Jefferson Davis cast a shadow over the drafting of the Fourteenth Amendment and its ratification as well. While the states debated the amendment, many in the North expressed gratitude for Section 3. Not having it, Northern newspapers warned, again and again, "would render Jefferson Davis eligible to the Presidency of the United States." [155]

A trial date for Davis had been set for June 5, 1866. When the day came and Judge Underwood called the court into session at two o'clock, Davis wasn't there; he was still in military prison. The Virginia lawyer appointed to the prosecution, Lucius Chandler, who had neither conducted an investigation nor spoken to any witnesses, stayed home; he said he was sick. Chief Justice Chase spent the day in his library in Washington, where he wrote a letter to his daughter. Outside his window, he could hear a newsboy crying, "'Dai-l-y Chron-i-cle!, full account of something I don't understand what and 'trial of Jeff Davis!'" [156] Davis's lawyer, Charles O'Conor, knowing Chase wouldn't be there, didn't bother to show up, either.[157] Chase maintained that he could not possibly attend a civilian court in Virginia because the state was still under military rule. Chase planned to run for president in 1868, and he wanted no part of the trial of Jefferson Davis. The Julius Caesar of ambition had his eye on the election.

Underwood rescheduled the Davis trial for the first Tuesday in October 1866.[158] But the chief justice had no intention of showing up then, either.[159] And over the summer, Speed resigned, unable to work any longer for Johnson. Speed supported the Fourteenth Amendment; Johnson opposed it. In Speed's place, Johnson appointed Henry Stanbery, whose politics aligned with his own: Stanbery had prepared Johnson's veto of the Civil Rights Bill.[160]

Republicans, billing themselves as the "party of progress," made great gains in the November elections. They took that as a mandate to press forward with the Fourteenth Amendment, despite the South's failure to ratify it. In March 1867, Congress passed a bill introduced by Thaddeus Stevens, the Military Reconstruction Act—once again over Johnson's veto. It called for the occupation of the former Confederacy by the U.S. Army and stipulated that no state could reenter the Union without first ratifying the Fourteenth Amendment and rewriting its constitution to include Black male suffrage. Military rule would be in effect, John Bingham pledged, "only until the people by a solemn vote at the polls, under the authority of the national law and the protection of the national Army, shall have assented to the constitutional amendment and set up a just and republican government." [161] Under what became known as Congressional Reconstruction, there would be Black voters, Black delegates to constitutional conventions, Black legislators, and Black jurors.

Congressional Reconstruction Conventions, 1867–70

1867	Alabama
1867–68	Virginia, Louisiana, Georgia
1868	Mississippi, Arkansas, Florida, South Carolina, North Carolina
1868–69	Texas
1870	Tennessee

So it was that on May 13, 1867, when Jefferson Davis hobbled into that courtroom in Richmond, he was entering a room he knew well—it had been his headquarters—but the people in that room were unfamiliar.[162] Black

freedmen sat as spectators. And then the grand jury filed in.[163] Six of its eighteen members were Black, the first Black men to serve on a federal grand jury. Fields Cook, born a slave, was a Baptist minister.[164] John Oliver, born free, had spent much of his life in Boston.[165] In one of the more extraordinary ironies of American history, one of the jurors sitting in judgment of Jefferson Davis, the first and last president of the Confederate States, was George Lewis Seaton, the son of Lucinda, who had been enslaved at Mount Vernon, the plantation home of the first president of the United States.[166]

"I was a member of the grand jury which indicted Mr. Jefferson Davis," a Black grand juror named Cornelius Liggan Harris, a shoemaker, would later write. As Harris took his seat, he eyed Davis. Harris remembered, "He looked on me and smiled." [167]

Black men had not served as jurors anywhere in the United States before 1860. By the mid-1860s, Black newspapers had begun to advocate for this reform. "Why have we no representatives on the jury?" asked the editor of the *New Orleans Tribune* in 1864. "Are our lives, honor, and liberties to be left in the hands of men who are laboring under the most stubborn and narrow prejudice? Is there any protection or justice for us at their hands?" [168] The issue had come up in Congress in 1866 during the debate over the Civil Rights Bill, which had guaranteed Black men the right to testify at criminal trials. This provision was among the reasons Johnson had cited for vetoing the bill, objecting (in a statement prepared by Henry Stanbery) not to what the bill actually did but to what it might lead to: "if Congress can declare by law . . . who shall testify . . . then Congress can by law also declare who, without regard to color or race, shall have the right to sit as a juror or as a judge, to hold any office, and, finally, to vote." Meanwhile widespread violence in the former Confederacy called attention to the problem of all-white juries: in 1865 and 1866, in five hundred trials of whites accused of killing Blacks in Texas, all-white juries found all five hundred defendants not guilty. Congress addressed the question more squarely in 1867 regarding a proposed law allowing Black men to serve on juries in the District of Columbia. The bill ultimately passed.[169] In 1867, when the military general commanding Texas announced that Black men would be allowed on juries, some judges simply refused to hold court.[170]

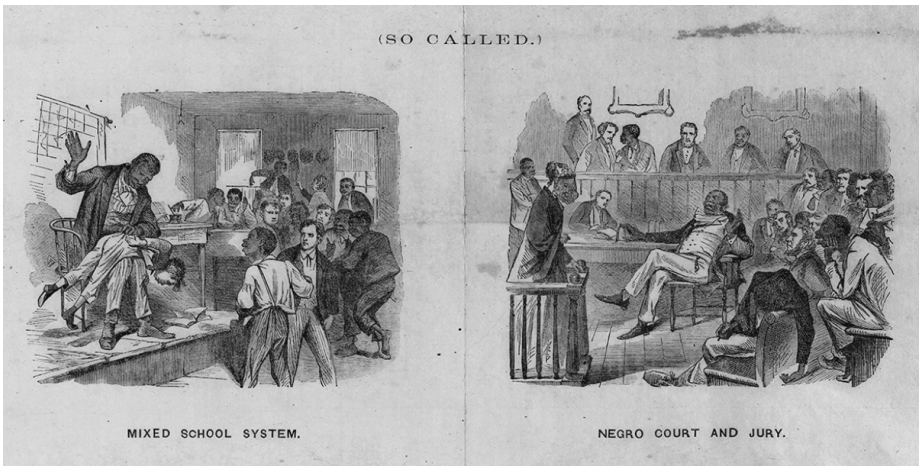
Military reconstruction had fateful consequences for the trial of Jefferson Davis. Congressional Reconstruction involved treating the former Confederacy as a conquered nation, which allowed for its military occupation and military rule.[171] If Davis were tried and argued that he could not have committed treason because, after Mississippi seceded, he was no longer a U.S. citizen, the government would have to argue that he had always been a U.S. citizen. But if he had been a U.S. citizen during the war, then the Confederacy had not been a foreign belligerent and the U.S. could not justify its occupation of it as a "conquered province." [172] In these circumstances, a handful of Radical Republicans became some of Davis's most ardent defenders. Gerrit Smith, a radical abolitionist and a member of the Secret Six who had financed John Brown, helped put up bail. "I have ever held that a sufficient reason why we should not punish the conquered South is that the North was quite as responsible as the South for the chief cause of the war," Smith explained. "The mercenary North coolly reckoned the political, commercial, and ecclesiastical profits of slavery, and held to it." [173] And after Thaddeus Stevens's death in August 1868, it came out that Stevens, the fiercest of congressional radicals, had secretly offered to represent the former president of the Confederacy.[174]

In Virginia in 1867, Judge Underwood had pledged that Davis would be investigated by a mixed-race grand jury and tried by a mixed-race petit jury. From 1862, jurors, like federal officers, were required to take the Ironclad Oath—in effect, a precursor to the Fourteenth Amendment's disqualification clause—swearing that they had never in any way aided "persons engaged in armed hostility" with the United States, which meant that former Confederates were excluded.[175] Some Northerners approved. "The trial of Jefferson Davis for leading the Rebellion in behalf of Slavery should be before a jury made up in part of freedmen, if only for the historic justice, not to say the dramatic beauty and harmony of such a denouement," the *New-York Tribune* wrote.[176] Predictably, Southern newspapers expressed disgust at the "three negroes, supposed to be the African quota of the Grand Jury," describing these men, swearing an oath on the Bible, as having "smacked their lips over the sacred volume when permitted to get at it." [177] A Richmond observer referred to the Davis grand jury as Underwood's "packed jury of ferrets and Yankees." [178] But the idea of Black men convicting a white man to hang had elicited outrage in both the

North and the South. An editorial published in both New York and Virginia asked, “If Davis is to stand before a nigger jury, what becomes of the notion that a man is to be tried before a jury of his peers?” [179]

When Davis walked into the federal courthouse in Richmond on May 13, 1867, eyed the grand jury, and smiled, he had reason to.[180] Days before, Lucius Chandler had traveled to Washington to confer with Evarts and Stanbery, where the new attorney general had explained that not only did he not intend to lead the prosecution, he did not intend to attend the trial. The three men decided not to object to O’Conor’s request that Davis be released on bail.[181] The prosecution seemed to be abandoning the case. There were plenty of reasons and plenty of problems with the prosecution. But the point at which the prosecution truly fell apart was exactly when Underwood impaneled Black jurors.

The jurors seated, Underwood addressed the courtroom. “In the very rooms we now occupy dwelt the fiery soul of treason, rebellion and civil war,” he said, but the jury itself furnished “ocular evidence that the age of caste and class cruelty has departed, and a new era of justice and equality” was dawning. Underwood warned jurors that they would likely face threats and even violence, especially in Richmond, given that “this city has long been the centre and seat of the greatest traffic in human beings that has ever disgraced the world.” [182] They were heated remarks; critics deemed him unfit to sit on the bench.[183] The prosecution stating that it was not prepared for trial, Underwood agreed to release Davis on bail.[184] “The business is finished,” O’Conor wrote his wife. “Mr. Davis will never be called upon to appear for trial.” [185]



Follow for extended description

Broadside commenting on the Virginia state constitution drafted at a Congressional Reconstruction convention over which John Underwood presided beginning in December 1867

A new trial date was set for November 25, 1867.[186] No one expected the prosecution to be ready. Two years after Davis's arrest, Chandler had still conducted no investigation nor prepared a superseding indictment. Quite why is hard to say. Even incompetence and inexperience seem hardly to cover it. Underwood told Speed that he believed Chandler was a Confederate sympathizer who was making money by selling pardons.[187] Underwood called a petit jury. O'Conor wrote to Davis, "Chandler professes the kindest disposition and says he will try to get a White jury. But this is impossible. Underwood is a devoted courtier at the feet of Sambo and there is no appeal from his decisions." The jury, O'Conor warned, "will be composed of 8 or 9 negroes and 3 or 4 of the meanest whites who can be found in Richmond." [188] O'Conor very much doubted the trial would ever take place. "I find it impossible to believe that we are destined to play parts in a farce so contemptible as a trial before Underwood and a set of recently emancipated Negroes," he wrote Varina Davis, "but it is equally impossible to assert with confidence that the thing will not happen." [189]

And . . . the thing did not happen. On the day the trial was to begin, a crowd assembled at the train station in Richmond to wait for the train from Washington. "The colored population seem to take a deep interest in the proceedings, and were on hand *en masse*," a correspondent for the *New York Times* reported. The train pulled up. "Has Mr. Chase come?" came the cry.[190] Mr. Chase had not. At the courthouse, a marshal announced that the court was adjourned. It was one of the sorriest moments of the whole sorry history of the failed prosecution. A newspaper reported that there had been a tremendous crowd outside the courthouse, "consisting chiefly of blacks," but when the marshal made the announcement, the crowd "quietly dispersed." [191]

As to history

Republicans in Congress sought to continue the work of amendment. Having failed to include suffrage in the Fourteenth Amendment, they wanted to provide for it in a Fifteenth Amendment. But they had more on their docket and not much time to do it before the November elections.

In February 1868, the House impeached President Johnson after investigating him for, among other things, intentionally derailing the Davis prosecution.[192] Francis Lieber favored impeachment, not least for the precedent it would establish: "as to history, it will be a wonderful thing to have the ruler over a large country removed for the first time without revolution." [193] The same reticence that derailed the Davis prosecution derailed the Johnson impeachment: Did this not look like vengeance rather than justice? In any event, the Johnson impeachment trial grossly interfered with the Davis treason trial. At the Senate impeachment trial, Chase presided as chief justice, and Evarts led Johnson's defense, joined by Stanbery (who resigned his position as attorney general), which led to yet more postponements of the Davis trial, from March to May, from May to June, from June to November.[194]

The Fourteenth Amendment was ratified in July. Chandler's term as district attorney having expired in June, Evarts recruited Boston lawyer Richard Henry Dana to join the prosecution. Dana worked hard to prepare for trial. In a Richmond hotel, he and Evarts drafted a new fourteen-count indictment, based on the testimony of multiple witnesses, including Robert E. Lee, who had testified against Davis before the grand jury.[195] (Evarts wrote a parody of Chandler's earlier, single-count indictment: "I have arrived at the fact that J.D. used to wear a Confederate uniform on great occasions, and have *a* witness who can prove it, in the person of a colored waiter who came to me last evening.")[196] But Dana reluctantly came to the conclusion that the trial ought not to proceed. For plenty of reasonable people, the urgent matter seemed to be to disqualify Davis from ever again holding public office; sending him back to prison or, God knows, hanging him, could have been almost as bad for the country as acquitting him. Dana drafted a letter of resignation, addressed to Johnson, and sent it to Evarts, who pocketed it, unsure what to do.[197]

By the time Chase and Underwood finally sat in court together in Richmond, in December 1868, Chase had quietly suggested to the defense a new line of argument, which O'Conor happily deployed.[198] O'Conor claimed that Davis could no longer be prosecuted for treason because, having been disqualified for office upon the amendment's ratification—"It needs no legislation by Congress to give it effect," the defense said—he had already been punished.[199] Dana argued that the Constitution was not a criminal code and that being disqualified for office was not a penalty.[200] Chase agreed with O'Conor; Underwood agreed with Dana.[201] The case would have gone to the Supreme Court.[202]

On December 7, after Ulysses S. Grant, military hero and Illinois Republican, won the presidency, the lame-duck Fortieth Congress passed the Fifteenth Amendment, over the objections of Democrats. *The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude*. It would be the last of the Civil War amendments.

On Christmas Day, the lame-duck president, Andrew Johnson, pardoned "every person who directly or indirectly participated in the late insurrection or rebellion." Not long afterward the prosecution entered a *nolle prosequi*.[203] The trial of Jefferson Davis was over. And the constitutional door that the war had opened was closed.

Next we want the jury box

The city of Baltimore held a jubilant, mammoth parade in May 1870 to celebrate the ratification of the Fifteenth Amendment. Maryland's governor had opposed ratification, and so had the state's legislature; Maryland had voted against the amendment in February. But the necessary bar of twenty-eight states had been reached later that month all the same, and Black Baltimoreans decided to hold a celebration to beat all others. (Maryland would not ratify the Fifteenth Amendment for more than a century, finally voting for it in 1973.) Twenty thousand spectators came to the city to watch a parade so long, its passage, syncopated by marching bands and a troop of Zouave drummers, lasted five hours. It moved from Broadway up Orchard Street, known as the Black Fifth Avenue, up Washington Boulevard,

through the Mount Vernon neighborhood, and ended in Monument Square. Black families traveled for miles—from Philadelphia and Washington, from New York and Richmond—to attend this largest celebration in the country. Black Union soldiers marched in uniform. Frederick Douglass, Maryland's most celebrated son, climbed to a stage erected in Monument Square to deliver a rousing address before a rapturous crowd. Black men had gotten the ballot box, Douglass said, and "next we want the jury box." [204]

The abandonment of Reconstruction, and of the Reconstruction amendments that Black Americans celebrated in Baltimore on that dazzling day in May 1870, began even before Reconstruction itself was underway. The abandonment of the promise of Reconstruction started with the failure to prosecute Jefferson Davis. Aside from Davis's single appearance in a courtroom in Richmond in May 1867, the ex-president of the Confederacy never appeared in a courtroom to defend himself against the charge of treason. Instead, for Confederates, the United States offered amnesty.

Amnesty is a kind of charity. It is not usually given with malice toward none. "More than six years having elapsed since the last hostile gun was fired between the armies then arrayed against each other," Ulysses S. Grant told Congress in 1871, "it may well be considered whether it is not now time that the disabilities imposed by the Fourteenth Amendment should be removed." [205] Over the objections of the first Black members of Congress, including Robert Elliott of South Carolina, Congress voted for a general amnesty. In the Senate, Sumner tried to attach civil rights provisions to that bill, on the ground that both measures involved the removal of disabilities and the guarantee of equal rights. "Now that it is proposed that we should be generous to those who were engaged in the rebellion," Sumner said, "I insist upon justice to the colored race everywhere throughout this land." Or as another Black congressman, Joseph Rainey, put it, about ex-Confederates: "We are willing to accord them their enfranchisement, and here today give our votes that they may be amnestied," but "there is another class of citizens in this country who have certain dear rights and immunities which they would like you, sirs, to remember and respect." Sumner and Rainey did not prevail. The amnesty bill passed, but there would be no new civil rights bill until 1875.[206] Eight years later the Supreme Court would declare it unconstitutional.

Salmon P. Chase ran for president in 1868 and 1872 and lost. Francis Lieber died in 1872, Chase and Underwood in 1873, and Sumner in 1874.

Underwood's close friend Harriet Beecher Stowe wrote his obituary.[207] The Supreme Court would fail to enforce the Fourteenth Amendment, and Congress would abandon Reconstruction. In 1876 Lucius Chandler put stones in his pockets and drowned himself. Jefferson Davis, who presented himself during his only day in court, in 1867, as being at death's door, lived for many years more. He died of a cold in 1889, at the age of eighty-one.

In the decades after the abandonment of Reconstruction, the fight to realize the promise of the Reconstruction amendments would move from Congress to the courts. Frederick Douglass wanted that jury box, and he wanted judgeships, too. But it would be more than a century before a Black man would take a seat on the Supreme Court, when Lyndon Johnson nominated Thurgood Marshall, another Marylander, in 1967. Looking back, the 1860s and '70s appear to have been as much a tragedy as a triumph, the story of three amendments that passed and yet somehow failed, too. Even the trial of Jefferson Davis was a chance for a kind of justice that never came.

But for the trial of the former president of the Confederacy that never took place, twenty-four men had been assembled as a jury pool. Twelve of them were Black. So momentous was the occasion of a mixed-race jury—here to weigh in not only on Davis's guilt or innocence but, in effect, on the very meaning of the Constitution—that the twenty-four men had sat for a photographer: twelve white men and twelve Black men posed, cheek by jowl, hands on one another's shoulders, the picture of a promise.[208]

Joseph Cox was a blacksmith who, like his fellow juror Lewis Lindsey, had been elected in October as a delegate to Virginia's 1867 constitutional convention. At that convention, where Underwood was elected president, Lindsey proposed a disqualification clause, barring former supporters of the Confederacy from holding office; that part of the new constitution was never ratified.[209] John B. Miller, born free, worked as a barber; he was later elected to the Virginia House of Delegates.[210] Albert Brooks, born into slavery in 1817, had bought his freedom for $1,100 and in 1862 had bought his wife, Lucy Goode, their three youngest children, "and the increase in future of the females" for $800.[211] Lucy Goode Brooks had a cameo made, a silhouette of her husband taken from that photograph of him as a juror called to determine whether Jefferson Davis had committed treason against the United States.[212] She wore it for the rest of her life.[213]

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6

No Amendment Is Necessary

Victoria Woodhull, c. 1871.

> *The right of suffrage in the United States shall be based upon citizenship, and shall be regulated by Congress; and all citizens of the United States, whether native or naturalized, shall enjoy this right equally, without any distinction or discrimination whatever founded on race, color, or sex.*
>
> —Failed amendment to the U.S. Constitution, introduced into the House, 1868

At ten in the morning on January 11, 1871, Victoria Woodhull, thirty-three, appeared before the House Judiciary Committee, the first American woman to formally address a congressional committee. The committee men sat on one side of the room, Woodhull and "an ardent train

of feminine adherents," as the *New-York Tribune* put it, on the other. John Bingham, chair of the committee and a principal author of the Fourteenth Amendment, took his seat at the head of the table. Susan B. Anthony, wearing a black velvet gown, was seated alongside other leading female suffragists; they were in the city for a women's rights convention and had come to hear Woodhull, who had upended the female suffrage movement by calling for the abandonment of its long struggle in favor of simply declaring victory.[1] Woodhull spoke quietly, reading a petition she had earlier submitted to the House and Senate in which she argued that women already had the right to vote and needed only to seize it by convincing Congress to pass enabling legislation to put into execution "the rights vested by the Constitution in the Citizens of the United States to vote, without regard to sex." [2] No constitutional amendment was necessary.

Woodhull was dazzling, an iconoclast, a rebel. She was not, however, the first to take this position. Black freedwomen in the South had attempted to vote in 1870.[3] Their rebellion had not gone unpunished, and neither would Woodhull's. And yet however ingenious, her declaration was utterly out of place with the spirit of amendment of the postwar decades, in which revising the Constitution became the subject of ceaseless moral crusades: amendment as salvation.

Abolition had begun as a moral crusade, and so had suffrage, and temperance, and vegetarianism, and peace. Most women came to the cause of women's rights by way of other causes. Frances Ellen Watkins Harper, born free in Maryland in 1825, had been a lecturer for the Anti-Slavery Society for years before she took up the cause of female suffrage. Susan B. Anthony became a suffragist after she was told she was not allowed to speak at a temperance convention in 1852. Well before the Civil War, the moral crusade had become a well-established political form, nothing less than the reigning female political tradition, the chief means by which middle-class white women, especially, sought to drive legal, social, political, and constitutional change. The crusader's tools were the petition, the convention, the pledge, and the pamphlet. Party politics, elections, court cases, appearances before congressional committees: these were the tools of the powerful, not the powerless. The avenue of federal constitutional amendment had been closed for decades. Now that it was open, crusaders pleaded with Congress to change the Constitution, by petition.

Woodhull's style was altogether different, bolder, more direct, and more confrontational; it was something closer to a litigation strategy, like filing a series of lawsuits with the aim of bringing a case to the Supreme Court, seeking constitutional change by arguing for your own interpretation of the Constitution, original intent be damned. The original intent of the framers, after all, had been to deem women to be something other than persons.

Woodhull launched her amend-at-will approach at a pivotal moment in the history of the campaign for female suffrage. In 1865, as the Thirty-Ninth Congress opened and began considering possible amendments, Elizabeth Cady Stanton recommended that "when the Constitutional door is open," women ought to "avail ourselves of the strong arm and blue uniform of the black soldier to walk in by his side." [4] As Congress began to tinker with the language of what would become the Fourteenth Amendment, Stanton warned that if "that word 'male' be inserted" into the Constitution, "it will take us a century at least to get it out again." [5] It had, after all, taken a half-century for people like John Jones to get the word *white* out of state constitutions, after it was inserted beginning in the 1810s.

Early in 1866, Stanton and Anthony, relying on their experience petitioning Congress to pass the Thirteenth Amendment, organized a massive petition campaign for the new amendment to grant women the right to vote, too, as part of what Anthony described as "the new order of things." Unfortunately, the petitions backfired. Before the petition campaign began, the word *male* hadn't much appeared in drafts and discussions. Only after the women's rights petitions drew attention to the absence of the word and to the fact that that women considered themselves to be eligible to vote was the word routinely included. Sumner later professed that he tried his best and "wrote over nineteen pages of foolscap to get rid of the word 'male' and yet keep 'negro suffrage' . . . intact; but it could not be done." [6] And the battle itself divided the suffrage movement.

In 1866 Frances Watkins Harper electrified the National Women's Rights Convention. "You white women here speak of rights," she said from the podium. "I speak of wrongs." [7] Inspired by Harper, suffragists and abolitionists had formed the American Equal Rights Association, with Lucretia Mott as president and with the aim of securing "Equal Rights to all American citizens, especially the right of suffrage, irrespective of race, color or sex." Under its aegis, suffragists, who had also long been

abolitionists, fought for both the Thirteenth and Fourteenth amendments. But by the time Congress sent the Fifteenth Amendment to the states, it was clear that the framers of both amendments had set aside the cause of women's rights to guarantee equal protection and the franchise regardless of race, a decision that would splinter the woman suffrage movement. After Section 2 of the Fourteenth Amendment, the apportionment clause, introduced the word *male* into the Constitution, suffragists hoped that the Fifteenth Amendment would declare that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, sex, or previous condition of servitude," but no version specifying "sex" passed either the House or the Senate.[8]

This failed, too. Instead, the suffrage movement divided in 1869, at the third annual meeting of the American Equal Rights Association, over some suffragists' insistence that they would not support the Fifteenth Amendment unless it guaranteed women the right to vote. Frederick Douglass rose to speak against this position. "I do not see how any one can pretend that there is the same urgency in giving the ballot to woman as to the negro," he said. "When women, because they are women, are hunted down through the cities of New York and New Orleans . . . when they are in danger of having their homes burnt down over their heads; when their children are not allowed to enter schools; then they will have an urgency to obtain the ballot equal to our own." Susan B. Anthony rebutted him, betraying her belief that educated white women were more deserving of the vote than uneducated Black men. "Let the question of women [be] brought up first and that of the negro last," Anthony said. "Mr. Douglass talks about the wrongs of the negro; but with all the outrages that he today suffers, he would not exchange his sex and take the place of Elizabeth Cady Stanton." [9]

The rift was impossible to repair. The suffrage movement fractured into two organizations. The American Woman Suffrage Association, led by Frances Watkins Harper and Lucy Stone, would fight for passage and ratification of the Fifteenth Amendment as urgently necessary, with the idea that female suffrage would follow, state by state. The National Woman Suffrage Association, headed by Susan B. Anthony and Elizabeth Cady Stanton, put suffrage for white women above all other causes and, arguing against the Fifteenth Amendment, sought support for their position by demeaning Black men and immigrants from Ireland, Germany, and China. "Patrick and Sambo and Hans and Yung Tung, who do not know the

difference between a Monarchy and a Republic, who never read the Declaration of Independence or Webster's spelling book" wrote Stanton, who believed they ought not to be "making laws for Lucretia Mott." [10] Two weeks after the passage of the Fifteenth Amendment, Indiana congressman George Julian introduced a proposed sixteenth amendment at their urging, declaring suffrage to be based on citizenship, without distinction of sex.[11]

Woodhull attended a suffrage meeting but found it too timid for her taste. The splintered suffrage organizations scheduled a meeting for a possible reunion under a new Equal Rights Association for April 6, 1870, but four days before the meeting, Woodhull published an announcement in the *New York Herald.*[12] "As I happen to be the most prominent representative of the only unrepresented class in the republic, and perhaps the most practical exponent of the principles of equality, I request the favor of being permitted to address the public," she began. She touted her accomplishments: she had founded a stock brokerage in New York and become independently wealthy. "While others of my sex devoted themselves to a crusade against the laws that shackle the women of the country, I asserted my individual independence; while others prayed for the good time coming, I worked for it; while others argued the equality of woman with man, I proved it by successfully engaging in business; while others sought to show that there was no valid reason why women should be treated, socially and politically, as being inferior to man, I boldly entered the arena of politics and business and exercised the rights I already possessed." Americans were living through revolutionary times in which much that had only recently seemed impossible had become very possible. "The blacks were cattle in 1860. A Negro now sits in Jeff Davis's seat in the United States Senate." Woodhull dropped a bombshell: "I now announce myself as a candidate for the Presidency." [13]

As Woodhull began her campaign for the presidency, suffragists were pressing for a sixteenth amendment, guaranteeing women the right to vote. Woodhull's declaration at first advanced that cause. In an editorial about Woodhull's presidential bid, the *Herald* celebrated "the clearing of the track for the Sixteenth and as many other amendments as may be deemed necessary." [14] That May, Woodhull and her sister Tennessee Claflin started their own newspaper, *Woodhull & Claflin's Weekly*, with the motto "UPWARD & ONWARD" and a regular column called "Sixteenth

Amendment." [15] But in the fall of 1870, when she moved from New York to Washington, to advance her presidential campaign, she changed her mind about the sixteenth amendment, which was still stalled in the House Judiciary Committee. On November 19 she wrote in *Woodhull & Claflin's Weekly* that it was a dead letter: "I do now proclaim to the women of the United States of America that they are enfranchised." [16] She began planning a political strategy: fixing the Constitution without amending it and without asking for the aid of the Supreme Court.

A republican form of government

The woman suffrage campaign met with striking rejection, time after time. Woodhull stepped into the movement and anointed herself its vanguard just at the moment when the federal government had assumed broad new powers relative to the states. Woodhull could not have foreseen in 1870 that no further amendment to the federal Constitution would pass for forty-three years. Not until 1913 would Congress pass the Sixteenth Amendment, and it would have nothing to do with women's rights. As had been true during the last amendment drought, in the sixty-one-year stretch between the Twelfth Amendment in 1804 and the Thirteenth in 1865, the years between the Fifteenth, in 1870, and the Sixteenth, in 1913, would be marked by an extraordinarily activist and conservative Supreme Court. Constitutional change came in these years, but it came from the bench on which nine men sat, resolute.

Yet as had also been true in that earlier interregnum, constitutional change happened in these years in the states, where what did or did not belong in a constitution, and how far one could be amended, was the subject of heated and sustained debate. Much of it involved continued and even widening resentment of the federal government, not just from the former states of the Confederacy but from the newer states of the West.

In the first place, Congress required the rebel states to rewrite their constitutions, and as it did for new states entering the Union, it very often demanded certain provisions and revisions. Between 1864 and 1866, all eleven states of the Confederacy held (all-white) constitutional conventions; Congress rejected ten of their proposed constitutions.[17] A delegate at Mississippi's 1865 convention complained about what he considered

constitutional coercion. “This is no Convention, and does not represent the people, but rather the President of the United States, or the Federal Government,” he fumed, damning the idea of amendment “by force and bayonets” that would produce only “a bastard Convention.” [18]

Congress made demands and, within its powers, enforced them. In 1866 the Joint Committee on Reconstruction proclaimed that “no portion of the people of this country, whether in State or Territory, have the right, while remaining on its soil, to withdraw from or reject the authority of the United States.” (Jefferson Davis had hoped to argue against this proposition at his trial but never had the chance.) It required that any new state constitution acknowledge that there existed “no right to secede.” [19] Congress also required that states entering or reentering the Union adopt constitutions that guaranteed “a republican form of government.” The Fourteenth Amendment’s apportionment clause punished states that denied the right to vote to any “male inhabitants”—which was illegal under the Fifteenth Amendment after 1870—by reducing their representation in Congress. In 1866 Congress rejected Nebraska’s proposed constitution, which limited the franchise to “white citizens” and “white persons of foreign birth who shall have declared their intentions to become citizens.” [20] In 1868, when Arkansas sought to reenter the Union, Congress required that its new constitution “shall never be so amended or changed as to *deprive* any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized.” It imposed these same conditions on other states of the former Confederacy.

Under the 1867 Military Reconstruction Act, Congress also decreed that rebel states seeking to reenter the Union had to ratify the Fourteenth Amendment and proclaim the supremacy of the federal government. South Carolina’s 1868 constitution, for instance, provided that “every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and no law or ordinance of this State in contravention or subversion thereof can have any binding force.” In a speech at the convention’s conclusion, the president of the convention proclaimed that “we have obliterated from our political system that most pernicious heresy of State sovereignty—a heresy which, for nearly half a century, taught by our leaders, had, like an *ignis fatuus*, led the people of South Carolina, on more than one occasion, to the brink of rebellion.” [21] Delegates to

Mississippi's 1868 convention resolved that the state's "ordinance of secession was based upon an unfounded assumption of State sovereignty and a perverted theory of State rights, and brought about in the interest of slavery," and they denounced "the doctrines of State rights and State sovereignty, interpreted as they have been into a justification of secession, as utterly subversive of our form of government, and tending to confusion, anarchy, and national destruction." [22] All new states entering the Union after 1870 were required to include a federal supremacy clause as well.

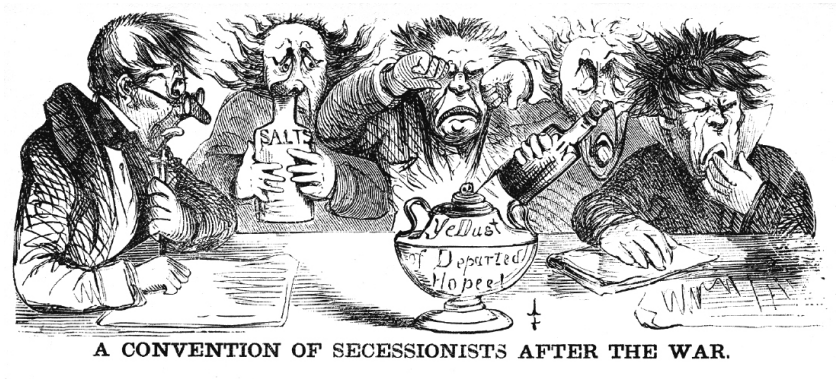
Follow for extended description

Extract from the Reconstructed Constitution of the State of Louisiana, 1868

On the ground, federal supremacy was purely notional in the face of the vigilantism of Southern white supremacist organizations, including the newly formed Ku Klux Klan, whose members attacked Black schools, Black churches, Black businesses, Black newspaper offices, Black women and children, and above all Black men who tried to vote. In Pulaski, Tennessee, in 1868, more than two thousand Black men were registered to vote, but fewer than seven hundred managed to cast a ballot. So great and so widespread was the violence that in 1870 the Grant administration

established the Department of Justice, whose initial remit was to investigate and prosecute the Klan.[23]

The most remarkable change of all was a fleeting one. For the first time, Black men served as delegates to state constitutional conventions. And here what they undertook to do is exceedingly interesting: they often sought to diminish the states' power of amendment. All-white state constitutional conventions held between 1820 and 1860—the very conventions that introduced the word *white* into state constitutions—had generally made both making amendments and holding future conventions easier. The Reconstruction-era so-called Black state conventions, which removed the word *white* from state constitutions, made both amending and convening more difficult.



A CONVENTION OF SECESSIONISTS AFTER THE WAR.

Follow for extended description

Political cartoon satirizing a convention of Southern secessionists after the war, drinking from "Ye Dust of Departed Hopes," c. 1865

Most new state constitutions qualified the people's right to "alter or abolish" them, changing it to a much softer and not-to-be-seen-as-endorsing-secession right to "alter or reform." Four states—Georgia, Texas, Louisiana, and Mississippi—eliminated the right entirely. Other states made it harder to call a state constitutional convention, and Louisiana and Florida made no provision at all for future conventions.[24] Adding these obstacles to constitutional revision was accomplished, in sizable measure, by Black men. Having watched state constitutional conventions chisel away at their rights for decades, Black men serving as delegates at state conventions sought not only to codify their rights but, before adjourning, to make those rights provisions unalterable. "We have been cheated out of our rights for

two centuries," said Black delegate Francis Cardozo at South Carolina's 1868 convention, "and now that we have the opportunity, I want to fix them in the Constitution in such a way that no lawyer, however cunning or astute, can possibly misinterpret the meaning." [25]

By the beginning of 1869, Black men were guaranteed the right to vote in seventeen states (where the word *white* was deleted) but barred from voting in seventeen others (where voting requirements still included the word *white*).[26] The purpose of the Fifteenth Amendment had been to overturn these restrictions, and to bar any future restrictions, as violations of the Constitution. That the Black community in Baltimore celebrated its ratification with a fabulous parade in a state that had rejected the amendment did not augur well for its enforcement. In the Supreme Court, the Constitution would remain white.

The word *male*

The Fifteenth Amendment is what legal scholars call "doctrinally undeveloped," though this is something of an understatement.[27] Like the Fourteenth Amendment, the Fifteenth Amendment was barely enforced. Efforts were made to repeal it, but by the 1880s, this was hardly necessary since white Southerners had found ways, far short of repeal, to nullify it; it became, in many parts of the country, a dead letter. Neither Congress nor the Court explored its implications or derived a doctrine from its underlying principles to use for broader application.

Woodhull attempted to develop a Fifteenth Amendment doctrine. Her argument began with the logic of the amendment itself. Where suffragists had despaired at the inclusion of the word *male* in the Fourteenth Amendment and the absence of the word *sex* in the Fifteenth, Woodhull declared that none of this mattered. "With the right to vote sex has nothing to do," she liked to say. "The Constitution makes no distinction of sex." The Fifteenth Amendment, she reminded Congress, says that the "right of citizens of the United States to vote shall not be abridged . . . on account of race, color or previous condition of servitude." Here, she made two claims. First, "a race of people comprises all the people, male and female," and therefore "all people included in the term race have the right to vote"; and second, women, white and Black, were covered under the language of

“previous condition of servitude,” since they had “from time immemorial groaned under” the burdens of their enforced service to men.[28] (As she asked in another speech, “If freedom consists in having an *actual share* in appointing those who frame the laws, are not the women of this country in absolute *bondage*, and can government, in the face of the Fifteenth Amendment, assume to deny them the right to vote, being in this ‘condition of servitude’?”)[29]

Woodhull introduced these arguments in a memorial she published in December 1870. She repeated them in her testimony before the House Judiciary Committee on January 11, 1871, at a meeting timed to coincide with a suffrage convention to be held in Washington the next day. She appeared on the Capitol at ten in the morning. At three that afternoon she spoke at Lincoln Hall, to an audience of suffragists in town for their convention. Then she went to meet with President Grant. Even the vehemently anti-suffrage *New-York Tribune* conceded, “All the past efforts of Miss Anthony and Mrs. Stanton sink to insignificance beside the ingenious lobbying of the new leader and her daring declaration.” [30]

At the end of the month, the Judiciary Committee released a report. John Bingham, writing for the majority, conceded much of Woodhull’s argument but insisted that Congress lacked the authority to issue the declaratory act urged by Woodhull and tabled the petition.[31] The minority report was written by William Loughridge and Benjamin Butler. Loughridge and Butler argued for accepting Woodhull’s contention—and issuing the requested declaration—in the spirit of the age, a spirit of innovation and progress. The Fourteenth Amendment had for the first time defined a citizen, and its birthright citizenship clause declared everyone born in the United States to be a citizen. Loughridge and Butler, drawing on decades of Black abolitionist agitation, argued that “from the very nature of our government, the right of suffrage is a fundamental right of citizenship.” [32]

Woodhull had not expected to prevail immediately, and her argument had gotten exactly the serious hearing that she’d sought. She continued the campaign, delivering a lecture on “constitutional equality” to a sold-out Lincoln Hall two weeks later.[33]

“Women did not join in the act of constructing the Constitution,” Woodhull began. “I and others of my sex find ourselves controlled by a

form of government in the inauguration of which we had no voice, and in whose administration we are denied the right to participate." Under what logic were women expected to abide by the Constitution if they were to remain disenfranchised and ineligible for office? She called on her audience to rally for change by seizing it: "The government is an embodiment of the people, and as *they* change, so also must it change. In this significant fact lie all the true beauty and wisdom of our form of polity. It can be changed without actual revolution, and consequently possesses the inherent qualities of permanency." The Fourteenth and Fifteenth amendments were sufficient; no more amendment was needed, but Congress did need to act, with enabling legislation. She'd had it with petitions and pleadings and moral persuasion: "If Congress refuse to listen and grant what women ask, there is but one course left them to pursue." Were a year to pass without congressional action, she warned, women would hold their own constitutional convention "to frame a new constitution and to erect a new government, complete in all its parts, and to take measures to maintain it as effectually as men do theirs." Was she serious? Yes, she insisted. "We mean treason; we mean secession, and on a thousand times grander scale than was that of the South. We are plotting revolution; we will overslough this bogus republic and plant a government of righteousness in its stead, which shall not only profess to derive its power from the consent of the governed, but shall do so in reality." [34]

And then began her downfall. Where liberals advocated for separation of church and state, free speech, a free press, and freedom of thought (and often called themselves freethinkers), most stopped short of advocating for free love. Woodhull, though, not least by way of the Victoria League that she founded, did advocate for free love, by which she meant that she approved of divorce and of sex before marriage. "Yes, I am a Free Lover," she said, answering a heckler. "I have an *inalienable*, *constitutional*, and *natural* right to love whom I may." [35] (Other suffragists used the language of "self sovereignty" to describe what would later come to be called reproductive rights. Wrote Stanton in 1871, "Woman must at all times be the sovereign of her own person.")[36]

At the time she was running for president, Woodhull was also caring for her ex-husband, who was dying. He lived in the same house as she and her husband. Moralists attacked her as a libertine and a prostitute. She tried to defend herself by pointing out that their attacks on her domestic

arrangements were evidence of her opponents' desperation: "Woman's Suffrage and Woman's Rights being the issue, and there being no defense," she wrote in 1871, "I am taken as the representative woman, and my personal character being maligned and deprecated, the cause suffers." [37]

On November 7, 1871, election day, Woodhull and eleven other women from New York tried to vote at the polls at 682 Sixth Avenue. When poll workers refused to accept their ballots, Woodhull took a copy of the Constitution out of her pocket and delivered an impromptu lecture.[38] Given the ongoing attacks on her character, she failed to win any meaningful support for her presidential bid, which had always been as much a stunt as a campaign. Even her support among suffragists began to flag. Stanton still supported her, but Anthony abandoned her.[39] In May 1872, at the annual suffrage convention held in New York, Stanton, in a keynote address, urged women to follow Woodhull's lead and attempt to vote in November. She also supported Woodhull's call for a new political party, the Equal Rights Party, under whose banner Woodhull sought the presidency. Anthony, who had contrived to get herself elected president of the convention, offered no such endorsement. When Woodhull got up to address the convention, she called for the meeting to adjourn to another hall where it would convene as a nomination convention. The motion was not out of order, but Anthony refused to allow a vote on it. Woodhull persisted. She simply called for a vote herself. Anthony then declared the vote out of order, an announcement that was met with mayhem. When Woodhull seized the podium, Anthony found a custodian and got him to turn off the lights.[40]

The Equal Rights Party did hold its presidential nominating convention the next day, with 668 delegates. They nominated Woodhull for president, chanting, "Victoria! Victoria!" and, in absentia and without his knowledge, Frederick Douglass as vice president. (Douglass kept well out of the dispute among suffragists.)[41]

Abandoned by suffragists and wounded at being maligned as lascivious, devious, and worse (one newspaper dubbed her "Mrs. Satan"), Woodhull decided to exact vengeance on the moralists. In the November 2, 1872, issue of *Woodhull & Claflin's Weekly*, on newsstands on October 28, Woodhull published a blistering attack on Henry Ward Beecher, who, as was widely known in certain circles, had been carrying on an adulterous affair with a married woman for years.[42] Within hours, Woodhull was

arrested for obscenity, under the terms of a state law—an early instance of a series of draconian morals codes that would soon be passed by Congress and championed by anti-vice zealot and newly installed U.S. postal inspector Anthony Comstock. (Comstock himself had arranged for Woodhull's arrest. Using an alias, he had requested a copy of the issue by mail, so that he could report the violation.) She spent election day in Ludlow Jail. Five years later she left the country.

The Amendmentists

The radicalism of Woodhull's approach to constitutional change can truly be seen only by comparing her declaration that the Constitution did not need amending with pleas for amendments in the 1870s and '80s, when the three amendments ratified between 1865 and 1870 elicited a flurry of calls for more. This had been true with every surge of successful amendments: each produced a sense that the Constitution was ripe for still more changes, driving public interest in the possibility of constitutional revision. Before Woodhull announced that a constitutional amendment wasn't necessary for women to gain the right to vote, suffragists pushed for a sixteenth amendment. But so did many other Americans, most especially moral crusaders. Their preferred sixteenth amendments would introduce God into the Constitution, prohibit the sale of alcohol, and ban polygamy.

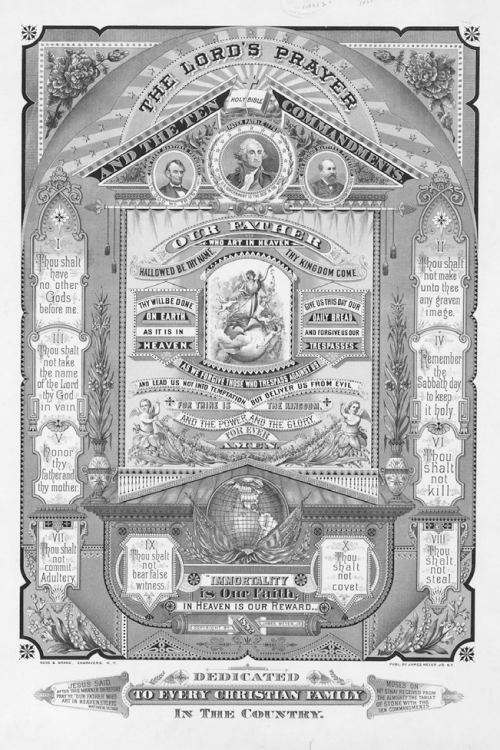
Proposals to express devotion to God or to Christ had been among the first amendments ever urged. In 1789 Benjamin Rush had written to John Adams suggesting that this omission might be repaired: "perhaps acknowledgement might be made of his goodness or of his providence in the proposed amendments." [43] None had ever earned either substantial national support or consideration; to the contrary, much deeper support existed for the religious toleration and opposition to the state establishment of religion that were adopted in 1789 as part of the First Amendment. In the 1870s such proposals came back into view, as they would periodically over the next century and a half, but they were generally expressions of religious schisms as much as anything else.

Derided as "the Amendmentists," religious leaders very often proposed amendments that were at odds with one another, especially as they took up positions on either side of charged questions about the relationship between

church and state. Evangelical, conservative Protestants advocated the recognition of God in the Constitution; liberal and more secular Protestants both opposed such a recognition and advocated the end of Bible instruction in public schools.

A synod of Protestants, meeting in 1861, launched a petition campaign to introduce God into the Constitution; they believed that because the nation had not been founded as a Christian nation, the Civil War had been God's punishment. They regretted that "the name of God is not found in our National Constitution, nor does it contain a distinct recognition of his authority or existence." For this omission, the nation had been punished. As Felix R. Brunot, who served as the head of Grant's board of Indian commissioners, noted, the Confederate Constitution *did* thank God—its preamble invoked "the favour and guidance of Almighty God"—which, he believed, had stood its army well in battles.[44]

The Union movement to call for a constitutional amendment to recognize the Christian religion began at a convention in Xenia, Ohio, in February 1863, just weeks after the Emancipation Proclamation. As one evangelical reported, "The civil war in which the nation was then engaged was almost universally felt to be an expression of the Divine displeasure against the nation." Reformers cited slavery and the lack of an acknowledgment of divine providence as the "two defects in our otherwise inimitable Constitution"; the Emancipation Proclamation remedied the first, but the second, "the crowning, original sin of the nation," the failure to acknowledge God, required an amendment. In 1864 reformers founded the National Association to Secure the Religious Amendment to the Constitution of the United States. With the backing of the inimitable Massachusetts senator Charles Sumner, leaders of the association met twice with Lincoln and claimed that he said, "You got one of the things you asked for in my first administration (the emancipation of the slaves), and I hope you will get the second in my second administration." [45] That second thing was an insertion into the preamble, to read:



Follow for extended description

The Lord's Prayer and the Ten Commandments as an American catechism that also looks like a dollar bill, 1882

> We, the people of the United States, *recognizing the being and attributes of Almighty God, the Divine Authority of the Holy Scriptures, the law of God as the paramount rule, and Jesus, the Messiah, the Saviour and Lord of all* in order to form a more perfect union . . .[46]

Sumner withdrew his support for the movement after meeting with Myer S. Isaacs, secretary of a Jewish civil rights organization called the Board of Delegates of American Israelites. Isaacs called the amendment the work of "zealots and fanatics" and warned Sumner that he appeared to be backing the establishment of Christianity as a national religion. Sumner assured Isaacs that the amendment had no chance of passing, and in any case, he didn't actually support it.[47] "I have said that I should not object to a recognition of God by formal words in the Constitution," Sumner protested. "That is all; I take it no Hebrew would differ with me on this point." [48]

The National Association to Secure the Religious Amendment to the Constitution met in conventions and organized petition drives. Beginning in 1868, the offices of the *Christian Statesman* offered petition forms, to be

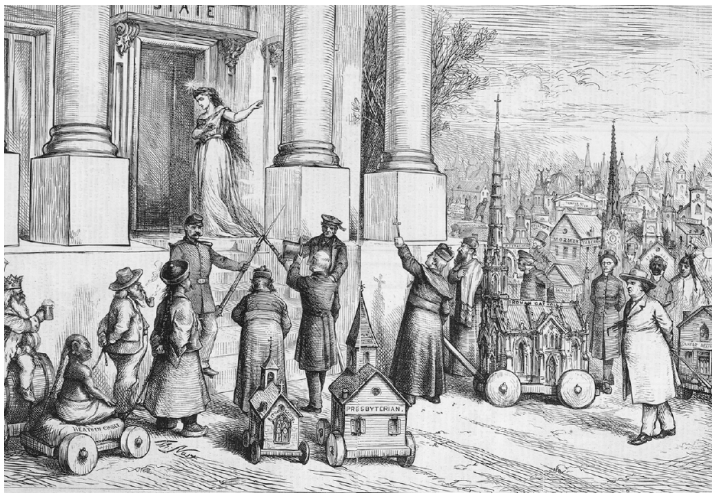
filled out by readers and mailed to Washington. “Stacks of petitions almost a mountain high must be in the rooms of that committee,” said one senator, in 1871, about the Judiciary Committee. Between 1864 and 1900, religious reformers submitted nearly eight hundred petitions to Congress requesting such an acknowledgment in one form or another; most were signed by hundreds of people and some by thousands. The overwhelming majority came from the Midwest and upstate New York, the parts of the country that had been most affected by the Second Great Awakening.[49]

“Our nation is Christian—the Constitution is unchristian,” lamented Brunot in 1874.[50] But if the national sin of neglecting to mention divine providence in the Constitution was the reformers’ stated motive, the movement was animated by other causes of concern, too, including Darwinism and the rising number of immigrants who were not Protestants (especially Catholics and Jews). Evangelicals of the Second Great Awakening despaired at the growth of secularism over the course of the nineteenth century and, after the Fourteenth Amendment’s incorporation of the Bill of Rights to the states, at the disestablishment of religion guaranteed by the First Amendment. Sunday laws and blasphemy laws had been overturned, and Bible instruction in public schools had been banned.[51] Petitions calling for a new constitutional amendment grew, ranging from an amendment to “more fully recognize the obligations of the Christian religion” (1864) to one “recognizing Jesus Christ as the supreme ruler of nations” (1867).[52] None earned significant support in Congress. After the war, the reformers’ attention moved to religious instruction.

In 1869, in an attempt to lure Catholic families away from parochial schools, the Cincinnati School Board banned Bible reading and all forms of religious instruction in the city’s public schools. Among the school board members was Max Lilienthal, a German-born educator who had emigrated to the United States in 1845 and settled in Cincinnati; by 1855 he became rabbi at Cincinnati’s Congregation Bene Israel. Lilienthal was the leader of the movement to establish Reform Judaism in the United States. His lectures were announced in the *Index*, the organ of the Free Religious Association. And he regularly defended the school board’s decision, including in the *Jewish Times*. An abolitionist committed to the idea of moral progress, Lilienthal argued that “progressive civilization is neither Jewish nor Christian” but “something greater, something broader than all

these sectarian terms." [53] Nationally, liberal Protestants supported the school board's decision. Most notably, the preacher Henry Ward Beecher, brother of Harriet Beecher Stowe, wrote in 1869 that the state "has no business to teach religion, or to show partiality to one or another sect in religion." [54] In 1870, in *Board of Education of the City of Cincinnati v. Minor*, the Ohio Superior Court ruled that the school board's decision violated the state's constitution. Lilienthal referred to the legal battle as "a regular tournament between modern philosophy and obsolete theology." In a notable dissent from the Superior Court decision, Alphonso Taft (father of the future president and Supreme Court chief justice William Howard Taft), declared his view that the First Amendment required "neutrality toward all sects" and that Bible reading "is Protestant worship. And its use is a symbol of Protestant supremacy in the schools, and as such offensive to Catholics and to Jews." Three years later the Ohio Supreme Court unanimously agreed, reversing the lower court (and thereby upholding the constitutionality of the school board's decision), arguing that a republican form of government necessitated "a free conflict of opinions as to things divine." And in a direct rebuke to the Christian amendment movement, the court stated that "religion is not—much less Christianity or any other particular system of religion—named in the preamble to the Constitution of the United States as one of the declared objects of government." [55]

Leaders of the Christian amendment movement saw the banning of Bible reading in public schools as the inevitable tragic consequence of the omission of Christianity from the Constitution: "instead of expelling the Bible from our common schools, to make them conform to the fundamental law, which acknowledges neither God nor the Bible, we shall insert the acknowledgement of God and His law in the Constitution, and make it conform to our common schools." [56] Soon the National Association to Secure the Religious Amendment to the Constitution changed its name to the National Reform Association, now describing its mission as not only securing a Christian amendment but also maintaining "existing Christian features in the American government." [57] They were attempting to halt an avalanche of secularism. "The expulsion of the Bible is only the starting point," warned one Protestant leader. "It means ultimately the elimination from public instruction of all that tends to the promulgation of the doctrines of true religion, or morality, and of the rights of free human worship." [58]



Follow for extended description

"No Union Upon any Terms," an indictment of the marriage of church and state, *Harper's Weekly*, 1871

Opposition to the Christian amendment grew, especially among freethinkers and religious skeptics, led by Octavius B. Frothingham, who had founded the Free Religious Association in 1867. The *Index* warned that a Christian amendment would lead to "the overthrow of the Free Republic and the erection of a Christian Theocracy in its stead," along with the end of free speech and a free press. They formed Liberal Leagues, dedicated to the defeat of the Christian amendment. And in 1872 they'd organized a massive yearlong petition campaign to counter the flood of Christian amendment petitions. Their petition read, "We protest against such proposed amendments as an attempt to revolutionize the government of the United States, and to overthrow the great principles of complete religious liberty and the complete separation of Church and State on which it was established by its original founders."

On the floor of the Senate, Sumner, having switched sides, introduced one petition, signed by sixteen hundred Bostonians, in May 1873. A year later he presented a similar petition, this time signed by more than thirty-five thousand people—and nearly one thousand feet long. "It is seldom that 35,000 people can be found to sign an appeal against a wise measure," the *Boston Globe* reported, "and the 953 feet of the petition certainly go a great way in demonstrating the absurdity of the proposed constitutional plan of salvation." [59] In response, Benjamin Butler, of the House Judiciary Committee, issued a report the next month that concluded that the framers

of the Constitution had carefully weighed this question in 1787 and had decided “that it was inexpedient to put anything into the constitution or frame a government which might be construed to be a reference to any religious creed or doctrine.” Moreover, none of the amendments proposed during the ratification debates had seen fit to correct this omission.[60]

Because even that did not defeat the Christian amendment movement, its opponents crafted an *alternative* amendment that they published on the front page of every issue of the *Index*. They called it the religious freedom amendment, but the Christian amendmentists called it the irreligious amendment. Instead of an insertion into the preamble, they sought to “enlarge” the First Amendment by adding a clause to Section 1, barring Congress from making any law “favoring any particular form of religion” and adding a Section 2 that applied the same restrictions to the states and that further provided that:

> No religious test shall ever be required as a condition of suffrage, or as a qualification to any office or public trust, in any State; and no person shall ever in any state be deprived of any of his or her rights, privileges or capacities, or disqualified for the performance of any public or private duty, or rendered incompetent to give evidence in any court of law or equity, in any consequence of any opinions he or she may hold on the subject of religion.[61]

And then they organized another petition drive, which failed.

The drafting and ratification of the Thirteenth, Fourteenth, and Fifteenth amendments in just five years gave reformers false hope. Those amendments had been, all of them, wartime measures, even after the war had ended. The Thirteenth and Fourteenth amendments had been passed by a Congress that did not include the Southern states. Ratification of the Fourteenth Amendment, as Southerners liked to point out, had been forced upon them and so, effectively, had the Fifteenth. In peacetime, after the nation was reunited, getting an amendment through a partisan Congress was nearly impossible. Between 1870 and 1909, not a single amendment passed both houses of Congress.

Petitions came and were read and filed away. On the floor of Congress, amendments were introduced as bills and sent to committee to die. But in 1875, one entirely unlikely amendment did get out of committee and went to a vote; it even passed the House. It sought to broker a peace between the Christian amendmentists and the religious freedom amendmentists.

Before 1876, the only party platform to endorse a constitutional amendment had been the Republican platform of 1864, which included a pledge to abolish slavery by amendment. After 1876, amendment planks became commonplace.

Amendments Pledged on Party Platforms, 1876–92

Year	*Party*	*Amendment*
1876	Prohibition	prohibition
1876	Republican	no public funds for sectarian schools
1880	Republican	no public funds for sectarian schools
1884	Greenback	Senate term limits
1884	Greenback	suffrage regardless of sex
1884	Greenback	prohibition
1884	Prohibition	prohibition
1888	Union Labor	direct election of senators
1892	People's	regulation of civil service
1892	Socialist	abolition of president, vice president, and Senate

Grant's administration was plagued with corruption, and there seemed a real chance that Republicans would lose the White House in the election of 1876. By the end of 1875, Grant was keen for a political win for his party. With city and state funding still going to parochial schools—the overwhelming majority of which were Catholic—Grant decided to tap into a growing opposition to religious education animated by anti-Catholicism and, equally, into a growing demand for universal, free public education. In a speech in Des Moines in September 1875, he called on cities and states to "encourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools" and to "Keep the Church and the State forever separate." [62] That December,

in his annual message to Congress, Grant called for a constitutional amendment forbidding public schools from teaching "religious, atheistic, or pagan tenets" and banning the use of public funds for schools "of any religious sect or denomination." [63] Grant aimed to resolve the dispute by asking for concessions from both sides: Protestants would give up Bible reading in schools; Catholics would give up public funding for parochial education.

Maine Republican, former Speaker of the House, and presidential aspirant James G. Blaine proposed a narrower amendment in December. ("No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects of denominations.")[64] "All that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes," warned the *Nation*.[65]

In 1876 the Blaine amendment passed the House, 180–7. It was significantly revised in the Senate. Lobbying from the Christian amendmentists led to the addition of a clause that read, "This article shall not be construed to prohibit the reading of the Bible in any school or institution." That insertion likely doomed the amendment. The Senate voted 28–16 in favor of the revised amendment, but that tally fell four votes short of the required two-thirds majority. (Twenty-seven senators, including Blaine, simply failed to show up to vote). The Blaine amendment became one of a handful of amendments to pass one chamber, only to fail in the other.[66] Republicans included a version of the amendment on their party platform in 1876, but it never rose from the ashes of its Senate defeat.[67]

Supporters and opponents of the Christian amendment clashed again in the 1890s. In 1892, in an opinion in *Church of the Holy Trinity v. United States*, a Supreme Court justice observed, almost in passing, that "we are a Christian people, and the morality of the country is deeply engrafted upon Christianity." [68] The language gave new hope to the Christian amendmentists, who once again pursued their objective, leading their opponents to renew their efforts to get Congress to pass a religious freedom amendment. As a Washington correspondent for the *Los Angeles Times*

wearily reported in 1896, “There are always people who want to insert the word ‘God’ in the Constitution, as is done in some of the State Constitutions, and people who make it their business to see that this is not done. They watch each other like hawks, and all they accomplish is to create such a warfare that Congress will not consider it seriously.” [69]

The rum curse

In the course of American history, constitutional amendment as Christian salvation has generally been a dead end. Abolition began as a religious crusade, but it succeeded only by operating within electoral politics. And it took the secession of the South to accomplish the Thirteenth Amendment. Victoria Woodhull appears to have taken the failure of so many crusading amendments as a warning that a different approach was necessary. But not every suffragist learned that lesson. Nor did other types of constitutional crusaders.

The tornado of religious enthusiasm that swept much of the Midwest, where support for the Christian amendment was strongest, was only one front of a much larger storm of religious passion. Temperance reformers wanted to purify the Constitution, too. They wanted to purify the whole country and even the world.[70] By the 1870s, they wanted a federal constitutional amendment. Organized into brigades in the states, and aided by a national organization that printed useful materials like a *Constitutional Amendment Manual*, theirs would be one of the few such moral crusades to succeed—with the ratification of the Eighteenth Amendment in 1919—and then their amendment would be the only one in American history to be repealed, under the terms of the Twenty-First Amendment, in 1933.

Urged on by temperance reformers during the Second Great Awakening, a handful of states had banned the sale of liquor starting in 1851, but most of those laws had been deemed unconstitutional. Temperance was a woman’s crusade, and for good reason: some men who drank to excess beat women and failed to support their wives and children. In 1862 Congress had imposed a liquor tax to help fund the war. War led to drinking, and so did the aftermath of war. The number of saloons doubled in a single decade. Between 1840 and 1910, the consumption of beer rose by 1,000 percent. By

the 1870s, taxes on liquor, beer, wine, and tobacco were providing 90 percent of the federal government's revenue.[71]

In an era of Comstockery, temperance found new followers. Beginning in the early 1870s, crusaders held revival meetings, closed saloons, convinced drinkers to sign abstinence pledges, petitioned state constitutional conventions, and campaigned for a federal constitutional amendment. Much animus was directed against German brewers. (German-language newspapers referred to the crusaders as the "prayer pest.")[72] In the Midwest, crusaders forced the closure of a thousand saloons.

Drinking, once considered a vice requiring personal restraint, was edged out in favor of the notion that the sale of liquor ought to be a crime, requiring constitutional amendment. Organized drives petitioning Congress for an amendment to ban "the manufacture and sale of intoxicating liquors throughout the United States" began in early 1871, weeks after Woodhull appeared before the House Judiciary Committee.[73] By 1872, prohibitionists were seeking a constitutional amendment that would "render all persons addicted to the use of intoxicating liquors ineligible to office" or, still more broadly, disqualifying from office anyone who uses "intoxicating liquors as a beverage." [74] In 1873, after a call for a congressional investigation of the liquor trade was defeated, calls for a constitutional amendment grew louder. In 1874 the movement coalesced around a new national organization, the Women's Christian Temperance Union (WCTU), formed in Cleveland, Ohio; its standard petition called for an amendment banning "the making, selling, importation, and exportation of intoxicating liquors." [75] In 1875 the WCTU announced its formal turn to the amendment solution, calling drinking "a crime against God" whose end required a constitutional amendment. WCTU petitions began flying to Capitol Hill.[76] In 1876 the first bill calling for a prohibition amendment was introduced into the House.[77]

The relationship between temperance and suffrage was uneasy. Within the rhetoric of the movement, drinking was a vice indulged in by men, at the expense of women and children. In 1875 Frances Willard convinced the Illinois chapter of the WCTU to pass a resolution "that since woman is the greatest sufferer from the rum curse, she ought to have power to close the dram-shop door over against her home." But when Willard, then corresponding secretary of the national organization, sought the presidency,

she was defeated. She resigned and inaugurated the Home Protection Petition campaign, seeking for women the right to vote on temperance issues. In 1879 she finally prevailed against the anti-suffrage faction and was elected president of the WCTU, a position she held for nearly twenty years.[78]

Neither the Christian amendment nor the religious freedom amendment ever succeeded, not even in getting out of a congressional committee. With far better local support, national organizational infrastructure, and movement endurance, the prohibition and woman suffrage amendments did succeed—ratified as the Eighteenth and Nineteenth amendments in 1919 and 1920—but only after a half-century of struggle. Victoria Woodhull had proposed an entirely different and immediate procedure, involving no special pleading, only a citizen's declaration of constitutional meaning. That hadn't worked, either. Suffragists went back to the quieter, humbler, more mannered pleading of petitioning.

Madam, you are not a citizen

Victoria Woodhull liked to tell a story about how, when she presented her argument to the House Judiciary Committee in 1871, John Bingham had said to her, "Madam, you are not a citizen," and that she'd had to remind him of the text of the Fourteenth Amendment (which he had mostly written).[79] This story seems almost certainly apocryphal. But the question of who was and was not a citizen, or a person, under the Fourteenth Amendment would occupy the courts for decades. Were Indians citizens? Were Chinese Americans citizens? Were corporations persons?

On November 5, 1872, election day, Woodhull was unable to attempt to exercise her Fifteenth Amendment right to vote—she was locked up in Ludlow Jail. But other suffragists went out and gave it a try. Sojourner Truth tried to vote in Michigan. Susan B. Anthony and fourteen other women attempted to cast their ballots in Rochester, New York, and were arrested. When registering to vote, Anthony had asked the registrar whether he "had read Benj Butler's report"—the minority report, agreeing with Woodhull's claim that the Fourteenth and Fifteenth amendments guaranteed women the right to vote. (The registrar had not read it.) At her trial in June 1873, indicted on the charge of having "knowingly voted without having a

lawful right to vote," Anthony was asked, "Did you have any doubt yourself of your right to vote?" She answered, "Not a particle." She was found guilty.[80]

In Washington, Mary Shadd Cary and more than sixty other women had tried to register to vote in 1871, without success. "We do not know of her equal among the colored ladies of the United States," Frederick Douglass once wrote about her. Born in Wilmington, Delaware, in 1823, Shadd was the oldest of thirteen children. Her father, an antislavery activist, had regularly attended Black conventions and had been president of a Black convention in 1833. Beginning at the age of sixteen, Shadd taught in Black schools. By 1851, after the passage of the Fugitive Slave Act, she had left the United States and urged fellow free Blacks to follow her. She settled in Windsor, Ontario, just across the water from Detroit, where she published *A Plea for Emigration or, Notes of Canada West, in Its Moral, Social and Political Aspect* and helped found a newspaper, the *Provincial Freeman*. Described as "the first colored woman on the American Continent, to Establish and Edit a weekly newspaper," she also became a compelling orator. In 1855 she addressed an audience of Black men at the Eleventh Colored National Convention in Philadelphia; while in the city, she argued the proposition (and won) in a debate on "Shall the Free Colored People of the United States Emigrate to Canada?" The next year she married a barber named Thomas F. Cary. In 1863 she recruited Black men for the Union Army. After her husband's death in 1860, she and her two children moved to Washington in 1869, where Shadd Cary studied law at the newly founded Howard University.[81]

Shadd Cary agreed with Frances Harper, who argued that "much as white women need the ballot, colored women need it more." In January 1874 she joined six hundred other women in signing a petition seeking the right to vote in the District of Columbia. It was always hard to get attention on the Capitol at the start of a congressional session. Consider the first day of this session, when, promptly at noon on January 7, the Forty-Third Congress opened. In the Senate, the chaplain said a prayer, minutes were read, and the floor was opened for the presentation of petitions. Sumner introduced a protest of "the proposed theological amendment to the Constitution" that was signed by more than thirty-five thousand people and, if unfurled, measured nearly a thousand feet long. He promised that the petition itself was brief: "We protest against such proposed amendment as

an attempt to revolutionize the Government of the United States, and to overthrow the great principles of complete religious liberty and the complete separation of church and state on which it was established by its original founders." He apologized that he'd failed to introduce it when it first came into his hands, the previous spring, but he'd been too ill to attend the Senate. Reading this petition was one of Sumner's last acts. He would die of a sudden heart attack, at home, weeks later, on March 11.

There followed some discussion of whether to refer the petition to the Judiciary Committee, or to the Privileges and Elections Committee, of which Oliver Morton of Indiana was chair, or to another committee.

Morton, hearing his name, stirred. "I was not listening this morning," he confessed.

Wearily, Sumner began all over again, explaining the giant scroll. "This is a petition most numerously signed, and largely from the West, against what is known as the proposed theological amendment to the Constitution of the United States by the insertion of new words in the preamble."

The petition was referred to the Judiciary Committee. But there were more petitions to read into the record that day, including one from the California Woman Suffrage Association, asking for a constitutional amendment declaring that "the right of citizens of the United States to vote and hold office shall not be denied or abridged on account of sex." [82] A week later that session's prohibition amendments began arriving, with two from Wisconsin.[83]

And so it went. Another day, another stack of petitions. Did anyone listen? Not often. Petition after petition after petition died in committee. On January 21 that suffrage petition signed by six hundred women from the District of Columbia was sent to the House Judiciary Committee.[84] Shadd Cary then addressed that committee, speaking, she said, "as a colored woman, a resident of this District, a tax-payer of the same, and one of a club equal in point of numbers to the male colored voters herein, claiming affiliation with two and a half millions of the same sex in the country at large." While denouncing "the word male" and asking that it "may be stricken out by you without delay," she argued that "by the provisions of the 14th + 15th amendments . . . millions of colored women today share with colored men the responsibilities of freedom," including suffrage. If Black men had earned the right to vote by their service in the Union Army, so had Black women, by their many, many sacrifices. And that war would have

been for nothing until its victory could "be made permanent," she warned, and unless the government were to be based "upon the consent of the governed," by granting constitutional rights equally "to both sexes." If Congress would act, she closed, Black women would, at last, "be governed by their own consent."

Mary Shadd Cary had no more success in 1874 in persuading the House Judiciary Committee than Victoria Woodhull had had in 1871. She had less success and was less noticed.[85]

Within a year, the Supreme Court had ruled on the Woodhull-Cary strategy, known in suffrage circles as the New Departure. In Missouri, the suffragist Virginia Minor had attempted to register to vote in 1872, too. Rejected, she'd filed suit against the registrar, Reese Happersett, arguing that because Minor was a citizen under the terms of the Fourteenth Amendment, she could not be denied the right to vote. When the state supreme court ruled against her, Minor appealed to the U.S. Supreme Court. In a unanimous decision, the justices ruled that the right to vote is not among the privileges and immunities of citizenship and that "if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication." Nor had the Fourteenth or Fifteenth amendments established that right. *Minor v. Happersett* put an end to the argument that the Constitution didn't need amending.[86]

Women were granted the right to vote in Wyoming in 1869, Utah in 1870, and Colorado and Idaho in 1893 and 1896. The political struggle for equal rights raged on. In 1880 Shadd Cary founded the Colored Women's Progressive Freedom Franchise, whose first goal was "to assert their demand of equal rights." [87] In the election of 1896, women in four states—Wyoming, Colorado, Idaho, and Utah—were able to vote for president. Elizabeth Cady Stanton wrote to one candidate asking for his support and employing all the racist and nativist rhetoric that had animated her brand of suffrage since 1869: "it would be a graceful tribute from a young man to the mothers of this Republic to recommend Congress in his inaugural address to pass a Sixteenth Amendment to the National Constitution 'forbidding disfranchisement, in the several States, on the ground of Sex,'" she urged, assuring him that this would place "educated women at least on an even political platform with emancipated slaves, and ignorant immigrants from the old world." [88]

In England, Victoria Woodhull republished her original petition to Congress. “The object of the Women’s Suffrage Convention had been to obtain the franchise by amending the Constitution,” Woodhull wrote in 1896, looking back. “The whole gist of my contention from the first was, and is, that no amendment is necessary.” [89]

She had been wrong. Women, it turned out, needed an amendment. The trouble was how to get one.

The understanding clause

In 1876 James G. Blaine lost the Republican nomination to Rutherford B. Hayes, who then lost the popular vote to New York Democrat Samuel J. Tilden. Before the counting was completed, Tilden also appeared to have won the electoral vote, except for the many rumors that Black men had been prevented from voting, or that their votes had been discarded. In the end, a hastily formed electoral commission granted the presidency to Hayes, apparently in exchange for a promise to end the military occupation of the South.

Redemption Conventions, 1874–1902

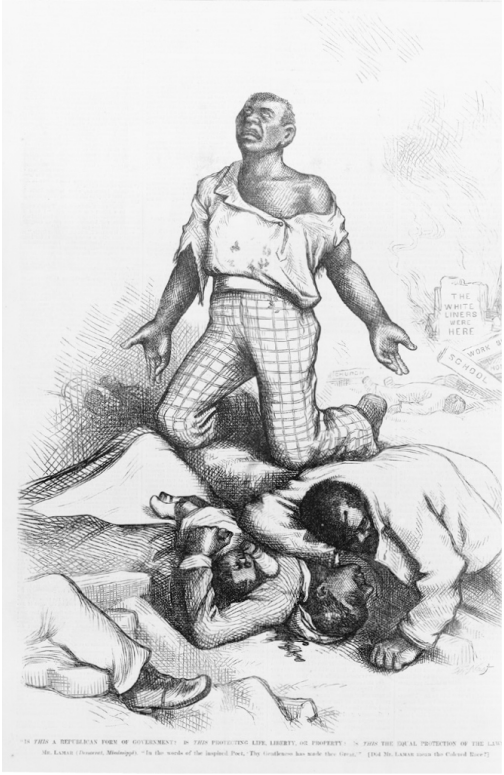
1874	Arkansas
1875	Alabama, Texas, North Carolina
1877	Georgia
1879	Louisiana
1885	Florida
1890	Mississippi
1895	South Carolina
1901–2	Virginia

Once Reconstruction was abandoned, the former Confederate states rewrote their constitutions once more. These are known as Redeemer

constitutions, since they were part of white Southerners' attempt to "redeem" the former Confederacy from what they described as "Negro supremacy." For these state conventions, voters chose delegates in elections that barred Black voters—often through acts of terror and violence—and held conventions where, with rare exception, Black men did not serve. The Redeemer constitutions reversed many of the provisions of the Reconstruction constitutions, weakening or abandoning federal supremacy clauses and restoring the right of citizens to "alter or abolish" their constitutions.[90]

After the federal government abandoned Reconstruction, it began the long, slow abandonment of the Fifteenth Amendment. Tennessee in 1870 adopted the first state constitution to institute poll taxes to bar Black men from voting. Post-Reconstruction state constitutions and Jim Crow laws would, by the end of the century, make it effectively impossible for Black men in the South to vote. Meanwhile the Supreme Court effectively dismantled the Fourteenth Amendment in its 1873 *Slaughter-house Cases* decision (ruling that the privileges and immunities clause of the Fourteenth Amendment was binding only on the federal government, not on the states), and in 1883 it declared the 1875 Civil Rights Act unconstitutional.

Mississippi had held a constitutional convention in Jackson in 1890. All but one of its 136 delegates were white. The exception was Republican delegate Isaiah Montgomery, who had been born into slavery in 1847, the property of Joseph Davis, an older brother of Jefferson Davis. Joseph Davis had required the slaves on his plantation at Davis Bend, south of Vicksburg, to devise their own laws. Every Sunday he, as judge, presided over trials, where slaves presented claims before slave juries. Montgomery's father was a mechanical engineer, and Isaiah became Joseph Davis's private secretary, serving Jefferson Davis in the same capacity whenever he visited Davis Bend. Montgomery would later write that he and Jefferson Davis became "fast friends." After the war, Isaiah Montgomery's sisters studied at Oberlin, and the Montgomery family bought all four thousand acres of the Davis plantations, becoming the richest Black family in the South. Jefferson Davis sued for the property, and in the end, Isaiah Montgomery sold the plantations at auction, but through this and other ventures, he remained among the wealthiest Black men, and wealthiest men, in the United States. He maintained a close relationship with Davis's widow, Varina.[91]



"Is this a republican form of government?" 1876

Delegates to Mississippi's convention explicitly argued against Black suffrage and formally urged the repeal of the Fifteenth Amendment, one stating that "white people only are capable of conducting and maintaining the governments." [92] As one delegate explained, "It is the manifest intention of this Convention to secure to the State of Mississippi white supremacy." Disenfranchising Black voters without disenfranchising white voters required precision and yet had somehow to be accomplished without violating the Fourteenth and Fifteenth amendments. Montgomery served on the franchise committee and supported its solution, which was not only to mandate poll taxes but to restrict the franchise in a wholly new way, by what became known as the "understanding clause." It required prospective voters to pass a literacy test that required not only reading but also explaining any given portion of the state's constitution. Montgomery delivered an address at the convention, supporting the franchise requirements, including the understanding clause. He hoped that it would be "fairly enforced" and "bridge a chasm" between the races and instead divide Mississippi voters not by race but by education.[93]

Isaiah Montgomery, c. 1890

But the understanding clause was vastly unpopular with the broader public since it so obviously seemed ripe for corruption. One newspaper called “upon the members of the Constitutional Convention to wipe out, strike out, blot out, kick out that outrageous, unjust, iniquitous, miserable and disgraceful clause in the franchise law, known as the ‘Understanding Clause.’ Everybody knows that it was put there for the purpose of swindling men out of their votes under the cover of law, and that it is a disgrace to the State.” In the end, the state legislature simply adopted the constitution rather than submitting it to the people for ratification, where it would likely have failed. The understanding clause, selectively applied, effectively disenfranchised the entire Black electorate. (White voters were not generally asked to take the test.)[94]

“I have stood by, consenting and assisting in striking down the rights and liberties of 123,000 freemen,” Montgomery admitted.[95] “He has made peace with the lion by allowing himself to be swallowed” was the verdict of Frederick Douglass.[96] Elements of the Mississippi system, and other mechanisms of disenfranchisement, were soon adopted throughout the South.

The word *white* had been written into state constitutions before the Civil War, deleted afterward, and overruled by the Fourteenth Amendment in 1868. The Supreme Court had been chipping away at the protections guaranteed by the Reconstruction amendments, beginning in 1873 with the *Slaughter-house Cases*.[97] In 1896, in *Plessy v. Ferguson*, the Court ruled that racial segregation in public accommodations (like railway cars) did not violate the equal protection clause of the Fourteenth Amendment because of a doctrine the Court created, allowing for segregation so long as accommodations were "separate but equal." [98]

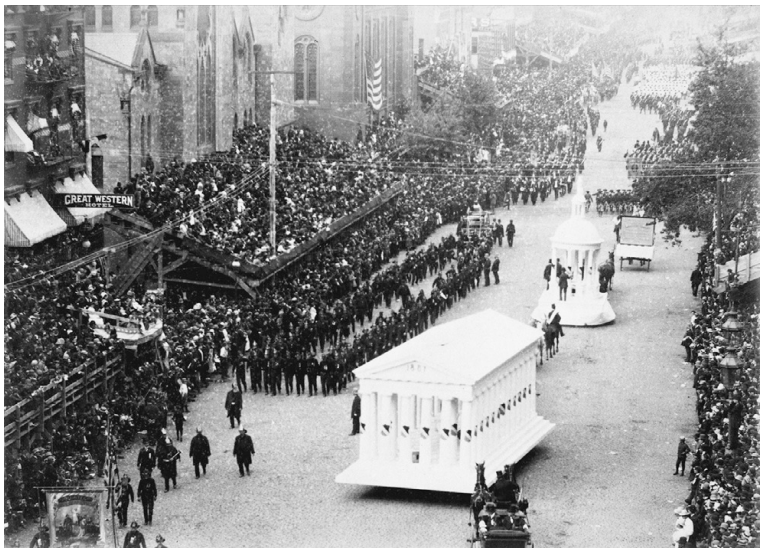
The Supreme Court all but nullified the Fourteenth Amendment, while across the South, Jim Crow laws and Redeemer constitutions effectively nullified the Fifteenth Amendment. By 1900, Southern members of Congress began routinely introducing proposals to repeal both the Fifteenth Amendment and the apportionment clause of the Fourteenth.[99] This was purely symbolic. They'd already been, violently, voided.

A Century of Constitutional Interpretation

In 1887 many Americans found it difficult to celebrate the one hundredth anniversary of the Constitution. There seemed to be, as one organizer put it, an "entire absence of any interest or general sentiment in favor of the proposed celebration on the part of the public at large." Most cities and towns ignored the anniversary. A national celebration was planned for Philadelphia, but to a man, the nation's most acclaimed orators declined the invitation to speak. No poet could be found. James Russell Lowell, Oliver Wendell Holmes Sr., John Greenleaf Whittier: all declined. Walt Whitman was not asked (the Centennial Committee having decided that such a choice "would not be safe"). The "Colored People's Display" was deemed a poor effort. Not until nearly the last minute did anyone notice they had forgotten to arrange for fireworks.[100]

In the end, the organizers pulled it together, and some five hundred thousand people, including President Grover Cleveland and his wife, descended on the city for the military parade on September 17. But compared to the hoopla that in 1876 had greeted the anniversary of the Declaration of Independence, the constitutional centennial was a disappointment. And as E. L. Godkin persuasively argued in *The Nation*,

Americans of the future would be more likely to celebrate the real founding of the country at the anniversary of 1865, with the ratification the Thirteenth Amendment, than the anniversary of the drafting of the original Constitution in 1787.[101]



Philadelphia's Constitutional Centennial Parade of Progress, 1887

With the hundredth anniversary of the Constitution, a century of attempts to amend it came to a close, too. It appeared to plenty of people as though those efforts had more or less ended. The Constitution "was intended to be, and is, practically beyond the reach of the people," according to an editorial titled "Not a Democracy," in the *Washington Post* in 1888. "It is virtually unamendable." [102] The writer believed this to be a good thing. Not everyone agreed. One historian used the occasion to quite carefully take stock. How many had been those attempts? And to what end?

A great enthusiasm for counting had begun, in the study of history and, in fact, of everything. In a widely read and much-admired account of American institutions published in 1888, *The American Commonwealth*, the British jurist and member of Parliament Lord James Bryce, the Tocqueville of American constitutionalism, reported that between 1884 and 1886, forty-seven amendments had been introduced on the floor of Congress, and not one had seen even the slightest success. He took this as a measure of both "the excellence of the original instrument" and "the difficulties which surround the process of change." Bryce blamed the Civil War for the

difficulty of amendment: “the struggle over the interpretation of a document which it was found impossible to amend, passed from the law courts to the battlefield.” And he offered a theory for why it was so hard for Americans to clear the admittedly high bar set by Article V. He put it down to party politics: “A change in the Constitution, however useful its ultimate consequences, is likely to be for the moment deemed more advantageous to one party than to the other, and this is enough to make the other party oppose it.” [103]

American scholars soon took up the subject. In 1889 the University of Pennsylvania’s John Bach McMaster published a long and exceptionally well-researched essay called “A Century of Constitutional Interpretation” in the popular illustrated magazine *The Century*. McMaster, who was only thirty-six but already one of the nation’s leading historians, offered a detailed and spirited account of the ceaseless attempts to amend the Constitution, beginning in 1787, when “the Constitution was very far from being what the people wished.” For McMaster, American constitutional history was, in fact, the story of Americans’ attempts to close the distance between the Constitution they had and the Constitution they wanted. If “the amending stopped” at the Fifteenth Amendment, McMaster wrote, “the rage for amendment went on burning with tenfold fury.” [104]

Constitutional history was, at the time, just emerging as an academic discipline, one with leanings toward social science and quantification. McMaster’s work inspired a young disciple. Herman Vandenburg Ames graduated from Amherst College in 1888, briefly studied at Columbia, and began doctoral study in history at Harvard in 1889, where he likely read McMaster’s essay, and also McMaster’s books, including his 1889 *Outline of the Lectures of the Constitutional History of the United States.* He might even have gone to Philadelphia to attend McMaster’s lectures, in which McMaster gave nearly equal attention to “Defects in the Constitution” and efforts to amend it as to constitutional interpretation.[105] At Harvard, Ames overlapped with W. E. B. Du Bois, who earned his BA in 1890 and his PhD in 1895; they also shared an adviser in the historian Albert Bushnell Hart.

For Ames’s dissertation, which he completed in 1891, he undertook an extraordinarily ambitious archival project: the compilation and analysis of “Proposed Amendments to the Constitution of the United States during the First Century of its History.” Reading through the records from Philadelphia in 1787, Ames had come to think something had gone terribly wrong. “It is

difficult to avoid the conclusion that it was the expectation of the members of the Federal Convention that a frequent use of the amending power would be made," he wrote. And he'd been surprised to discover that although many scholars had written about the fifteen amendments that, up till then, had been ratified, "no attention has been paid, with rare exception, to the amendments which have failed." (Ames cited and thanked McMaster and noted that "two excellent brief articles" by McMaster were nearly the only pieces ever written on the subject.) So he'd gone to Washington and tried to find the records of those failures. In the *Congressional Globe* and the *Congressional Record* and especially in the Senate document room in the Capitol, paging through old papers, he found "upward of 1,300 distinct resolutions, containing over 1,800 propositions to amend the Constitution." [106]

Ames believed that the Constitution was too difficult to amend. "The expectation of the framers" had not been fulfilled, he wrote in 1891, and "the facts plainly show that the method is not sufficiently facile to meet our wants." [107] Five years later he published his monograph to much deserved acclaim. The next year he joined McMaster on the history faculty of the University of Pennsylvania. (The two men later wrote a book together.) Ames's compilation, as the single reference work on the subject, provided the most important record of constitutional amendment efforts to date.[108] He called attention to the difficulty of amending the Constitution—eighteen hundred proposals and only fifteen ratified amendments over the course of a century—and warned of the fateful consequences of unamendability.

Ames's figures, though, are not altogether reliable. On the one hand, he inadvertently exaggerated the scale of constitutional discontent by counting proposals that were duplicative, or mere refinements upon one another, or simply different sections of a single amendment, as if they were separate amendments.[109] On the other hand, he left much out. As he noted in a footnote, "No notice has been taken of petitions." [110] He overstated the number of proposals introduced on the floor of Congress, and he left out entirely the voices of people who offered support for or opposition to existing proposals, or who introduced their own proposals, by way of petition.

Quantitative evidence of the Constitution's unamendability arrived at a time when the nation confronted radical social and economic changes. By

the 1890s, the United States stretched across the continent, crisscrossed by railroad tracks and telegraph wires and, in the West, scissored with barbed wire. The U.S. population had grown from under four million in 1790 to more than sixty million a century later. Immigrants, as a percentage of the U.S. population, had risen from 10 percent in 1850 to 15 percent in 1890, when new waves of immigrants from eastern Europe, especially Jews, Hungarians, and Italians, fled poverty in the Old World to seek their fortunes in the New. The rise of the corporation and the growth of the railroads, along with American expansion—including the acquisition, conquest, and annexation of the Philippines, Cuba, Guam, Puerto Rico, and Hawaii—contributed to dire economic inequality in what came to be known as the Gilded Age, characterized by an extraordinary accumulation of wealth among the very few and miserably meager conditions for a very many. Less than 1 percent of the population controlled more than half the nation's wealth.[111]

Yet an increasingly activist and conservative Supreme Court sided, again and again, with business interests. Before 1890, it had hardly ever used its most powerful weapon, its asserted power to declare government actions unconstitutional, but after 1890 it used that tool repeatedly, relying, too, on its finding in the 1886 case, *Santa Clara County v. Southern Pacific Railroad*, that corporations are persons entitled to Fourteenth Amendment rights.[112]

In 1898 a very young historian named Charles Beard lamented that "this crowned Constitution with its halo has been the bulwark of every great national sin—from slavery to monopoly." [113] Only amendment, it seemed, had ended the former, and only amendment could end the latter. Amendments *were* necessary. But what if they were impossible? Frederick Upham Adams, who invented the electric light post and edited a magazine called *The New Time*, believed that "the great issue of 1900 will be: 'Shall the Constitution of the United States be so amended or revised that the rights of the Majority shall be preserved?'" In 1897 he explored the consequences of an undemocratic and unamendable constitution in a novel called *President John Smith*. While robber barons count their millions and starving workers march by the hundreds of thousands in endless strikes, the Supreme Court strikes down as unconstitutional all laws designed for their relief, unwilling to admit that the Constitution of 1787, "an antiquity, the

cherished heirloom of a vanished age," was "absolutely unfitted" for the world of 1887. Our hero is a lawyer named Smith:

> John Smith had no patience with certain of his friends who would hold up their hands in horror that the constitution of the United States was full of errors.
>
> "Have you no veneration?" exclaimed Jones one day.
>
> "Not a bit," responded Smith. "Veneration is a half-witted, obsequious brother to superstition, and I care for the companionship of neither."

Smith becomes a judge but resigns from his judgeship because he refuses to take an oath to the Constitution. After giving a stirring speech at a nominating convention, in which he argues for the repeal of the entire Constitution, he's nominated for president. Although he wins both the popular and the electoral vote, his enemies plan to steal his victory from him, whereupon, as the vice president is overseeing the Electoral College count at the Capitol, Smith's followers break in and riot. Insurrection is what happens when you can't amend the Constitution. With Smith's defeat by way of a stolen election, the country descends into chaos. At a meeting in Omaha, Smith calls for a constitutional convention to draft a new constitution, "in which the people shall make and unmake laws; in which the people shall elect and depose officials; in which the will of the people is supreme." Its Article VIII provides for repeal, revision, or amendment "by a majority vote of the people of the United States." The constitution is ratified, overwhelmingly, and Smith becomes the next president.[114]

Insurrectionists attacking the Capitol during the Electoral College count in *President John Smith* (1896)

In 1898 North Carolina Supreme Court justice Walter Clark (a contributor to Frederick Upham Adams's magazine, *The New Time*), describing the 1787 Constitution as "a misfit," called for a wholesale revision. "The Constitution is not a fetish to be worshipped nor did it come down from heaven a perfect work," Clark wrote. "Its defects nearly brought us catastrophe." It did not foresee the steamboat, the railroad, the factory, the bank, the corporation. It was not democratic. He lamented the indirect election of the Senate. He lamented the Electoral College. He lamented the presidential nomination of Supreme Court justices as well as their life tenure.

The Constitution, Clark pointed out, was devised for a population of three million, living along the Atlantic, but "we are now trying to make it do duty for 80,000,000 settled from Ocean to Ocean, and from the Great Lakes to the Gulf," he complained. "The expected admission of Hawaii, which indicates a colonial policy, are features unprovided for by a constitution which contemplated merely a union of co-equal States and not permanent territories or colonies."

Clark believed that, in an age of American empire, the very survival of the republic was at stake. “The revision is needed,” he concluded. “It will and must come.” [115] And it did come. But not then, and not there. Meanwhile, as Clark saw, a crucial chapter in American constitutional history had been unfolding nearly five thousand miles away from the nation’s capital, on a tropical island in a volcanic archipelago in the bluest Pacific.

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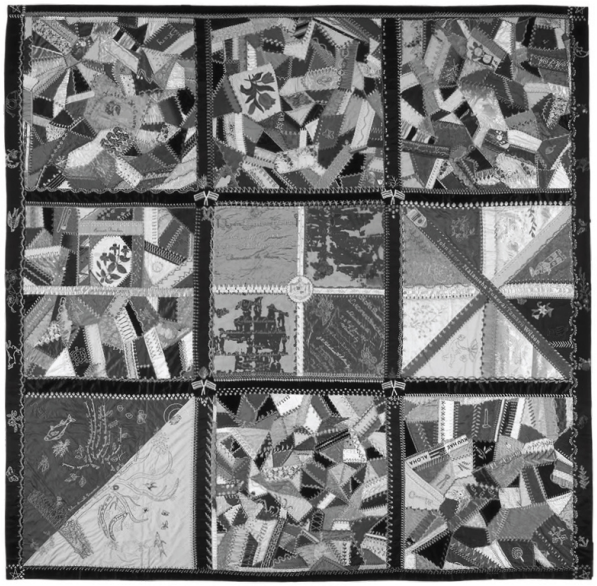
7

We Began This Quilt



Quilt of Queen Lili‘uokalani, c. 1895

> *The name of this Republic is hereby changed from the United States of America to the United States of Earth.*
>
> —Failed amendment to the U.S. Constitution, introduced into the House, 1893

The queen was locked in an upstairs bedroom in the royal palace as if she were Rapunzel. Anything she might read had been taken away from her, though as a kindness, she was allowed pencils and paper. “I was thereby able to write music, after drawing for myself the lines of the staff,” she explained. She’d been provided with two cages of canaries; she adored their singing. She sang herself; her songs were more than songs: she used them to send messages. Friends were permitted to bring her flowers from the royal garden. “Such lovely flowers are sent in pots all in bloom and my room is a perfect bower of ferns and flowers,” she wrote to her niece. The flowers were

more than flowers; they'd been cunningly wrapped in bits of newspaper, the queen's only supply of news.[1] She spent much of the day with her female attendants. "We are occupied in sewing," she told her niece. They were "darning stockings or mending some rent in our garments," but they were also stitching a *kapa apana*, a crazy quilt.[2] The quilt was more than a quilt. It was a kind of *kumukānāwai*, or constitution, a repair to a tear in the fabric of her kingdom, a rent, mended.

Hawaii's constitutional past, like that of other insular U.S. territories—Puerto Rico, Guam, American Samoa—as well as that of North American Native nations, has mainly been left out of the larger history of American constitutionalism. These histories follow different plotlines and timelines; they involve different actors, languages, politics, laws, and as Francis Lieber would have termed it, different constitutional hermeneutics. They can be hard to fold into a national story centered on the U.S. Constitution and the workings of the federal government in Washington, DC, and there are arguments, too, against doing that kind of folding, on the theory that this, too, is another kind of forced assimilation.

But leaving these parts of American history out of its constitutional past renders American imperialism invisible and obscures the influence of U.S. constitutional ideas and practices on insular territories and Native nations, as well as influence that runs in the other direction. The constitutional and political contest over the annexation of Hawai‘i in 1898, more than twenty years after the end of Reconstruction, reveals the persistence of race-based ideas about republicanism, constitutionalism, and the powers of interpretation and amendment. Folding this story into a larger narrative of American constitutional history also reveals the role played in that annexation by U.S. corporations like the infamous Sugar Trust and establishes the centrality of the conflicts between business and labor that would inform efforts to amend and reinterpret the Constitution for decades. With constitutionalism, as with the queen's quilt, Hawai‘ians had their own fabrics and patterns, textures and weaves. But they also imported fabrics, silks, and patterns from China, Japan, Europe, and America, then stitched them together, making of the art of quilting, too, a metaphor for constitutional construction.

The queen's nine-block quilt measured 97½ by 95½ inches, a size that would cover a proverbial queen-size bed. It was made out of rich, bright silks cut from the queen's clothing and stitched with many-colored satin threads in a then-popular needlework style usually called crazy quilting but sometimes known as "Japanese patch," since it was influenced both by the English

embroideries of William Morris and by Japanese or “Oriental” mosaics.[3] The center block is itself divided into four quarters, each containing embroidered words, a chapter in the life of the queen. The story begins on a blue brocade, stitched with threads of gold and red:

Lydia Kamakaeha Liliʻuokalani
Born, Sept. 2nd. 1838.

Liliʻuokalani had been born into the House of Kamehameha. American missionaries had arrived in Hawaiʻi in 1820, just after the death of King Kamehameha, a time of deep political and religious disruption. The diseases that the Americans brought led to devastating population decline and all the dislocation and desperation that comes with it. By the time Liliʻuokalani was born in 1838, nearly half the Native population, the Kānaka Maoli, had died. A missionary baptized her and named her Lydia. The missionaries told the *aliʻi*, or nobles, that the worship of their god, Jehovah, required adopting the *palapala*, the written word, and that it could both save their people and strengthen their own power. For Hawaiʻians, this technology was merely another form of the medium of speech, the powerful tradition of oral performance, and the keeping of history, especially through chants, prayers, proverbs, and songs.[4] Yet the missionaries required different acts of speaking and writing. Lydia was sent to a missionary school. She spoke Hawaiʻian and English and some French, German, and Latin.

Alongside Christianity, American missionaries spread American constitutionalism around the world, and with the same missionary zeal. In 1839 King Kamehameha III agreed to *He Kumukānāwai a me ke Kānāwai Hoʻoponopono Waiwai no ko Hawaiʻi Nei Pae ʻĀina*, a Declaration of Rights, and the next year to *Ke Kumukānāwai a me nā Kānāwai o ko Hawaiʻi Pae ʻĀina*, Hawaiʻi’s first written constitution.[5] Article 46 provided for amendment.[6] And still Native Hawaiʻians died. By 1860, the population had once again been cut in half. In 1862, when Liliʻuokalani was twenty-four, she married an American, or *haole* (foreigner), then studied for at a time at Oʻahu College. In 1878 she composed her most famous *mele*, or song, “Aloha ʻOe (Farewell to Thee).” [7] There were so many good-byes. In little more than a century, Hawaiʻi’s Native population had fallen from nearly nine hundred thousand to less than forty thousand. Year by year the Kānaka Maoli became a

smaller and smaller percentage of the population and the number of *haole* grew.[8]

Liliʻuokalani, c. 1891

Constitutionalism in Hawaiʻi involved a ceaseless battle for power between the monarchy and the coalition of American and European missionaries and sugar plantation owners sometimes known as the "missionary party," who sought to dispossess and rule over Native Hawaiʻians and disenfranchise Portuguese, Chinese, and Japanese laborers. (Liliʻuokalani called Americans and Europeans "pseudo-Hawaiʻians.")[9] By the 1880s, the Kānaka Maoli had become a minority in their own land. In 1887 the missionary party imposed a new constitution, taking power away from the monarch, King David Kalākaua, Liliʻuokalani's brother. A growing resistance formed the Hui Kālaiʻāina, a political association, to fight for voting rights for the Kānaka Maoli, under the slogan, "Hawaiʻi for the Hawaiʻians." [10]

Liliʻuokalani became *mōʻī wahine*, queen, in 1891 at fifty-two. On her quilt, she stitched,

Proclaimed Heir Apparent, Apr. 10th, 1877.
Ascended the throne,

January 29th 1891.

She was determined to revise her kingdom's constitution. It was for this that she would be imprisoned in the royal palace, shut up with singing birds and blooming flowers and silken threads and needles, mending and stitching. Her crime, the last act of the last Hawai'ian sovereign, was her attempt to amend the Hawai'ian *kumukānāwai*.

Bastard constitutions

Article IV of the U.S. Constitution guarantees "to every State in this Union a Republican Form of Government." No such guarantee was ever made to every territory. From the start, the U.S. Constitution had been as much a colonial constitution as an anti-colonial one. Even as Americans cast off their status as colonial subjects of the British Empire and embraced both independence and republicanism, they were establishing an American Empire.[11] Jefferson had famously declared in 1805 that "by enlarging the empire of liberty . . . we provide new sources of renovation, should its principles, in any time, degenerate; in those portions of our country, which gave them birth." But the growth of the republic meant the violation of the sovereignty of Native nations and the denial of both statehood and equal citizenship to people who lived in places the United States decided to acquire.[12]

Between 1776 and 1871, the federal government made treaty after treaty with Native nations, an act that by its nature acknowledged their sovereignty, and after 1831, under the formal term of "domestic dependent nations." But it broke treaty after treaty, an act that, by its nature, made a mockery of sovereignty.[13] The 1787 Constitution placed "Indians not taxed" beyond the pale of the political community, excluding them from the calculation of representation; instead, in the 1780s, the federal government promised Indians their own representation in Congress. This never came to pass, even though the promise was regularly renewed. In the 1830s Andrew Jackson had proposed that Eastern Indians removed to "Indian Territory" would have representation in Congress when a portion of that land, known as "Western Territory," entered the Union as a state. Indian Territory, at the time, stretched from the top of Texas to the bottom of Canada and from the Great Lakes to the Rocky Mountains. Members of Congress had objected to the prospect of adding "to our Union men of blood and color alien to the people of the United States," and the proposal for Western Territory had been rejected.[14] A decade

later the same reservations had been raised to admission to the Union of portions of Mexico. At the annexation of Texas in 1845 and of more than half of Mexico in 1848 with the Treaty of Guadalupe Hidalgo, members of Congress had objected both to establishing these territories as colonies and to admitting them as states, on racial grounds. John C. Calhoun argued that Americans had never "incorporated into the Union any but the Caucasian race" and that "to incorporate Mexico would be the first departure of the kind; for more than half the population are pure Indians, and by far the larger portion of the residue mixed blood." [15]

The bigger the nation grew, the wider its inequalities. State constitutions ratified in the mid-nineteenth century sought to restrict suffrage to white men, at a time when the free Black population was rising, as was the population of Americans of Mexican, Chinese, and Japanese descent. After the United States expanded to the Pacific, with the establishment of the Oregon Territory in 1848 and the entry of California into the Union in 1850, some new state constitutions not only disenfranchised Chinese and Japanese immigrants and their descendants but also barred them from citizenship. Oregon's 1857 constitution prohibited Blacks from entering the state, owning real estate, making contracts, or in any way using the legal system.[16] Before 1850, Indian Territory had stood at the remote, western edge of the United States. After 1850, it divided the Eastern United States from the Western. From the federal government's vantage point, Indian Territory now stood in the way of settlement, transportation, and especially commerce. In a speech advocating the transcontinental railroad, Illinois senator Stephen Douglas insisted that "the Indian barrier must be removed." [17] In 1854 the federal government established the Kansas and Nebraska Territories, which entered the Union as states in the 1860s. In 1861, when the South seceded from the Union, many tribes formed alliances with the Confederacy, which promised them both representation and statehood. When the Union won, the tribes lost, too. In any event, the Confederacy would have been no likelier than the Union to keep its promises. Each element of this history had implications for Hawai‘i.

The American Board of Commissioners for Foreign Missions, the Christian missionary society that had undertaken missions to the Cherokee and fought against Jackson's Indian removal policy, had organized the first missions to Hawai‘i, but by the 1840s, many of the sons of those missionaries had themselves become the wealthy owners of large sugar plantations. They proselytized Christianity, constitutionalism, and capitalism, in that order. Hawai‘i's 1840 constitution established a constitutional monarchy, but much

of the new government's power lay in the hands of American missionaries and businessmen. American-style legal codes, including a revised constitution drafted by an American attorney and adopted in 1852, introduced wage labor and private land ownership; promoted foreign investment, the importation of Chinese and Japanese laborers, and the settlement of businessmen from the United States; impoverished the people, *maka'ainana*, and alienated them from the land; and took away the political power of women, who were denied the right to vote.[18] During the American Civil War, Hawai'ian sugar planters profited from the disruption of trade in the Atlantic and grew wealthier still. But at their power, the monarchy balked.

When Kamehameha V ascended to the throne at the end of 1863, he refused to swear an oath to the 1852 constitution. Among other things, he objected to its liberal suffrage provisions and wished to introduce property and literacy qualifications. Its tortured amendment provision, Article 105, made amendment exceedingly difficult, and in any case the king believed that he himself held the power of amendment.[19] In May 1864 he called for a constitutional convention. In an address to its delegates, he conceded that "under a constitutional government the people must be consulted" but asked "who are the people? Is it the dregs of society, the ignorant and improvident, or is it the intelligent element?" To a proposed amendment to add the words *and equal* to Article 1 ("God hath created all men free and equal and endowed them with certain inalienable rights"), the king objected, citing the Hawai'ian division between nobles, *ali'i*, and commoners: "The history of these islands informs us, that there have always been here races of chiefs and common people." But when its delegates refused to do his bidding, he dissolved the convention—in a final speech to the convention, he said that "universal suffrage cannot coexist with a monarchic form of government"—and promulgated a new constitution that extended his own political power at the expense of that of American missionaries and businessmen.[20] Lili'uokalani composed a *mele*, or song, that endorsed this new constitution.

Mai noho a ha'alele	*Do not abandon*
I keia hana maika'I	*This good work*
'Onipa'a, onipa'a	*Steadfast, stand firm*

Ko kākou Kumukānāwai. *(For) our constitution.*[21]

On the mainland, the post–Civil War federal government exerted its power to promote expansion to the Pacific, taking unceded Indian lands along the way. Under Reconstruction-era treaties with Indian tribes in 1866, the federal government required the Five Tribes—Cherokee, Chickasaw, Choctaw, Creek, and Seminole—to emancipate their slaves and grant them citizenship (a demand the tribes resisted) and to cede much of what remained of Indian Territory to railroads. Indian Territory was reduced to what is now the State of Oklahoma (a Choctaw word meaning "home for the red man"). The federal government then ceased its policy of making treaties with Native nations and instead pursued the twin policies of forced assimilation and devastatingly brutal warfare against Plains Indians, the Cheyenne, Arapaho, Comanche, Kiowa, and Apache, forcing them onto reservations on smaller and smaller stretches of land. Within Indian Territory, Native nations established new forms of government, but most were uninterested in seeking statehood. In 1870 an intertribal council adopted Indian Territory's first constitution, the Okmulgee Constitution, establishing a confederacy, "republican in form, with due regard for the rights of each tribe under existing treaties." Though the council met until 1876, the constitution was never ratified. (The Chickasaw objected due to lack of equal representation in the legislature.)[22]

The ratification of the Fourteenth Amendment raised questions about Indian citizenship. The birthright citizenship clause granted citizenship to "all persons" born in the United States or under its jurisdiction. What about Indians born on sovereign Indian lands? In 1879 Standing Bear, or Ma-chú-nu-zhe, a Ponca chief, was imprisoned in Nebraska for leaving Indian Territory to bury his son, who'd died during a forced removal. He filed a habeas corpus petition seeking his release. In *Standing Bear v. Crook*, he argued that he was both a citizen and a person under the terms of the Fourteenth Amendment. The U.S. government argued that he was neither. The judge ruled in favor of Standing Bear. "Webster describes a person as 'a living soul; a self-conscious being; a moral agent; especially a living human being; a man, woman, or child; an individual of the human race,'" the district judge wrote. "This is comprehensive enough, it would seem, to include even an Indian." [23] Five years later, in *Elk v. Wilkins*, the Supreme Court took up the question. In 1880 John Elk, a former Winnebago (Ho-Chunk) tribal citizen who had left his homelands and settled in Omaha, Nebraska, tried to register to vote. He was

denied, on the ground that, as an Indian, he was not a citizen. Elk argued that he was indeed a citizen under the terms of the Fourteenth Amendment, but in a 7–2 decision, the Supreme Court ruled that he was not a citizen because, although born within the territorial limits of the United States, he had not been subject to its jurisdiction because he had been a citizen of a tribe. (The two-man dissent argued that because Elk had "severed all relations with his tribe," he had automatically become a citizen of the United States.)[24]

Prejudice against Chinese immigrants had been a feature of state law and constitutional discourse since the 1850s. In 1854 the California Supreme Court ruled that no person of Chinese, African, or Native American descent could testify in court against a white person; the court specified that Chinese immigrants had been "marked as inferior" by nature.[25] Oregon's 1859 constitution forbade immigrants from China from owning real estate. Francis Lieber, a man who had written that "the white man has shown little sympathy with the other races, and sympathy is the first basis of all idea of justice," also complained that Chinese immigrants "invade our country similar to the Norway rat," and in 1870 he proposed a constitutional amendment "prohibiting the immigration of any but white people." [26] California's 1879 constitution banned Chinese immigrants from government employment. In waves of violence, Chinese immigrants who settled in the American West were threatened, harassed, arrested, and lynched. In 1882, with the Chinese Exclusion Act, Congress inaugurated a race-based immigration and citizenship policy, restricting immigration from China for ten years and barring all Chinese immigrants from becoming U.S. citizens; it was renewed again in 1892 and 1904 and granted permanency two years later. Prejudice against Chinese felt in the United States, where they were represented in the press as filthy and diseased, was carried to Hawai‘i by white settlers and missionaries, including, for instance, the early editors of the *Pacific Commercial Advertiser*, an English-language Honolulu newspaper that advocated restricting Chinese immigration to Hawai‘i.[27]

As for the Fourteenth Amendment's definition of personhood, the Court most notably intervened in a case in 1886, *Santa Clara County v. Southern Pacific Railroad*, when it ruled the corporations are, under the Fourteenth Amendment, persons. The implications of that ruling, in the struggle between capital and labor that would animate much political disputation, would become the focus of amendment agitation in the Progressive era. In the shorter term, it advanced the interests of railroad corporations in opening Western lands to white settlement.

In 1887, with the Dawes Act, Congress opened up to white settlers land that had previously been closed to them by mandating the division of tribal lands (exempting only the Five Tribes in Indian Territory): Indians who agreed to live and dress as "White" would be allotted grants of land for farming, though as it turned out, the lands made available to them were often barren.[28]

Lili‘uokalani was the head of a sovereign nation that was neither part of nor even adjacent to the United States. She was Polynesian, not Asian or African or European or American. Yet each of these events—American expansion to the Pacific, the denial of Native sovereignty, the assertion of federal supremacy, the overturning of constitutions, the hardening of racial lines—was another link in the chain of events that would lead to her imprisonment in Hawai‘i in 1891.

The constitutional sovereign

Congress passed the Dawes Act in February 1887. That spring American missionaries and businessmen in Hawai‘i began plotting against the king, David Kalākaua, who since 1882 had opposed closer ties with the United States. At his coronation, Kalākaua had also reintroduced and celebrated the ancient practice of *hula*, banned and much despised by Victorian-era missionaries as obscene. Americans opposed to Kalākaua, led by Lorrin Thurston and Sanford B. Dole, both children of missionaries, formed the Hawai‘ian League, a clandestine society whose members included the owners of the kingdom's wealthiest sugar plantations. They wanted to overthrow the monarchy and establish a republican government ("by all necessary means"); some wanted to secure annexation to the United States and apply for statehood.[29] Native Hawai‘ians did not support any of these objectives. In secret, the Hawai‘ian League enlisted the support of an all-white paramilitary organization, the Honolulu Rifles, and drafted a new constitution.[30] Kamehameha V's 1864 constitution had proclaimed that "The King is Sovereign of all the Chiefs and of all the People; the Kingdom is His." Thurston and Dole's 1887 version deleted those last four words. The king's power as an executive was given, instead, to his cabinet, which retained control over legislation. Nor could the king remove any members of the cabinet without the approval of the legislature, which, in turn, was elected only by men of considerable property. Dole appointed himself to a new supreme court, with lifetime tenure. The legislature, under the 1887 constitution,

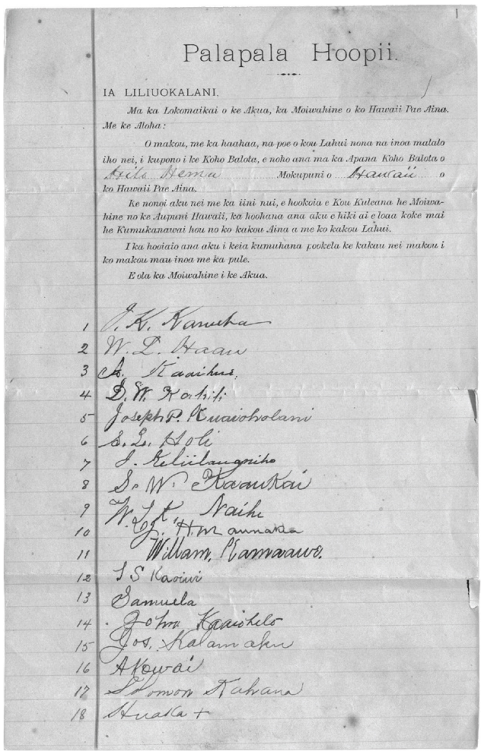
controlled the military, where earlier the king had. The Thurston and Dole constitution denied nearly all Native Hawai‘ians of the right to vote by setting a property requirement for voting at $3,000 (about $100,000 in 2025 money) and imposed racial restrictions that excluded eighteen thousand naturalized Chinese Hawai‘ians from the electorate.[31]

White Southerners complained that the Fourteenth and Fifteenth amendments and Reconstruction-era state constitutions were “bastard constitutions” that had been imposed on them “by force and bayonets.” [32] Hawai‘ians called the constitution that Dole and Thurston imposed on them in 1887 the Bayonet Constitution. Faced with the Honolulu Riflemen and under threat of assassination, Kalākaua signed the constitution. When a delegation of *kanāka* begged him to abrogate the constitution, he issued a statement of particular ambiguity: it has been read as endorsing the new constitution, admitting his powerlessness to change it, and warning Hawai‘ians to view it as fundamentally foreign: “Under the old Constitution, the people went barefoot or wrapped their feet in ti leaves; under the new Constitution, they wore shoes; under the old Constitution, they wore the malo, now they wear clothes like other civilized people; under the old Constitution they sheltered their heads under palm leaves, now they wear hats and moreover, this was His Constitution.” [33] Were hats and shoes good, bad, or simply inevitable?

At the time, Lili‘uokalani was away on a four-month voyage. In England, she met with Queen Victoria (who kissed her on the forehead).[34] When she left, her brother’s four-member cabinet included three Native Hawai‘ians. When she arrived home, days after her brother signed the Bayonet Constitution, his cabinet consisted entirely of white men who were members of the Hawai‘ian League; among them, only Lorrin Thurston had been born in Hawai‘i.[35] She later wrote that the *haole* conspirators had “forced the king, without any appeal to the suffrages of the people, to sign a constitution of their own preparation, a document which deprived the sovereign of all power, made him a mere tool in their hands, and practically took away the franchise from the Hawaiian race.” [36] As heir apparent, she began considering what she might do by way of amendment. Could she alter? Could she abolish?

Kalākaua died in 1891, and Lili‘uokalani ascended to the throne, inheriting the Bayonet Constitution. She moved into Iolani Palace, the opulent residence built by her brother. (The palace had electric lights installed in 1887, four years before the White House.)[37] Early in 1892 a debate emerged in the legislature, where the Liberal Party called for a new constitution, to replace the Bayonet

Constitution—this time to be sent to voters for ratification. The Reform Party, which was responsible for the 1887 constitution, was opposed to calling a convention. “I do not wish to be governed by dolls,” said one Liberal Party leader. There was much intrigue, including an attempted rebellion by Liberals who had earlier attempted to overthrow Kalākaua and replace him with his sister.[38]



Palapala Hoopii.

IA LILIUOKALANI.

Ma ka Lokomaikai o ke Akua, ka Moiwahine o ko Hawaii Pae Aina. Me ke Aloha:

O makou, me ka haahaa, na poe o kou Lahui nona na inoa malalo iho nei, i kupono i ke Koho Balota, e noho ana ma ka Apana Koho Balota o Hilo Hema Mokupuni o Hawaii o ko Hawaii Pae Aina.

Ke nonoi aku nei me ka iini nui, e hookoia e Kou Kuleana he Moiwahine no ke Aupuni Hawaii, ka hoohana ana aku e hiki ai e loaa koke mai he Kumukanawai hou no ko kakou Aina a me ko kakou Lahui.

I ka hoolaio ana aku i keia kumuhana pookela ke kakau nei makou i ko makou mau inoa me ka piile.

E ola ka Moiwahine i ke Akua.

1 J. K. Kauwila
2 W. L. Haau
3 A. Kaaihue
4 D. W. Kahiki
5 Joseph K. Kuaiwolani
6 S. L. Holi
7 J. Kaiulangnio
8 S. W. Kaauhai
9 W. H. Naihe
10 J. M. Kamaka
11 William Kamauoa
12 S S Kaaiwi
13 Samuela
14 John Kaaiokilo
15 Jos. Kalamaku
16 Akoai
17 Simon Kahana
18 Kuaka +

Petition submitted to Lili‘uokalani requesting a new constitution, 1892: “We, with humility, the undersigned people of your Nation . . . do hereby petition, with the great desire to have executed by your authority as Queen of the Hawaiian Kingdom, the endeavors to obtain soon a new Constitution for our country and people.”

The Hui Kālai‘āina, Hawai‘i for the Hawai‘ians, wanted a new constitution, too, one that would restore the political power of Native Hawai‘ians and weaken the government’s ties to the United States and its control by an American oligarchy.[39] They wrote and signed petitions, *palapala hoopii*, papers of protest, and submitted them to the queen.[40] “Petitions poured in from every part of the Islands for a new constitution,” Lili‘uokalani later wrote. “It was estimated . . . that out of a possible nine thousand five hundred registered voters, six thousand five hundred, or two-thirds, had signed these petitions.” [41] (The thirty-four *palapala hoopii* that survive in the archives,

from the islands of Hawai‘i, Oahu, and Maui, contain some two thousand names; the petitions from other islands appear to have been lost.)[42] In the fall of 1892, Lili‘uokalani and Native legislators drafted a constitution that gave the queen rather than the legislature the power to appoint the cabinet, established term limits for supreme court judges, and extended suffrage to Natives and to Chinese laborers but disenfranchised the *haole*. It closely resembled the 1864 constitution.[43] In December, by a vote of 24–17, the legislature had rejected her call for a constitutional convention. She decided to proclaim the constitution by fiat.[44]

On the morning of Saturday, January 14, 1893, she rode in an open carriage from Iolani Palace to the legislative building, where she presided over the scheduled closing of the legislative session. She then rode back to the palace, followed by dozens of members of the Hui Kālai‘āina, marching two by two and carrying, in a ribboned box, a copy of the new constitution.[45] In the palace’s Blue Room, she presented the document to her cabinet. “I was requested by my people to promulgate a new constitution,” she said. “I want you gentlemen to sign it or to consent to it.” She likely expected them to accede, as Kamehameha V’s cabinet had acceded in 1864. They did not, advising her that this method of amending the constitution was unlawful.

Instead, the U.S. minister to Hawai‘i, John Stevens, communicated with a U.S. naval ship, the USS *Boston*, in the Honolulu harbor. Stevens argued that “American and Christian Caucasian people” needed to take over Hawai‘i in order that it not be “submerged and overrun by Asiatics.” [46] At his request, American forces—164 sailors and marines, each armed with eighty rounds of ammunition—entered the city and marched to Iolani Palace, carrying the American flag. Dole, who agreed to serve as president of a newly declared republic, announced the dissolution of the monarchy and the establishment of a provisional government, to remain in power only until Hawai‘i became part of the United States, which they expected to happen swiftly. “The Hawaiian pear is now fully ripe, and this is the golden hour for the United States to pluck it,” wrote Stevens, in a letter back to Washington.[47]

Seeking to avoid bloodshed, the queen yielded but insisted that a legal review would support her claim that she remained “the constitutional sovereign of the Hawaiian Islands.” [48] She stitched this turn of events, too, into the center of her quilt:

Dethroned January 17th, 1893.

Hoping to return to power, Lili‘uokalani sought the support of both the American president, Grover Cleveland, and the U.S. Congress. In the American press, she faced caricatures that brought together tropes used to demean both indigenous Americans and people of African descent. A New York newspaper described her as the “debauched Queen of a heathenist monarchy where . . . those who wish to make Honolulu a center for the manufacture and distribution of opium lie together with the lewd and drunken majority of the native race, who live largely by the lucrative prostitution of their females to the wifeless Chinese and Japanese.” [49] The February 1894 cover of *Judge* magazine depicted her as a cannibal who sought the support of Cleveland but had the real aim of beheading Dole.

Caricature of Lili‘uokalani in *Judge*, 1894

In Congress, Alabama senator and chair of the Senate Foreign Relations Committee, John Tyler Morgan, recommended annexation. Morgan, who had been a brigadier general in the Confederate Army, urged Lorrin Thurston to “take one thousand Confederate soldiers to Hawaii,” and he would be sure of victory. In a 1,176-page Senate report, Morgan damned the queen as having attempted to “grasp absolute power and destroy the constitution and the rights of the white people.” [50] Nevertheless, Congress refused to approve of an

annexation treaty, removed Stevens from his position, and instructed his replacement to restore Lili‘uokalani. The president disavowed the rebellion, calling it “a substantial wrong.” [51]

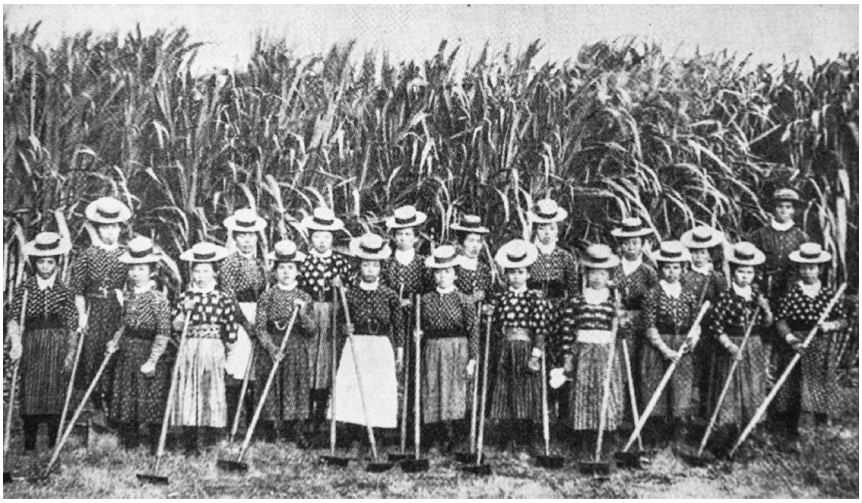
Kumukānāwai a ka hapauuku

Once it became clear that the United States would not immediately annex Hawai‘i, the leaders of the provisional government realized the need to form a permanent government, fearing that if they were removed from power, they would be charged with treason for having toppled the queen. They began planning for a constitutional convention and preparing a constitution for a republican rather than a monarchical government. For a model, they looked to the states of the former Confederacy, where no Redemption constitution was more influential than Mississippi’s, Jim Crow constitutionalism’s founding document.

“I enclose extracts from the present Constitution of Mississippi, which is said to have the effect of disfranchising a majority of the negroes of that state,” a member of the Hawai‘ian League wrote to Dole from Washington near the end of 1893.[52] Lorrin Thurston, too, now serving as Hawai‘i’s minister to the United States, urged Dole to model the new constitution on the constitution adopted by Mississippi in 1891.[53] Mississippi’s constitution had spread across the South. Now it crossed the Pacific.

In preparing for its 1894 constitutional convention, Hawai‘i’s provisional government decreed that the nineteen members of its executive and advisory councils would automatically be included in the convention’s thirty-seven delegates and that anyone hoping to vote for the remaining eighteen spots would have to meet strict eligibility requirements and swear their fidelity to the provisional government and their opposition to the restoration of the monarchy. No Chinese or Japanese—groups that together made up more than half of Hawai‘i’s population and who had been granted suffrage in the 1852 constitution and denied it in 1887—would be able to vote for delegates. Then too, “the men who are clamoring for a government of the people propose to bar out Hawaiians altogether,” one missionary wrote home to Boston.[54] No one was allowed to vote who would not swear to oppose the restoration of the monarchy. Having brooked no dissent, the results of the elections in May could have been predicted: of the thirty-seven delegates elected, eighteen were U.S. citizens and only six were Kānaka Maoli.

One purpose of establishing a new constitution was to meet a set of standards for annexation to the United States, which required a republican form of government. Mississippi's constitution provided a model because it theoretically met that standard while also imposing such elaborate new burdens on voters as to establish a white-only electorate. Dole, as president of the convention, said in his opening address that the point of rewriting the constitution was "to more fully introduce the principle of representation by the people." [55]



Japanese sugarcane workers in Hawai‘i, c. 1880

To that end, Chinese Hawai‘ians, led by merchant Goo Kwai and rice planter Wong Kwai, submitted a petition to the convention asking that they be regarded neither "as a proscribed race" nor "in the same light as our fellow-countrymen in the United States" and instead be granted the franchise.[56] Female suffragists from the Hawai‘i chapter of the Women's Christian Temperance Union submitted a petition supporting restricting suffrage by property and education but lifting a measure introduced into the 1852 constitution that restricted voting to men.[57]

While the convention was meeting, the territory's former attorney general, William N. Armstrong, who had traveled around the world with King Kalākaua in 1881, published in a Honolulu newspaper an article called "The Effect of the Alien," remarking on the nature of this constitutional moment: "We have before us this grave and extraordinary proposition, that we, about a thousand Anglo-Saxons and Teutons, shall govern, and govern wisely if we can do so, about 80,000 'aliens' in blood." (By *aliens*, Armstrong meant not

Americans or Europeans but “Asiatics”—Chinese and Japanese.) The new constitution simply could not be “democratic” because these “aliens” could not possibly participate in representative government. (“If we attempt to govern these aliens through a simple Republican form of government,” he warned, “they will soon get the best of us.”) To guarantee white rule, he recommended two forms of government, “one for ourselves” and another by which the “whites” can “rule natives, Chinese, Japanese and Portuguese.” This, he suggested, would have been the best way to handle the problem in the United States, too, instead of the flawed policy of Reconstruction: “In dealing with the negro, the Government of the United States simply produced social anarchy in the South,” Armstrong wrote. The model to adopt in Hawai‘i, he suggested, was not Reconstruction but federal Indian policy, under which the U.S. government “has the same absolute power over some thousands of Indians that we hold and intend to hold over the Asiatics.” [58]

Notwithstanding Dole’s stated commitment to the principle of representation, the delegates acted on neither the Chinese nor the female petitions, instead banning Chinese and Japanese men from voting (by decreeing that no one from a country that did not have treaty relations with Hawai‘i could vote) and barring all women from voting (by limiting the franchise to men).[59] Then, to bar Native Hawai‘ian men from voting, the constitution imported the methods deployed in the Jim Crow South, including the addition to the constitution of an understanding clause. As in Mississippi, the possession of property was to be used as a proxy for “mental qualifications,” but more precise restrictions were deemed necessary as well.[60] Anyone attempting to vote had to own property, be employed, and have renounced the monarchy. More, he had to be able “understandingly to read, write and speak the English language” and “intelligently to explain, in his own words, in the English language, the general meaning and intent of any article or articles of this Constitution.” [61] The very language of the constitution became a mechanism of disenfranchisement.

The constitution was not submitted to the people for ratification. No elections were held. Kānaka ‘O¯iwi called it *Kumukānāwai a ka hapauuku*, the constitution of the minority. “There Will Be No Election—Dole to Be Proclaimed President of Hawaii Without a Vote,” a New York newspaper reported on July 1, 1894.[62] The next day the editors of the *Hawaii Holomua*, or Progress, published “A Solemn Protest . . . Against the New Constitution and Mr. Dole’s Republic.” They denounced the constitution as having been “framed by aliens,” meaning whites; declared the forced abdication of the

queen and the founding of the provisional government as the results of “a most contemptible conspiracy”; and described Dole as an “oath-breaking ex-Judge who now maskerades as a president of a republic.” [63]

Two days later, on the Fourth of July, the provisional government announced the ratification of the new “republican” constitution and the formation of the Republic of Hawai‘i. Mississippi in the Pacific.

I proposed to make certain changes in the constitution

What happened in Hawai‘i would influence American constitutional development throughout the Progressive era. Few corporations were bigger or drew more of the ire of Progressive reformers than the Sugar Trust that, in the 1890s, was built from wealth extracted from Hawai‘i, Native Hawai‘ians, and Chinese and Japanese immigrants. It was in an attempt to defeat conglomerates like the Sugar Trust that American Progressives would seek change first in Congress, then in the Supreme Court, and finally, by amending the U.S. Constitution.

At the same time, what happened in Hawai‘i also drew from constitutional practices in the United States that had dispossessed Indians of their land and forced them to assimilate, stripped women of political power, deprived the poor of the right to vote, and denied the citizenship of, and failed to provide equal protection of the laws to, people of African and Asian descent. In Hawai‘i, these practices were stitched together like the pages of a book, from Georgia’s treatment of the Cherokee in the 1820s and ’30s to Mississippi’s treatment of African Americans in the 1880s and ’90s: dismantling an indigenous government by requiring the adoption of a written constitution as a means for an assertion of sovereignty and then ignoring that sovereignty and taking over the government anyway, to erect a new government that was republican in name only. But in Hawai‘i, there was an added dimension: the toppling of a monarchy, a queen who had been recognized by governments around the world and who had even had an audience with the queen of England. “No darker cloud can hang over a people than the prospect of being blotted out from the list of nations,” wrote Mō’ī Wahine Lili‘uokalani. “No grief can equal that of a sovereign forcibly deprived of her throne.” [64]

On the night of January 2, 1895, a band of Lili‘uokalani’s supporters received shipment of some three hundred Winchester rifles from San Francisco and hid them in caves in Waikīkī. They were preparing for the opening battle

of a civil war, a *kaua ku¯loko*, with the aim of ousting the oligarchy. Three nights later the plot was discovered and defeated. Lili‘uokalani would stitch in her quilt:

Uprising
January 6th 1895

One hundred and twenty-three men were arrested and detained as prisoners of war. The government declared martial law and proceeded to arrest another nearly three hundred men and women, including all newspaper editors who had supported the queen, and held them as political prisoners, *pio kalaiaina*. Of the *pio kalaiaina*, 175 were charged with treason, and faced execution; most of the rest were charged with misprision, or knowledge of and complicity with treason. Among these was Mō’ī Wahine Lili‘uokalani.[65]

Her Majesty Queen
Lili‘uokalani
Imprisoned at Iolani Palace
January 17th 1895 . . .
We began this quilt there

When troops searched her residence at Washington Place, they found a cache of weapons buried beneath the flower beds in her backyard, including thirty-four rifles, eleven pistols, a thousand rounds of ammunition, and twenty-one homemade bombs.[66] Inside, authorities opened her safe and removed all the documents it contained, including her diaries and the petitions demanding a new constitution. They also found a note, in Lili‘uokalani’s handwriting, titled, “Course to pursue on hearing news of the restoration”: “Appoint cabinet ministers . . . Proclaim the new government and declare Martial Law . . . Issue warrants of arrest for all dangerous people and such Annexationists who are considered dangerous to the safety and peace of the community and the public in general . . . Issue notice for the return of all firearms, guns, and ammunition to the government.” [67] She was arrested.

One hundred and seventy of the 175 *pio kalaiaina* were tried at a military tribunal. Most were sentenced to hard labor; six were sentenced to be hanged. Lili‘uokalani was told that their lives would be spared if she would abdicate the throne. She agreed.

H.M. Queen
LILI‘UOKALANI
Abdicated on the
24th of Jan. 1895

At her three-day trial in February, she disputed the government’s right to try her and refused to enter a plea. “The only charge brought against me really was that of being a queen,” she later wrote. In lieu of a defense, she wrote a statement in Hawai‘ian.[68] “In the year 1893,” she read, “I proposed to make certain changes in the constitution of the Hawai‘ian kingdom, which were suggested to me as being for the advantage and benefit of the kingdom, and subjects and residents thereof.” Her cabinet then said they would not support those changes, whereupon “a minority of the foreign population made my action the pretext for overthrowing the monarchy, and, aided by the United States naval forces and representative, established a new government.” Found guilty of misprision of treason on February 27, she was sentenced to five years’ hard labor, a sentence, she wrote, whose “sole present purpose was to terrorize the native people and to humiliate me.” Instead of being sent to prison, she was confined in an upper room of what had been the royal palace but had been dubbed, by the republic, the Executive Building.[69]

She stitched her quilt. She wrote *mele*. They were smuggled out of the palace and published in the newspaper *Ka Makaainana*.

Eia ko hewa la e Kalani	*This is your offense, Kalani*
No kou aloha i ka lahui	*It is because of your love for your people*[70]

Her followers published *mele*, too, in a kind of call and response.

Mahope makou o Liliulani,	*We back Lili‘uokalani,*
A kau hou Ia I ke Kalunu,	*She will be crowned again;*
Ha’ina mai ana ka puana,	*Tell the story*

Na pua I aloha I ka aina.	*Of the people who love their land.*[71]

Eight months later she was pardoned and released. She went to Washington, an exile, to plead for her restoration and to argue, unsuccessfully, against the annexation of Hawai‘i. For years she lived in Boston. In 1897 President McKinley signed a treaty of annexation and sent it to the Senate. Nearly thirty thousand people, more than half the Native population of Hawai‘i, had signed a *palapala hoopii kue hoohuiaina*, a petition objecting to annexation.[72] The United States initially voted down the annexation treaty, but after the Spanish-American War broke out early in 1898, it changed course and approved the treaty that July. The U.S. policy of Chinese exclusion now extended to Hawai‘i, and under the terms of the treaty, no Chinese in Hawai‘i were allowed to emigrate to the mainland.[73]

The treaty was never submitted for approval to the people of Hawai‘i. At Iolani Palace, the Hawai‘ian flag was lowered, and the U.S. flag raised. Upon annexation, the U.S. government seized the so-called crown lands, all the territory in Hawai‘i claimed by the crown on behalf of the people. “*Auwe! Kuu aloha i kuu Aina hanau ame kuu lahui aloha. Ka iwi o kuu iwi ke koko o kuu koko. Aloha! Aloha! Aloha!*” Lili‘uokalani wrote in her diary. “*Auwe!* My love for my birthland and my beloved people. Bones of my bones, blood of my blood. *Aloha! Aloha! Aloha!*” [74]

Under the terms of the treaty that ended the war with Spain, the United States gained the Philippines, Puerto Rico, and Guam, and Spain ceded its claim to Cuba. Two years later the United States acquired Eastern Samoa and, in 1903, the territory in Panama on which it would build a canal. In 1915 the United States would invade Haiti.

Lili‘uokalani became the most eloquent opponent of the establishment of an American empire. “Perhaps there is a kind of right, depending upon the precedents of all ages, and known as the ‘Right of Conquest,’ under which robbers and marauders may establish themselves in possession of whatsoever they are strong enough to ravish from their fellows,” she wrote bitterly.[75] American imperialism in the Caribbean and the Pacific, spurred as much by business interests as by foreign policy, extended the nation’s reach while compromising its commitment to a republican form of government. Congress had no interest in admitting Hawai‘i as a state, given that it would enter the Union with a majority nonwhite population; other islands remained territories,

too. Asked Mōʻī Wahine Liliʻuokalani, the monarch to the democracy, “Is the American Republic of States to degenerate, and become a colonizer and a land-grabber?” [76] Would the republic become an empire? Or had it already become one?

Millions of black and brown people

Liliʻuokalani was hardly alone in asking this question. In the 1890s Americans, too, pointed out the incompatibility of republicanism with imperialism. And they asked other questions as well.

What force might compel the United States to honor its constitutional guarantees of a republican form of government and equal protection and due process regardless of race? Not the Supreme Court. In 1898, in *United States v. Wong Kim Ark*, the Court ruled that children born in the United States to Chinese immigrants are American citizens under the terms of the Fourteenth Amendment’s birthright citizenship clause.[77] But more often, the Court, Congress, and the states denied the full immunities and privileges of citizenship to people of color. *Plessy v. Ferguson*, the 1896 case in which the Court established its “separate but equal” doctrine, would cast a shadow more than half a century long.

What force, then, could counter the Court? Constitutional amendment. But constitutional amendment is not available to minority populations, whose rights are supposed to be protected by the Court.

W. E. B. Du Bois had an idea. He suspected that the addition of more people of color to the population of the United States, whether through immigration or naturalization or even through territorial annexation, would aid the cause of racial equality. Demography was on the side of justice, he believed. If people of color were to become a single political constituency, they could win rights. Black Americans must seek an alliance with the “masses of dark men and women” who inhabit the new lands acquired or conquered by the United States, Du Bois argued in 1899. “We must remember that the twentieth century will find nearly twenty millions of brown and black people under the protection of the American flag, a third of the nation,” he said, “and that on the success and efficiency of the nine millions of our own number depends the ultimate destiny of Filipinos, Porto Ricans, Indians, and Hawaiians, and that on us too depends in a large degree the attitude of Europe toward the teeming millions of Asia and Africa.” [78]

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Wong Kim Ark's certificate of departure, 1894

This view, which would find expression at a conference of Asian and African peoples in Bandung, Indonesia, in 1955, was not a view shared by the deposed queen of Hawai‘i at the turn of the twentieth century. Lili‘uokalani left for Honolulu in 1900. For years, she tried to regain control of the crown lands; she wrote letters, she courted Congress, she sued the U.S. government. She saw little to be gained for the people of Hawai‘i in being classed with Filipinos or Puerto Ricans and especially not with North American Indians. In pleading her case to Congress and the American public, she complained that "the people of the Islands have no voice in determining their future, but are virtually relegated to the condition of the aborigines of the American continent." [79]

In assessing that situation, she was not wrong. The condition of indigenous peoples living within the continental United States was changing, but not for the better. Like Native Hawai‘ians, their sovereignty depended on the willingness of the United States to honor it, a willingness not to be relied on. Their treaties with the federal government were what James Madison would have called mere "parchment barriers" to American settlement and land acquisition. And their rights under the U.S. Constitution were very few and dwindling. They had no voice in drafting that Constitution, and they had no means to amend it. Nevertheless, as the twentieth century began, even as

Lili‘uokalani continued to fight the federal government, Indians in what became the State of Oklahoma would produce one of the most influential constitutions in American history.

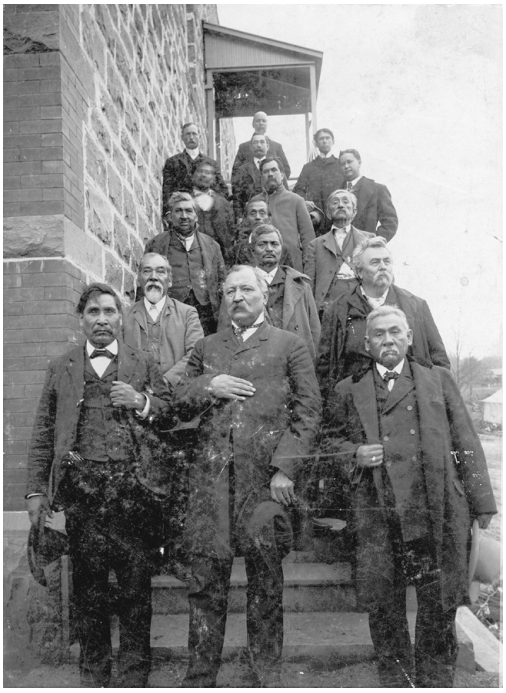
Grand and great, the future state

At the turn of the century, Indian Territory remained a territory, if vastly diminished in size. At its establishment, it had comprised about a third of what is now the continental United States. In 1890 it was shrunk to the eastern half of what is now the state of Oklahoma; the western half became the Oklahoma Territory. The promise, made at the establishment of Indian Country as an unorganized territory in 1834, had always been that it would one day enter the Union as an American state. This promise had not been kept. The strategy of defending tribal sovereignty by adopting a written constitution, first tested by the Cherokee Nation in 1827, after the Cherokee sage Sequoyah had devised a written syllabary for the Cherokee language, had halted neither the federal government’s seizure of Indians’ lands nor their forced removal nor the waging of wars of conquest against them. But in 1898, under the Curtis Act, Congress placed the previously exempted Five Tribes under the land allotment provisions of the Dawes Act and Indian Territory under U.S. law—dissolving tribal courts, tribal governments, and tribal land claims. This change was scheduled to go into effect on March 4, 1906.

Meanwhile traditionalists fought to preserve tribal government, insisting that they already operated under fundamental law—their own fundamental law. The Creek leader Chitto Harjo, or Crazy Snake, renounced any authority of the federal government over the Creek Nation and set up an independent government in Hickory Ground with as many as five thousand followers.[80] In 1900 he declared the Creek chief Pleasant Porter deposed, for his cooperation with the Dawes allotment scheme. The next year Harjo and 252 of his followers—about one in ten Creek men—were arrested and indicted for conspiracy, charged with the crime of having “willfully and feloniously formed a certain government . . . purporting to be the legal and lawful government of the Muskogee tribe of Indians.” They pleaded guilty and, in a statement, insisted on having been, “as citizens of the Creek Nation . . . opposed to the abolition of our courts by any act of Congress and to any change in our tribal form of government.” All were eventually pardoned.[81]

They had been prosecuted, in effect, for constituting themselves, by an act of consent, into a government.

In 1902 white leaders in Oklahoma Territory began planning to seek admission to the Union as a new state, Oklahoma, that would absorb Indian Territory; Indians would comprise a minority. The nontraditionalist Creek chief Porter undertook to do what Harjo could not. Porter and two other chiefs, William C. Rogers (Cherokee) and Green McCurtain (Choctaw), held a conference to make plans to seek entry to the Union as a separate Indian state. They formally insisted on their right to form a government. As McCurtain wrote, “In the light of our history, it would be fitting and just to permit the Indian to have a voice in the effection of at least one state, on a continent to which he once lay claim.” [82]



Delegates to the Sequoyah Convention, 1905

While the white Oklahomans planned for their constitutional convention, Porter, McCurtain, and Rogers organized their own constitutional convention, to be held in Muskogee on August 21, 1905. They suggested that if white Oklahomans wanted to be part of a single state, they were welcome to join the Indian one and submit to “a constitution framed by Indian Territory Representatives.” [83]

The convention organized by Porter, McCurtain, and Rogers met for sixty days. (The Chickasaw refused to participate, their chief stating, “In my judgment, the time has not arrived for the Indians to say they want statehood, and for this reason I will not officially or personally participate in the proposed convention.”)[84] The constitution its delegates devised in many ways resembled other state constitutions of the era: it included a bill of rights, proclaimed federal supremacy, and guaranteed the people the right to “alter and abolish” the constitution. But it also included a number of distinctly new features, the very kinds of reforms that North Carolina Supreme Court justice Walter Clark had called for in 1898, in urging a wholesale revision of the U.S. Constitution: all judges were to be elected; corporations and banks were to be regulated; workers were to be protected; child labor was to be banned; and free public education was to be provided.[85] At the close of the convention, the delegates approved it unanimously, Porter declaring it the belated fulfillment of a promise: “From time immemorial the Indians as a heritage of the original inhabitants have been promised a state, an empire of their own.” [86]

There had been some debate about what to call this new state, this first Indian state. Contenders included Indianola or Tecumseh, but in the end the decision was made to honor the inventor of the Cherokee syllabary. As a poem in the *Cherokee Advocate* put it,

> *Yes, grand and great, the future state*
> *Should bear Sequoyah’s name.*[87]

Ratification of the constitution for the new state of Sequoyah required the approval by referendum of the national councils and of the electorate. The national councils of Cherokee, Chickasaw, and Choctaw approved it; the Creeks and Seminoles did not. Submitted to the people for ratification, it won approval overwhelmingly, 56,279–9,073.[88]

And then: Congress rejected it.

Instead, in January 1906, Congress accepted Oklahoma’s application for statehood, as a state that would simply absorb Indian Territory. Its proposed constitution was a barely changed version of the Sequoyah Constitution, with all its progressive social and economic provisions. (Most of the delegates from Indian Territory who served at Oklahoma’s constitutional convention had served at the Sequoyah convention, too.) Vice President William Howard Taft, who traveled to Oklahoma, urged Congress to reject it. “It is no constitution at

all," he fumed, complaining of its length, its complexity, and its many provisions, which he described as "flavored with Socialism." The populist William Jennings Bryan called it "the best constitution in the United States." [89] In the first decades of the twentieth century, the principles behind Oklahoma's constitution—which was, essentially, the Sequoyah Constitution, absent statehood for Indians—would inspire the greatest burst of federal constitutional amendment since Reconstruction.

Original rights

In 1907 the Senate sent a select committee to Indian Territory to ponder the implications of the battle between the competing constitutions of Sequoyah and Oklahoma. Its members met with Chitto Harjo, Crazy Snake, who spoke through an interpreter.

Q. Whom do you represent?
A. The four mother nations have sent me here to represent them.
Q. What do you mean by that?
A. The Creeks, Cherokees, Choctaws, and Chickasaws.
Q. What are you?
A. I am here representing the four mother people as to our original rights.

Harjo told of how Americans had once pledged to the Five Tribes that this territory was theirs forever. "I will never stop asking for this treaty, the old treaty that our fathers made with the Government which gave us this land forever," he said. "For my old fathers and your old fathers made that treaty . . . back there on the other side of the Mississippi, and they said that this land out here was to be ours as a nation for ever, and that is the treaty I want for we are to have it as long as the grass grows, water runs, and the sun rises, we should have this land." [90]

Fundamental law is meant to bind one generation to another, over time. In this case, it did not. The water ran, the grass grew, and the sun rose, but the law by which the Creek constituted themselves did not last. Crazy Snake's speech is an origin story, a constitutional origin story. It is also a story about land and water, mountains and sky, humans and the natural world, ideas absent from the U.S. Constitution but present everywhere in indigenous lawmaking,

ideas that a century later would reemerge in an environmental legal movement that would seek to grant rights to nature.

In 1893, when Lili‘uokalani was imprisoned, she had translated a Hawai‘ian origin story, the Kumulipo, into English:

At the time that turned the heat of the earth,
At the time when the heavens turned and changed,
At the time when the light of the sun was subdued
To cause light to break forth,
At the time of the night of Makalii (winter)
Then began the slime which established the earth,
The source of deepest darkness.

It was a tale of birth and rebirth.

The sea spread, the land spread,
The waters spread, the mountains spread.[91]

Ideas spread, too, from a tropical island on a volcanic archipelago in the Pacific to the prairie grasses of Oklahoma and even to the banks of the Potomac.

In 1910, in *Lili‘uokalani v. the United States*, the deposed queen lost her suit over the crown lands. Her health declined, then plummeted. She began to suffer from dementia. For years, she scarcely knew where or who she was. In the summer of 1917, schools of *alalaua*, or red fish, were seen in the harbors of Maui, an ancient portent of the death of an *ali’i*.[92] A deathwatch began. In November, Lydia Kamakaeha Lili‘uokalani, the last monarch of Hawai‘i, succumbed. “The coming of death was almost imperceptible,” a newspaper reported, “so weak had been the queen for many hours, so slender the thread of life to which she still clung with amazing vitality.” [93] No one stitched with golden threads the last chapter of her reign—

LILI‘UOKALANI
died

11th of Nov. 1917

—but on the day she died, the bells at a Honolulu cathedral tolled seventy-nine times, one for each year of her life. One week later a state funeral was held in the very room in the palace where, so many years before, she had once been held prisoner and had stitched a quilt, and as her casket was paraded through the streets, the people chanted and wailed and keened and sang “Aloha ‘Oe.” [94]

The heavens turned. Wars were won and lost. Constitutions were written and rewritten. A republic became an empire and once more a republic. The grass grew, the sun rose, the seas spread, and the waters ran red with blood.

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“Inevitable,” *Puck*, 1903. The image depicts a well-balanced, centralized government as the inevitable consequence of constitutional amendment.

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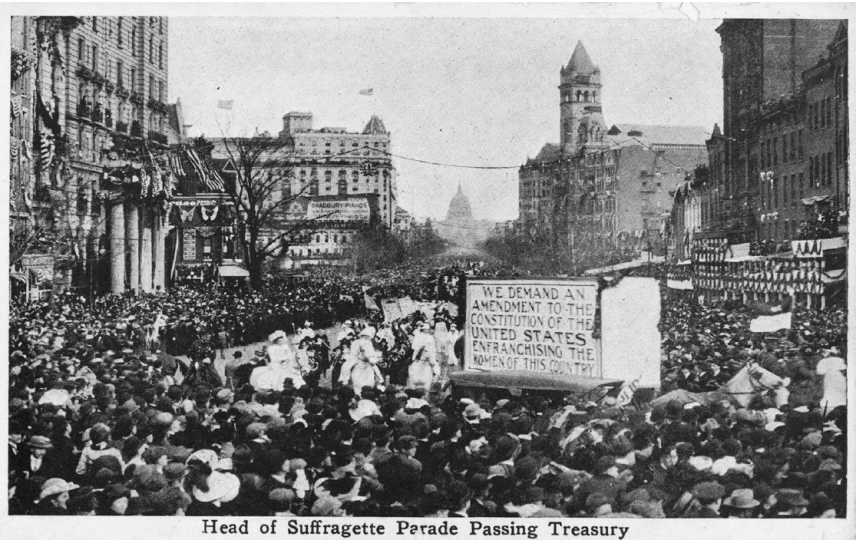
Part Three

The Pattern of Amendment, 1905–1959

> *We favor such amendment to the Constitution as may be necessary to provide for the election of all Federal Judges, without party designation, for fixed terms not exceeding ten years, by direct vote of the people.*
>
> —Progressive Party platform, 1924



Head of Suffragette Parade Passing Treasury

Follow for extended description

Suffrage parade in Washington, DC, 1913

AT THE UNRULY SUFFRAGE PARADE HELD IN WASHINGTON ON MARCH 3, 1913, the day before Woodrow Wilson was to be inaugurated on the steps of the Capitol, the marchers wore white dresses. They carried banners. They waved placards. They rode white horses. They blew horns. They walked. They came alone. They came together. They numbered five thousand. They came with their state delegations. They came with their labor unions. They came with their classmates, in gowns and caps, marching behind their college banners. They marched as teams: librarians, lawyers, nurses, and teachers. There were more than twenty floats. Teams of horses pulled carriages carrying giant banners of yellow silk, trimmed in white, with purple letters announcing the great demand: WE DEMAND AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES ENFRANCHISING THE WOMEN OF THIS COUNTRY. They were attacked: taunted, tripped, beaten, and spat on, chiefly by well-dressed men in suits who flooded out of office buildings. More than one hundred injured women were carried to the hospital. The marchers locked arms and marched on.[1]

Twenty-eight-year-old Alice Paul, who had recently completed a doctoral dissertation on the legal status of women, choreographed the procession with a single objective: “We are marching to start a nation-wide movement for a constitutional amendment,” she told the *Washington Post*.[2]

Most of the marchers were white, but Black women marched, too. A twenty-five-woman delegation from Delta Sigma Theta sorority from Howard University marched. Ida B. Wells, leader of the anti-lynching movement, came from Chicago, where she'd founded a Black woman suffrage club. Told by Paul to march with a segregated Black section of the parade, Wells refused. She marched, instead, with the otherwise all-white delegation from Illinois.[3] They marched down Pennsylvania Avenue and halted at the Treasury Building, where they posed in a tableau, around a suffragist dressed as Liberty, as if she were Anne Willing Bingham, painted by Gilbert Stuart, in 1797.

Woodrow Wilson, who was born in Virginia and grew up in Georgia, was the first Southerner elected to the presidency since the Civil War. He was also a scholar of the Constitution and a proponent of a school of constitutional interpretation known as "living constitutionalism." He did not support female suffrage, despite his commitment to constitutional change. He was also a segregationist. (The NAACP's James Weldon Johnson would note, grimly, that Wilson "bears the discreditable distinction of being the first President of the United States, since Emancipation, who openly condoned and vindicated prejudice against the Negro.")[4] Wilson completed his PhD in 1886. Living constitutionalism had by then become canonical. "Our real constitution," an American civics textbook explained that year, "is found in the interpretations which the courts have given to the written documents and the actual institutions which have been established under them." [5] Wilson planned a great work, a "history of government in all the civilized States in the world," to be called *The Philosophy of Politics*.[6] The history of government, he argued, was the story of the adaptation of "old means to accomplish new ends"—a history of progress.[7] He was an adopter of a political persuasion that came to be known as Progressivism.

Beginning in the 1890s, the Progressive spirit straddled both the Republican and Democratic parties and animated surprisingly vital third parties, too: the People's Party, the Progressive Party, and the Socialist Party. The Progressive agenda centered on expanding the power of the federal government to regulate the economy and relations between labor and capital and to restrain the power of corporations. These goals required constitutional changes to which a great many people objected, including a deeply conservative Supreme Court. Progressivism can be understood as an

attempt, as the editor Herbert Croly explained, to overthrow "the monarchy of the Constitution." [8] The Progressive era renewed the American philosophy of amendment: the Constitution had become amendable again—to Progressives' eyes, not amendable enough, and to the eyes of conservatives, far more amendable than it was ever intended to be.

In 1890 Wilson was named chair of jurisprudence and political economy at Princeton, where he wrote a five-volume *History of the American People*.[9] Beginning in the 1890s, while he toiled on his *Philosophy of Politics*, a conservative Supreme Court overturned laws passed by Congress that were designed to address the social and economic dislocations of the Gilded Age: the rise of the trusts, the ruthless exploitation of workers in factories and on the railroads, the failure of farms, the abject poverty of immigrants, the financial panics wrought by reckless speculators and bankers, the ceaseless strikes called by unions. Most infamously, in 1895, in *Pollock v. Farmers' Loan and Trust Co.*, the Court struck down the 1894 Income Tax Act, which had taxed income, interest, corporate profits, and inheritance, by reading the 1894 income tax against the records of 1787. "We regard the conclusion reached as inevitable," the Court wrote, "when the circumstances which surrounded the convention and controlled its action and the views of those who framed and those who adopted the Constitution are considered." [10] Wilson devised a theory of constitutional interpretation designed to counter that position.

In 1908 Wilson published *Constitutional Government in the United States*, in which he argued that the founders' theory of checks and balances was outdated. "The trouble with the theory is that government is not a machine, but a living thing," he wrote. "It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton." Regretting readings of the Constitution that followed "a very mechanical theory of its meaning and intention," he believed that "living political constitutions must be Darwinian in structure and in practice." [11] Two years later he'd resigned from the presidency of Princeton to run for governor of New Jersey, and two years after that he'd been elected president. With the exception of Donald Trump, no other American has ever gone from private life to the White House in so short a time.[12]

Suffragists thought the time had come at last for the amendment first proposed by Susan B. Anthony in 1878: "The right of citizens of the United

States to vote shall not be denied or abridged by the United States or by any State on account of sex." [13] The Constitution had not been amended since 1870. But in 1912, to reverse the Court's decision in *Pollock*, Congress passed an amendment granting Congress the power to tax personal incomes, and in February 1913 it was ratified as the Sixteenth Amendment.

In his inaugural address on March 4, 1913, the day after the suffrage parade, Wilson declared that it was the obligation of the federal government to regulate the economy to protect ordinary Americans "from the consequences of great industrial and social processes which they cannot alter, control, or singly cope with." [14] A new era of American constitutionalism had begun. Amending state constitutions was becoming easier to do. By 1913 constitutional amendment could be enacted by a simple majority vote at the polls, through the new direct democracy devices of the initiative and the referendum in eleven states—Arizona, Arkansas, California, Colorado, Michigan, Missouri, Nebraska, Nevada, Ohio, Oklahoma, and Oregon.[15] In the spring of that year, the states ratified the Seventeenth Amendment, mandating the popular election of senators (where before, they'd been elected by state legislators). And even this was not the last amendment headline of 1913. In December, the Anti-Saloon League and the Woman's Christian Temperance Union joined forces to hold a parade in Washington—an "Anti-rum army"—urging Congress to pass, at last, a prohibition amendment.[16]

Nineteen thirteen was conservatives' annus horribilis. On top of everything else, it was the year the historian Charles Beard published *An Economic Interpretation of the Constitution*, history written in the spirit of a muckraker, arguing that the framers had been interested, above all, in protecting their own wealth. "SCAVENGERS, HYENA-LIKE, DESECRATE THE GRAVES OF THE DEAD PATRIOTS WE REVERE," read a story about Beard's book, published in an Ohio newspaper, by the future president Warren G. Harding.[17]

Four federal constitutional amendments were ratified between 1913 and 1920—an unprecedented surge, except for the adoption of the Bill of Rights. Wilson did not change his position on female suffrage until his campaign for reelection, after suffragists paraded with a donkey named Woodrow carrying on its back a sign that read IT MEANS FREEDOM FOR WOMEN TO VOTE AGAINST THE PARTY THIS DONKEY REPRESENTS.[18] But

women finally achieved the right to vote with the ratification of the amendment in 1920. The struggle, like so many struggles, had seemed interminable. ("To get the word 'male' in effect out of the Constitution cost the women of the country fifty-two years of pauseless campaign," said Carrie Chapman Catt.[19] That's also about how long it took to get the word *white* out of state constitutions.) And then the Article V giant slept once more. In the 1920s two more efforts failed: the Equal Rights Amendment, introduced in 1923 with hardly any prospect of success, and the Child Labor Amendment, sent to the states for ratification in 1924. By the end of the 1930s, after an extraordinary faceoff between the executive and judicial branches of the federal government, New Dealers would turn, decisively, to the Supreme Court to effect constitutional change. So would the civil rights movement. In the 1950s, with the Supreme Court's momentous 1954 decision in *Brown v. Board of Education*, this strategy would yield long-overdue results but would also unsettle the nation's constitutional balance. There would be still more marching on Washington. But Americans' divided assessment of the Court and of its methods of constitutional interpretation would take on a new temper, and during the Cold War, a new theory of constitutional interpretation would begin to take form: a search for the framers' original intentions.

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8

Mr. Constitution

U.S. solicitor general James M. Beck at the White House, 1922

> *Your memorialist most earnestly and respectfully asks that Congress pass an act calling for a convention.*
>
> —Failed call for a constitutional convention, submitted to Congress by the Oregon legislature, 1903

James Montgomery Beck, Mr. Constitution, was born, as only seems fitting, in Philadelphia. A lawyer, a writer, and briefly a member of Congress, he wore a pince-nez and a bow tie and a straw boater, as if he were a character out of a P. G. Wodehouse novel, an Edwardian dandy, Sir Raymond Bastable, or a partner in the firm of Boles, Boles, Boles, Widgery,

Widgery & Boles. The Hon. J. M. Beck loved England and, Pecksniffian in a barrister wig, was the first foreigner to argue a case before the Privy Council.[1] He had a penchant for quoting Shakespeare. He appeared on the cover of *Time* magazine in its first year, 1923, when he was the U.S. solicitor general.[2] He could often be heard on the radio, denouncing the American people for wishing to amend the Constitution, as if this were an act of blasphemy or aggravated battery.

Beck is the grandfather of modern constitutional conservatism, which was founded on opposition to constitutional change of any kind, whether by judicial interpretation or by amendment. The position of latter-day originalists, that amendment is the proper mode of constitutional change, would have scandalized him. Beck's Constitution was perfect.

Born in 1861, in the shadow of the Civil War, Beck began practicing law in 1884. It was an age of corporations and monopolies and trusts, giant conglomerations of companies and of wealth: steel, coal, oil, railroads, and sugar. It required a great deal of lawyering. In 1890 Congress passed the Sherman Anti-Trust Act, which banned combination "in the form of trust or otherwise, or conspiracy, that was in restraint of trade or commerce among the several states, or with foreign nations." The age of trusts was also the age of trustbusters. This required even more lawyering. Beck represented the trusts. He was pro-trust; he believed the Anti-Trust Act was unconstitutional. He championed industry and finance. He felt Wall Street was unfairly maligned for avarice. He despised muckrakers. He served as general counsel for the American Sugar Refining Company; he defended Standard Oil. If someone was trying to bust your trust, Beck was the man to call.

Beck believed that most attempts to amend the Constitution were driven by foreign ideologies that had been brought to the United States by immigrants from eastern Europe—statism and socialism—fiendish notions that betrayed the nation's founding ideals of individual rights and free markets. He often wondered when it had begun, the great fall, the great decay of constitutional fidelity. He had in mind one particular day, September 17, 1887. He had been twenty-six, then, living in Philadelphia, when the city celebrated the Constitution's centennial with a military parade overseen by President Grover Cleveland. That day Beck had been deeply stirred as the best of men made speeches that acclaimed the wisdom of the Constitution "and showed a spirit of joyous optimism that its future was

assured." [3] But that glorious day had been America's last fine day because of the doubt, skepticism, unrest, and chaos that followed, and especially because of the strikes: railroad worker strikes and coal miner strikes and every other kind of strike. In Louisiana that year, Black sugarcane workers went on strike. (A sheriff's posse shot and killed sixty of them.)[4] Beck blamed labor for everything terrible that had happened to America since September 17, 1887. "It was then that the seeds of decay began their pernicious growth," he insisted. "It was then that the American people began to have a conception of their government which was not that of the Constitution but that of a unitary socialistic state." [5]

Not long afterward Beck began to put his constitutional conservatism into practice by representing the trusts and defending American imperial expansion. In 1892 the American Sugar Refining Company acquired the E.C. Knight Company and three other smaller refining companies, leading it to control 98 percent of the American sugar processing industry, much to the consternation of Progressive reformers. The government sued, arguing that these acquisitions granted the company "nearly complete control of the manufacture of refined sugar in the United States," in violation of the Sherman Anti-Trust Act. In an 8–1 decision in 1895, the Supreme Court found in favor of the Sugar Trust, holding that refining is a local process and that federal control over interstate commerce was "not intended by the framers of the Constitution." The decision greatly weakened the Anti-Trust Act.[6] Later that spring, in an even greater blow to Progressive reformers, the Court handed down a 5–4 decision in *Pollock v. Farmers' Loan and Trust Co.* that struck down a federal income tax, again citing the intention of the framers.[7]

The American Sugar Refining Company, later Domino Sugar, processed sugar in the United States, especially at a sprawling complex along the East River in Brooklyn, New York; it imported sugarcane for processing from Hawai‘i, Cuba, and Puerto Rico. Its interests lay in the conquest, acquisition, and annexation of these territories.[8] Sugar comprised 93 percent of Hawai‘i's export business. Twenty-two of the thirty-three men who plotted the overthrow of Queen Lili‘uokalani in 1893 owned sugar stock, including Lorrin Thurston, who led the plot. The Progressive-era historians Charles and Mary Beard, James M. Beck's nemeses, argued that it had been "mainly sugar that precipitated the crisis" that led to

Lili‘uokalani’s removal and the annexation of Hawai‘i in 1898.[9] In 1901 the first civilian governor of Puerto Rico left his position and, having overseen the dismantling of the island’s many crops in favor of the monoculture of sugar—“the yield of sugar per acre is greater than in any other country in the world”—returned to the United States, where he became first treasurer and then president of the American Sugar Refining Company.[10]

None of these facts concerned James M. Beck, an avowed imperialist. In a speech in 1898, he invoked America’s “destined world supremacy.” [11] In 1900, as assistant attorney general, he argued that the United States had the power to rule Cuba; *Neely v. Henkel* was the forerunner of what became known as the “Insular Cases,” which limited the applicability of the Constitution in U.S. territories. Beck won.[12] What *did* concern Beck was the federal government’s opposition to conglomerations during the presidency of Theodore Roosevelt. In Beck’s capacity in Roosevelt’s Justice Department, he was compelled to become a trustbuster, which he did not like, and so in 1903 he resigned. The next year he represented Standard Oil when it was sued by the Bay State Gas Company. A muckraker denounced Beck, calling him “Counsel and Chief Orator for the Standard Oil Co. and the ‘System,’” after which Beck, in a speech to the New York State Bankers’ Association, accused Progressives of “moneyphobia.”

In 1905, in *Lochner v. New York*, the Supreme Court overturned a maximum-hours law in New York that prevented bakers from working more than ten hours a day or sixty hours a week. The Court argued that the law violated the Fourteenth Amendment’s guarantee of due process: “The right to purchase or to sell labor is part of the liberty protected by this amendment unless there are circumstances which exclude the right.” Although not expressly mentioned in the text, the Court argued that deducible from it is a “liberty of contract.” [13] Beginning with *Lochner*, a conservative Supreme Court played a kind of constitutional dodgeball with Progressives. In a line of cases involving the constitutionality of labor laws and what was sometimes called “social legislation,” the Court knocked down Progressive initiatives, thus driving Progressives into the arms of Article V.

Beck celebrated the liberty of contract, in a 1917 brief, as “one of the most sacred rights guaranteed by the Constitution, and upon it the amazing edifice of American industry has been largely built.” [14] In the 1900s he

wrote some two hundred unsigned editorials for the *New York Sun* (whose parent company he represented) and denounced Theodore Roosevelt as "a cross-between a harebrained fanatic and a conscienceless demagogue." [15] He appears to have begun investing in sugar by 1905; he became general counsel for the American Sugar Refining Company in 1909, at a time when it was the subject of both another anti-monopoly suit and a fraud investigation.[16] He represented the Sugar Trust for nearly seven years. Twice he defended the company in cases before the Supreme Court.[17]

As Beck saw it, the assault on the Constitution had started with the labor movement. Then came socialism, the busting of trusts, the flood of immigrants, the Reds, and Bolshevism. All hell broke out during the New Deal. But for Beck, looking back at the end of his life, it seemed clear that the fatal turning point had come not in 1887 but in 1913, with the ratification of the Sixteenth Amendment, which, nullifying *Pollock v. Farmers' Loan and Trust Co.*, granted Congress the power to tax incomes. "Possibly it did more to destroy our form of government than any single cause except the impact of a mechanical civilization," Beck wrote. And yet Americans, he feared, had barely noticed; it was as if they were passengers on the "good ship Constitution." The *Titanic* had sunk in 1912. Beck loved nothing better than a metaphor. The good ship Constitution was the *Titanic*, and the Sixteenth Amendment the iceberg. And yet even as the ship crashed into that iceberg, the passengers took no notice. "They continued to play cards and dance, in complete ignorance that they were doomed," Beck wrote. The water began pouring into the hold. The great hull groaned. Deck chairs skittered across polished wooden planks.[18] And alone, James Montgomery Beck bailed out the water, bucket by bucket.

The House of Dollars

By the beginning of the twentieth century, woman suffragists, Christian amendmentists, and indefatigable prohibitionists had for decades been seeking federal constitutional amendments by way of moral crusades and congressional petitions. They had enjoyed very few successes. James Beck did not like these crusaders or their crusades. But he found them no threat: there seemed to be very little chance that any of them would ever succeed.

What riled Beck was a new spirit of amendment—call it amendment pragmatism—that animated the Progressive movement. Progressives applied, to an agenda forged by a populist movement of farmers and factory workers, the tools of modern bureaucracy and the influence of experts. They wanted to restrain monopolies, regulate the economy, protect workers, and advance direct democracy through mechanisms like the initiative and referendum and the election and recall of judges. They began their constitutional revolution in the states. Between 1889 and 1908, every state except Wyoming and Tennessee amended its constitution. Most implemented reforms along the lines of the measures proposed by the Sequoyah Constitution in 1905 and adopted by Oklahoma in 1906, attempts to deal with the problems of industrial society, often in painstaking detail. Oklahoma's 1906 constitution established an eight-hour day for public employees. It banned child labor. It granted women the right to vote, at least in certain elections. It was also prodigiously long and contained a great deal that could scarcely be said to belong in a constitution: a subsection prohibiting railroads from providing free tickets to employees ran to nearly four hundred words.[19]

Progressives wanted to make the process of amendment easier and to place it more directly in the hands of voters. Their work began with proposals for "gateway amendments"—amendments revising amendment procedures, on the theory that if a genie offers to grant you three wishes, your first wish ought to be to ask for more wishes. State after state applied the mechanisms of initiative and referendum to the power of amendment, in a process whereby if something between 5 and 18 percent of voters initiated an amendment by petitioning the government, it went on the ballot as a referendum. The percentage of voters required for an initiative varied by state. Ratification was accomplished by a simple majority. Voters used this method of amendment to write not only fundamental law but also ordinary legislation—blurring the lines between and often confusing the two—putting into their constitutions, as Walter Lippmann complained, "all kinds of rules and restrictions that, given any decent humility about the future, ought to be no more permanent than an ordinary statute." Amendments sprouted from constitutions like eyes on an old potato. In 1907 Louisiana ratified twenty-seven amendments; in 1911 California ratified twenty-three; in 1912 Ohio ratified thirty-four. Progressives like the dauntless Columbia University historian Charles Beard approved of this spirit of amendment as

“a strong movement away from the Constitution”; conservatives like James Beck mourned it for the very same reason.[20]

Amendment pragmatism had a fusionist sensibility, bringing together the populism of the People’s Party with the idea of progress written into Progressivism. A constitution was “The People’s Law,” the love-him-or-hate-him populist William Jennings Bryan said in a speech before the Ohio Constitutional Convention of 1912, meeting in Columbus. Bryan, heralded as “the Great Commoner,” celebrated the initiative as the people’s tool to remedy any of “a constitution’s defects, either of omission or commission.” [21] Theodore Roosevelt, speaking at the same event, began by paying tribute to the people’s power of amendment and protesting “against any theory that would make of the constitution a means of thwarting instead of securing the absolute right of the people to rule themselves.” [22] Speeches on such occasions are, of course, so much flimflam. But they did serve to welcome a broad range of amendments.

Nor did Progressives expect to stop with state constitutions. But amending the U.S. Constitution was far more difficult than amending state constitutions. And federal laws were harder to pass, too. They were especially difficult to get through the Senate. Then, too, if a Progressive law did get passed, chances were good that the laissez-faire Supreme Court would strike it down. That made Article V more important than it had ever been before.

Nothing better illustrated the nature of this constitutional blockade than the debates over the direct election of the Senate and the establishment of a federal income tax. Progressives viewed the Senate as aristocratic, anachronistic, and unaccountable. Remedying its malapportionment was banned by Article V, which placed the states’ equal suffrage in the Senate beyond the power of amendment. How senators were elected *did* admit of a remedy by way of an amendment; the problem was, sitting senators had to agree to the change, and this they had proved stubbornly unwilling to do, no matter how many times voters had asked for this reform. First introduced in 1826, an amendment calling for the direct election of senators had been put forth repeatedly in the 1880s and ’90s, with proposals mainly from the states. It had also been supported by petitions, beginning in 1867 with a petition from the Kansas legislature.[23] Farmers and laborers, especially in the Western states, demanded it. The State Grange of Illinois petitioned for

the amendment.[24] So did the Farmers' Mutual Benefit Association of Indiana and the Knights of Labor of Washington, DC.[25] But every time the House voted for the amendment—in 1893, 1894, 1898, 1900, and 1902—the Senate voted against.[26]

To accomplish much of what they wanted to accomplish, Progressives had first to wage and win a war against the Senate. They alleged that election to the Senate was chiefly accomplished by bribery and other forms of corruption. They called the Senate the House of Dollars. "It is as difficult for a poor man to enter the Senate of the United States as for a rich man to enter the kingdom of heaven," one member of Congress charged in 1900, putting forth the interesting but sadly unsupportable contention that direct election by the people would make it nearly impossible for money to get a man elected to the Senate.[27] There were indeed instances of men who bribed state legislators to earn their seats.[28] But between 1857 and 1900, the Senate investigated allegations of quid pro quo against only ten senators and found merit in only three cases. The bigger issue was the larger role of money in politics. In 1894, for instance, Henry Havemeyer, head of the Sugar Trust, was questioned by a Senate Special Committee to Investigate Attempts at Bribery; the American Sugar Refining Company said paying for influence was a necessary price of doing business. And then there was the problem of the ineptitude of state legislatures, which not infrequently failed to elect anyone to the Senate at all but instead delayed or deadlocked. Delaware, for instance, failed to send two senators in 1895, 1899, 1901, and 1903. Between 1891 and 1905, eight states were without any representation in the Senate for stretches of time as long as four years.[29] No senators might have been better than one or even two senators, since far too many of the men who did take their seats were willing to sell their own votes, at least according to an investigative series, published in 1906, called, memorably, "The Treason of the Senate." [30]

The fate of the income tax seemed also to illustrate the influence of a monied aristocracy. Congress had first introduced a graduated income tax in 1862, to fund the Union in the Civil War. Radical Republican Thaddeus Stevens, then chair of the House Ways and Means Committee, had declared that "it would be manifestly unjust to allow the large money operators and wealthy merchants, whose incomes might reach hundreds of thousands of dollars, to escape from their due portion of the burden." The law established

the Internal Revenue Bureau and imposed a 3 percent tax on incomes over $600 and 5 percent on those over $10,000. Two years later the tax on incomes over $5,000 was raised to 10 percent.

After the war, by which time European nations were increasingly using graduated income taxes and inheritance and estate taxes as progressive alternatives to regressive tariffs and sales taxes, Ohio's John Sherman (he of the Anti-Trust Act) tried to stave off calls to repeal the tax in the United States. "We tax the tea, the coffee, the sugar, the spices the poor man uses," Sherman said. "We tax every little thing that is imported from abroad, together with the whiskey that makes him drunk and the beer that cheers him and the tobacco that consoles him. Everything that he consumes we call a luxury and tax it; yet we are afraid to touch the income of Mr. Astor. Is there any justice in that? Is there any propriety in it? Why, sir, the income tax is the only one that tends to equalize these burdens between rich and poor." Sherman had been unsuccessful; Congress repealed the tax in 1872. But after the Panic of 1893, a depression caused chiefly by bank failures, Congress reintroduced an income tax: a 2 percent tax on incomes of $4,000 or more, and a capital gains tax, applied to both individuals and corporations, on all "gains, profits and income . . . whether derived from any kind of property, rents, interest, dividends or salaries, or from any trade, employment or vocation." Corporations raised objections to it. A lawyer for Standard Oil declared its "principles as communistic, socialistic—what shall I call them—populistic as ever have been addressed to any political assembly in the world." [31] This had been James Beck's view, too.

“A Needed Change in the Senate Lobby,” *Puck*, 1902

Beck and the leaders of America’s largest corporations therefore applauded when, in *Pollock v. Farmers’ Loan and Trust Co.*, the Court declared the 1894 income tax law unconstitutional. But Justice John Marshall Harlan, dissenting, argued that the decision subjected the American people to “the dominion of aggregated wealth.” And despite the sighs of relief heaved by millionaires, the decision was extraordinarily unpopular. “Nothing has ever injured the prestige of the Supreme Court more than that last decision,” said William Howard Taft. Progressives immediately began calling for a constitutional amendment to overturn the decision. “If the Constitution really prevents equal and just taxation the people can amend their Constitution,” announced the *New York World*. “And they will!” [32] William Jennings Bryan had led the charge on the national stage, and in 1896, when both the People’s Party and the Democratic Party nominated Bryan as their presidential candidate, both included support for an income tax on their platform.[33] Beck, who started out as a Democrat, left the party when it nominated Bryan.

Amendments Pledged on Party Platforms, 1900–20

Year	*Party*	*Amendment*
1900	People’s	income tax
1900	Democratic	direct election of senators
1900	Silver Rep.	direct election of senators
1900	Silver Rep.	income tax
1908	Democratic	income tax
1908	Prohibition	prohibition
1908	Independence	direct election of senators
1908	Independence	direct election of judges
1908	Independence	income tax
1912	Socialist	abolish judicial review

Year	*Party*	*Amendment*
1912	Socialist	amendment by majority vote in majority of states
1912	Socialist	abolish presidential veto
1912	Democratic	single term for president
1912	Prohibition	single six-year term for president
1912	Prohibition	income tax
1912	Progressive	expediting and easing amendment
1916	Republican	placing transportation under federal control
1916	Prohibition	prohibition
1917	Socialist	amendment by majority of voters in a majority of the country
1917	Socialist	suffrage regardless of sex
1920	Prohibition	treaty ratification by majority of both houses

Still, Progressives were in a pickle. To implement a federal income tax, they needed a constitutional amendment. To get a constitutional amendment, they had to get it through the Senate. To get an income tax amendment through the Senate, they needed a more accountable Senate. To get a more accountable Senate, they needed a constitutional amendment. They went back to the drawing board.

High time for a constitutional convention

The only way to amend the Constitution without Congress is for two-thirds of the state legislatures to call for a convention to propose amendments. In 1893 states began calling for a convention to propose a direct Senate election amendment. California went first. But some states weren’t willing to wait for a constitutional amendment to elect their senators by popular

vote, so they came up with workarounds. Beginning in 1901, Oregon put the election of the state's U.S. senators directly to voters in nonbinding elections; in an initiative measure, Oregonians then passed a law requiring candidates for the state legislature to declare, on the ballot, whether they would honor the vote of these nonbinding elections. By 1910, twenty-eight other states had adopted this or a similar de facto method of direct election. Nebraska's ballot indicated, after the name of each legislative candidate, whether he "promises to vote for the people's choice" or "will not promise to vote for the people's choice." [34] Nationally, in elections that year, ten Republican senators who had earlier voted against the direct Senate election amendment lost their seats. Meanwhile momentum grew for a convention. In 1906 the governor of Iowa held a conference in Des Moines where representatives from eleven states discussed whether a convention, if it were held, ought to be limited to considering the direct Senate election amendment. By 1909, twenty-eight state legislatures had petitioned Congress to call a convention; only thirty-one were needed to reach two-thirds.[35]

Under these circumstances, Americans became exceptionally interested in the intricacies of Article V. The federal amendment process was soon the subject of sustained public fascination, serious scholarship, and congressional deliberation. Historians, constitutional lawyers, and a new breed of academics calling themselves political scientists all engaged in this debate, which took place at conferences, in academic journals, in the popular press, and by the 1920s, on the radio. At a time when the breakup of empires and the establishment of new democracies was leading to a surge of constitution-writing in Europe, Americans were especially intrigued by remarks offered by foreign observers, in the long line of commentators on American constitutionalism that stretched from Tocqueville to Lieber to Bryce.

In 1905, for instance, Australia's attorney general, Henry Bournes Higgins, contributed an article called "The Rigid Constitution" to the American journal *Political Science Quarterly*. Higgins had served as a delegate to Australia's constitutional convention in 1897 but disliked the resulting constitution and had campaigned against its ratification because he had supported an easier amendment mechanism and regretted that, in imitation of the U.S. Constitution, the new Australian Constitution "requires the concurrence of artificial majorities for amendment." Still, he was

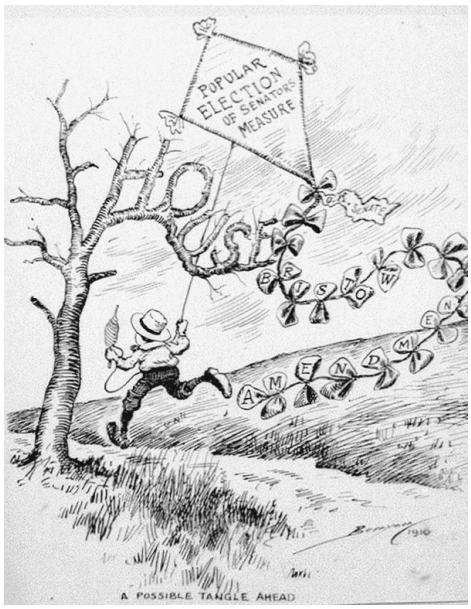
grateful that “it is less hopeless to look for amendment in Australia than in the United States.” Marveling at the unchanged and nearly unchangeable U.S. Constitution, Higgins remarked that—true to Jefferson’s ideal constitutional duration—the average lifespan of a state constitution in America was only nineteen years. Inspecting the graveyard of failed federal amendments, Higgins deemed two to have been particularly sensible: the direct election of the president, and the direct election of senators. Given the difficulty of amendment, Higgins pointed out that constitutional change in the United States happens only at the hands of U.S. Supreme Court justices, and sadly, “it must be admitted that judges are not persons to whom the amendment of a constitution should be entrusted.” Amendment by the judiciary, he concluded, was a deformity of American constitutionalism in which far too much energy was spent “in ascertaining what a dry piece of parchment means rather than what the people need.” [36]

Nor was this criticism, of course, offered only by foreigners. In 1906 North Carolina Supreme Court chief justice Walter Clark called for “The Next Constitutional Convention” in the *Yale Law Journal*. Clark had little reverence for the last one. Describing the 1787 convention as “reactionary,” he pointed out the many ways in which it fell short of democratic ideals: its proceedings were closed to the public, its records were secret, and only thirty-nine of the fifty-five delegates even signed the resulting document, which was, in any case, submitted not directly to the people for a vote but to ratifying conventions. “The Declaration of 1776 was concerned with the rights of man,” Clark wrote. “The Convention of 1787 entirely ignored them.” The U.S. Constitution was never very good, Clark argued, but at this point it was worse than useless: it was designed for three million people living along the Atlantic, but “we are now trying to make it do duty for very nearly 100,000,000, from Maine to Manila, from Panama and Porto Rico to the Pole.” Concluding that it was “high time” to hold another convention, Clark urged a series of reforms aligned with the Progressive agenda: reform of the Electoral College, a single six-year presidential term, the election of Supreme Court justices to nonrenewable ten-year terms, direct election of senators, and abolition of the equal suffrage of the Senate.[37]

If conservatives feared constitutional amendments, they were terrified by the prospect of a convention. Never before had a movement for constitutional reform deployed the threat of a convention so effectively. If the choice was between an amendment or a convention, conservatives

preferred an amendment. Congress edged toward action. In 1908 the Democratic platform called for an income tax amendment, but William Howard Taft, accepting the Republican nomination that year, said he still hoped Congress could pass a law that the Supreme Court would tolerate, not least because its decision in *Pollock* had turned on one vote. Taft asked Congress to pass an inheritance tax. Many Democrats in Congress supported a tax on corporations. To persuade them against that course, Republicans, including the president, offered to support an income tax amendment (which they believed had no chance at ratification). In a message to Congress in June 1909, newly elected President Taft said that "an amendment is the only proper course" for establishing Congress's power to tax incomes. The Senate introduced the amendment weeks later.[38]

The income tax amendment passed the House (318–14) and Senate (unanimously) in July 1909 and went to the states for ratification as the Sixteenth Amendment. This process proved maddeningly slow. As frustration over the delay in ratifying the Sixteenth Amendment and getting the direct Senate election through the Senate grew, the number and range of proposals to amend the amending provision grew, too. In April 1911, Victor Berger, a member of Congress from Wisconsin and a member of the Socialist Party during the peak of its influence in the United States, proposed two amendments on the floor of the House. The first granted Congress the power, "by a majority vote of both Houses, to call a convention for the purpose of revising or amending the Constitution." [39] The second—another kind of workaround—abolished both the presidential veto and judicial review and effectively abolished the Senate.[40] In the same congressional term, Oklahoma Democrat Robert Owen proposed an easier method of amendment.[41]



Follow for extended description

Direct election getting tangled up in the House, 1913

With direct election in effect through workarounds, and facing the prospect of an open-ended convention, the Senate finally relented. In 1911 it for the first time brought the direct election resolution to a vote. The cautious warned against the change: cried New York senator Elihu Root, "How little we know what any amendment would produce!" [42] The amendment fell five votes short of a two-thirds majority, but then, to Root's everlasting disgust, it passed barely a month later, in a special session in June 1911. There remained the matter of reconciling it with the House version.

And still the Sixteenth Amendment remained unratified. By July 1911 it had achieved the approval of the legislatures of thirty-one of the forty-six states, but those thirty-one states contained 73 percent of the population of the United States. In the *North American Review*, Munroe Smith, professor of law and history at Columbia, marshaled a great deal of evidence to contend that the framers had not intended amendment to be so difficult and that the time had come to amend Article V. As Smith pointed out, even if the direct Senate election amendment were to be ratified, it would not prove that the Article V could be relied on, since the measure, by that point, enjoyed such extraordinary bipartisan support. ("Proposed by a Republican President and passed by a Republican Congress, it is supported by

Democrats as an essentially Democratic measure," he wrote. "The rejection of this amendment, indeed, would go far to prove that formal change of the Constitution is impossible, but its adoption should not unduly elate those who desire further amendments.") Smith listed all kinds of deformities that he believed were caused by the difficulty of amendment, including the hollowness and cynicism of the parties: "our parties have no use for principles because they would not be able to put them into practice."

Worse, he conceived of Article V as the only possible check on the Supreme Court. If the people elect legislators who pass a law and then the Court effectively vetoes that law, the people's only remedy—since they can't vote the justices out of office—is a constitutional amendment, but if that doesn't work, the people are helpless. Smith then joined the ranks of the many observers who offered a new method of amendment: a proposed amendment would have to pass both houses of Congress by a simple majority vote but in two successive Congresses, after which it would be sent to state legislatures, to state conventions, or directly to the voters (Congress chooses which); by whatever method, ratification would be accomplished by a vote in "a majority of the States, provided that the ratifying States contain, according to the last preceding enumeration, a majority of the total population of all the States." [43] (At least one commentator pointed out in this era that the conservation movement, concerned with wildlife and wilderness and an ancestor of the late twentieth-century environmental movement, was of such fundamental importance that it too required changes to fundamental law or even an entirely new Constitution.)[44]

In May 1912, after a nearly year-long stalemate between the House and the Senate, the direct Senate election amendment went to the states for ratification as the Seventeenth Amendment. Reporting the news of its ratification the next year, the *Washington Post* pointed out that a proposal for direct election of senators had first been introduced into the House in 1826, reached the Senate in 1850, and "met with senatorial disfavor for the next 62 years." [45] William Jennings Bryan, as Wilson's secretary of state, had the honor of signing the formal announcement of its ratification, on May 31, 1913.[46]

But as Munroe Smith had predicted, the advance of the Sixteenth and Seventeenth amendments hardly slowed the momentum for a gateway

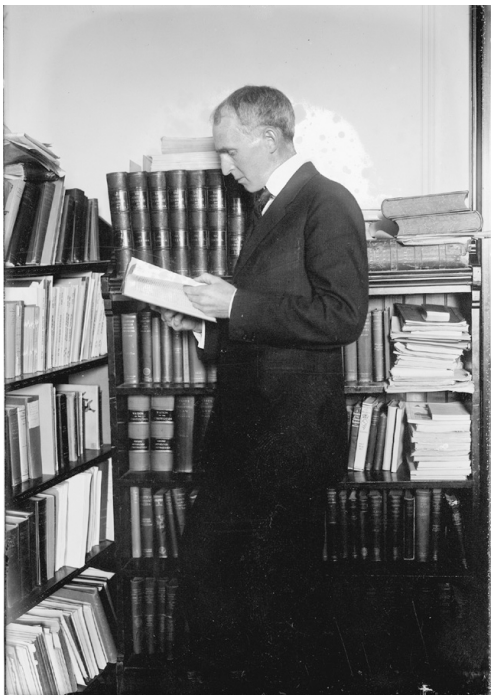
amendment. By now the Socialist Party platform advocated amendment by a majority of voters in a majority of states.[47] (In the 1912 election, Socialist mayors and other municipal officers were elected in more than fifty American cities.) A minority report issued by the Judiciary Committee called for an amendment to Article V making possible federal constitutional amendment by way of popular initiative. “A constitution ought to be the direct declaration of the people,” they insisted, “rather than the declaration of a legislative body representing the people.” [48] In August, Wisconsin senator Robert M. La Follette Sr. proposed that if a majority of both houses, or any ten states, supported an amendment, it would be sent to the states, where ratification would be accomplished by a majority vote in a majority of states, as well as by a majority of voters nationwide.[49] In November, something close to La Follette’s proposal—the endorsement of an “easy and expeditious method of amending the Federal Constitution”—became a plank in the platform of the Progressive Party.[50] And in Congress in 1913, Republicans introduced a version of an easier-amendment amendment, too.[51] Five more variations were introduced that spring.[52]

If these proposals were no more than kite-flying, there were more kites flying in that constitutional sky than ever before.

Why did Beard have to tell it?

No wonder 1913 was conservatives’ annus horribilis. The Sixteenth and Seventeenth amendments were ratified, after which income tax became the federal government’s principal source of revenue, allowing for its continued expansion. (Without that revenue, the United States would never have been able to enter the First World War.) Also in 1913, gateway amendments were introduced into Congress, and suffragists marched to the Capitol and presented Congress with their amendment in March, while the Anti-Rum March offered up its own amendment on the steps of the Capitol in December.[53] Bolshevism was on the rise in Europe, socialism in the United States. Yet in some ways nothing so troubled conservatives as the publication in 1913 of Charles Beard’s *An Economic Interpretation of the Constitution*, which would become at once the most influential and most controversial book ever written about the Constitution.

The redheaded Charles Austin Beard was born in Indiana in 1874 and worked on the family farm before going off to study at DePauw, where he met Mary Ritter. In 1899 Beard went to Oxford to study constitutional history. He and Ritter married in 1900, and both began graduate school at Columbia. Beard earned a PhD in 1904 and began teaching at Columbia. Ritter became a pioneer in women's history, and she and Beard collaborated on a slew of books, including the best-selling textbook *The Rise of American Civilization*.



Charles Beard in his study, c. 1913

For Beard's 1913 study of the Constitution, he examined the previously unexamined records of the Treasury Department to investigate the stock holdings of the fifty-five delegates to the 1787 Constitutional Convention. In a sense, he was investigating whether the framers were the sorts of men whose accumulation of wealth informed—even corrupted—their view of government. He argued that in devising the Constitution and, in particular, in implementing its aristocratic features, the framers were protecting their own property interests. His conclusion was unambiguous. For Beard, the Constitutional Convention had been, in effect, a House of Dollars.

Beard's theory proved explosive. One later student of constitutional history compared Beard's influence to that of Darwin or Freud. At the time

of the book's publication, it was met with a furious reaction. Warren G. Harding, the man who would coin the reverential phrase "Founding Fathers" at the Republican National Convention in 1916, called Beard's book "libelous, vicious, and damnable in its influence." At least one city banned it from its public schools.[54] According to Mary Ritter, Taft said, "Of course Beard was right but, that being true, why did Beard have to tell it?" [55]

The book was everywhere read as a commentary on Progressive efforts to amend the Constitution and on the Supreme Court's conservatism, but Beard himself would later insist that "in no sense was the volume a work for the occasion, written with reference to immediate controversies." [56] This contention is difficult to accept. In 1910 Beard had bemoaned the difficulty of amendment, regretting that "the extraordinary majorities required for the initiation and ratification of amendments have resulted in making it practically impossible to amend the constitution under ordinary circumstances, and it must be admitted that only the war power in the hands of the federal government secured the passage of the great clauses relating to slavery and civil rights." [57] In 1915 he founded in New York an organization called the Committee on the Federal Constitution, which proposed a two-part amendment to Article V.[58]

Among the Progressive reformers who joined Beard on the Committee on the Federal Constitution were Florence Kelley, the labor leader, and Albert Bushnell Hart, the Harvard historian who had supervised the dissertations of W. E. B. Du Bois and Herman V. Ames.[59] Ames was the scholar who had made the first compilation of proposed amendments to the Constitution. His influence on Beard's committee, and on the broader debate, was considerable; he made it possible to quantify the difficulty of amendment. Some scholars, reviewing the proposed amendments compiled by Ames, found the overwhelming majority of them to be either frivolous and self-promoting or the whims of a temporary political fancy; these men expressed relief that the Constitution had "escaped the fate that has befallen the constitutions of the states," which had been so buffeted by the winds of change that they had "long since ceased to be constitutions in a true sense." [60] But for every commentator who looked at Ames's numbers and was glad that Article V had proved as sturdy as an iron door, three more looked at Ames's numbers and wanted to fashion a battering ram.

In 1916 the *American Political Science Review* cited Ames in reporting that although two amendments had just been ratified, they were two in a thousand, for an amendment rate of 0.002. “More than 700 resolutions providing for 977 amendments” had been introduced into Congress between 1889 and 1913, the author reported, predicting that given this appalling amendment rate, an amendment to amend Article V would soon be sent to the states.[61] In the same journal, a call for a “More Democratic Procedure of Amending the Constitution” attempted to calculate the costs to the country of the lapse of more than two decades between the Supreme Court’s overturning of the income tax, in 1895, and the ratification of the Sixteenth Amendment in 1913. In that span of time, the nation had moved from a predominantly agricultural economy to a predominantly industrial one, and the absence of a tax on income subsidized the wealthy at the expense of the laboring poor.[62]

Still, Beard’s tiny and short-lived Committee on the Federal Constitution was outgunned, outfunded, and outlasted by its conservative counterpart: the National Association for Constitutional Government (NACG). The organization had first been proposed in “The Crisis in Constitutionalism,” published in the *North American Review* in 1913 by the Reverend David Jayne Hill, a Baptist minister and former ambassador to Germany.[63] Hill founded the NACG in Washington in 1916 for the purpose of warning the public about “the danger of reconstructing the Constitution” and bringing “to the minds of the people a realization of the vital necessity of preserving the nation’s basic law unimpaired.” [64] Endorsed by Elihu Root, a former secretary of state who had left his seat in the Senate rather than submit to direct election, the NACG published its own journal, the *Constitutional Review*, beginning in April 1917.[65] Its inaugural issue, printed just as the United States entered the war in Europe, denounced those who called for “structural changes” to the Constitution and warned that the nation’s founding document was “in danger of assassination.” [66]

The National Association for Constitutional Government disseminated an understanding of constitutionalism that would have been unrecognizable to the eighteenth-century framers but quite familiar to twenty-first-century originalists. But the NACG was only one of a host of patriotic societies founded before and during the war, advocating for military preparedness, constitutional fidelity, and political loyalty. These included the National

Security League and the American Defense Society. Both James Beck and Columbia University president Nicholas Murray Butler served on the editorial board of the *Constitutional Review* and on the executive board of the National Security League. All these organizations took up constitutional education, printing pocket Constitutions and instituting the teaching of the Constitution in schools and as part of the naturalization process. "Denouncing the 'reds' does no good," wrote the editor of the *Constitutional Review*. "There must be a campaign of counter-education." [67] The NACG also advocated the establishment of September 17, Constitution Day, the anniversary of the signing of the Constitution, as a national holiday. (The idea had first been proposed by the Sons of the American Revolution in 1917.)[68] Its printed pocket Constitution contained not only the text of the document but a short treatise on how to read it and why to be very, very cautious about amending it.[69] During the war, the Constitution became, itself, a kind of loyalty oath.

In October 1917 Beard submitted a letter of resignation to his university president, the NACG's Nicholas Murray Butler, after the university's trustees fired two faculty members who opposed American involvement in the war. Beard supported involvement; he just didn't support loyalty oaths or firing faculty for their political views.[70] Charles and Mary Ritter Beard then moved to Connecticut, where they wrote books and raised cattle.

Ratification of the Eighteenth Amendment in January 1919 was essentially a wartime measure—banning alcohol as a matter of military preparedness—but it divided conservatives. Many, like Beck and Butler, objected to amending the Constitution to police private morals, but other conservatives approved of Prohibition for the very same reason. In any event, they agreed about the necessity of constitutional education, a campaign that saw startling success. Between 1789 and 1860, only one state, California, had required the teaching of the Constitution in public schools.[71] By 1924, the legislatures of twenty-five states had mandated such classes.[72] They were to teach constitutional worship; students were to be taught to "revere the Constitution as the best form of government ever devised by the mind of man. Let him not try to diminish the power of any one of the three columns of government, particularly let him not attempt to question the restraining power of the Supreme Court." [73] The book they very often assigned was written by Mr. Constitution himself.

Be a Good Boy

Mary Church Terrell, two years younger than James Montgomery Beck, was born in 1863 to freed slaves in Memphis. Her father became a wealthy businessman—a millionaire—as an investor in real estate. Terrell grew up in Oberlin, Ohio, and studied at Antioch College, then at Oberlin College, where she became an avid suffragist. She studied classics as an undergraduate before earning a master's degree in education. She married in 1891 and spent much of her career as a teacher and a writer but in the 1890s began dedicating herself to organizational work, first through helping to found the Colored Women's League in 1892 and then the National Association of Colored Women; in 1909 she helped found the NAACP. Terrell led the struggle to push white suffragists to eradicate the racism within the woman suffrage movement and to collaborate with Black women to use suffrage to fight the "double burden" faced by Black women. Terrell was crucial to the suffrage movement both for the pressure she exerted on white suffragists and for the advocacy for female suffrage that she undertook within the Black community, persuading Black men of the need for the women's vote, an argument all the more intricate and urgent because even as suffragists were fighting for what would become the Nineteenth Amendment, white supremacists were attempting to repeal the Fifteenth.[74]

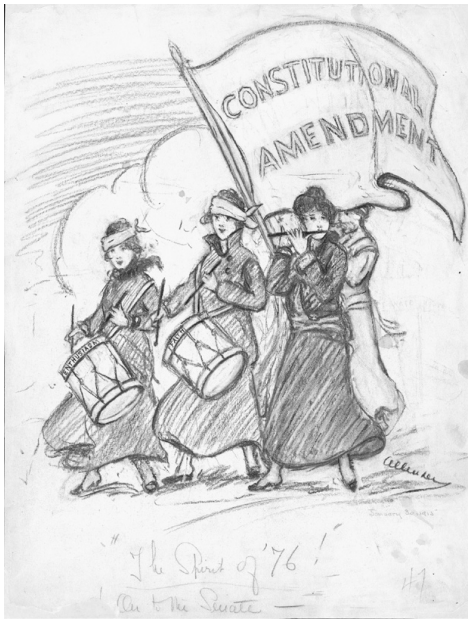
After the suffrage parade in Washington in March 1913, the House finally took up the suffrage amendment, known as the Susan B. Anthony amendment, in honor of Anthony, who died in 1906. Modeled on the Fifteenth Amendment, it read: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." The debate in Congress proved agonizingly slow, but meanwhile, suffragists sought victory in the states. By 1919, women could vote in twenty-eight states. Of the twenty-one states where women could not vote, ten were in the South.[75] Those were the same states where poll taxes, literacy tests, voter registration requirements, and vigilantism meant that the Fifteenth Amendment was, effectively, a dead letter, an interpretation that the Supreme Court had supported in *Guinn and Beal v. United States* in 1915. There the Court, while striking down a grandfather clause, did not question the constitutionality of literacy tests and affirmed the states' power over suffrage. Even so, white Southerners in Congress had been fighting to repeal the Fifteenth Amendment, introducing thirty

different resolutions for its repeal between 1900 and 1915. (One resolution was introduced by a Pennsylvanian; the rest came from Alabama, Georgia, North Carolina, Mississippi, and South Carolina.)[76]

In 1915 Mary Church Terrell published an arresting piece in the pages of the NAACP's magazine, *The Crisis*, arguing that support for the woman suffrage was not in tension with but was in fact a necessary element of efforts to preserve the Fifteenth Amendment. "Precisely the same arguments used to prove that the ballot be withheld from women are advanced to prove that colored men should not be allowed to vote," she wrote. "The reasons for repealing the Fifteenth Amendment differ but little from the arguments advanced by those who oppose the enfranchisement of women." [77]

Terrell's reading of the opposition was all too accurate. In an address to the Alabama State Bar Association in Selma in 1919, Emmet O'Neal, the former governor of Alabama, delivered a spirited attack on the Anthony amendment by comparing it to the Fifteenth Amendment. The Fifteenth Amendment does not grant Black men the right to vote, he pointed out; it only bars states from denying anyone the right to vote on the basis of race, color, or previous condition of servitude. ("It struck out the discriminating word 'white' from every State constitution," O'Neal said.) The same was true of the Anthony amendment; it didn't grant women the right to vote; it only barred states from denying anyone that right based on their sex. There were plenty of other ways to bar people from voting, as O'Neal well knew. In 1901, at Alabama's constitutional convention, delegate O'Neal had framed the state's poll tax and literacy test requirements. "Does the Anthony Amendment, if ratified, give to women the right of suffrage?" he asked, in his 1919 address to his fellow Alabama lawyers. "The same question was asked as to the Fifteenth Amendment," he pointed out, and the Court had answered that "it did not in its true sense give to the negroes the right of suffrage," and the Court would give the same answer to the Anthony amendment. That is to say, it would "strike from every State constitution the discriminating word 'male,'" but the states would retain the power to discriminate in any other way they wished. Alabama's poll tax, for instance, would remain in effect, as would its requirement that citizens wishing to vote "must have worked or been regularly engaged in some lawful employment, business or occupation, trade or calling" if they wished to register to vote. Housekeeping would qualify, O'Neal argued; hence poor women and Black women, most of whom were poor, would be able to vote,

but wealthy white women who hired housekeepers would be excluded from the ballot, with the result, O'Neal warned, that were the Anthony amendment to be ratified, "the great mass of negro women in Alabama and the South would become part of the electorate," which "would unquestionably menace the domination of the white race." [78]



"The Spirit of '76!" 1915

The Anthony amendment passed in the House in January 1918 and again in May 1919, then passed in the Senate the next month. Three states —Illinois, Michigan, and Wisconsin—ratified it almost immediately, followed by more states over the summer, though in July, Georgia became the first state to reject the amendment. South Carolina voted no in January 1920, as did Virginia and Maryland in February and Mississippi in March and Louisiana in July. Despite losses in these six Southern states, by August 1920 only one more state was needed to ratify the amendment. In Tennessee, Mary Church Terrell's home state, the Senate voted yes, and when the vote went to the House, it was expected to be close. Supporters of the amendment wore yellow roses; opponents red roses. Twenty-four-year-old Congressman Harry Burn wore a red rose. He had a letter in his pocket from his mother, Phoebe Ensminger Burn. "I wish you were home," she'd written to her son. "Hurray and vote for suffrage and don't keep them in doubt," she told him, and "Don't forget to be a good boy." [79] Young Harry

Burn voted yes, breaking the tie. The Nineteenth Amendment became law. That November all over the South, Black women voted for the first time. More than a thousand Black women registered to vote in Chatham County, Georgia, more than six thousand in Duval County, Florida, where in Jacksonville, the Klan patrolled the streets on election eve. Like Black men, Black women often headed to the polls in groups, for safety, for help filling out forms, and for fighting intimidation. They went as families, with their schools, and with their congregations. Three people from the AME's "Old Folks Home" in Baltimore went together that fall, Mrs. Geneva Gray, eighty-four, Mrs. Mary Garrett, ninety, and Mr. Moses James, ninety, and "in a clear voice but with shaking hands got themselves on the books." [80]

The next year Mary Church Terrell delivered a speech called "An Appeal to Colored Women to Vote and Do Their Duty in Politics." She wanted women to vote but admitted that everything about the suffrage campaign, and Black women and men's experience trying to cast their ballots on Election Day 1920, had convinced her that the ratification of the Nineteenth Amendment had not solved the problem of the South's unwillingness to honor the Fifteenth Amendment.[81] What good was an amendment if it existed only on paper?

Constitutional Jell-O

The Supreme Court was undergoing its own revolution in the 1920s, under the chief justiceship of William Howard Taft. Taft was born in Ohio in 1857, the year the Supreme Court decided *Dred Scott*, and went to Yale before studying at the Cincinnati School of Law. He'd served three years on Ohio's superior court when, in 1890, he became the youngest-ever U.S. solicitor general. He argued eighteen cases before the Supreme Court and won fifteen, and in 1892 he was appointed a federal judge for the Sixth Circuit. While serving as governor-general of the Philippines, he was twice offered a position on the Supreme Court; both times he declined. Elected U.S. president in 1908, he failed to win reelection in 1912, after which he joined the faculty of Yale Law School. His best-known academic work was a series of lectures published in 1916 as *Our Chief Magistrate and His Powers*, a critique of the presidencies of Theodore Roosevelt and Woodrow

Wilson masquerading as what Taft described as a “careful study from the unbiased standpoint of the historian and the jurist.” [82]

Taft had long wanted to restructure the federal judiciary, and he was also keen to defend the Constitution from what he considered to be the excesses of Progressivism. In 1916, when Wilson nominated the nation’s leading Progressive lawyer Louis Brandeis to the Court, Taft vigorously opposed the nomination (which he had expected to come to him). “It is one of the deepest wounds that I have had as an American and a lover of the Constitution and a believer in progressive conservatism, that such a man as Brandeis could be put on the Court,” Taft wrote, calling Brandeis a muckraker, a hypocrite, and a socialist. Taft solicited the signatures of six other former presidents of the American Bar Association on a letter he wrote opposing Brandeis.[83] (Much of the objection to Brandeis was antisemitic; much was political.) “I think as ill of WHT’s morals now as of his intellect,” Brandeis wrote to his wife at the time. Privately, Brandeis referred to the walrus-mustached Taft, who tipped the scales at around three hundred pounds, as “the fat man.” [84]

Taft’s campaign did not derail Brandeis’s confirmation, and in any case, at the time confirmation was all but automatic; it certainly did not elicit the interest of the public.[85] (No nominee appeared before the Senate Judiciary Committee until 1925, when Harlan Stone appeared, briefly, to answer specific, narrow questions about the Teapot Dome scandal. No proposed justice was called before the committee again until Felix Frankfurter, in 1939, who initially refused but finally relented, if only for the purpose of denying that he was a Communist.)[86]

In 1920 Taft delightedly accepted the invitation, offered to him by Warren Harding, to serve as chief justice.[87] He remains the only chief justice of the Supreme Court to have served as president of the United States. If he cannot be said to have had the keenest legal mind, he had the strong and steady arm of an experienced executive. He ran the Court for only nine years, but during that time he ushered in sweeping reforms, changing not only what cases the Court heard but also where it operated, elevating its power, its prestige, and not least, its mystique.

Originally, the Supreme Court heard every case that made its way to its chambers; it had no choice. “Questions may occur which we would gladly avoid; but we cannot avoid them,” John Marshall, the longest-serving chief

justice, complained in 1821.[88] A century later, in a country whose population had grown tenfold, the Court was overwhelmed by its backlog. Taft convened a committee that he charged with drafting a bill that would rationalize the Court's docket. In what became known as the Judges Bill, the justices proposed the certiorari system, by which they would in most areas of law be able to exercise their discretion to choose what cases they deemed worthy of their attention. Taft went before the House Judiciary Committee to explain the importance of "letting the Supreme Court decide what was important and what was unimportant." [89] Congress passed the bill in 1925. "Easily one-half of certiorari petitions now presented have no justification at all," Taft reported in the *Yale Law Journal* nine months later.[90] The executive branch had the White House, the legislature the Capitol, but the Court had no home of its own and had long met in a dingy room, the old Senate chamber. Taft convinced Congress to authorize funds for the construction of a building for the Court alone, befitting the status of the judiciary. Taft himself chose the seven-acre site. The new building was meant to be the largest marble building in the world, an austere and imposing monument to the rule of law.[91] It looks like a Grecian temple, restored.

The Taft Court was the hinge between laissez-faire conservatism and the 1930s duel between the Court and the New Deal. Taft himself wasn't a great thinker or a powerful writer. The luminaries on his Court were Oliver Wendell Holmes Jr. and Brandeis. Holmes described Taft's opinions—between 1921 and 1928, Taft wrote 249 of them, as opposed to 205 by Holmes and 193 by Brandeis—as "rather spongy." Brandeis, with a nod to what the abolitionist Wendell Phillips once said about Abraham Lincoln—that he was a "first-rate second-rate man"—said Holmes had "a first-rate second-rate mind." [92] But Taft's opinions were the Court's opinions. One legal scholar determined that Taft "authored or joined the opinion for the Court in 98.7 percent of its decisions." [93] He ran an amiable bench. Once he joined the Court, he took the initiative of forging a peace, even a friendship with Brandeis. "I've come to like Brandeis very much," he wrote his daughter, and Brandeis, for his part, was charmed.[94] That didn't mean they agreed. Brandeis was the least likely member of the Court to agree with the majority, as his dissents were nearly always informed by his commitment to democracy over prosperity.[95]

Conservatives on the Court granted the Court authority to overrule legislation in order to accord the law with custom and tradition and original intent. Taft's rule for whether a law could be declared unconstitutional had to do with his equation of progress with the accumulation of wealth: property and contract had to be protected at all costs.[96] Holmes disagreed. "The justification of a law for us cannot be found in the fact that our fathers have always followed it," he wrote. "It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants." [97]

Holmes argued that the framers had "called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters." They had "created an organism," and its growth required the Court to evaluate cases "in the light of our whole experience and not merely in that of what was said a hundred years ago." [98] Brandeis most fully advanced the Progressive view of the Constitution as a living organism. "Our Constitution is not a strait-jacket," he wrote in the draft of a dissent in *United States v. Moreland*, in which he was joined by Holmes. "It is a living organism. As such it is capable of growth—of expansion and of adaptation to new conditions. Growth implies changes political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions than in material things. Because our Constitution possesses this quality of adaption, it has endured as the fundamental law of an ever developing people." But Chief Justice Taft had asked him to take these sentences out because "they are certain to be used to support views that I could not subscribe to." To secure the chief justice's concurrence in his opinion, Brandeis omitted these sentences, with regret.[99]

In 1921 Harding, who had nominated Taft to the Court, named Beck solicitor general. Beck served for four years, during which he oversaw more than eight hundred cases and argued more than a hundred. He also set about to defeat the idea of a living Constitution. A man of daunting energy, he wrote a great deal for the popular press, even while holding this position. He was best known for a book whose first edition appeared in 1922 as *The Constitution of the United States: A Brief Study of the Genesis, Formulation and Political Philosophy of the Constitution of the United States*. Essentially a refutation of Beard's *Economic Interpretation*, Beck's *Constitution* began as a series of lectures delivered at Gray's Inn, London,

and was first published by the National Security League. Treasury secretary Andrew Mellon paid for the distribution of two thousand copies to libraries across the country. Beck's *Constitution* was printed and reprinted, updated and amended, translated and exported, and so widely circulated that it became the reigning interpretation of the Constitution. It was inescapable.[100]

Beck loved the Constitution. He blamed Americans for betraying it. He was a constitutional fundamentalist. In 1896 a Christian socialist had published a short book called *In His Steps: What Would Jesus Do?* Beck, in his book on the Constitution, asked, "What Would the Framers Think?" A chapter on the centennial celebration in 1887 reminded readers that Benjamin Franklin had once written that he wished he could be preserved in a cask of Madeira wine for a hundred years to see how things would turn out. Beck imagined that such a cask existed, then argued that Franklin, and alike George Washington, upon emerging from the Madeira in 1887 would have been thrilled to discover that their Constitution had survived so many "epoch-making changes," but that if they'd gone back into the cask and come out again in 1922, they would have been heartbroken to discover that "this profound faith in the Constitution" had weakened and that "millions of men would distrust its wise restraints, that organized parties would declare their hostility to some of its essential principles, and that responsible leaders of thought would be willing to tear down in a day what it had required a century to erect." [101]

Beck was angry that in the half century since 1887, Americans had questioned the Constitution and amended it. He didn't like the Sixteenth Amendment. He didn't like the Seventeenth Amendment. And he very much didn't like the Eighteenth Amendment. In these views, he concurred with the leading historian of the Supreme Court, Charles Warren, who published his own anti-Beardian account of the Constitution—he and Beck arranged to review one another's books—in which he emphasized that the framers "were great men, employed upon a great task, and moved by high impulses": "When you are asked, hereafter, to consider amendments to that instrument, it would be well to consider carefully whether the men who urge such changes are equally great and whether their motives and ideals are equally high." [102] Beck's *Constitution* issued an identical warning, denouncing what he described as the decay of leadership, the revolt against

authority, and Americans' gross ignorance of the very nature of the Constitution.

"Mr. Beck Draws an Indictment Against a Whole People," one review of Beck's work was titled.[103] But by far the most perceptive—and the cruelest—criticism of Beck came from the acerbic constitutional law professor Thomas Reed Powell. Powell, born in Vermont in 1880, had studied at the University of Vermont and practiced law in Burlington before going to graduate school at Columbia, where he completed a dissertation in 1913—the year Beard published *An Economic Interpretation*.[104] He surely knew Beard as a student, and he also knew him as a colleague: after finishing his PhD, Powell taught in Columbia's political science department before being appointed to a professorship at the law school in 1920. In 1925 he moved to Harvard Law School but remained friends with Beard, who later wrote to him, "It would be a joy to have a jaw with you once more."[105]

In two reviews published in *The New Republic* in 1923 and 1925, Powell charged Beck with having written nothing so much as a prayer book. "Men without their Sinai and Olympus must have their Runnymede and Philadelphia," Powell sneered.[106] Powell had no patience with Beck's appetite for metaphor. On a single page, Beck had compared the Constitution to a Roman emperor, a temple, a beacon, and a Gothic cathedral.[107] In another passage, Beck had written:

> The Constitution is neither, on the one hand, a Gibraltar rock, which wholly resists the ceaseless washing of time or circumstance, nor is it, on the other hand, a sandy beach, which is slowly destroyed by the erosion of the waves. It is rather to be likened to a floating dock, which, while firmly attached to its moorings, and not therefore the caprice of the waves, yet rises and falls with the tide of time and circumstance.[108]

Powell wrote: "His idea seems to be that while it does not move forward or backward, it jiggles up and down."[109] Like Jell-O.

Beck kept updating the book. Powell kept reviewing it. Once, writing in a voice he referred to as "A. Simpleman," Powell laid it on especially thick, pointing out one of Beck's more ridiculous absurdities: his claim that the framers wrote a Constitution designed to protect the United States against the advance of Communism, an ideology that did not exist in 1787. Most of Beck's *Constitution* is about how the Constitution got made, A. Simpleman

reported. “The rest of the book is about what a good Constitution it is and how bad it is to make changes in it. The main reason why it is so good is because it was made by such good men. Mr. Beck says very nice things about them.” That goodness “is what Mr. Beck has in his mind when he speaks of ‘the anterior necessity of those who had property interests to protect themselves against that spirit of social revolt which we today call ‘bolshevism.’” [110]

With Beard and Powell on the one side and Beck and Butler on the other, American academics and lawyers divided over what the Constitution ever had been, what it was, and what it could be. Was it the Rock of Gibraltar? Or was it a bowl of Jell-O? But they weren’t the only people involved in this argument.

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9

Miss Bolsheviki

Follow for extended description

The anti-feminist *Woman Patriot* depicts suffragism as a woman consigning “antis” like Warren G. Harding and William Howard Taft to “Political Extinction,” September 1920. Harding would be elected president six weeks later and would appoint Taft to the Supreme Court.

The Congress shall have the power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

—Failed amendment to the U.S. Constitution, passed by both the House and Senate, 1924

The conservative movement to halt the amendment and decay of the Constitution in the Progressive era was led neither by James M. Beck nor by any man. It was headed by Mary Guthrie Kilbreth, a New Jersey–born member of the Daughters of the American Revolution, an anti-socialist, anti-suffragist, and anti-feminist.[1] Like Phyllis Schlafly in the 1970s and ’80s, Kilbreth appeared before Congress to object to just about every piece of legislation advocated by feminists in the 1920s and ’30s. Although she failed to defeat the Nineteenth Amendment, she led a successful campaign to defeat the Child Labor Amendment and effectively demonized the Equal Rights Amendment.

Before the ratification of the Nineteenth Amendment, Kilbreth had been the president of the National Association Opposed to Woman Suffrage and, under the auspices of the Woman Patriot Publishing Company, published a magazine called *Woman Patriot: Dedicated to the Defense of Womanhood, Motherhood, the Family and the State, AGAINST Woman Suffragism, Feminism and Socialism*. (The term *feminist* was coined in 1913.) *Woman Patriot* regularly ran a column called “The Amendment Situation,” with updates as the Nineteenth Amendment marched toward ratification.[2] After ratification, the National Association Opposed to Woman Suffrage contested the amendment’s constitutionality in the Supreme Court. (The first of these cases, *Fairchild v. Hughes*, was filed by the president of the American Constitutional League, Charles Fairchild, whose wife, Elizabeth Nelson Fairchild, was a vice president of the National Association Opposed to Woman Suffrage.)[3] Undeterred, Kilbreth set her sights on halting the agenda that many former suffragists had now turned to: maternal and child welfare and the abolition of child labor. She moved from New York to Washington. Under the auspices of the Woman Patriot Publishing Company, she published a twice-monthly successor magazine with a slightly revised title, *Woman Patriot: Dedicated to the Defense of the Family and the State Against Feminism and Socialism*.

“Suffragists and anti-suffragists have always agreed upon one point, that the importance of the issue is not in the ballot itself but in what follows woman suffrage,” Kilbreth wrote in a 1921 essay called “The New Anti-Feminist Campaign.” She wished she could have stopped suffrage, but having lost that battle, she called on her supporters to stop the “Sex

Revolution," by which she meant the destruction of the family by way of a Bolshevik revolution.[4] Feminists did indeed have sky-high expectations for what women could do with the ballot. The economist Charlotte Perkins Gilman, who in 1915 had published a feminist utopian novel called *Herland*, blamed men for much that was wrong in the world, telling them, "You have had your day—you have worked your will—you have filled the world with warfare, with drunkenness, with vice and disease. You have wasted women's lives like water, and the children of the world have been sacrificed to your sins. Now we will have a new world." [5] A Herland.

To that end, feminists, although divided on many points, built a coalition. In November 1920 a confederation of twenty-five women's organizations—including the National Women's Trade Union, the PTA, the YWCA, the League of Women Voters, and the American Association of University Women—formed the Women's Joint Congressional Committee (WJCC) to lobby Congress for legislation to improve the lives of women and children. Kilbreth called it a "Secret Lobby" and denounced the "vast Feminist Bureaucracies" it represented, including the Children's Bureau, a federal agency established in 1912.[6] The WJCC's first major accomplishment was the passage in 1921 of the Sheppard-Towner Maternity and Infancy Protection Act, which provided funds for everything from prenatal care to home visits by nurses. Urged on by none other than Solicitor General James M. Beck, Kilbreth and the Woman Patriot Publishing Company sought to block the law, which she connected to "birth control" (a term only recently coined by Margaret Sanger, who had founded the nation's first birth control clinic, in Brooklyn, in 1916).[7] When the law passed, Kilbreth sought to overturn it; in the Supreme Court, James M. Beck, as solicitor general, defended the legislation with reluctance. "More children die within the first month of their existence than this Nation lost in the World War," he said. "Nearly 200,000 children die in the first year." [8] The government prevailed.

Kilbreth's anti-suffragism and anti-feminism fused with anti-radicalism. The Red Scare that began in 1919—a year of labor strikes and anarchist bombs, race riots and their violent suppression—took a new form after 1920 in a conservative women's campaign against social reform as amounting to the "nationalization of women," or the placing of women's sexual and reproductive functions into the hands of the state—under

Bolshevism. Once the Nineteenth Amendment was ratified, the Red Scare didn't wind down; it just turned its attention from immigrant radicals to American feminists, as defilers of the Constitution.[9]

The Spider Web Chart

Women's Constitutional Leagues began forming in 1921, starting in Massachusetts. Their purpose was to sound the alarm about the "growing menace to the Constitution." Complaining that the Constitution had been "amended past recognition," they also supported an early version of what conservatives called the back-to-the-people amendment, a proposal to make amending the Constitution more difficult.[10]

Conservatives, through organizations like the National Security League, the Sentinels of the Republic, and the Women's Patriotic Conference on National Defense, were fighting both for what would come to be called conservative constitutionalism and for preparedness as a political objective, urging Congress to continue the military expenditures it had begun during the war. The Boston-based Sentinels' mission had five parts:

> To maintain the fundamental principles of the American Constitution.
> To oppose further Federal encroachment upon the reserved rights of the States.
> To stop the growth of socialism.
> To prevent concentration of power in Washington through the multiplication of administrative bureaus under a perverted interpretation of the General Welfare clause.
> To help preserve a free Republican form of government in the United States.[11]

The Sentinels' constant refrain, not least in a series of radio addresses, was that the United States suffered from "too much government" (by which it meant too many social services, but not too much military spending).[12]

Feminist organizations—those associated with the peace movement and beyond—by contrast, called for a reduction in federal military spending. They wanted to use their votes and their lobbying skills to convince the federal government to spend money on women and children, not on guns and tanks. The War Department was determined to defeat those efforts. The head of the Chemical Warfare Service—whose munitions peace activists were particularly keen to ban—believed that all such women were "either socialists or Bolsheviks or doing the work of the Bolsheviks." In 1923

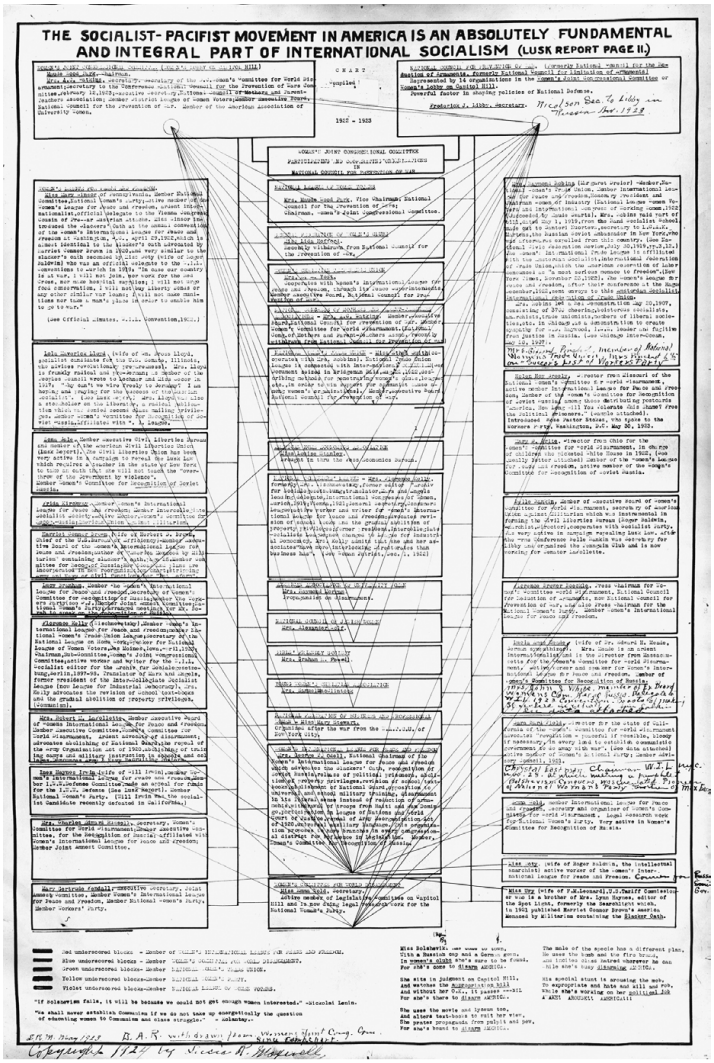
Lucia Ramsey Maxwell, a librarian working for the Chemical Warfare Service, prepared an extraordinarily intricate one-by-two-foot chart, known as the Spider Web Chart, attempting to establish the ties between sixteen of the nation's largest women's organizations and leaders, from Florence Kelley's National Consumers' League to the PTA and the YWCA. She dedicated the chart to Kilbreth—"with appreciation for her work"—and provided, as a title, a quotation from the report of the Lusk Committee, a New York legislative body investigating sedition: "The Socialist-Pacifist Movement in America Is an Absolutely Fundamental and Integral Part of International Socialism." And she added a poem, to accompany it, which begins:

Miss Bolsheviki has come to town,
With a Russian cap and a German gown,
In women's clubs she's sure to be found,
For she's come to disarm America.
She sits in judgment on Capitol Hill,
And watches appropriation bills,
And without her O.K. it passes—Nil,
For she's there to disarm America.
She uses the movie and the lyceum too,
And alters text-books to suit her view,
She prates propaganda from pulpit and pew,
For she's bound to disarm America.

Maxwell sent copies of the Spider Web Chart to President Harding and to J. Edgar Hoover, who would soon become head of the newly formed Federal Bureau of Investigation. It circulated privately in 1923, but in March 1924 it was printed in Henry Ford's newspaper, the *Dearborn Independent*, and then widely reprinted.[13]

Maud Wood Park, chair of the Women's Joint Congressional Committee, wrote to the War Department to complain and ask for a retraction. She received an acknowledgment that the department had destroyed its own copies and an admission that the chart contained errors—but no public retraction. Park then led an internal investigation into the methods deployed by Kilbreth, which reported that the "relentless

opponents of the last two amendments, the prohibition and woman suffrage amendment," had now turned their attention to the defeat of anything that might improve the lives of women and children. Since the end of the war, these opponents had been joined by "the advocates of greatly increased military preparedness." Together they employed the same method as against any legislation or proposed amendment: "It is charged that the legislation is un-American; that it seeks to break down the Constitution; that it originated in Moscow." [14]



The infamous Spider Web Chart, 1925

The timing of the Spider Web Chart's leak to the public, in March 1924, was no accident. By then Mary Kilbreth and the Woman Patriot Publishing

Company had undertaken to grapple with an entirely new amendment situation.[15]

The Alice Paul theory of constitutional law

In April 1923 the Court handed down its decision in *Adkins v. Children's Hospital*, striking down DC's minimum wage law for women. Justice George Sutherland, an English-born conservative from Utah, writing for the majority, argued that labor laws aimed at women amounted to an unconstitutional interference in the Lochnerian liberty of contract and that, in any case, such laws were no longer necessary because the "ancient inequality of the sexes" had become, in the dizzying Model T–and-frozen-food age of the flapper, a thing of the past. Given "the great—not to say revolutionary—changes . . . in the contractual, political and civil status of women, culminating in the Nineteenth Amendment," Sutherland wrote, "it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point." [16] (Oliver Wendell Holmes notably dissented: "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account.")[17] Florence Kelley, the nation's leading labor lawyer, didn't think you had to squint to notice the enduringly unequal status of women in the United States in 1923. You could, for instance, turn your gaze on the Court itself and give it a long, hard stare.

Sutherland was celebrating—and sadly, wildly overstating—changes he'd had a real hand in, as had his wife, Rosamond Lee Sutherland. From the time of Sutherland's election to Congress from Utah in 1900 and through his years in the Senate, he and she had fought for woman suffrage, hosting delegations at their home in Washington, making speeches at suffrage meetings, and publishing articles in magazines. In 1910 Rosamond Lee Sutherland published the essay "The Appeal of Politics to Woman," in the *North American Review*. In it, she argued that women needed more than the right to vote: they needed to be elected and appointed to public offices because laws made, enforced, and interpreted by men were unfair to women and children. "Are there not many ways in which the active voice, as well as the passive influence of women, is sadly needed in remedial legislation

to-day?" she asked. "Does not the cause of working women need serious attention?" For instance, there was the problem of unfair wages for women. "Men and women work shoulder to shoulder as teachers, clerks and in countless capacities as wage-earners, but the men almost invariably receive much better salaries, not because they do better work or are more trustworthy, but simply because they are men; which is unjust, illogical and all wrong." Then, too, she wrote, "the crying evil of child labor would surely be eradicated were women instrumental in making and enforcing the laws." [18]

In 1913, when suffragists "stormed the Capitol to argue why women should have the ballot," according to the *Salt Lake Telegram*, Rosamond Lee Sutherland was one of two senators' wives to join the delegation; the other was the formidable feminist lawyer Belle Case La Follette, wife of Wisconsin senator Robert La Follette.[19] (Like Florence Kelley, Belle La Follette was named on the Spider Web Chart.) A year later George Sutherland denounced the rule of women by men: "To deprive . . . [women] of the right to participate in government is to make an arbitrary division of the citizenship of the country upon the sole ground that one class is made up of men, and should therefore rule, and the other class is made up of women, who should, therefore, be ruled." [20] He had also in 1915 introduced the Nineteenth Amendment into the Senate and declared women's disenfranchisement "an unjust and intolerant denial of equality." [21] In 1923 Sutherland was working with Alice Paul, head of the National Woman's Party, on a draft of the Equal Rights Amendment, even as he was writing his opinion in *Adkins*.[22]

Children in a Labor Day parade, New York, 1909

Florence Kelley, meanwhile, dedicated herself to eradicating what Rosamond Lee Sutherland had described as “the crying evil of child labor.” Kelley led not only the campaign for maximum hour and minimum wage laws for women but also the urgent and exhausting campaign to end child labor. In 1904 she’d founded the National Child Labor Committee to coordinate efforts across the states. The obstacle to that work was the U.S. Supreme Court, especially, after 1921, under Chief Justice William Howard Taft.

In *Adkins*, Brandeis had to recuse himself; his wife had been involved in the Children’s Hospital. It was Taft who dissented in *Adkins*, following *Muller v. Oregon*, which Brandeis himself had argued before joining the Court. Taft, who had headed the War Labor Board, found it hard to dismiss outright the need for a wage floor, but this would be his last real disagreement with his Court’s conservative majority. *Adkins* set in motion a confrontation with the Court that wouldn’t fully come to a head until the New Deal.[23]

But in 1923, for Florence Kelley, it wasn’t just *Adkins*. It was the two cases that had come before. For decades, Kelley had been fighting for child labor laws in the states. Twice Congress had passed laws aimed at abolishing or at least limiting child labor. Twice the Supreme Court had struck down those rules as unconstitutional. Then came *Adkins*, which Kelley called “a new Dred Scott.” [24] She called for an overhaul of the federal judiciary. She wanted to put women on the bench. “Three times in

three years the Supreme Court has given warning that justice and mercy for women and children are not to be expected from a court which, itself a perpetual monopoly of men, incarnates age-long injustice," wrote Kelley in that commentary published a month after Sutherland issued the Court's decision. Where Sutherland had insisted that the "ancient inequality of the sexes" had been all but eradicated by the Nineteenth Amendment, Kelley answered that the Court itself represented an "age-long injustice" in the form of the "perpetual monopoly of men" serving on the bench. To break that monopoly, the next appointees both to the Supreme Court and to the DC Court of Appeals, Kelley insisted, had to be female, "the first in a series of able women of the modern mind." [25]

Set the nine men on the bench aside, two bowties, one cravat, six neckties. Wasn't this a case about women? That was another of Kelley's points. "Although the life, health and happiness of women and girls are at stake, no woman has participated in the minimum wage case at any of its stages," she pointed out in her reading of Sutherland's opinion. This wasn't strictly accurate. No female lawmakers had voted on the DC law, no female judge or justice had heard the case, no female lawyers had argued it. But Kelley had had a hand in writing a great many of the nation's labor laws, including DC's minimum wage law for women, on which she'd collaborated with Harvard Law School professor Felix Frankfurter, who then went on to argue for the appellants in *Adkins*.[26] And Molly Dewson, Kelley's deputy, had drafted much of the 1,248-page brief for the DC minimum wage board in *Adkins*, even though it went out under Frankfurter's name.[27] Still, in the end, Sutherland decided to ignore Dewson's work in its entirety, declaring the empirical evidence in her brief —more than a thousand pages of statistics, testimony, and analysis regarding the suffering of women—as having shed "no legitimate light upon the question." [28]

Amendments Pledged on Party Platforms, 1924–36

Year	*Party*	*Amendment*
1924	Republican	abolition of child labor
1924	Democratic	banning those who fail of reelection to subsequent terms in Congress

1924	Progressive	Congress may veto Supreme Court decisions
1924	Progressive	direct election of all federal judges
1924	Progressive	ten-year term limits for federal judges
1924	Progressive	direct nomination and election of the president
1924	Progressive	amendment by initiative and referendum
1924	Progressive	national referendum on any declaration of war
1924	Socialist	abolition of child labor
1928	Communist	repeal of the Eighteenth Amendment
1932	Socialist	securities tax
1932	Socialist	easing of amendment process
1932	Socialist	workers' rights
1932	Socialist	repeal of the Eighteenth Amendment
1932	Republican	repeal of the Eighteenth Amendment
1932	Democratic	repeal of the Eighteenth Amendment
1936	Democratic	increasing the commerce power
1936	Communist	decreasing the power of the Supreme Court

When Frankfurter read the Court's opinion, he telegrammed Kelley: "Upshot would be adoption of Alice Paul theory of constitutional law." [29] The Alice Paul theory of constitutional law was a theory that Florence Kelley considered a species of madness. As soon as the Nineteenth Amendment was ratified, Paul had begun crafting a new constitutional amendment. "There is at this moment an insanity prevalent among women where one would least expect it," Kelley wrote about an early draft of the Equal Rights Amendment. "The slogans of the insane are 'A fair field and no favor,—Equal rights for women, nothing more.—We ask no privileges now that we have the vote.'" [30] As for the very term *equality*, Kelley had little use for it. "Let's not begin with meaningless words," she'd once said. 'Equality' where there is no equality is a terrible a thing for the defenseless

workers as the cry of ‘peace’ where there is no peace.” She felt the same way about “liberty of contract.” [31]

Alice Paul, c. 1919–20

Alice Paul had struggled over the question of whether a prohibition on discrimination by sex would undermine labor legislation. She’d sent drafts of the Equal Rights Amendment to Sutherland—one draft’s Section 2 read, “This article shall not be interpreted as preventing legislation in the exercise of the police power or for the protection of women in industry”—but after Sutherland and other lawyers she consulted took the position that the clause was not needed, it was deleted.[32] She’d then aided the plaintiffs in *Adkins* and, by the end of the year, had succeeded in having the Equal Rights Amendment introduced into Congress.

Lost in the tug-of-war between Kelley and Paul was their shared understanding that the Constitution was not written for women and children. The Nineteenth Amendment hadn’t ended the need for amendments required to remedy so dire an inadequacy. After *Adkins*, Florence Kelley turned her attention to drafting and lobbying for the Child Labor Amendment.[33] Paul’s amendment aimed to eliminate a distinction;

Kelley's aimed to make one. Mary Kilbreth wanted them both to fail. And it was she who succeeded.

The Mother Amendment

According to the U.S. Census for the year 1900, one in six American children under fourteen—nearly two million children—worked in mills, meatpacking plants, stores, mines, factories, and fields.[34] State legislatures had been attempting to contend with the problem, with little success. The problem was especially acute in Southern textile mills. Alabama passed a child labor law in 1901, but under its terms, children as young as twelve could still work sixty hours a week, and in any event, many of the owners of the mills were out of state, beyond the reach of state laws. The need for a national law led Florence Kelley to help found the National Child Labor Committee in 1904.[35] Four years later the NCLC hired the photographer Lewis Hine, who between 1908 and 1924 took over five thousand photographs of children at work. By 1909, forty-three states had passed laws regulating the labor of children. In 1916, in the Keating-Owen Act, Congress attempted to regulate child labor by setting minimum wages and maximum hours.

To challenge the law, a textile industry leader in North Carolina found a man named Roland Dagenhart whose two sons worked in a textile mill; on their behalf, he filed a suit against William C. Hammer, the U.S. attorney for the Western District of North Carolina. In a 5–4 opinion in *Hammer v. Dagenhart* (1918), Justice William R. Day held that regulating child labor did not fall under the Constitution's commerce clause. (Holmes, in a dissent, found this hard to swallow: "Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid.")[36] Reuben Dagenhart, one of the boys who worked in the mill, was interviewed five years later. "We got some automobile rides," he said about his involvement in the case when he was fifteen, with his brother, then thirteen. "They bought both of us a Coca-Cola. That's what we got out of it." He was now twenty. "Look at me! A hundred and five pounds, a grown man and no education. I may be mistaken, but I think the years I've put in the cotton mills have stunted my

growth. They kept me from getting any schooling. I had to stop school after third grade and now I need the education I didn't get. . . . It would have been a good thing for all the kids in this state if that law they passed had been kept." [37]

Congress in 1919 had tried again, passing the Child Labor Tax Law, imposing a tax on any products manufactured by a company that employed anyone "under the age of sixteen in any mine or quarry, and under the age of fourteen in any mill, cannery, workshop, factory, or manufacturing establishment." In 1922, in *Bailey v. Drexel Furniture Co.*, Taft wrote the majority opinion that ruled this law unconstitutional as well. At the time, Justice William R. Day's son, Rufus, who had clerked for his father and helped prepare his opinion in *Hammer v. Dagenhart*, was working for James Beck, the solicitor general, while living with his father, the justice. (Justice Day hired three of his four sons to clerk for him; all three also argued cases before the Court, while their father was still sitting on it; only irregularly did the justice recuse himself in those cases.) Beck, who approved of Day's opinion in *Hammer v. Dagenhart*, didn't like the Child Labor Tax Law because of its assertion of federal power at the expense of the states. Left to defend the law, he slyly offered to the Court a way to overturn it, perhaps aided by his clerk, Rufus Day, who prepared briefs for him (and who, in the spring of 1923, argued three cases before the Court).[38] Beck, in his brief in *Bailey v. Drexel Furniture Co.*, volunteered an argument for the opposition, claiming that "candor" compelled him to admit arguments that ran against his own. Beck made sure Taft knew he'd done this on purpose, writing to the chief justice, after hearing his 8–1 opinion striking down the law (in which he was joined by Day), that "although I presented the Government's contention in the Child Labor Cases as strongly as I was able, yet none who heard you deliver the opinion may have welcomed the decision more than I." [39]

Florence Kelley immediately called for a constitutional amendment. In Cincinnati, at the annual convention of the American Federation of Labor, she presented the Child Labor Amendment, granting Congress "the power to limit, regulate, and prohibit, the labor of persons under eighteen." In 1923 Kelley began pressuring Congress to pass it. Introduced in the House in April 1924, it passed on the same day. Less than two months later it passed the Senate, the swiftest amendment to get through Congress.

It seemed poised to be the swiftest amendment ever ratified, too, given the breadth of its support. Mary Church Terrell's National Association of Colored Women sent orders to chapters to lobby state legislatures. "Please remember, dear sisters," that state legislatures had to pass the Child Labor Amendment, or else "it will not be incorporated into the Constitution of the United States," warned Terrell, "and that will certainly be a calamity." [40] The Child Labor Amendment was endorsed by every political party and by the AFL, eleven members of the Women's Joint Congressional Committee, and the Federal Council of Churches of Christ.[41] "Twenty years ago the Constitution was a grim and ancient spinster dead set in her ways," declared the *New York Times*, but now she's "succumbing to an almost flapper passion for change and excitement." [42]

In truth, as the Congressional Research Service reported in 1924, the Progressive-era amendments had all been the subject of long-standing and widespread political support and had for years appeared on party platforms. (The Greenback Party's platform first called for what became the Sixteenth Amendment in 1880; the People's Party platform called for the Seventeenth Amendment in 1892; the Prohibition Party's platform included what became the Eighteenth and Nineteenth amendments in 1872.)[43]

Support for the Child Labor Amendment had been strong, and legislators expected that it would only get stronger, that it would enjoy the overwhelming support of newly enfranchised women, who were widely expected to vote as a bloc. That changed with the March 1924 publication of the Spider Web Chart, damning the very women's organizations that supported the Child Labor Amendment as part of a radical socialist, Communist plot to destroy the United States. The fear of a female Communist conspiracy did not succeed in derailing the amendment in Washington, but it had an extraordinary effect in the states, where the vote on ratification was in many places conducted by a popular referendum and where Child Labor Amendment advocates had failed to plot an effective state-by-state ratification strategy.[44]

The campaign against the Child Labor Amendment had many lieutenants, but its brigadier general was Mary Kilbreth. Between 1921 and 1938, Kilbreth testified before Congress twenty-six times. She for instance appeared three times in 1921: twice to oppose the Sheppard-Towner Maternity and Infancy Protection Act (claiming the "birth control

movement" was behind it, along with a socialist conspiracy "to destroy for this world the holy institution of marriage"), and once to oppose the establishment of the Department of Education as an unwarranted expansion of the federal government.[45] Kilbreth, the blue-blooded daughter of the director of an Ohio life insurance company, never married and did not have children. Her influence far surpassed the constituency she represented; it was, rather, a consequence of her zeal and dedication. The Woman Patriot Publishing Company consisted of four board members plus Kilbreth; its sole publication, *Woman Patriot*, boasted at best twenty-five hundred subscribers.[46] When Kilbreth appeared early in 1924 to oppose aid for women and children in Germany, she was asked, "How large is this organization which you represent?" She admitted she represented no organization. "We are a group of women who are publishing a paper," she said. "You represent no organization or society?" "Absolutely none." [47]

Nevertheless, Kilbreth was extraordinarily effective at recasting social reforms as social ills. In her opposition, which included a petition campaign, she was joined by the textile industry, the National Manufacturers Association, and the Sentinels of the Republic.[48] But she and *Woman Patriot* supplied the basic argument against what she and her allies liked to call the mother amendment, insisting that a "coterie of socialists" hoped to "nationalize the children" and replace mothers with the state.[49] For Progressive reformers, the abolition of child labor was the flip side of compulsory public education; one reason to prevent the employment of children was to allow them to attend school. "Child Labor Amendment Means Federal Control of Schools," Kilbreth warned in a front-page story in *Woman Patriot*, the month before the House vote. (She raised a particular alarm about the teaching of "sexology.")[50] Before the House Judiciary Committee, she argued that "brain stuffing from books" was not as good for children as "all the practical moral training inherent in work." The Child Labor Amendment, like the Maternity and Infancy Protection Act, "involved communistic government interference in the domestic relations," she said, and claimed that under its terms a girl could not help her mother wash the dishes or a boy help his father milk the cows. She attacked Florence Kelley—referring to her as "a translator of Marx and Engels." (Kelley had in fact translated Engels.) And she insisted that the Woman Patriot Publishing Company, with its five board members, represented the

voice of the people and that it was people like Kelley who were imposing changes "over the heads of the people without the people themselves having any voice whatever in these changes." [51]

The Child Labor Amendment passed in the House on April 26, 1924, the same day it was introduced, and in the Senate only a month later. But in Massachusetts it met its Waterloo.

Massachusetts had been among the state legislatures to petition Congress for the amendment in the first place, and the legislature was widely expected to ratify easily. But given the persistence of complaints that the Eighteenth Amendment had been ratified by state legislatures when public opinion opposed the amendment—including in Massachusetts, where public opinion opposed Prohibition—Massachusetts had in 1920 passed a Public Opinion Act whereby any proposed federal amendment had to be put to the voters in a nonbinding referendum.[52] Hence the Massachusetts legislature sent the Child Labor Amendment directly to voters, in a statewide referendum. Opponents hinted at Bolshevism and cited the use of the word *labor* in the amendment, instead of *employment*, to argue that the amendment would prevent parents from assigning chores to their children.[53] In November 1924 voters rejected the amendment by a three-to-one margin, and the legislature abided by that preference. Before Massachusetts held its vote, five states had ratified the amendment; after the Massachusetts vote, no other state, in the 1920s, approved it.

The Back-to-the-People Amendment

Weeks after Taft issued the Court's opinion in *Bailey*, Wisconsin senator Robert La Follette, in a speech before the American Federation of Labor, decried what he called "judicial oligarchy" and proposed a constitutional amendment granting states the right to nullify Supreme Court opinions. La Follette had campaigned against Taft's bid for reelection in 1912, and he had voted against his confirmation to the Court.[54] He was a close friend of Louis Brandeis.[55] The Court had repeatedly defied the will of the people, expressed through state legislatures and through congressional action, La Follette said, pointing out that Taft had been "invested with the enormous prestige and influence of chief justice by presidential appointment who had been repudiated by the voters of the United States on his record." La

Follette claimed that "it would take a dozen constitutional amendments to correct the evils of the decisions which the Supreme Court has handed down in the last two or three years.[56] Progressives called for all manner of remedies, including not only a Child Labor Amendment but also a minimum wage amendment, granting Congress the power to set one.[57] They also sought another route to their constitutional ends: they proposed reforming the judiciary, including by an amendment allowing Congress to remove any Supreme Court justice by a majority vote in both Houses, and by an amendment providing for the justices to be elected and to hold office for ten-year terms. Florence Kelley wanted to put women on the Supreme Court. (That would not happen until 1981, when Ronald Reagan appointed Sandra Day O'Connor.) Idaho senator William Borah, examining forty cases in which the Court had overturned state laws by a 5–4 majority, proposed that any such decisions ought to require a 7–2 majority.[58] Taft was distressed but confident. "Meantime," he wrote a fellow justice, "there is nothing for the Court to do but to go on about its business, exercise the jurisdiction it has, and not be frightened because of threats against its existence." [59]

The historian Charles Warren came to the Court's defense. As to the criticisms advanced by men like La Follette and Borah, "There is no novelty in these attacks," Warren declared, insisting that "no functioning body under our Government has been more subjected to continuous assault than the Supreme Court." [60] Warren, a former assistant U.S. attorney general and Boston Brahmin so dedicated to Harvard that he regularly wore a crimson bow tie and who, with two other men, had founded the Immigration Restriction League, agreed with Taft's denunciation of Charles Beard's interpretation of the framers, insisting that "young men must be taught that America is much more than the result of class interests and sectional influences. They must learn that the men who made America had aspirations and beliefs apart from their personal fortunes." [61] In 1922 he published a three-volume book, *The Supreme Court in United States History*.[62] Every history of the Supreme Court takes a position on the nature of its authority. Warren's work not only placed the Court at the center of American history but also defended it against Progressive critics. "No one can read the history of the Court's career without marveling at its potent effect upon the political development of the Nation, and without concluding

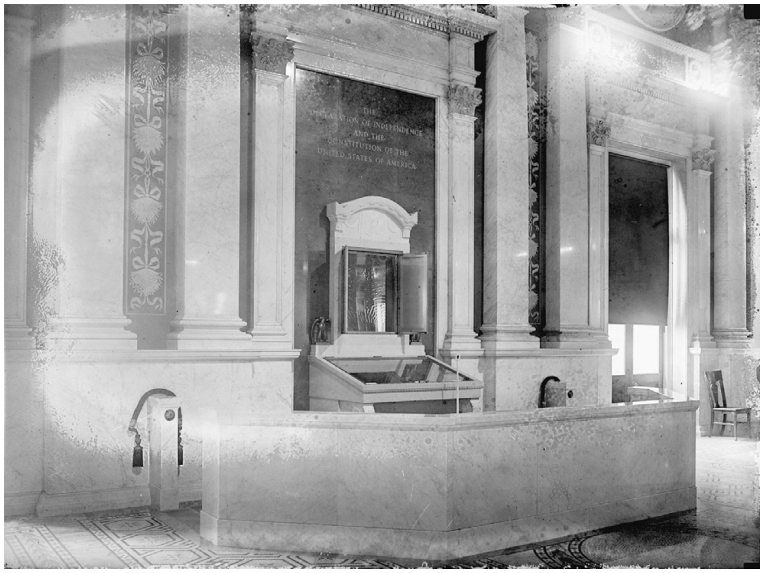
that the Nation owes most of its strength to the determination of the Judges to maintain the National supremacy," he argued. No institution except the railroad had so wholly kept the American people together and preserved the Union.[63] In 1923 the book won the Pulitzer Prize.

Even as Progressives continued to argue that the Constitution ought to be made easier to amend, the success of the Sixteenth, Seventeenth, Eighteenth, and Nineteenth amendments, and the seeming likely ratification of the Child Labor Amendment as the Twentieth, led conservatives to propose a constitutional amendment of their own: one that would make the Constitution more difficult to amend.

In the Senate, New York Republican James Wadsworth Jr., who had voted against both the Eighteenth and Nineteenth amendments, had been introducing amendments to stiffen Article V since 1917.[64] (Wadsworth campaigned to repeal the prohibition amendment, and while he supported woman suffrage, he believed these matters should be left to the states.)[65] Tennessee Democrat Finis J. Garrett introduced a version into the House. By January 1924, an amended version, known as the Wadsworth-Garrett amendment, had earned support in both houses.[66] It also enjoyed the strenuous support of the Sentinels of the Republic, which claimed to have originated the idea.[67] After various adjustments as the proposal went to committee and back again, the version considered in 1925 added five hurdles to ratification: amendments were to be ratified in the states either by a state convention or by a referendum (the states chose); states could reverse their ratification votes at any point until either three-fourths of the states voted yes or one fourth of the states voted no; if one-fourth of the states rejected an amendment, no matter how many other states had or had not voted, the process ended and the amendment failed; to be ratified, an amendment had to be accepted by three-fourths of the states within eight years of its passage in Congress.[68]

Senator Wadsworth and Representative Garrett argued for this reform in the interest of the people's rule. "As the situation now stands fewer than 4,000 individuals in this nation of 110,000,000 people can, if they choose, alter every sentence and paragraph of the Constitution," Garrett said on the floor of the House, and "the people have no means of prevention nor any method of recourse or review." [69] Conservatives dubbed the Wadsworth-Garrett amendment the back-to-the-people amendment. Mary Kilbreth

sometimes just called it the people's amendment and sometimes the second bill of rights.[70] Feminist organizations, including the League of Women Voters, fought to defeat what Maud Wood Park called "the vicious amendment," alerting women that its every provision, no matter the name, "would operate to increase the odds against ratification and in favor of rejection." [71] Feminists and other Progressives braced for a fight, but aside from the scant followers of Mary Kilbreth, no one lined up behind the back-to-the-people amendment; there was no fight to fight.



Shrine of the Constitution at the Library of Congress, 1924

The decline and fall of the American Constitution

Before the 1920s, the Constitution itself—the sheepskin parchment marked with goose-quill ink—had never been seen by the public. The original document had in fact largely been forgotten and ignored and more than once all but misplaced. After it was signed in 1787 and sent to Congress, which then met in New York, it had been filed away. Eventually it was moved to Philadelphia and in 1800 to Washington, where it was stored first in the Treasury Department and then in the War Office. During the War of 1812, it was hidden in an empty house in the countryside, for safekeeping. In 1875 it was found in a tin box in the bottom of a closet, and in 1894 it was locked in a steel safe in a basement. Not until the rise of James Beck–

and Mary Kilbreth–style conservatism was attention paid to the parchment Constitution as a near-sacred relic.[72]

It was, as it happened, the age of the discovery of the tomb of Tutankhamun and also of the Colonial Revival, during which the robber barons of the Gilded Age who supported immigration restriction made a fetish of the founding of the United States, and especially the framing of the Constitution, as expressions of patriotism and a bulwark against socialism. The du Pont family purchased Madison's home, Montpelier. A Pittsburgh industrialist purchased James Monroe's home. John D. Rockefeller funded Colonial Williamsburg, and a group of New York City lawyers purchased Monticello from a Wall Street financier, in order to create a "national shrine." [73] In the 1920s, as again in the 1980s and 2020s, constitutional conservatism—originalism and its Beckian ancestor—was inseparable from heritage tourism, monuments to the tombs of ancestors.

In 1921 President Warren Harding ordered the Constitution, along with the Declaration of Independence, transferred from the Department of State to the Library of Congress, with the idea that both documents ought to be preserved and possibly, for the first time, displayed together, as Harding said, to "satisfy the laudable wish of patriotic Americans to have an opportunity to see the original fundamental documents upon which rest their independence and their government." By 1924, in time for the 150th anniversary of the Declaration of Independence, the two documents were displayed in a glass and marble shrine on the second floor of the library.[74] By 1929 James Beck was arguing for a "permanent memorial" to be built to the Constitution, in time for the 1937 celebration of its 150th anniversary.[75] He was worried, as he said in a radio address, that the words of the Constitution had become "so faded in the minds of the American people as to be almost illegible." [76]

Calvin Coolidge's landslide victory in 1924, defeating both the Democrat John W. Davis and the Progressive Robert La Follette, vindicated the conservative cause. After Coolidge took office, Beck lobbied for the position of U.S. attorney general. When that was not forthcoming, he decided to defend the Constitution by running for a congressional seat from Philadelphia. He had not lived in Pennsylvania since 1903, but in 1926 he leased a two-room apartment on Spruce Street in Philadelphia. When he won the seat, his election was contested, on the ground that Beck in fact

lived in Washington. By his own confession, he had never once even eaten a meal in his Philadelphia apartment. And as *The Nation* reported, only in the late summer of 1927 did Beck pay "his first Philadelphia tax in twenty-four years"—a fifty-cent poll tax, so he could register to vote, though when Election Day came, he stayed in his grand mansion in Washington, pleading "a cold." [77]

Beck weathered the controversy and took his seat in Congress, where he became a prominent orator in the immensely popular campaign to repeal or, at the very least, to amend the Eighteenth Amendment, positions that, after the Depression set in, were favored by nearly three in four Americans.[78] Having for so long opposed amending the Constitution, Beck now championed it, but only for the sake of *un*-amending the Constitution. In a radio address promoting the repeal, he assured listeners that the framers of the Constitution "did not regard any who suggested amendments as wanting in patriotism." [79] At the end of 1932, he announced that he would be introducing an amendment to amend Article V to make ratification easier: he proposed reducing the number of states required to ratify an amendment from three-fourths to one-half, so long as the total population of the ratifying states was "at least equal to three-fourths of the population of the United States." [80] Beck wanted to ease the path toward ratification in order to push through the repeal of Prohibition. He had another motive, too: he wanted to defeat the proposal, then on the table, to ratify the repeal of Prohibition by conventions rather than by legislatures. This had never been done before, and with the newly elected Franklin Delano Roosevelt taking office, promising a New Deal to pull the nation out of the Great Depression, Beck didn't think 1933 was a good time to start experimenting.

Beck's concern was federal power, especially in the hands of the incoming Roosevelt administration. He wasn't worried about the states ratifying an amendment by convention; he was worried about Congress telling the states how to ratify an amendment. "We are probably entering upon a period of great constitutional changes," he wrote in January 1933, anticipating FDR's inauguration. "The changed political philosophy of the American people is rapidly converting this nation from one that was based upon an individualistic conception of government to a highly collectivist theory." Beck was appalled by the New Deal upon which FDR had campaigned. And if he was determined to accomplish the repeal of the

Eighteenth Amendment, he did not want to grant the federal government any further power over the amendment process, warning that a Congress so emboldened might one day soon decide "it would be necessary for all elections to State conventions to be controlled by the Federal Government, and even conceivably by the use of Federal bayonets." [81]

The repeal amendment passed Congress in February 1933, and by December it had been ratified—by conventions, rather than by legislatures, as required by Congress—as the Twenty-First Amendment. Beck, for all his delight in the end of Prohibition, regretted the method by which it had come about. And with that, the ever-alarmed Beck complained, all that was left of the Constitution was a skeleton.[82]

With FDR in the White House now vigorously implementing the New Deal, which truly did amount to a constitutional revolution, Beck became one of the president's most outspoken congressional opponents. The National Recovery Act was, he said, "economic slavery." The Constitution, under the New Deal, was "like a dead oak in a forest." It was still standing, but its roots were dead, and the next strong storm would surely blow it down, whereupon "the noble tree, under which seven generations of Americans have sheltered themselves and under which they have builded the greatest and noblest and freest government in all the world, will fall forever." [83]

Beck's metaphorically exuberant political despair in the 1930s became, among political commentators, something of a national joke. In 1932, when he published *Our Wonderland of Bureaucracy*, an indictment of the growth of the federal government in the form of agencies and bureaus, the economist Harold Laski derided it as a "vast mass of unproven and rhetorical statements" and described Beck's eloquence as "of the type which conceals an essential poverty of thought." As for Beck's ceaseless sounding of constitutional alarms, "The truth is that he is a Rip Van Winkle who went to sleep in the era just after the Civil War and has awakened to dismay in a world quite beyond his understanding." [84]

But Beck of course was far from alone in waging a campaign against the New Deal. In August 1934 he joined with fellow conservatives in founding the American Liberty League, backed by wealthy industrialists including the brothers Pierre and Irénée du Pont and Alfred P. Sloan Jr., president of General Motors. The league's president had previously headed

the Association Against the Prohibition Amendment, and the Liberty League continued the anti-prohibitionists' campaign against the regulatory power of the federal government. James Wadsworth, of the eponymous Wadsworth-Garrett amendment, served as one of its first officers.[85] Beck served on the league's National Lawyers Committee, a group of corporate lawyers keen to use their powers to topple the New Deal.[86] FDR, in a press conference, likened the league's worshipful attitude toward the Constitution to that of lovers of the Ten Commandments, whose tenets "appeared to be 'love thy God but forget thy neighbor,'" except that "'God,' in this case, appeared to be property." [87] (Robert Jackson, then in FDR's administration as a special counsel, called Beck's endless Liberty League speeches and articles about the imperiled Constitution "a driveling defense against phantom enemies.")[88] The *New York Times* reported that the league's sole purpose was "bringing back the Old Deal." [89] The Democratic National Committee hired a publicist who, in echoes of the House of Dollars epithet, dubbed the league "the millionaire's union," a moniker that stuck.[90]

In September 1934, having been reelected to Congress three times, Beck announced that he would leave the legislature at the end of his term. Congress "has largely ceased to be a deliberative body," he said, having become "merely a rubber stamp for the executive, and to be a one-four-hundredth part of a rubber stamp no longer appeals to me." [91] In his statement of resignation, he charged FDR with attempting to build a "unitary, Socialistic state." On the "good ship Constitution," he warned, "the waters of innovation are pouring into this noble vessel," and "the undercurrent of socialism is now pouring into the hold." [92]

In December 1934, in a radio address on the question "Shall We Abandon the Ship?" Beck answered, unsurprisingly, that Americans must not "abandon the ship, for if we do, it will not be the Constitution alone that will perish." Still, he believed some changes were necessary and offered the very unusual proposal that when the Depression ended, the president ought to appoint a committee of two hundred "outstanding Americans" to consider amendments.[93] Charged with advocating for amendments, Beck then retreated and said he expected that such a committee would in fact decide against amendments to any fundamentals, though a few to "its

mechanics" might be in order. (He favored a four-year term for members of Congress and a seven-year term for the president.)[94]

Beck, after leaving Congress, dedicated himself to radio addresses, law review articles, work for the Liberty League, and legal efforts to overturn elements of the New Deal. He challenged the constitutionality of the Tennessee Valley Authority, a federal electric utility, before the Supreme Court, telling the justices that if they upheld the law creating it, they would be guilty of converting "a constitutional federation of the States into a unitary socialistic state of unlimited powers." [95] He lost. In a law review article, observing that Edward Gibbon had completed *The Decline and Fall of the Roman Empire* in June 1787, even as the delegates were deliberating in Philadelphia, he asked Americans to consider "whether the time is approaching when some Gibbon of the future can take pen in hand and write of the decline and fall of the American Constitution." [96]

Beck plodded along, clanging his warning bell in the night, night after night after night. In March 1936 he appeared again before the Supreme Court, this time on behalf of his client, J. Edward Jones, an oil stock dealer. Jones refused to file information with the new Securities and Exchange Commission, in defiance of the Securities Act of 1933. It was Beck's last case, and he won. Six days later he died of a heart attack, at home. He was seventy-four.[97] But like Rip Van Winkle, he had for a very long time seemed a hundred years older.

Indian Self-government

FDR's administration instituted a series of reforms that came to be known, collectively, as the Indian New Deal. In 1924, in large part due to the advocacy of Gertrude Simmons Bonnin (of the Yankton Sioux), also known as Zitkala-Ša, president of the National Council of American Indians, Congress had passed the Indian Citizenship Act, over the opposition of many Indians, including the Haudenosaunee. It granted citizenship to all indigenous peoples born within the United States—or as seen from Indians' vantage point, it imposed citizenship on them without their consent. It did not require Indians to give up their tribal citizenship. Zitkala-Ša then presented a petition to Congress in 1926, on behalf of the National Council of American Indians.[98] By 1927, both Zitkala-Ša and the social activist

John Collier testified before the Senate in support of a proposed investigation into Indian affairs with an eye toward the relief of poverty through the remedy of self-government. Zitkala-Ša blamed Congress for the "near pauperization of the Indians." [99] Collier described the condition of Indians under federal law as "the practical enslavement of Indians." [100] A century after the Cherokee Nation adopted a written constitution, most indigenous groups in the United States did not have written constitutions; urged on by Zitkala-Ša and Collier, the federal government came to believe that Native nations should enact written constitutions, chiefly as a means to formalize the government-to-government relationship between the United States and sovereign Native nations.[101]

When FDR took office, he appointed Collier as head of the Bureau of Indian Affairs. A Progressive who had trained as a sociologist at Columbia and spent time among the Taos Pueblo in the 1920s, Collier hoped to reverse much of earlier federal Indian policy, including forced assimilation and "Americanization" and the undermining of tribal sovereignty and culture. He'd headed an investigation that had resulted in the publication in 1928 of the report *The Problem of Indian Administration*, and with his appointment in 1933, he hoped to put his recommendations into effect. His many initiatives included closing Indian boarding schools. (For decades, the bureau had forcibly removed children from their families and sent them to schools where they were forbidden to speak their Native languages; many were horribly maltreated, abused, and even starved. Many never saw their families again.) Above all, he aimed to end the Dawes Allotment program, instituted in 1887, and return unallotted land to the tribes and promote tribal self-government.

In January 1934, Collier's Bureau of Indian Affairs distributed a circular titled "Indian Self-government" to Indian tribes, recommending a set of steps toward self-government, including the drafting and ratifying of written constitutions. It asked tribes to review the proposal, meet to discuss it, and report back. More than 250 tribes held the recommended referenda, but to Collier's surprise and disappointment, opposition was considerable, and turnout was low. Only a minority of those tribes who reported back approved of what was being proposed, though the circular was so murky that it was difficult to know quite what was being proposed.[102]

That spring, as Congress debated a bill that became known as the Indian Reorganization Act, Collier sponsored ten congresses across Indian Country to debate the bill's provisions.[103] The first congress, among Northern Plains Indians, was held in Rapid City, South Dakota; the response was mixed at best. Many Indians had accommodated themselves to the allotment scheme and were reluctant to give it up. Then too, as Lakota delegate Oliver Prue told Collier at one Indian congress, "we have come to learn to distrust all Government officials that come out here to negotiate with our people and we really have been fooled so many times, time and again, that we just simply distrust every Government official that came out here, however true they may be." [104] Collier, working with the Ho-Chunk reformer Henry Roe Cloud, a Yale graduate, had success at some congresses, though they were notably unable to secure the support of the Navajo.[105] In May, Collier reported to Congress that "fifty-five tribes, comprising 141,881 Indians, had approved the bill and that only twelve tribes, with 15,106 members, had voted against it." The tribes also proposed some thirty amendments to the bill, all of which Collier supported and presented to Congress.[106] But as Vine Deloria Jr. (of the Standing Rock Sioux) would later write, "On his return to Congress, Collier saw his program virtually gutted." In advocating for communal ownership of tribal lands, Collier was accused of advancing Communism.[107]

As passed, the Indian Reorganization Act did not require the tribes to adopt written constitutions, but it did require tribes on reservations to hold a referendum within a year of the act's passage, on whether the tribe wished for the act to apply to them. These elections took longer than expected and in many cases resulted in the bureau essentially strongly encouraging a specific outcome: the adoption of a written constitution.[108]

The Indian Reorganization Act (IRA), which exempted Oklahoma (a vast portion of Indian Country), Hawai‘i, and Alaska, stated that a tribe had the right to "organize for its common welfare and may adopt an appropriate constitution and bylaws," and it established procedures for ratification by a popular vote. But it also required that any constitution—and any amendment to any constitution—be approved by the secretary of the interior. It did not require either constitutions or a specific form of government, but it did require that any constitutions adopted under its authority had to "prevent the sale, disposition, lease, or encumbrance of

tribal lands, interests in lands, or other tribal assets without the consent of the tribe." [109]

The IRA had been chiefly drafted by the young New Deal lawyer Felix Cohen, assistant solicitor with the Department of the Interior, whose sensibility aligned with Collier's and who had received an education in the history of Indian law from a Mohawk teacher, Ray Fadden, from Onchiota, New York. (Born in 1907, Cohen was named after Felix Frankfurter, a friend of his father's.)[110] Indian constitutions, Cohen observed, "are not an innovation of the New Deal" but go back at least to the fifteenth-century Gayanashagowa, binding the Haudenosaunee.[111] Based on his reading of wampum and written Indian constitutions, as well as U.S. state constitutions, Cohen prepared a model constitution, an outline suggesting what ought to be one, and a "Basic Memorandum on the Drafting of Tribal Constitutions." Whether he sent his model constitution to tribes is not altogether clear; in 1934 he wrote that he had not done so because the tribes were "so variable that no single constitution prepared by the Indian Office could possibly fit the varied needs of the different Indian tribes" and because a constitution adopted from the model "would be only an adopted child and not be the natural offspring of Indian hearts and minds." [112] He also warned against distributing it out of concern that the tribes "would naturally be tempted to regard it as compulsive rather than suggestive." It seems unlikely, however, that everyone in the Bureau of Indian Affairs heeded this warning.[113]

Nearly a hundred tribes, from the Blackfeet to the Winnebago, adopted written constitutions in the years immediately following the law's passage. (In the twenty-first century, not all of the 574 federally recognized tribes have written constitutions but of those that do, 60 percent are IRA constitutions.)[114] But the Indian New Deal, like countless other federal policy changes, lasted only until the federal government determined on a new course of action, known as termination, in 1953.[115] It also revealed the limits of the federal government's commitment to the idea of republicanism as embodied in the acts of writing, ratifying, and amending a written constitution. The federal government didn't consider Indian constitutions to be Rocks of Gibraltar or bowls of Jell-O or ships whose holds were flooding. With Indian constitutions, every act of drafting, ratifying, and

amending was conditional on the approval of the Bureau of Indian Affairs and, ultimately, of Congress.

The Living Constitution

It was purely accidental that Charles Beard's article "The Living Constitution" appeared in May 1936, the month after James Beck's death, though it was unfortunate, because Beard appeared to be mocking a dead man. He began by poking fun at orators who delighted in constitutional metaphors, likening the Constitution to a sheet anchor, a lighthouse, and a beacon. For Beard, constitutional metaphors were a whole lot worse than bad writing; they reduced constitutional analysis to sorcery.[116]

The idea of a living constitution was hardly new, even if it had newly taken on that name. Thurman Arnold, FDR's assistant attorney general, is credited with popularizing the phrase "living Constitution" in the 1930s.[117] But Francis Lieber had written about the Constitution as an organism in 1865, representing amendments as its offspring. Woodrow Wilson had advanced this idea, as had Holmes and Brandeis.[118] "The Constitution of the United States is most significantly not a document but a stream of history," Frankfurter wrote in 1937. "And the Supreme Court has directed the stream." [119] By the 1930s, this conception of the Constitution had gained purchase in the public mind.

Beard, having witnessed the rhetorical effusions of James Beck for decades, and who had just published a new edition of his *Economic Interpretation of the Constitution*, took pains to contrast living constitutionalism with a "cult of constitutional certitude" that had come to dominate Washington, at least insofar as it was trotted out "on all ceremonial occasions." Anticipating the upcoming 1937 commemoration of the sesquicentennial of the Constitution, Beard reminded readers that the Constitution was hardly a set of positive and unequivocal commands. "Article II of the parchment may repose peacefully in the archives," he observed, "but the Article that counts most in real life is the personality occupying the White House." [120]

Yet what seemed to count most in the 1930s was neither the parchment preserved in the archives nor the personality occupying the White House but the nine old men in black robes who sat on the Supreme Court. Before

1935, the Court, with a five-man conservative majority, had broadly upheld the New Deal. “While an emergency does not create power,” Chief Justice Charles Evans Hughes had said, “an emergency may furnish the occasion for the exercise of the power.” [121] In January 1935 the Court ruled in favor of FDR, and Hughes upheld FDR’s agenda, leading one of the four most stalwart conservatives, known as the Four Horsemen, to cry out, “The Constitution is gone!” [122] But then, on a single day in May 1935, nearly the last session before the Court moved to a new and impressively grand Supreme Court Building, it struck down three elements of the New Deal, including the National Recovery Administration. Over the next year and a half, the Court struck down more than a dozen laws, all in 5–4 decisions.[123]

FDR, exasperated, considered his options. He had plenty of experience with constitutional amendments. As a state senator, he had supported the Sixteenth, Seventeenth, and Nineteenth amendments; his wife Eleanor had engaged in the campaign for the Child Labor Amendment. Democrats’ support for the repeal of the Eighteenth Amendment had helped FDR win the White House in 1932. “Roosevelt Advocates Constitutional Changes,” the *Los Angeles Times* reported in June 1935, listing a few of president’s latest ideas: “One scheme is to increase the number of Supreme Court justices so as to create a pro–New Deal majority therein. Another is so to alter the Constitution as to destroy the Court’s present power to negative acts of Congress.” [124] Constitutional amendment seemed, at the time, the easier path, but it was difficult enough that the *New York Times* reported that the administration was “considering a specific plan for a ‘quick’ method of amending the Constitution, by what would be the equivalent of a popular referendum.” [125] FDR bided his time, waiting for the 1936 election.

One idea was a constitutional amendment resurrecting an idea proposed by La Follette in 1924, requiring that only a unanimous Court could overturn a law passed by Congress. There were other amendments on the drafting table, too, including a slightly less strenuous requirement for a two-thirds opinion for overturning a law passed by Congress. FDR also considered an amendment strengthening Congress’s power to enact general welfare laws. (In 1787, Washington had proposed language in the Constitution granting Congress the power to “legislate in all cases for the general interests of the union, and also in those to which the states are separately incompetent, or in which the harmony of the United States as

may be interrupted by the exercise of individual legislation.") He also considered a judicial retirement amendment and presented to his cabinet a proposal to grant Congress power to overturn a Supreme Court ruling (by once repassing, at its next session, a law that the Court had found unconstitutional).[126]

After Roosevelt won reelection in a rout in 1936—he won forty-six states and 61 percent of the popular vote—he was widely expected to proceed with a call for an assortment of amendments, or even for a constitutional convention, though he is reported to have been against that, having allegedly said that "there was no way of keeping such an affair from getting out of hand what with Coughlin and other crackpots about"—that is, the demagogue Father Charles Coughlin—"but there is more than one way of killing a cat." [127]

The Liberty League hoped he *would* call for a raft of amendments, or a convention, knowing how well they could organize against it. Instead, he abandoned the idea of amendment, partly because of the delay it would have entailed, partly because he knew the Liberty League had amassed a war chest to fight any New Deal amendment, and partly because he did not relish the prospect of building a coalition with conservative Democrats.[128] Plus, he was working out another way to kill that constitutional cat.

But first, something in the character of an experiment, Roosevelt in 1937 called for an immediate ratification of the Child Labor Amendment and undertook to blitz the press. *The March of Time* obliged with a vivid seven-minute newsreel, presenting footage of children wearing little more than rags dwarfed by enormous machinery in factories and working as day laborers in fields, in something of a moving picture version of Lewis Hine's photographs, while a solemn narrator explained the urgency of ratification. The newsreel presented the opposition, which by now had dubbed the measure the federal-control-of-youth amendment, the narrator noted that "throughout the U.S. conservatives cry that regulation of youth is the first step toward dictatorship," but presented a much stronger argument on behalf of what it called "the most bitterly contested constitutional amendment in U.S. history" and confidently predicted ratification by year's end.[129]

Roosevelt had no such confidence. The experiment failed. Meanwhile, two of his closest advisers were supporting his resolution to abandon the

path of constitutional amendment, arguing that the wiser path would be to continue to insist on interpreting the Constitution to accommodate social and economic legislation. The first was Felix Frankfurter. The second was Roosevelt's attorney general, Homer Cummings. "The American constitutional method is a process of adaptation and growth," Cummings said in a speech delivered to the New York Bar Association at the end of 1935.[130] And as Cummings wrote in his diary a week after the 1936 election, "There is nothing the matter with the Constitution but that the entire difficulty has grown out of a reactionary misinterpretation of it." In February 1937 Cummings proposed, instead, a legislative solution that became known as the court-packing plan. He asked Congress to pass a law reforming the federal judiciary that would require naming an additional justice for every sitting justice over the age of seventy. That described six of them, including Hughes, who was seventy-seven.[131]

To a senator who pressed him to pursue a judicial retirement amendment instead, FDR wrote in February, "I am an optimist, as you know, but I think you are a worse optimist than I am." [132] In a fireside chat in March, he described the court-packing bill as the only possible solution "short of amendments," since while many in Congress liked various amendments, support fell short for any single one. And then there was the matter of urgency: "We cannot rely on an amendment as the immediate or only answer to our present difficulties," he insisted. Amendment in the interests of social legislation was bound to encounter formidable obstacles and delays, he warned. Looking back at the amendment history of his own lifetime, he insisted that "no amendment which any powerful economic interests or the leaders of any powerful political party have had reason to oppose has ever been ratified within anything like a reasonable time." [133]

This wasn't strictly true: yes, the Child Labor Amendment had stalled, but the Twenty-First Amendment had moved along fairly quickly. Still, amendments were unpredictable. Urged on by Frankfurter—whom FDR would name to the Supreme Court in 1939—the president abandoned amendment in favor of the exercise of executive and judicial power. This marked a fateful turn in the history of liberalism.

Roosevelt had reasons for making this turn. He was daunted by his fear of the bottomless pockets of the Liberty League, and by his frustration at the failure of the Child Labor Amendment, still eight states short of the

required thirty-six. And as the reigning historian of the amendment process has pointed out, amendment happened so infrequently that few politicians or legal theorists had sufficient experience with it to anticipate how any proposal might fare during ratification in the states, whether by legislatures, conventions, or referendum.[134] Meanwhile, the president had good reason to expect success with his court-packing bill.

But the campaign waged against it proved every bit as energetic as the campaign he feared the Liberty League would wage against an amendment.[135] By now, new methods to measure public opinion allowed the president and Congress to determine just how much support existed for restructuring the federal government. George Gallup had founded the American Institute of Public Opinion in 1935, later followed by Roper's opinion polling outfit. Both organizations measured Americans' attitudes about possible amendments. Broadly, they were in favor. In 1936, 61 percent favored the Child Labor Amendment (this rose to 76 percent in 1937); 70 percent favored the minimum wage amendment. In 1936 only 43 percent of Americans favored an amendment "transferring to the Federal Government the power to regulate agriculture and industry"; this rose to 58 percent in 1937. In 1937, 64 percent favored an amendment requiring Supreme Court justices to retire between ages seventy and seventy-five; by 1939, that number had dropped to 59 percent.

Gallup Public Opinion Survey Questions About the Constitution, 1936

Question	Date	Yes	No	No opinion
Would you favor or oppose an amendment to the Constitution transferring to the federal government the power to regulate agriculture and industry?	Jan. 13–18, 1936	43%	57%	
Do you favor an amendment to the Constitution giving Congress the power to limit, regulate, and prohibit	Apr. 6–11, 1936	61%	39%	

Question	Date	Yes	No	No opinion
the labor of persons under eighteen?				
Do you favor an amendment to the Constitution to regulate minimum wages?	Jun. 22–27, 1936	70%	30%	
Would you favor an amendment to the Constitution giving Congress the power to regulate agriculture, commerce, industry, and labor?	Dec. 16–21, 1936	42%	51%	7%
Do you favor an amendment to the Constitution giving Congress the power to limit, regulate, and prohibit the labor of persons under eighteen years of age?	Jan. 13–18, 1937	70%	25%	5%
Do you favor an amendment to the Constitution giving Congress the power to limit, regulate, and prohibit the labor of persons under eighteen years of age?	Jan. 20–25, 1937	76%	21%	3%
Do you favor an amendment to the Constitution giving Congress the power to limit, regulate, and prohibit	Jan. 27–Feb. 1, 1937	69%	27%	4%

Question	Date	Yes	No	No opinion
the labor of persons under eighteen years of age?				
Do you favor an amendment to the Constitution giving Congress the power to limit, regulate, and prohibit the labor of persons under eighteen?	Feb. 3–6, 1937	76%	24%	
Would you favor an amendment to the Constitution giving Congress greater power to the regulate industry and agriculture?	Mar. 3–8, 1937	58%	42%	
Should the Constitution be made easier to amend?	Mar. 3–8, 1937	28%	60%	12%
Would you favor an amendment requiring Supreme Court justices to retire at some age between seventy and seventy-five?	Apr. 7–12, 1937	64%	36%	
Would you favor an amendment to the Constitution making the income from government bonds taxable?	Jun. 16–21, 1937	49%	32%	19%
Would you favor a constitutional amendment prohibiting any president to run for a third term?	Aug. 11–16, 1937	49%	51%	

Question	Date	Yes	No	No opinion
Do you think that each amendment to the Constitution should be approved by a direct vote of the people instead of by state legislatures?	Dec. 30, 1937– Jan. 4, 1938	53%	34%	13%
Do you think that each amendment to the Constitution should be approved by a direct vote of the people instead of by state legislatures or constitutional conventions?	Feb. 16–21, 1938	56%	29%	15%
Do you think an amendment should be adopted when two-thirds of the states vote in favor, instead of three-fourths of the states as at present?	Feb. 16–21, 1938	17%	22%	24%
Would you favor an amendment to the Constitution to fix the number of justices (to the Supreme Court) at nine?	Apr. 15–20, 1938	61%	39%	
Would you favor an amendment to the Constitution requiring employees of state and local governments to pay federal income taxes?	Apr. 21–26, 1938	74%	15%	11%
Would you favor a constitutional amendment prohibiting any president of	Aug. 18–23, 1938	48%	52%	

Question	Date	Yes	No	No opinion
the United States from serving a third term?				
Would you favor a constitutional amendment requiring all U.S. (United States) Supreme Court and federal judges to retire at seventy?	Jan. 9–14, 1939	59%	34%	8%
Should the Constitution be amended to require Congress to obtain the approval of the people in a national vote before the United States could take part in a foreign war?	Feb. 18–24, 1939	54%	39%	7%
Should the Constitution be amended to require a national vote before the country could draft men to fight overseas?	Mar. 10–15, 1939	61%	39%	
Would you favor an amendment to the Constitution to prevent any president of the United States from serving a third term?	Jul. 5–10, 1940	41%	59%	

A slim majority of 53 percent agreed that amendments “should be approved by a direct vote of the people instead of by state legislatures.” In 1937 only 17 percent favored lowering the ratification requirement from three-fourths of states to two-thirds, and only 28 percent agreed that the Constitution should “be made easier to amend.” [136]

If FDR had stayed the course and pursued a constitutional amendment to restructure the Supreme Court, he might well have succeeded. A strong majority of Americans favored such an amendment. Had FDR not blinked, Article V might well have constitutionalized the New Deal, placing it on far firmer ground than it gained.

Follow for extended description

The constitutional battle over the New Deal, *New York Post*, January 6, 1937

That nice unconstitutional bill

What's the best way to change the Constitution? In the end, the Court decided. FDR's battle with the Court reached its dramatic conclusion on March 29, 1937, when the Court issued its opinion in *West Coast Hotel Co. v. Parrish.* Reversing its decision in *Adkins v. Children's Hospital* from 1923, the Court upheld a Washington state minimum wage law for women. Justice Owen Roberts changed his position, a reversal widely seen as a response to Roosevelt's court-packing plan and thus ever afterward known as "the switch in time that saved nine." Soon afterward the Senate Judiciary Committee elected not to move the court-packing plan out of committee.[137]

West Coast Hotel Co. v. Parrish ended the Lochner era, as Chief Justice Hughes, writing for the majority, acknowledged that "the Constitution does not speak of freedom of contract." An aging George Sutherland, still on the bench, dissented. Sutherland's method of constitutional interpretation was, he insisted, both specific, and disciplined. "The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it," he'd written in a dissent in 1934.[138] "The meaning of the Constitution does not change with the ebb and flow of economic events," he wrote in his dissent in *West Coast Hotel Co. v. Parrish*. He accused the majority of effectively amending the Constitution. "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation," he scolded his brethren.[139]

The New Deal involved such a wholesale restructuring of the powers of the federal government that those who supported it tended to endorse the very idea of change. "I don't believe in one generation deciding what the others shall do," wrote one philosophy professor in 1931. "Our forefathers didn't know anything about a country of 120,000,000 people, with automobiles, trains, and radios." [140] Thomas Reed Powell, looking back at 1787 from 1937, said the framers "indulged in change, they planned for change, they provided the way for change. They and their friends agreed upon further change as the price of securing the immediate change they sought to bring about. More important still, they left open the way of change by what they left undone." As for the Court, he welcomed its decision in *West Coast Hotel Co. v. Parrish*, and offered up a neat quantitative analysis, counting the votes of all the justices who weighed in on the minimum wages cases, and came up with seventeen justices having participated, eleven voting in favor, and seven against. (He counted Roberts twice.)[141] Maybe that was a kind of amendment ratification.

"Who killed Article Five?" the legal scholar Bruce Ackerman asked, studying the New Deal. "Not the President, not the Congress, but the Supreme Court." For Ackerman, the Court had interfered with the process of Article V amendment by submitting to pressure and negotiating the "switch in time." [142] But it took more than the Court alone to kill Article V.

Convincing the Court to change its mind was one way to amend the Constitution. With the Court's decision in *West Coast Hotel Co. v. Parrish*,

New Dealers abandoned the minimum wage amendment. But another way to amend the Constitution was to convince Congress to pass a law doing the same work as an amendment. A new wave of states had ratified the Child Labor Amendment during the Depression—fourteen states had ratified in 1933 and five more in 1935, and four more in 1937, raising the total to twenty-eight out of a required thirty-six. Given the painfully low employment rate, removing children from the labor force made especially good economic sense. In 1934 FDR declared that even without the amendment, child labor had effectively ended.[143] He spoke too soon. The employment of children continued, and the Court's striking down of New Deal legislation led the National Child Labor Committee to intensify its efforts at ratification of the Child Labor Amendment.

But FDR still preferred other, easier means. When, in the "switch in time," the Court finally ruled in his favor, FDR turned to his secretary of labor, Frances Perkins, and asked her, "What happened to that nice unconstitutional bill you had tucked away?" [144] That law was the Fair Labor Standards Act whose provisions included the abolition of child labor. It would never have passed muster with the Supreme Court before its capitulation in 1937. But it passed Congress in 1938, and the chastened Supreme Court did not overturn it.

The passage of the Fair Labor Standards Act led to the abandonment of the Child Labor Amendment. It had passed Congress and failed of ratification, only to be rendered essentially obsolete by federal legislation. The same is sometimes said of the Equal Rights Amendment. These two failed proposals, both made in the 1920s, share another fate: both, nearly a century later, remain the subject of ongoing efforts at ratification, since the problems they aimed to address have still not been solved by ordinary legislation.

Not because it is old, but because it is ever new

On Constitution Day, September 17, 1937, the 150th anniversary of the Constitution, Roosevelt delivered a speech before a crowd of sixty-five thousand, gathered at the base of a floodlit Washington Monument.[145] He spoke of "four handwritten sheets of parchment" containing "eternal verities, unchangeable by time and circumstance," but he emphasized what

the Constitution did not contain. It did not specifically provide for judicial review, “nor does it mention the number of judges for the Court.” He maligned the delays of the amendment process: “It cost twenty years of taxation on those least able to pay to recognize the constitutional power of the Congress to levy taxes on those most able to pay.” And “it has cost twenty years already—and no one knows how many more are to come—to obtain a constitutional interpretation that will let the Nation regulate the shipment in national commerce of goods sweated from the labor of little children.” He insisted that Americans would no longer tolerate such delays, could “no longer afford the luxury of twenty-year lags,” and would no longer “sacrifice each generation in turn while the law catches up with life.” He asked Americans to revere the Constitution “not because it is old, but because it is ever new.” [146]

Jacobus tenBroek at his braillewriter, c. 1939

As for the relationship between the old and the new, Jacobus tenBroek, a blind scholar of law at the University of California who went on to found the National Federation for the Blind, spent much of his time in 1937 undertaking an assessment of how the Supreme Court had made and justified its decisions over the course of the first century and a half of its history.

TenBroek, born in Canada in 1911, had lost much of his sight in an accident at age seven and all of it by age fourteen. After graduating from the California School for the Blind in 1931, he’d studied history, political

science, and law at the University of California, Berkeley, after which he was a fellow at Harvard Law School until Thomas Reed Powell helped him secure a position at the University of Chicago.[147] In a series of influential articles published between 1937 and 1939, tenBroek conducted a thorough investigation of what he called "the intent theory of constitutional construction," or the "intent doctrine," that is, the justices' use of the records and proceedings of the Constitutional Convention for the purpose of discovering "the intention of the framers." [148] (TenBroek thought justices' reliance on these records was very often naïve, in that they appeared to credit the framers "with the capacity to state their exact position in words, and with having been entirely lacking in concealable purpose," or else very cynical, in that they used whatever they found to justify whatever decision they pleased.)

But in a survey of a century and a half of Supreme Court decisions, with notable stopping points at *Dred Scott* and opinions written by George Sutherland, tenBroek found that "while the United States Supreme Court will use convention debates and proceedings to show that the intention of the framers thus reveals affirms or does not contradict the position of the Court, such intent so discovered will be disregarded when in conflict with the interpretation of the Constitution announced by the Court." Beyond the intent doctrine's capriciousness, tenBroek found its methods irredeemably flawed: the records of the Constitutional Convention are vague, incomplete, and contradictory; the framers, like all people, very often hid their own motives and intentions; and the records represent the views of the loudest delegates but not necessarily of the body itself. On democratic grounds, the debates in the state ratifying conventions "would come much closer to revealing actual constitutional intent than would the proceedings of the framers' Convention," except that those debates are subject to all those same limitations. In the end, tenBroek concluded, such sources "are fundamentally unsound instruments wherewith to rationalize a decision rendered." [149]

If the intent doctrine were what its advocates claimed it to be, tenBroek pointed out, each justice would be "a mindless robot whose task is the utterly mechanical function of measuring constitutionality by the yardstick of conformity to the original intent." But none of this was true: original intent was not discoverable; it was an act of interpretation. And weighing its influence required reasoning and judgment, neither of which was

incontrovertible and both of which were subject to contestation, argument, and revision. Ultimately, tenBroek argued, “the meaning of the Constitution varies, even in the absence of formal amendment.” That, for tenBroek, was the nature of constitutionalism. Sutherland, he alleged, was simply wrong. A constitution’s meaning ebbed and flowed. “The economic conditions” since *Adkins* had required the Court’s reversal in *West Coast Hotel Co. v. Parrish*, as the majority had written, insisting that the Court had an obligation to note economic and social facts. TenBroek pulled no punches. He called the intent doctrine a fallacy:

> Any theory which describes the meaning of the Constitution as changeless, which understands that constitutionality is decided by the outcome of a judicial search for the original intent, which makes of a constitutional issue only an historical question, which denies the proper influence of the altering factual world upon the meaning of the document—any theory which does all these things—is an utterly false portrayal of what the Supreme Court actually does.

He made a list of the factors the Court ought to consider in interpreting the Constitution under what he described as “the doctrine of constitutional adaptability” (which he argued, not without a sense of irony, had been the framers’ original intent): original intent, the nature of the problem, the history of the country, the Court’s earlier decisions, the actions and present attitude of other branches of the government, the Court’s views as to “justice, expediency, policy, social need, economic and political, theory, ultimate consequences,” and the justices’ predilections. But “above all else, questions should be considered in the light of present day conditions as they actually exist, not in the near darkness of the world as it surrounded the framers, nor yet in the dimming illumination of things as they were in the youth of the justices.” [150]

TenBroek devastated the line of constitutional interpretation that stretched from Roger Taney to George Sutherland. Let the courts adapt, he insisted. But formal amendment, by 1937, seemed less and less likely. You could amend the Constitution by Article V; amend the Constitution by persuading the Court to interpret it your way; or amend the Constitution by convincing Congress to pass a law that did some or much of what you hoped an amendment might do. But for large numbers of Americans in 1937, no path to amendment was available at all. In April of that year, right after *West Coast Hotel Co. v. Parrish*, John P. Davis, a founder and executive secretary of the National Negro Congress, testified before a

Senate committee on the matter of the Reorganization of the Judiciary, just before the committee tabled the idea, given the Court's capitulation on the minimum wage.

The Supreme Court, Davis told the Judiciary Committee, had utterly failed to honor the Thirteenth, Fourteenth, and Fifteenth amendments. "Practically every major citizenship right guaranteed Negro people by these amendments has been either seriously limited or rendered a nullity by biased decisions," he said. He recounted the whole sorry history, beginning with the Supreme Court cases that essentially nullified the Fourteenth Amendment as it applied to Black people, down through the persistence of lynching and Jim Crow poll taxes. Even if Congress were to pass an anti-lynching law—which FDR refused to support, because he needed white Southern Democrats to support his New Deal legislation—Davis predicted that the Court would find it unconstitutional. But as for other remedies? Davis had little hope.

FDR might have risked Article V, instead of funneling constitutional change through the courts. The civil rights movement did not have that choice. Least of all did Davis place hope in Article V. "We cannot wait for amendments while 3,000,000 Negros are denied the right to vote," he said. "For who can say that the new amendments will not share the same fate as the old." [151] His only hope, and it was a slender hope, rested in the Supreme Court. No argument would more powerfully indict the amendment provision of the Constitution; nor would any argument made in the 1930s more significantly redirect the nation's constitutional history in the aftermath of the Second World War.

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10

The Lost Amendment

Ethel Payne shaking hands with President Lyndon B. Johnson at the White House, 1966

No State law shall be held to conflict with the Constitution or laws of the United States by reason of the fact that it may require the maintenance of racial segregation in public schools if such State furnishes substantially equal public-school facilities to all races.

—Failed amendment to the U.S. Constitution, introduced into Congress, 1954

Reporter Ethel L. Payne, forty-three, five foot three, and indomitable, was preparing for a five-week world tour on March 26, 1955, when she filed an arresting story from Washington, DC: Southern segregationists opposed to *Brown v. Board of Education*, the Supreme Court's landmark 1954 decision declaring segregation in public schools to be a violation of the Fourteenth Amendment, were seeking to overturn it by calling for a constitutional convention.[1] They wanted to pass what would come to be called the Lost Amendment, an amendment for the Lost Cause.

Brown v. Board of Education, whose interpretation of the Fourteenth Amendment relied on sociological rather than historical evidence, altered both the relationship between constitutional amendment and judicial review and the very nature of constitutional agitation. From Reconstruction through the start of the New Deal, efforts to amend the Constitution had come more often from the left than from the right. In 1937, after FDR won his battle with the Court, New Dealers abandoned the idea of amendment and looked to the Court to enact change. So did the civil rights movement. In 1940 the young Baltimore lawyer Thurgood Marshall founded the NAACP's Legal Defense Fund and plotted out a litigation strategy to defeat segregation by challenging *Plessy v. Ferguson*'s "separate but equal" doctrine. Beginning in the 1940s but especially after 1954, calls for amendment came more often from the right and in particular from a conservative political minority—chiefly Southern Democrats—determined to overturn the New Deal, halt the march of Communism, reassert states' rights, and impede the extension of civil rights. After *Brown*, that minority would continue to pursue Article V amendment and even, as Ethel Payne reported, a constitutional convention. Finding little but failure, they also tried to defeat the Warren Court by arguing for interpreting the Constitution according to the "original intent" of its framers, repurposing the old proslavery argument that the Constitution sanctioned slavery to the claim that it also sanctioned segregation. By the 1960s, original intent doctrine had become a hallmark of a conservative insurgency within the Republican Party, led by Arizona senator Barry Goldwater and California governor Ronald Reagan. A decade later it entered the elite legal academy and, in the 1980s, the Justice Department, public discourse, and finally the Supreme Court.[2]

Ethel Payne is not the most obvious figure to serve as a guide along this winding path. She was not a civil rights lawyer, even though she'd wanted to be one. Born on the south side of Chicago in 1911, Payne was the grandchild of former slaves—from Tennessee on her father's side and from Kentucky on her mother's. Her father, who died when she was twelve, had been a Pullman porter. Payne never lacked for audacity. In 1931, when she was barely twenty, she wrote to W. E. B. Du Bois asking to write his biography. As an NAACP activist in the 1930s, she'd applied unsuccessfully to the University of Chicago Law School. In 1937 she warned FDR against packing the Court, an institution that she described, in a letter published in the *Chicago Tribune*, as the "final, greatest hope for political, moral, and economic justice" for Blacks. In 1941 she'd helped A. Philip Randolph, founder of the Brotherhood of Sleeping Car Porters, organize a march on Washington. In the 1940s she'd studied English and history at a junior college and, later, journalism at Northwestern at night while working at the Chicago Public Library by day.[3] After the war, she was living in Tokyo when she was hired by the *Chicago Defender*, the nation's leading Black newspaper. In 1953 she became the *Defender*'s Washington correspondent.[4] But what makes Payne an especially useful chronicler of this era is that, unlike so many observers of the battle over segregation during the Cold War, she spent a great deal of time outside the United States, reporting on the struggles for the political equality and self-determination of what were called the "darker races." That reporting casts light not only on the nature of the color line but also on the limits of midcentury Cold War liberalism.

In 1941 FDR had signed the Atlantic Charter, which endorsed "the right of all peoples to choose the form of government under which they will live." [5] At the end of the Second World War, the United States officially committed itself to decolonization and self-determination even as it sought to extend its own sphere of influence, and halt the spread of Communism, by pressuring newly independent nations in Africa and Asia to align with the United States over the USSR. Under these circumstances, American race relations became a concern of the State Department, contributing to Truman's decision to form a Committee on Civil Rights. Communist propagandists abroad "have tried to prove our democracy an empty fraud, and our nation a consistent oppressor of underprivileged people," the

committee warned.[6] This critique came from within the United States as well. Du Bois, in a 1947 statement to the new United Nations, described the United States as "the greatest modern attempt at democratic government to deny its political ideals" and argued that American racism "is far more dangerous to mankind than the Atom bomb." [7]

The costs of racism as domestic policy were borne by the people on whom it was imposed, including, during the Second World War, more than one hundred thousand people of Japanese ancestry imprisoned in internment camps. The Supreme Court notoriously upheld that policy in 1944 in *Korematsu v. United States*, but a dissenting justice rightly described it as "the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy." [8] From a U.S. foreign policy standpoint, American racism had different costs. The imprisonment of Japanese and Japanese Americans, the impoverishment of Native peoples ("the Russians have been particularly watching our attitude toward native Indians of our country," Eleanor Roosevelt warned on the radio in 1949), the continued colonial status of the island territories of Hawai‘i, Guam, and Puerto Rico, and above all, the persistence of Jim Crow laws gave the Soviet Union abundant ammunition in persuading former colonies in Africa and Asia that the United States was not to be trusted and that they should align instead with the USSR. It was from that vantage point that Payne would call the day the U.S. Supreme Court issued its decision in *Brown* "the greatest date in United States history in regard to its relations with Asians and Africans." [9]

Payne arrived in DC just in time to watch the second round of oral arguments in the series of consolidated school segregation cases that were gathered together under the heading of the Kansas case, *Brown v. Board of Education*. *Brown* had first been argued in 1952, but the new chief justice, Earl Warren, had called for a reargument and asked the parties "to ascertain what was the interpretation of the 14th amendment with reference to schools at the time of its adoption." To answer Warren's questions, Thurgood Marshall relied on a book by Jacobus tenBroek, *The Antislavery Origins of the Fourteenth Amendment*, published in 1951.[10] "We have taken full advantage of your book," Marshall wrote tenBroek in 1953.[11] TenBroek, who had earlier denounced the original intent theory of constitutional construction as a fallacy, had sought to demonstrate that the

Fourteenth Amendment had origins well outside the debates held in the Capitol. On the opposing side, the historical research used by the NAACP's adversaries was chiefly prepared by a little-known lawyer from Richmond, David J. Mays, who had just won the Pulitzer Prize for his two-volume biography of the eighteenth-century Virginia lawyer, judge, and slave owner Edmund Pendleton.

Ethel Payne had first met Thurgood Marshall in Tokyo and once described him, entering a courtroom, as "devastatingly cool." [12] She watched the oral argument in *Brown*, rapt. "The fate of segregated public schools is now in the hands of the U.S. Supreme Court," she reported after the justices exited the courtroom. "The court must now decide whether to declare Jim Crow unconstitutional or leave it entirely up to the states to settle." [13] But the stakes were greater still. The conservatism that had opposed Progressivism and the New Deal as varieties of socialism took on a new and more radical cast in the 1950s as an anti-Communist crusade that, after *Brown*, drew strength from Southern segregationists who tied together opposition to federal power with opposition to civil rights.[14]

The conservative insurgency that began in the 1950s would, over the next two decades, reshape the Democratic and Republican parties. It's easy, eying that remarkable realignment, to lose sight of the world stage on which it took place. In the spring of 1954, as the U.S. Supreme Court deliberated over *Brown*, Indian prime minister Jawaharlal Nehru and Indonesian prime minister Sukarno began plans to hold a convention of delegations from Asian and African nations to chart their own course, unaligned with either the United States or the Soviet Union; it would be held in Bandung, Indonesia; Payne would be sent to cover it.[15]

On May 17, 1954, the day the Court was expected to issue its opinion, Payne was in the courtroom, sitting with the press. "If any of you are in touch with the man upstairs, can you put in a good word for us on this case please," Marshall said to reporters as he walked past. The *Defender* had halted its presses, awaiting the decision. Warren began reading the Court's unanimous opinion at 12:52 p.m. He said he'd found the historical evidence of the original intent of the framers of the Fourteenth Amendment to be "inconclusive." He also rejected the idea that he ought to defer to it, even if it had been conclusive. "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896

when *Plessy vs. Ferguson* was written," Warren said. "We must consider public education in the light of its full development and its present place in American life throughout the nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." [16]

The moment it became clear how the Court had decided, the room stirred, pulsed with emotion. "There I was—right in the middle of it and almost out of my mind," Payne wrote. Reporters raced to get out the story, which was broadcast, within minutes, on the radio. Across the city, Black taxi drivers blared their horns in jubilation.[17]

Much of the country celebrated. But segregationists in the South began pursuing all means possible to defy the Court. In 1955, in a decision known as *Brown II*, the Court ordered segregated schools to be integrated "with all deliberate speed," although it provided no mechanism for enforcing this decision. "If people don't want to go to school together," Mississippi senator James Eastland said in an interview on CBS, "who's going to make them?" Eastland insisted that there was "no racial friction" in his home state. That summer two white Mississippians mutilated and murdered the fourteen-year-old Black child Emmett Till.[18] A year later—even six years later—hardly any public schools in the Deep South had been integrated.[19]

On that twenty-sixth of March 1955, Ethel Payne reported a story that had barely been noticed in the white press. Joint resolutions had just been introduced into the House for a federal amendment that would "change the method of amending the articles of the Constitution" by lowering the number of states required to call for a constitutional convention; the purpose of the maneuver, Payne reported, was to use an amended Article V to overturn *Brown*. She warned that if this effort were successful, the "integration of schools could be delayed maybe 10, 20 or even 50 years." [20]

Ethel Payne might have covered that story. Instead, she boarded a plane for Bandung.

The rights revolution

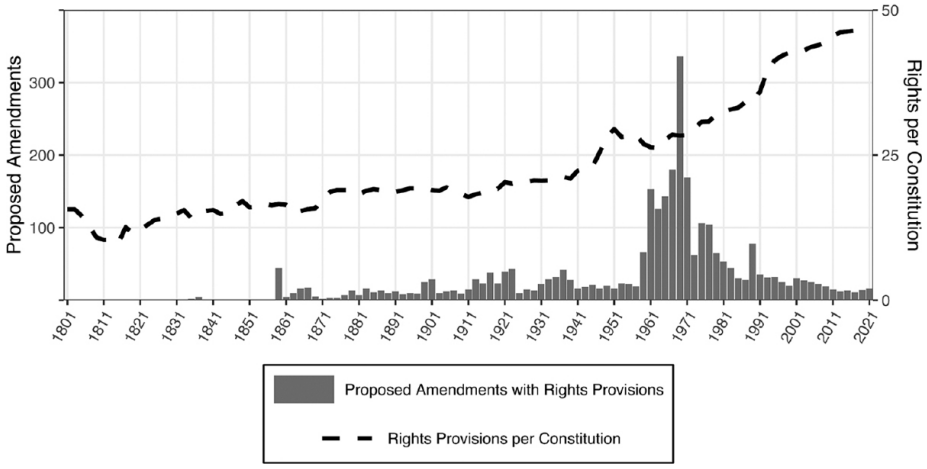
In the United States, *Brown* is credited with inaugurating a "rights revolution," during which rights—including civil rights, the rights of criminal defendants, reproductive rights, and more—were principally

achieved by decisions made by the Supreme Court, especially during the chief justiceship of Earl Warren, which began in 1953 and ended when Warren retired in 1969. These rights were not achieved by constitutional amendment: only a single amendment to the Constitution was ratified between 1933 and 1961, the Twenty-Second, in 1951, limiting the presidency to two terms. Of the four amendments ratified between 1961 and 1971, only the Twenty-Sixth concerned constitutional rights, and it didn't establish a new right. Instead, by lowering the voting age to eighteen, it merely expanded an existing one.

The rights revolution, however, was worldwide, lasted considerably longer, and outside the United States, was driven not by judicial interpretation but by the drafting and amending of constitutions. Language relating to rights in national constitutions nearly doubled between 1910, when words about rights comprised about 6 percent of national constitutional texts, and 1948, when that percentage had risen to 10; by 1970, it had risen to 12. (By 2000, 15 percent of words in national constitutions concerned rights, a growth that came to be known as "rights creep." [Figure 4])[21]

FIGURE 4

Rights Language in Proposed Amendments and National Constitutions by Congress, 1801–2021



Follow for extended description

One way to consider *Brown* as a constitutional change effected through judicial interpretation is to compare its history with the progress, or rather,

the failure, of the Equal Rights Amendment. Although first introduced into Congress in 1923, the ERA was in many ways the last of the Reconstruction amendments, since suffragists had since the 1860s fought for the Fourteenth Amendment to prohibit discrimination on the basis of sex. In the 1930s, it had seemed possible that it might wend its way through Congress. The hardships of the Depression had strengthened support for equal rights. “We have the best chance of winning Equal Rights now that we have ever had since the Amendment was first introduced,” one National Woman’s Party lobbyist proclaimed in 1936.[22] Congress, swamped with petitions calling for the ERA’s passage, held hearings in 1938.[23] “The logic of this step is self-evident,” said one advocate, endorsing the idea that the history of rights is characterized by an ever-widening community of rights holders.[24]

But just as Florence Kelley had opposed the ERA in the 1920s, leading liberal women, including Eleanor Roosevelt, continued to oppose it in the 1930s, fearing that it would undo necessary protections for women, especially within labor legislation.[25] Kelley died in 1932, but in her place the opposition was led by Frances Perkins, FDR’s secretary of labor, who complained that the ERA denied “the unique biological function of women and their responsibilities as homemakers and mothers of future citizens.” [26]

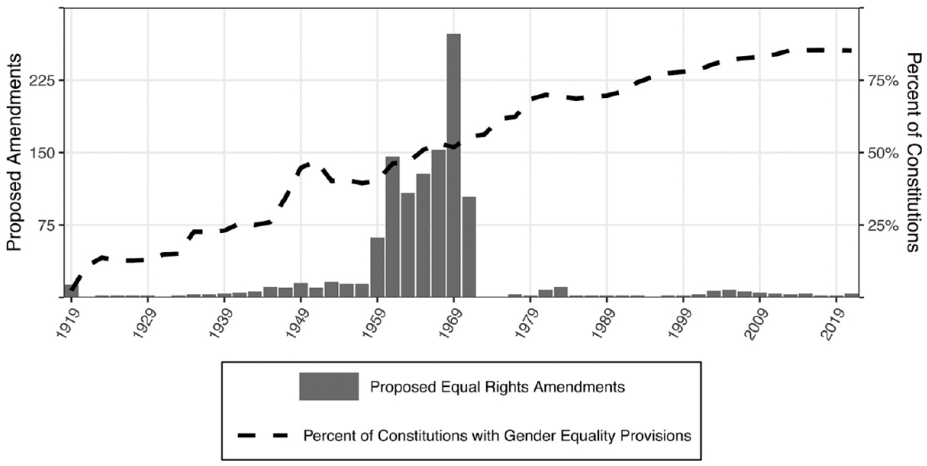
The Supreme Court’s 1937 decision not to overturn labor legislation, the passage of the Fair Labor Standards Act in 1938, and women’s contribution to the labor force in the Second World War combined to allay many of these objections. Since labor laws no longer offered special protections to women but instead guaranteed these protections to men as well, much of the protectionist position had become obsolete.[27] A swell of support for the Equal Rights Amendment followed.

In the 1940s the Equal Rights Amendment appeared to be keeping pace with another popular proposal, the presidential term limits amendment. The first hearings on that amendment—“No person shall be elected to the office of the President more than twice”—were held in 1940.[28] A 1943 survey found that 54 percent of Americans opposed the presidential term limits amendment, while 46 percent favored it; a year later those in favor had risen to 58 percent.[29] FDR’s decision to seek a fourth term in 1944 cemented support for the measure. Congress passed the Twenty-Second Amendment in 1947, and it was ratified in 1951.

Prospects for the Equal Rights Amendment seemed, if anything, better. In 1940 the Republican Party endorsed the ERA; the Democratic Party followed eight years later. By the mid-1940s, twenty-five governors had endorsed it. Eleanor Roosevelt abandoned her earlier objections in order to support the charter of the newly formed United Nations, whose preamble affirmed as fundamental human rights the "equal rights of men and women." [30] The ERA also gained the support of the National Association of Colored Women, headed by Mary Church Terrell, who testified in Congress in support of the amendment in 1945 and again in 1948. Like Ethel Payne, Terrell brought an international perspective to constitutional rights. As a young woman, she'd studied in France, Germany, and Italy, experiences that had informed the founding of the NACW in 1896. In 1904 she'd addressed the International Congress of Women in Berlin, speaking on "The Progress of Colored Women." She'd followed the establishment of equal rights provisions in constitutions in Europe both before and after the Second World War, and in her testimony to Congress in 1948, she noted that Japan's new constitution, too, granted equal rights to women. Terrell argued that the absence of such a provision in the underdeveloped U.S. Constitution was internationally embarrassing, in the same way as were American race relations.

FIGURE 5

Proposed Gender Provisions in Amendments and National Constitutions, 1919–2019



Follow for extended description

Amendments Pledged on Party Platforms, 1940–60

Year	Party	Amendment
1940	Republican	equal rights regardless of sex
1940	Republican	presidents limited to two four-year terms
1944	Republican	equal rights regardless of sex
1944	Republican	presidents limited to two four-year terms
1944	Republican	abolition of poll tax
1948	Republican	equal rights regardless of sex
1948	Democratic	equal rights regardless of sex
1948	Progressive	equal rights regardless of sex
1948	Progressive	direct election of president and vice president
1948	Christian	requiring segregation and Nationalist outlawing intermarriage
1952	Republican	equal rights regardless of sex
1952	Democratic	equal rights regardless of sex
1956	Democratic	equal rights regardless of sex
1956	Republican	equal rights regardless of sex
1956	Prohibition	direct election of president and vice president
1960	Socialist	equal ballot access for third parties
1960	Democratic	DC voting representation in Congress
1960	Republican	equal rights regardless of sex

In 1950 the Equal Rights Amendment passed the Senate by the required two-thirds majority. This version included a rider, designed to appease protectionists, modeled on those in many European constitutions—“The provisions of this article shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law upon persons of

the female sex." The Senate again passed the amendment in 1953, but in the House, the bill never wriggled free of the stranglehold imposed by the Judiciary Committee. For two decades, during which the number of women in Congress never rose above twenty—or less than 5 percent—opponents of the ERA kept it locked up.[31] However momentous the worldwide rights revolution, it left American women behind. Provisions for women's rights had been made in 35 percent of national constitutions by 1946, in 51 percent by 1956, and in 62 percent by 1966 (Figure 5).[32] This failure of American democracy did not encourage civil rights activists to change their minds about seeking change through the courts rather than through Congress and Article V.

From the vantage point of conservatives, though, Article V looked somewhat promising. Between 1937 and 1960, even as the New Deal became more firmly established—embraced not only by Harry S. Truman but also by Dwight D. Eisenhower—an emerging conservative counterrevolution attempted to limit federal power, especially as exercised by the executive and judicial branches.[33] Conservatives considered both the Eighteenth Amendment and the Twenty-Second to be successes in their efforts to rein in the federal government. What they particularly liked about Article V was that it avoided both the executive and judicial branches—the branches they blamed for creeping socialism in the United States.[34] They were happy to see the abandonment of the Child Labor Amendment and the locking up of the Equal Rights Amendment, even as their own list of proposed amendments grew longer and longer.[35] But by the 1950s, anything that anyone demanded of the Constitution, by whatever mechanism of change they sought to pursue, confronted a document whose meaning and place in American life had been transformed by the frantic, paranoid bunker mentality of the Cold War.

La Constitución del Estado Libre Asociado de Puerto Rico

Puerto Rico's struggle for independence, and its drafting of a new constitution, formed a crucial backdrop to the Court's deliberations in the school segregation cases. Enacting its stated commitment to self-determination, the United States had granted the Philippines independence in 1946. But its other territorial possessions, including Puerto Rico, it had

not liberated, a state of affairs that revealed the limits of the United States' commitment to decolonization, self-determination, republicanism, and constitutionalism, a commitment constrained by American ideas about race. A Puerto Rican Nationalist Party, the Partido Nacionalista, founded in 1922, had long been fighting for independence. And for just as long, the FBI had been attempting to thwart it, infiltrating the party and assembling surveillance files, or *carpetas*, on all its leaders and many of its members.[36]

Pedro Albizu Campos, who had studied at the University of Vermont and earned degrees from both Harvard College and Harvard Law School, became the head of the Partido Nacionalista in 1930.[37] In 1932 he ran for a seat in the Puerto Rican Senate against the Partido Popular Democrático's Luis Muñoz Marín, who had long supported Albizu Campos and who also proclaimed himself to be an "avowed nationalist." [38] Muñoz Marín, too, had studied in the United States, though he had dropped out of Georgetown Law School to become a poet in Greenwich Village. The FBI had *carpetas* on both men, including evidence that Muñoz Marín, an alcoholic, had become addicted to opium. Muñoz Marín defeated Albizu Campos, who went on to organize sugar workers. During a military purge of nationalists, Albizu Campos was arrested and tried for conspiring to overthrow the U.S. government, resulting in a hung jury. In a second trial in 1936, he was found guilty.[39] Muñoz Marín, meanwhile, went on to become president of the senate in 1940. Although Muñoz Marín had consistently advocated for independence, in 1943 he suddenly began arguing against it, claiming that Puerto Rico "was not ready for self-government." He appears to have done so under pressure from the United States, which had over him the hold of his FBI file.[40]

Albizu Campos was paroled in 1943, having served a prison sentence first in Puerto Rico and then in the United States. After an extended stay in a hospital in New York, he returned to Puerto Rico in 1947 and was met with crowds of supporters and the Cuerpo de Cadetes de la República, a liberation army he had formed in the 1930s.[41] Hoover now pursued him as a Communist, and in 1948, at Muñoz Marín's instigation, the senate passed a gag law under whose terms any advocacy of independence, including the display of the Puerto Rico flag, was illegal and punishable by as many as ten years in prison. In 1949 Muñoz Marín was elected governor, and the U.S. State Department began referring to Puerto Rico not as an "island

possession" but as an "associated state," without granting it any change of status, largely for the sake of countering critics: "It is only one of the things we might do to gain, with respect to Puerto Rico, as we have with respect to the Philippines, credit into the eyes of Latin America and the world at large," according to a State Department memo.[42]

Communism, in all its terrifying brutality, was bleeding, it seemed, to every corner of the globe. In China, Mao Zedong had come to power in 1949. In Eastern Europe, the sphere of Soviet influence had widened, behind what Churchill described as the Iron Curtain. Soviet tanks would soon roll into Hungary to crush an anti-Communist revolt.[43] Domestically, the United States became consumed by the fear of Communist infiltration of American institutions and even of the federal government itself, especially after Wisconsin senator Joseph McCarthy, in a speech in February 1950, claimed that Truman's State Department was riddled with Communists.[44]

That July, the U.S. Congress passed a law that purported to endorse home rule for Puerto Rico and calling for Puerto Ricans to "organize a government pursuant to a constitution of their own adoption"—which could only be ratified if Congress approved it.[45] The Partido Popular Democrático approved of the plan; the Partido Nacionalista did not. Declared Albizu Campos: "*Lo que buscan con esa constitución es convalidar las actuales relaciones—relación de fuerza que empezó el 25 de julio de 1898 con la invasión de territorio nacional puertorriqueño—para presentarse ante el mundo pretendiendo tener las manos limpias*." (What they are seeking to do with that constitution is validate the current relationship—a forced relationship that began on July 25, 1898, with the invasion of Puerto Rico's national territory—so as to stand before the world, seemingly, with hands unsoiled.)[46]

In October 1950, Albizu Campos led a revolutionary uprising that included an attempt to assassinate Muñoz Marín. The United States met this insurrection with overwhelming force, including bombing two towns, Jayuya and Utuado, and occupying much of Puerto Rico with the National Guard. On November 1, Puerto Rican nationalists in Washington attempted to assassinate Truman while he was staying at Blair House, down the street from the White House, which was undergoing renovations. Hours later the Insular Police, the FBI, and the National Guard coordinated an attack on

Albizu Campos's apartment in San Juan, and he was again arrested.[47] Muñoz Marín declared martial law, and his government, aided by American forces, arrested more than three thousand people within days.[48] Albizu Campos was tried in August 1951 and sentenced to eighty years in prison.[49]

Meanwhile, Puerto Rico began the process of constitution-writing. In a referendum—notably boycotted by the Partido Nacionalista—three in four Puerto Ricans who voted favored holding a convention. It met in San Juan from September 1951 to February 1952 and drafted a constitution that, in line with the most progressive American state constitutions, guaranteed a series of socioeconomic rights, including a right to work. It also borrowed heavily from the United Nation's 1948 Declaration of Human Rights: section 1 of Article II reads, "Human dignity is inviolable." [50]

Submitted to the people for ratification, the Constitución del Estado Libre Asociado de Puerto Rico passed with an 82 percent majority. Yet because Puerto Rico was not, in fact, a sovereign nation, the constitution required the approval of Congress, as if Puerto Rico were a state, which it also was not.[51] In hearings, members of Congress expressed concern that the constitution had an amendment provision that granted Puerto Ricans the power to amend it. "Suppose they amended it by striking it all out?" one congressman asked Muñoz Marín. "If we are to assume that the people of Puerto Rico will go mad," the governor answered, "we might as well stop discussing the whole matter." [52] In the end, Congress required that any amendment be subject to Congress's approval.[53]

On July 25, 1952, six months before the Supreme Court heard arguments in *Brown v. Board*, the Constitución del Estado Libre Asociado de Puerto Rico went into effect. The *constitución* itself would later be moved from the safe of the Supreme Court of Puerto Rico, deposited in an urn made of marble, and covered with "a concave glass hermetically sealed by a one-inch bronze ring." [54] In Washington, Americans moved the U.S. Constitution to a new shrine, too.

Constitution Avenue

On a chilly Saturday, December 13, 1952, the nine justices gathered in the first-floor conference room of the Supreme Court Building to begin their

deliberations in *Brown v. Board*. It must have been very difficult to concentrate. Only a block away a military procession—led by twelve police motorcycles and four soldiers carrying submachine guns, followed by a bayonet-wielding honor guard, two military bands, two armored tanks (one of which broke down en route), and thirteen hundred servicemen and women—made its way from the Library of Congress to the National Archives, ten blocks away on Constitution Avenue. Stalin was in Moscow, Mao in Beijing. The missiles were in their silos, the Buicks in their driveways. In suburban tracts on abandoned farmland, Americans were building fallout shelters, bunkers against atomic attack. And more than a thousand U.S. troops were guarding an armored tank, a Marine personnel carrier with a gunner sitting on top, to operate a machine gun. Inside were six sheets of sheepskin parchment, suspended in helium-filled glass cases, enclosed in wooden crates, resting on mattresses: the Declaration of Independence and the U.S. Constitution.[55]

No ancient procession, no devotion to any deity, was more worshipful. But this was the Cold War's Constitution: protected from atomic attack. When the procession arrived at the steps of the National Archives Building, servicemen armed with submachine guns flanked those who carried the glass cases up the steps. Inside, they were put on display, alongside the Bill of Rights, in a new shrine more secure than the one built in the Library of Congress in 1924. This tomb—the "world's largest safe"—was designed to withstand almost anything.[56] Every day the Constitution would be under armed guard. At night, it would be lowered by an elevator twenty feet below ground into what the *New York Times* described as "a specially constructed bomb and fireproof vault" made of "reinforced concrete twelve and one-half inches thick and enclosed in steel sheeting two and one-half inches thick": "It is estimated to be resistant to anything except a direct atomic bomb hit." [57]

U.S. Constitution being carried into the National Archives, 1952

Truman gave a speech inside the archive building, standing before the new shrine. He celebrated the Constitution and its “ideals of liberty” and warned against those who, in their pursuit of Communists, a pursuit he called “hysterical,” failed to honor the Constitution. “They are turning it into a mummy,” he said, “as dead as some old Pharaoh of Egypt.” [58] It was an odd thing to say, standing in front of a sarcophagus, but it was also an indictment of the kind of argument the justices had heard, days before, during oral argument in *Brown*.

During that first round, the NAACP’s lawyers, including Thurgood Marshall, offered a narrow, incremental argument. They didn’t ask the Court to overturn its 1896 opinion in *Plessy v. Ferguson*, a case that involved separate accommodation for Blacks and whites in railroad cars. Instead, they’d insisted only that *Plessy*’s “separate but equal” doctrine didn’t apply to public schools. It was the justices, not the lawyers, who introduced broader questions about whether the doctrine—and segregation itself—violated the Fourteenth Amendment, as it was understood in the 1950s, a world where Puerto Ricans were writing their own constitution. Asked one justice, “The social and economic conditions and the personal relations of the nation may have changed so that what may have been a

valid interpretation of them seventy-five years ago would not be a valid interpretation of them constitutionally today?”

On the third and final day of oral argument, Thursday, December 11, Milton Korman, defending school segregation in the District of Columbia, offered his answer to that question, arguing that even if conditions and relations had changed, the Constitution had not. In one of the most extraordinary moments in an extraordinary day, Korman then asked the Court’s permission to quote from an earlier decision, which he hoped would buttress his position. He proceeded to read these words:

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.

“That, Your Honors, was from *Dred Scott v. Sandford*, oh, almost one hundred years ago,” Korman said. “But it is equally applicable today.” [59] Americans had changed. A civil war had been fought. Slavery had ended. Race relations had changed. But the Constitution, Korman suggested, was still the Constitution of *Dred Scott*, or at least he hoped it was.

“I think we’ve got it won, five-to-four or maybe six-to-three,” John W. Davis, the South Carolina lawyer who led the segregation argument, said as he left the courtroom. Two days later, while the Constitution itself made its way to the National Archives, the nine justices met to begin discussing the case. Their deliberations, as always, were private. Four justices appear to have favored overturning *Plessy*; two, including the chief justice, Fred Vinson, a Democrat from Kentucky, favored upholding it; and three, including Felix Frankfurter, leaned toward overturning *Plessy* but wanted stronger evidence to do so. Frankfurter urged that the decision be delayed and the cases reargued in the next term.[60] But even as these nine men were deliberating, they would have heard the rumble and roar of a constitutional celebration, a drumbeat, a thrum, the screeching of bagpipes, an American yawp.

The people within our own borders

During that first round of oral argument in *Brown v. Board*, Justice Robert Jackson asked Thurgood Marshall, “What, if any, effect, does your argument have on the Indian policy, the segregation of the Indians?” Marshall had little to offer by way of an answer. “I think that the biggest trouble with the Indians is that they just have not had the judgment or the wherewithal to bring lawsuits,” he said.[61] It was hardly illuminating. But even as the NAACP was fighting to end school segregation, the National Congress of American Indians, formed in 1944, was fighting to end a new federal government policy known as termination.

Termination had first been proposed in 1947, during congressional hearings about reducing the number of federal employees. In the name of “freeing the Indians,” conservatives from Western states proposed to terminate the federal government’s involvement in Indian affairs.[62] Western legislators aligned termination with the civil rights movement. A South Dakota congressman indicted the Truman administration for “demanding that the colored man be given complete and wholly equal rights in the South” while not granting those rights to Indians.[63] Terminationists also depicted reservations, under the New Deal’s Indian Reorganization Act, as communistic. A Nevada senator complained that while the United States was “spending billions of dollars fighting Communism,” it was, at the same time, “perpetuating the systems of Indian reservations and tribal governments, which are natural Socialist environments.” [64]

Termination was at heart a budgetary measure, a way to relieve the federal government of its financial obligations to Indian tribes and coerce assimilation in the guise of supporting Native sovereignty. In 1949 an Indian Task Force—within a commission reporting on ways to reorganize the executive branch—advocated “progressive measures to integrate the Indians into the rest of the population as the best solution of the ‘Indian Problem.’” A 1952 House report on the Bureau of Indian Affairs endorsed this plan.[65]

Federal Indian policy had been so fickle that it was then naturally proposed to effect this change by way of constitutional amendment, to assure its lastingness. In January 1953 the arch anti-Communist and most powerful member of the Senate, Judiciary Committee chairman Patrick

McCarran, who had long opposed Paiute land claims in his home state of Nevada, proposed amending the Constitution's commerce clause so that it would read "The Congress shall have power to regulate commerce with foreign nations and among the several States," that is, deleting "and with the Indian tribes." [66] William H. Harrison of Wyoming had another idea, calling for the abolition of the Bureau of Indian Affairs and the termination of the federal government's relationship with Indian tribes—declaring that "at the earliest possible time" they "should be freed from Federal supervision and control." [67]

The National Congress of American Indians opposed the amendment. To challenge termination, Executive Director Oglala Sioux Helen Peterson spent months driving through Indian Country talking to Indians, with Winnebago activist Elizabeth Roe Cloud, in Roe Cloud's old Chevy. (Elizabeth Roe Cloud was the widow of Henry Roe Cloud, who had toured Indian Country in the 1930s with John Collier, meeting with tribal congresses to discuss the writing of their constitutions.) Peterson then also organized a three-day conference in Phoenix on the "Crisis in Indian Affairs" and an emergency conference in Washington in February 1954, attended by delegates who represented more than one-third of the Native Americans in the United States. It opposed termination and adopted a Declaration of Indian Rights written by Joseph Garry, the Coeur d'Alene president of the NCAI who had fought in both the Second World War and the Korean War.[68] In a statement on termination, the NCAI placed measures like McCarran's proposed amendment in their Cold War context, asking, "Shouldn't Indians have the same right of self-determination that our government has stated, often and officially, is the inalienable right of peoples in far parts of the world? Do we apply a different set of principles, of ethics, to the people within our own borders?" [69]

Under Peterson's leadership, Indians didn't win what many called "the war of 1954." But in an illustration of the political power of a growing indigenous rights movement, the National Congress of American Indians defeated McCarran's amendment, a rare but crucial victory. When Congress held hearings on Indian termination, the Seneca activist and editor Alice Lee Jemison, who had opposed the Indian New Deal as a denial of tribal sovereignty, voiced support for McCarran's termination amendment as "the only method by which Congress can ever fully free the Indians from the

status in which they are now held." Jemison spoke for herself alone. But Helen Peterson, speaking on behalf of the NCAI, questioned the claim that it would "restore the same rights to Indian tribes which are enjoyed by all other citizens of the United States," pointing out that it would give Indians nothing since they had been granted citizenship in 1924 and "would take from Indians protections they are properly entitled to and want to keep." [70]

That spring, in March 1954, four Puerto Rican nationalists led by thirty-four-year-old Lolita Lebrón carried semiautomatic pistols into the visitors' balcony at the Capitol, began to unfurl a Puerto Rican flag, shouted "*¡Viva Puerto Rico libre!*" and fired nearly thirty rounds, wounding five members of Congress.[71] (Ethel Payne, reporting from the Hill that day, had only just left the chamber, moments before the shooting.)[72] Before the insurrection on January 6, 2021, by armed supporters of President Donald Trump, it was the only successful invasion of the U.S. Capitol.

Two months after the invasion, the Supreme Court handed down its decision in *Brown v. Board of Education*.

We have nothing to fear from the record of history

The Supreme Court had been unable to make a decision after the first round of oral arguments, so Justice Frankfurter had convinced his colleagues to hold the case over to the following term. Frankfurter also asked his clerk, Alexander Bickel, to research the history. Bickel minutely reviewed the records of the Thirty-Ninth Congress and argued that "as originally understood," the Fourteenth Amendment did not apply to segregation, in schools or otherwise, but that its framers had crafted it with language "sufficiently elastic to permit reasonable future advances." Frankfurter's clerk concluded that "the legislative history of the Amendment is, in a word, inconclusive" but asserted that the "record of history, properly understood," invited a decision that would consider the condition of the United States in the 1950s, not the 1860s. Frankfurter then circulated the memo to the other justices. Vinson called for a reargument in *Brown* and asked the parties "to ascertain what was the interpretation of the 14th amendment with reference to schools at the time of its adoption." [73]

And then, unexpectedly, in September 1953, Vinson, sixty-three, died of a heart attack. "This is the first solid piece of evidence I've ever had that

there really is a God," Frankfurter said privately. After Eisenhower named California governor Earl Warren to replace Vinson, Warren asked the parties in the case to answer Vinson's five questions about the history of the Fourteenth Amendment.

The Richmond lawyer David J. Mays prepared the answers for the Virginia case. Mays's law firm represented the segregated school district in *Davis v. County School Board of Prince Edward County*, a suit filed by the NAACP on behalf of more than one hundred students, including the leading plaintiff, Dorothy Davis, a fourteen-year-old girl.[74] Mays would go on to become the architect of the South's campaign of "massive resistance" to integration and later of original intent originalism.

David John Mays, born in Richmond in 1896, just seven years after the death of Jefferson Davis, was a child of the Lost Cause. "I had almost memorized *The Clansman* when still a little fellow," he recalled, referring to Thomas Dixon's 1905 novel, *The Clansman: A Historical Romance of the Ku Klux Klan*, in which a thinly disguised Thaddeus Stevens, calling the Constitution a "worn-out rag" ("We have outgrown the swaddling clothes of a babe. We will make new constitutions!"), orchestrates what Dixon calls "the Black Plague of Reconstruction," leading heroic Southerners to form the Klan to defend the Constitution in the spirit of "Chivalry, Humanity, Mercy and Patriotism." [75] In 1915 Mays took the train from Virginia to the capital to watch D. W. Griffith's film adaptation of the book, *The Birth of a Nation*.[76] Two years later he'd seen his first lynching, in Memphis. He and his friends "howled with excitement" at the prospect, he wrote in his diary, and he watched with a mob of three thousand as a Black man named Ell Persons was doused with gasoline. "When the match was applied," Mays wrote, Persons "made no sound except for a faint pig squeal." [77]

Mays served in the military both before and during the First World War, when he also began to devote himself to colonial American history. He studied law at the University of Richmond. In 1924, after entering private practice, he began writing a biography of Edmund Pendleton; it would take him a quarter century to finish. With the exception of a series of letters to James Madison, Pendleton's papers had been mostly destroyed; Mays spent years tracking down what survived of his other correspondence in scattered archives.[78] Politically, Mays started out as a conservative Democrat but despised the New Deal and left the party over civil rights; above all, he was

a Southerner. When he was a young lawyer, he complained in his diary that his Black maid, Sarah Goode, chose Washington, DC, as her destination for a week's vacation: "I should much prefer her going somewhere else," he wrote. "The Negroes there have entirely too many liberties to suit me." [79] He lost faith with the Democratic Party under FDR. "I have about all of the New Deal that I can stand," he wrote in his diary in 1935. He generally favored social legislation, including the abolition of child labor, but he opposed executive overreach and was outraged by Roosevelt's court-packing plan. "I have stomached much of Roosevelt," he fumed, "but no more." He undertook a letter-writing campaign, nationally, to defeat it.[80]

In May 1953, Mays won the Pulitzer Prize for his biography of Pendleton (the year Ernest Hemingway won the fiction prize for *The Old Man and the Sea*).[81] The next month the Court issued the call for the parties in the school segregation cases to answer those five questions about the history of the Fourteenth Amendment. Mays sent a staff of men to conduct research in the Library of Congress, the New York Public Library, and other libraries, for weeks, then "summarized that information for the Court." [82]

In November 1953, Mays's firm submitted its brief to the Supreme Court. At over two hundred pages, it bears the hallmarks of Mays's approach to historical research, and equally his voice, as when the brief insists, "We have nothing to fear from the record of history." Or when it mocks the NAACP's brief as having been "written by one of the Negroid-conspiracy school of historians." ("It interprets all history in the light of a supposed race struggle.")[83]

The Mays brief argues that the framers of the Fourteenth Amendment did not intend to abolish segregation in public schools and did not imagine that anyone in the future might interpret the amendment in that way and that, under these circumstances, the Court lacks the power to do so. The brief does not argue that the justices are in all cases obligated to base a decision on research into the original intent of the framers because this intent cannot generally be known but insists that "this is a different case" where "here the exact intention of the framers is known," and it therefore constrains the Court because "the judicial power does not extend to reversal of the exact intention expressed by the framers." [84]

On May 17, 1954, Ethel Payne was in the courtroom with a slew of reporters, awaiting the Court's decision. Chief Justice Warren elected to

read the 9–0 opinion aloud. He spoke at length about what research into the history of the Fourteenth Amendment had revealed and what it had not. “The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among ‘all persons born or naturalized in the United States,’” he observed. But “their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.” In short, he said, borrowing a term from Bickel’s brief, the historical record was “inconclusive.” [85]

When Warren declared the historical record “inconclusive,” he was dismissing research that Mays, the newly anointed Pulitzer Prize–winning historian, had overseen. As Mays put it, his interpretation of the Fourteenth Amendment “was argued but never heard.” [86] For the rest of his life, he dedicated himself to getting Americans to listen to it and to heed it.

On May 17 the Constitution of the United States was destroyed

The day Warren announced the Court’s opinion, Mississippi senator James Eastland declared: “The South will not abide by nor obey this legislative decision by a political court.” [87] Eastland, born in Sunflower County, Mississippi, in 1904, owned a nearly six-thousand-acre cotton plantation there. An arch anti-Communist, he’d hunted for subversives in his role on the Senate Judiciary Committee’s Internal Security Subcommittee, on which he served beginning in 1951; more famously, sometimes called the Voice of the South, he was one of the Senate’s leading defenders of segregation. Within days of the Court’s ruling in *Brown*, another Mississippi Democrat stood up on the floor of Congress and proposed a constitutional amendment to overturn it, and Eastland introduced his own proposed amendment into the Senate (then regularly reintroduced it), granting the states “exclusive jurisdiction” to regulate “health, morals, education, marriage, and good order.” [88]

“There is nothing in the United States Constitution that gives the Congress, the President, or the Supreme Court the right to declare that white and colored children must attend the same public schools,” Eastland

liked to say.[89] By July 1954, first in Mississippi then swiftly spreading, Southerners began forming White Citizens' Councils—sometimes known as the "uptown Klan"—to oppose integration.[90] Attacks on Black men, women, and children grew in number and ferocity. Unable to keep schools segregated, some state legislatures proposed constitutional amendments to instead abolish public education. In September, the Associated Press filed a report from Jackson, Mississippi, quoting a legislator from the Mississippi Delta who embraced lynching. "'A few killings' would be the best thing for the state just before the people vote on a proposed constitutional amendment empowering the Legislature to abolish public schools," the Mississippi lawmaker told the AP reporter, because those murders "would make certain that the people would approve the amendment and 'would save a lot of bloodshed later on.'" [91]

Opponents of the Court's decision in *Brown* claimed that the NAACP was a Communist front.[92] James Eastland and Joseph McCarthy—even after McCarthy's downfall—issued a statement in which they accused Chief Justice Warren of "following the Communist line." [93] The emergence of Puerto Rico's independence movement, the resistance of the National Congress of American Indians to being amended out of the U.S. Constitution, and Cold War concerns about the spread of Communism in newly decolonized nations formed a backdrop both to the Supreme Court's decision in *Brown v. Board of Education* and to Southern segregationists' reaction to it, which was to defy it by any means necessary. "On May 17 the Constitution of the United States was destroyed," Eastland liked to say at Citizens' Council rallies, telling white Southerners, "You are not required to obey any court which passes out such a ruling. In fact, you are obligated to defy it." [94] Virginia senator Harry Flood Byrd called for a campaign of "massive resistance" to *Brown*.[95] The engineer of that campaign was David J. Mays.

Beginning in January 1955, Mays served as lead counsel to a commission charged by the governor of Virginia with reporting on the effect of the Supreme Court's decision on the state and framing a legal approach to minimize its reach. "The art of it is to recognize the binding force of the Supreme Court decision while destroying its effect," Mays wrote in his diary.[96] It was Mays who determined what statement the commission ought to make and who conducted most of its research.

("Plowing through constitutions," he wrote in his diary.)[97] He also served as lead counsel in continued battles with the NAACP in Virginia, time and again facing Thurgood Marshall in court.[98] In September 1955 the Prince Edward Schools reopened, still segregated. "It took a great deal to bring this about," Mays beamed. "I am glad to have had a part in it." [99] He did not, however, expect to prevail in the U.S. Supreme Court where, as he wrote in his diary, "the nine wise men will pay no attention to mere white folk." [100]

The Virginia Commission issued its report in November 1955, opening with a restatement of the chief argument of the Mays brief: "When the Fourteenth Amendment was adopted three generations ago, no one dreamed that it had any application to segregation in the public schools." The report also recommended a series of solutions—chiefly to be enacted by way of a state constitutional convention—whose purpose was "to avoid enforced integration." [101] Mays coordinated the convention, was elected a delegate (receiving zero votes in Black precincts), and while demurring from serving as its president, ran the convention from behind the scenes.[102]

Mays also worked closely with James J. Kilpatrick, editor of the *Richmond News Leader*, who, in a series of editorials, essentially called for Calhoun-style nullification. Resurrecting the antebellum Southern idea that the Constitution is merely a compact among sovereign states, Kilpatrick argued that the states retain a right of "interposition": by interposing their sovereignty between the federal government and the citizens of a state, they could approve or reject any new meaning of the Constitution offered by the Court. Without this right, Kilpatrick insisted, the states would be "compelled to lie down like sheep and be sheared by any court." [103]

White supremacists' reaction to the Court's decision in *Brown* inaugurated a new era in the history of American constitutionalism. Conservatives pursued constitutional amendment as a mechanism for reversing the expansion of federal power represented by both the New Deal and the decisions of the Warren Court, beginning with *Brown*. And when that failed, they turned to original intent. Not for decades would this method come to be called "originalism," but it first broke out into public view in 1954.[104]

Defiance of *Brown v. Board* consolidated conservatives' commitment to constitutional amendment as the only legitimate method of constitutional change, at least so long as the Warren Court lasted, since it was the only

method that bypassed both the judicial and executive branches. In 1955, in response to *Brown v. Board*, amendment fever broke out as local and national organizations advocated a slate of proposed constitutional amendments to overturn the New Deal, halt creeping Communism in America, and use states' rights arguments to defeat the assertion of federal power represented by the Court's decision in *Brown*. They printed newsletters and pamphlets, some of them to tiny circulations, by mimeograph. They broadcast over the radio. In the South, White Citizens' Councils made their constitutional claims in publications like *The Crusader*, *The Alabamian*, and *The White Sentinel.*[105] But the kingpin was the stylish and erudite *National Review*, founded by William F. Buckley in 1955, in answer to Warren's insistence that one cannot turn back the clock, in order to—as Buckley put it—"stand athwart history and yell 'Stop.'"

Massive resistance wasn't only massive resistance to desegregation; it was massive resistance to federal power. The Campaign for the 48 States, founded in 1955, sought passage of five federal constitutional amendments: the Reed-Dirksen amendment, establishing a top tax rate; the Byrd-Bridges amendment, requiring the federal government to balance its budget; the Reed-Walter amendment, to grant the states "full power to amend the Constitution without the intervention of Congress"; the Mundt-Coudert amendment, restructuring the Electoral College so as "to take away excessive power now exercised by the minority groups in the larger cities"; and the isolationist Bricker amendment, sponsored by Ohio conservative Republican senator John Bricker, to constrain the executive's treaty-making powers.[106]

None of these five amendments captured the attention of the public, but not for lack of trying. The Campaign for the 48 States produced a series of short television programs, *Twilight Zone*–like in their alarmism, one for each of its amendments. The episode on the Byrd-Bridges amendment was titled *The Thief Who's Never Been Caught!* After a cue for "crash of cymbals, thunderous chord, rolling of timpani and powerful dramatic music," and the warning that this thief—inflation, which contributes to the national debt—will remain at large unless he is "forever chained down by Constitutional amendments," its announcer gravely intones, "The program you are about to see is the most important one that has ever been on television." [107] The balanced budget amendment went nowhere in the 1950s, but it would come back in the 1970s and with a vengeance.

The Bricker amendment was the best known of the proposals advanced by the Campaign for the 48 States, but a 1953 poll found that fewer than one in five Americans had heard of it.[108] (The same poll reported that only one in three Americans correctly answered the question "What are the first 10 amendments to the Constitution called?")[109] Still, the 20 percent of Americans who *had* heard of the Bricker amendment were decidedly zealous about it. At a time when conservative, suburban white women were the fastest-growing and most active foot soldiers in the Republican Party, a vast array of citizens' organizations had sprouted up, including Vigilant Women for the Bricker Amendment, based in the Midwest, which published a monthly newsletter.[110] Brickerites viewed the United States' involvement in the United Nations as a betrayal of the Constitution; objected to the U.S. ratification, in February 1955, of the 1949 Geneva Conventions; believed American consideration of the UN's 1948 Convention on the Prevention and Punishment of the Crime of Genocide to be unconstitutional; and generally feared a "world government" and a treaty power "never foreseen or intended by the founding fathers." [111]

Liberal intellectuals from Louis Hartz to Richard Hofstadter dismissed the far right as a lunatic, paranoid fringe.[112] But opposition to *Brown* gathered all manner of states' rights advocates, isolationists, white supremacists, Klansmen, anti-Communists, John Birchers, and tax revolters. Together, they were far stronger than the sum of their parts. Among the now-forgotten national leaders of this piecemeal movement in the 1950s was Howard Drummond Smoot, known as Dan Smoot, a self-identified "constitutional conservative." Born in Missouri in 1913, Smoot grew up in poverty, working as a child on a hog farm. He won a scholarship to Southern Methodist University and in 1941 began a PhD in American civilization at Harvard but dropped out to work for the FBI, where he pursued Communist subversives. (He could not enlist due to colorblindness and flat feet.) He "was forceful and aggressive and had a tendency to be a little over-confident which was attributed to his recognition of his own intelligence and ability," one supervisor reported. For being "extremely antagonistic . . . sullen and very uncooperative" and for having questioned the special agent in charge, he was censured and put on probation in May 1951. By June he had resigned to work for the millionaire Texas oilman and far-right provocateur H. L. Hunt.[113] After he left the FBI, he turned to

political commentary and broadcasting, issuing *Dan Smoot Speaks*, later *The Dan Smoot Report*, as a newsletter from Dallas beginning in 1955 and, two years later, as a weekly fifteen-minute radio and television spot, heard throughout the South, Midwest, and West Coast to an audience that reached six million.[114] Soon the FBI was keeping a file on Smoot, not as a former agent but as a current political commentator whose radio program would be heard at White Citizens' Council meetings. (Smoot asked the FBI to send him a letter stating that he had resigned and had not been fired, but meanwhile the FBI was conducting its own inquiry into him, noting in his file that he had, for instance, told a crowd of one thousand people in Portland, Oregon, that "a vote for either party this November is a vote for the Communist manifesto.")[115]

For his televised *Dan Smoot Report*, Smoot looked half G-man (clean-shaven, with close-cropped hair and a dark suit and tie) and half professor (sitting behind a wooden desk in front of a wall lined with bookshelves and a globe). The Fourteenth Amendment, he said in one episode, "was never legally adopted," calling it an "illegal appendage to our organic law." [116]

Beyond the repeal of the Fourteenth Amendment, the strenuous proposals of new amendments, interposition, and old-fashioned political violence, segregationists also explored the possibility of calling a federal constitutional convention to overturn *Brown v. Board*. This method had the advantage of not only bypassing the federal judicial and executive branches but Congress as well; the entire work of amendment, from proposal to ratification, would be done in the states. In February 1955 the Georgia legislature petitioned Congress to call a convention to consider an amendment affirming the states' exclusive power to operate and regulate their schools.[117] In March the Mississippi House of Representatives voted to petition Congress to call a convention to amend Article V so that in the future, a convention could be called whenever the legislatures of any twelve states called for one by a two-thirds vote.[118] "It would take little guessing to list who those states would be," Ethel Payne reported, with not a little bitterness, in the *Chicago Defender*. (There had been eleven states in the Confederacy.) Mississippi's petition never made it to Congress; it died in the state's senate judiciary committee, which feared that the Southern states would be outnumbered in a constitutional convention: "our voice would sound like a summer rain on Niagara Falls." [119]

Payne was worried. Southerners opposed to integration had no hope of getting enough states to call a convention or achieving a constitutional amendment to undo *Brown*, any more than they had ever had any hope, a generation and two before, of repealing the Fourteenth Amendment. Still, the performance of these efforts was not without meaning and consequence. And as Payne pointed out, they were supported by Northerners who want to get the Bricker amendment through.[120] She was not wrong to worry. In the spring of 1955, the Senate Judiciary Committee's Subcommittee on Constitutional Amendments began hearings on the Bricker amendment, despite its lack of widespread public support. It was not difficult to imagine that, were a constitutional convention to have been successfully called in the 1950s, Brickerites, Birchers, and segregationists would have been willing to scratch one another's backs.

Ethel Payne's report from Washington on March 26, 1955, about Southern states' interest in holding a constitutional convention, was one of the last she filed before boarding a plane to attend a very different convention.

The Color Curtain

Early one morning in March 1955, Payne, still in bed, got a call from her editor in Chicago:

> "How would you like to go to Indonesia?"
>
> Well, I was half asleep, so I said, "Indo who?"
>
> And he said, "Yes, Indonesia. You know, there's a great conference going to take place there." He said, "It's the first conference of darker people of the world. And we thought that you would be the person to go and cover it."
>
> So I said, "Yes? When?"
>
> He said, "Well, like yesterday."

Bandung was Payne's first foreign assignment, and she was leery, but she also needed a break from Washington: she'd become notorious for asking Eisenhower hard questions about his civil rights agenda during press conferences at the White House; by the summer of 1954, he'd become so annoyed that he stopped calling on her.[121]

She went to Chicago and packed her bags. She got her shots. She flew to California and boarded a TWA plane for the twenty-two-hour flight from

San Francisco to Manila, stopping in Hawai‘i to refuel. Then she got on a private jet with the head of the Philippine delegation to the Bandung Conference and flew to Jakarta. When the plane landed, a group of Indonesian students swarmed her. “I’m just a reporter,” she told them. But they really wanted to talk to her. “We heard you were coming, and we want to talk to you,” they insisted. “We want to learn all about you. We want to learn all about what’s happening in your country, to Negroes in your country.” [122]

With more than a thousand delegates from twenty-nine newly independent countries, representing two-thirds of the world’s population, the Bandung Conference was scheduled to begin on April 18, 1955. It was not drafting a constitution, but it would have its influence on American constitutionalism. Ethel Payne called it “the first time in history that a summoning of the darker people of the world has taken place.” [123] The American press mainly represented Bandung as a bid by China to lure its neighbors into the Communist fold, or even as a prelude to war. “Some credence was being given to the possibility of a Communist attack after the Asian-African conference,” said a Georgia Democrat who chaired the Senate Foreign Relations Committee.[124] The Eisenhower administration had rejected the request of Congressman Adam Clayton Powell Jr., New York Democrat, to attend as a representative of the United States. And W. E. B. Du Bois, Paul Robeson, and Roy Wilkins were all prevented from attending because the State Department had revoked their passports as suspected Communists.[125] Eisenhower refused to send so much as a message to the conference, though the NAACP sent one “on behalf of all Americans of good will.” [126]

Richard Wright, the celebrated Black American writer living in France, read about the conference in the newspaper, a meeting of “the despised, the insulted, the hurt, the dispossessed—in short, the underdogs of the human race,” as he wrote. “I felt that I had to go.” White people he met in Paris were skeptical.

> “But is not this Asian-African Conference merely racism in reverse?” a young white American asked me; he was obviously worried.
>
> “I think that the Asians and Africans are trying to gang up on the Western world,” a young woman, a journalist, told me.

“Isn’t this a racism inspired by the Communists?” an American professor asked me.[127] There had been rumors, too, that the United States sought to undermine the conference. Powell, denied by the State Department an official role at the conference, went anyway. As soon as he arrived, he held a press conference. “Anyone who said that the United States was out to sabotage this conference was a liar,” he said. He talked about the great progress on integration in the United States and insisted that racial discrimination “couldn’t be used as a propaganda weapon.” [128] He stood, if not as an ambassador, then as a racial emissary, evidence of his claim that “racism is on the way out in the United States and nothing can stop it.” [129]

Payne didn’t have much use for Powell, who was vain and full of bluster. “United States fears that the precedent setting conference would be Red-dominated appeared unfounded in the opening days,” she reported.[130] But she was impressed by Indonesian president Sukarno, particularly by his opening address. “For many generations our peoples have been the voiceless ones in the world,” Sukarno said. “We are often told ‘Colonialism is dead.’ . . . Let us not be deceived, or even soothed by that.” He then cleverly gestured toward the United States, calling on delegates’ “common detestation of colonialism” by remarking on the significance of the date. It had been on another April 18, in 1775, that Paul Revere had ridden to Lexington and Concord with the warning that the British were coming. Sukarno called the American Revolution “the first successful anti-colonial war in history.” But that war won’t be won, he went on, “until we can survey this our own world, and can say that colonialism is dead.” [131]

Tennessee-born Carl T. Rowan, who’d served as a naval officer during the Second World War and then gone to Oberlin on the GI Bill, reported on Bandung for the *Minneapolis Tribune*. One of only a handful of Black reporters writing for a general newspaper, he’d toured the South for the *Tribune* in 1951. (In the 1960s, he’d become President John F. Kennedy’s deputy assistant secretary of state and then, under Lyndon Johnson, director of the United States Information Agency and a member of the National Security Council, making him the highest-ranking African American in the federal government till that time.) Rowan had a much wryer voice than Payne, but he agreed with her assessment of Sukarno’s opening address: “Any who expected him to cite Marx or the Soviet revolution were disappointed.” [132]

Richard Wright published his quite different impressions of Bandung in *The Color Curtain*. The coinage of the title, a recasting of Churchill's "Iron Curtain," didn't stick. If Rowan's takeaway was that the United States ought to do a better job countering the anti-American propaganda of authoritarian regimes around the world, Bandung's broader message, for Wright, was that the color struggle was the world's struggle. And Adam Clayton Powell, after he returned to the United States, concluded almost exactly the reverse. "Bandung had completely changed my thinking," he later reflected, in that it led him to see civil rights as not a Black struggle but as America's struggle.[133]

After Bandung, Rowan traveled across Asia, discussing constitutions with villagers and leaders from India, Pakistan, and Burma to Hong Kong, Thailand, and the Philippines. In a thatched-hut village south of Madras, villagers told him that the Indian Constitution "has outlawed caste"; Rowan found the evidence for this claim vanishingly slim. Everywhere he went, he met people who pressed him about the South's campaign of massive resistance to desegregation. "I was banging my head against a stone wall in trying to convince them that while injustices remained," Rowan wrote, "Negroes were making startling strides toward first-class citizenship, and that if life lasted, we would reach our goal in America in a democratic way."[134]

Bandung set the American civil rights movement in a global context but also exerted an influence on it. Homer A. Jack, an American peace activist, went to Bandung, where there was much talk of Gandhian nonviolence.[135] Jack had been an avid student of Gandhi. He had worked at the War Resisters League with Bayard Rustin; in 1947, through the Congress of Racial Equality, or CORE, they'd organized the first Freedom Ride through the South. After Bandung, Rustin began advising the young Baptist preacher Martin Luther King Jr., during a bus boycott in Alabama.[136] "They have conducted a disciplined campaign which would, in many aspects, have made Mahatma Gandhi very proud," Homer Jack would report from Montgomery.[137] Much in the history of the civil rights movement involves the march from Montgomery to Selma. But in the history of American constitutionalism, much involves the journey from Bandung to Montgomery.

The Declaration of Constitutional Principles

When Ethel Payne returned from Bandung, she went to Montgomery. She'd never been to the South.[138] By the time she filed her first report, the bus boycott begun by Rosa Parks on behalf of the NAACP in December 1955 was in its tenth week. Blacks in Montgomery got around town and to and from work mainly by walking. "The young, the old, the middle-aged, the lame and the halt, housewives, maids and cooks, bell-hops, janitors and laborers, school teachers, doctors and lawyers," Payne wrote. "They were all taking to the road." [139]

Payne wrote an early account of King: "this gladiator going into battle wears a reverse collar, a flowing robe, and carries a Bible in his hand." [140] She cited the influence of Gandhi on the boycott.[141] She asked the *Defender* if she could stay in the South and report from there.[142] In an investigative series called "The South at the Crossroads," which ran in the *Defender*—and which the newspaper, in a nod to Richard Wright, advertised as Payne reporting from "behind the 'color curtain'"—she reported on white resistance to *Brown v. Board* and predicted that "some day a local authority is going to defy a direct order from the courts to admit Negro children and the courts will then be required to prosecute and carry out that order." [143] She compared Jim Crow in the American South to apartheid in South Africa and explained that the "backbone" of the Montgomery bus boycott was women working as cooks and maids and nannies in white households.[144] And she reported on the travels of James Eastland.[145]

When Payne arrived in Montgomery, Eastland was in the city to address an Alabama White Citizens' Council rally.[146] At the time, Southerners in the Senate were preparing a formal statement, replying to *Brown*. Georgia senator Richard Russell had heard an idea he adored. The Corwin amendment had passed Congress in 1861, had been ratified by three states—Maryland, Ohio, and Illinois—and had no ratification deadline. What if it could be resurrected? It read, "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." [147] Weren't public schools "domestic institutions"? Russell had written to

the Georgia attorney general, arguing for the state to ratify it.[148] "This might be called the story of the 'lost amendment,' " the *New York Times* reported. True, the Corwin amendment would seem to violate the Thirteenth Amendment, but Russell still liked the idea.[149] A Lost Amendment for the Lost Cause.

At the same time, Russell and Byrd were working with another arch-segregationist, South Carolina senator Strom Thurmond, to draft what they called a Declaration of Constitutional Principles. (Thurmond was its principal author.) It followed the logic of Kilpatrick's editorials. Russell was frustrated that an early draft calling *Brown* "illegal and unconstitutional" had been deleted in order to secure the signatures of more moderate Southerners.[150] On March 12, 1956, two days after the *Times* reported on the moonshot Lost Amendment strategy, the declaration was released to the press, and Georgia senator Walter George read it out loud in the Senate. Rebutting Warren's opinion in *Brown*, it offered the opinion its signers wished the Court had written instead: "The original Constitution does not mention education. Neither does the 14th amendment nor any other amendment. The debates preceding the submission of the 14th amendment clearly show that there was no intent that it should affect the systems of education maintained by the States." And it contained an indictment of the Court: "Though there has been no constitutional amendment or act of Congress changing this established legal principle almost a century old, the Supreme Court of the United States, with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land." [151]

The Southern Manifesto, as the Declaration of Constitutional Principles became known, was signed by seventy-seven members of Congress and nineteen senators, all from the former Confederacy.[152] (Only three Southern senators—Albert Gore, Estes Kefauver, and Lyndon B. Johnson—refused to sign. All three aspired to the presidency.) "How did the nation react to this?" Carl Rowan asked. "It shuddered—just the way the southerners hoped." [153]

Reading the manifesto, many Northerners came to believe that *Brown* could not be enforced and that maybe it shouldn't be. The manifesto urged resistance to *Brown* by "lawful means," but it was hard to see what could be

lawful about resisting a decision of the Supreme Court. Eastland, in particular, would soon be exceptionally well positioned to block the appointment of Supreme Court justices who approved of the decision; by the end of the year, he'd become chair of the Senate Judiciary Committee. Some signers told reporters that the "lawful means" included proposing constitutional amendments.[154] Rowan complained that Southerners, "even as they parade in the cloaks of flaming patriots, . . . fill the nation with strife, tear away at the judicial system and discredit democracy in the darkest, farthest corners of the globe." [155]

Payne wrote that the Southern Manifesto "came very close to declared treason." In response to it, the executive committee of the National Baptist Convention, meeting in Chicago in April, issued "The Negro's Declaration of Intention." [156] It avowed the civil rights movement's "love for our nation, good will towards all, utter devotion to the Federal Constitution, and undying faith in God," along with its commitment to "the complete victory of freedom on every front, and the preservation of the soul of the nation, whatever the cost." [157]

Payne read the Southern Manifesto with another manifesto in mind. In Montgomery, she'd gone to see Eastland speak at the state coliseum to that White Citizens' Council rally, twelve thousand strong. At the event, the organizers distributed handbills that read, "A Pre-View of the Declaration of Segregation."

> When in the course of human events it becomes necessary to abolish the Negro race, proper methods should be used, among these are guns, bows and arrows, sling shots and knives. We hold these truths to be self-evident: that all whites are created equal with certain rights, among these are life, liberty, and the pursuit of dead niggers. In every stage of the bus boycott we have been oppressed and degraded because of the juicy, unbearably stinking niggers.[158]

Her story about it ran on March 7, 1956. Five days later the Confederates in the Capitol issued their own declaration.

A Question of Intent

The authors of the Southern Manifesto argued that in *Brown v. Board* the Court had violated the "original constitution" by making an alteration to the Constitution that could rightly be changed only by constitutional

amendment. To support this argument, and in the hope of reversing *Brown*, they insisted that the only way to interpret that original constitution was to discover "the intent of the framers" and the text's "original meaning." [159]

Segregation had been denounced, if faintly, by both parties. "The southern white man has nowhere to go politically," Mays complained in his diary on November 5, 1956, Election Day.[160] Massive resistance was failing. All these court cases, Mays wrote, were so many "paper dolls." [161] Mays voted for Dwight Eisenhower, but Eisenhower disappointed him even more than FDR had.

In September 1957, on the orders of Governor Orval Faubus, a high school in Little Rock refused to admit Black students. After a standoff, Eisenhower called in the 101st Airborne Division to enforce integration. "Before Sept. 3, Little Rock was just the capital of Arkansas," Ethel Payne wrote. "Now thanks to the foolhardiness of Gov. Faubus, it has become infamous as the seat of defiance of the federal government." [162]

For Payne, every story in the South had a global dimension. That had been true for her before Bandung, and it only became clearer afterward. In 1957—the year she traveled to Ghana to report on its independence—she also reported from Birmingham, "Living in the South today is about as uneasy and dangerous as it is along the Gaza Strip in the Middle East." [163] But Black reporters like Payne and Rowan weren't imagining the international dimensions of America's constitutional impasse over race. Dalip Singh Saund, a Sikh American from California and the first Asian member of Congress, was on a trip to Southeast Asia during the crisis at Little Rock. From abroad, he liked to report on how "the budding new nations growing out of the wreckage of colonial empires are one and all writing their constitutions on the American Pattern," and "the Declaration of Independence and the Bill of Rights have been eagerly studied and widely copied." [164] This was both true and not true.

Follow for extended description

Opponents of *Brown* rally outside the Arkansas State Capitol, 1957

It was certainly true that many newly independent nations had written constitutions that borrowed from the American Constitution, though its own outdatedness, especially with regard to human rights, meant that its influence as a model was, by the 1950s, on the decline.[165] (Most new constitutions guaranteed rights, like women's rights, that the U.S. Constitution did not. And the U.S. Constitution guaranteed some rights—like the right to bear arms—that hardly any new constitutions included. A tiny 8 percent of national constitutions contained a right to bear arms in 1946; only 2 percent contained such a provision by 2006.)[166] It was also true that the imprinting of an American constitutional pattern on new nations was a story that Eisenhower's America wanted to tell, as if the sheepskin parchment sheets of the Constitution, stored in a concrete and steel bunker twenty stories below ground in hopes that they would survive an atomic bomb, could be laid out upon the new revolutionary office device, the Xerox copying machine.

And yet the American pattern, in the 1950s, seemed hardly one to emulate. Saund, speaking of the events at Little Rock and, like Adam Clayton Powell before him, hoping to burnish America's reputation for equal rights, insisted that "in thirty-five out of the forty-eight states of the Union there was no discrimination against Negroes in schools or public places." [167] This was not quite a comfort. And if the civil rights movement

was gaining strength by the end of the 1950s—in 1957 Congress was debating the first Civil Rights Act since Reconstruction—so was the conservative response to it, and not merely among the Dan Smoots of the world.

"The central question," wrote Buckley in the *National Review* in 1957, "is whether the White community in the South is entitled to take such measures as are necessary to prevail, politically and culturally, in areas in which it does not pre-dominate numerically." That is, was the South justified in denying Black citizens the right to vote? And here is how Buckley answered: "The sobering answer is *Yes*—the White community is so entitled because, for the time being, it is the advanced race." [168]

To say that white supremacy lay behind the opposition to *Brown v. Board of Education* is not to say that the opposition had no constitutional argument to make as well. And that argument was made. But separating the two is like trying to pull apart the strands of plied yarn. With massive resistance failing and federal troops enforcing integration, David J. Mays came up with a new idea. In 1958, at his urging, the Virginia legislature created the Commission on Constitutional Government (CCG). As agreed, the governor then asked Mays to head the commission. Mays planned to use the commission, which he referred to as "my CCG," to shift the campaign of massive resistance from a focus on race, and the undesirability of integration, to a focus on the Constitution and a return to its original intent.[169] If it had become unpalatable to defend segregation, it was certainly still possible to defend the sanctity of the Constitution.

Mays led the Commission on Constitutional Government, but his deputy was the *Richmond News Leader* editor, and instigator of the interposition option, James J. Kilpatrick, who had by now become a contributor to the *National Review*. Like the Liberty League of James Beck's day, the CCG aimed to promote the idea of states' rights and original intent, through publications and a high school curriculum.

In 1959 Mays agreed to testify before Congress in support of a constitutional amendment that would return the question of segregation to the states. It had been proposed by Georgia senator Herman Talmadge and was co-sponsored by six other Southern senators, including Eastland and Byrd, all of whom had signed the Southern Manifesto.[170] It was, in effect, a version of the Lost Amendment that Russell had dreamed of. Like the 1861 Corwin amendment, which placed slavery forever out of the power of the

federal government, the Talmadge amendment placed public education forever out of the power of the federal government.

Herman Talmadge had long served as governor of Georgia, following in the footsteps of his father, Eugene ("Mr. Segregation") Talmadge; between them, they'd held the governor's office for sixty years. In 1955, before running for the U.S. Senate, Herman Talmadge published a pamphlet called *You and Segregation*. A primer on states' rights and a call for resistance to *Brown v. Board*, Talmadge's pamphlet took particular aim at the NAACP which, he intimated, was a Communist front whose members "yell for the Supreme Court like spoiled brats." [171] Talmadge's pamphlet did not include a call for a return to the original intent of the framers; it was instead a mix of heated anti-Communist ranting and a strenuous argument for states' rights.

Yet of all the strategies used by segregationists to overturn *Brown*, an amendment along the lines that Talmadge proposed in January 1959 earned the most popular support. "It has been suggested that the Constitution of the United States be amended to permit each state to decide for itself what it wants to do about integration of white and colored students in the schools," Gallup said in a poll conducted the first week of February 1959. "Would you favor or oppose such an amendment?" Fifty-one percent of Americans were in favor.[172]

That spring the Senate Judiciary Committee's Subcommittee on Constitutional Amendments, whose members included Eastland, held five days of hearings on the Talmadge amendment. Talmadge, under questioning, told his colleagues that he did not consider a ruling of the Supreme Court to be "the law of the land," a position repeated by a parade of other pro-amendment, pro-segregation witnesses, including the head of the Sons of the Confederacy and the Sons of the Republic of Texas and a fairly motley assortment of far-right figures, one of whom testified that the *New York Times* and the *Washington Post* were Communist fronts.[173]

Very little of the testimony was particularly edifying until the third day, with the seating of David J. Mays.[174] Mays took pains to make clear that he was appearing that day in his capacity not as the lead counsel in a series of legal battles with the NAACP, aimed at preventing the integration of Virginia's schools, but in his capacity as head of the Virginia Commission on Constitutional Government.[175] He knew Talmadge's amendment had no

hope of passage, but he agreed to appear before the committee "for propaganda reasons." He wanted his statement entered in the *Congressional Record*, writing in his diary, "My material may make a dent in somebody."[176] It did.

Despite insisting that he represented not his law firm but the Commission on Constitutional Government, Mays explained his role in the school segregation cases and said that the statement he wished to enter into the record was simply a restatement of the brief his firm had submitted to the Supreme Court in 1953. "What I present here today is a summary of that summary," he said.[177] And indeed it was a summary of that earlier research, leading to its conclusion that "the Congress which initiated the Fourteenth Amendment did not believe that it barred segregation in the public schools." But Mays's 1959 statement to the Subcommittee on Constitutional Amendments also differed from that earlier brief in that it was far more concerned, as Mays told Congress, with the original intent of the Fourteenth Amendment. When the CCG published Mays's testimony, it titled the tract *A Question of Intent*.[178]

The Talmadge amendment truly was a lost cause; 51 percent approval in a Gallup poll wasn't anything close to the level of support required to amend the Constitution. Mays's strategy had always been better because it had broader applications. It didn't succeed in overturning *Brown*, but Mays's principal argument, which was to present a single mode of constitutional interpretation as the only legitimate mode, had the important benefit of equipping opponents of the Warren Court's many other landmark decisions with an argument that could be used against nearly all of them.

Long before the nomination of Robert Bork and the spread of originalism across the federal judiciary, David J. Mays pioneered the judicial philosophy these men would adopt. Quietly, Mays, the Pulitzer Prize–winning segregationist, wrote the script.

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Protesters outside the Supreme Court, Washington, DC, April 25, 2024

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Part Four

The End of Amendment, 1961–2016

> *No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.*
>
> —Failed amendment to the U.S. Constitution, introduced into Congress, 1975

Ronald Reagan at the Bicentennial Constitutional Parade in Philadelphia, 1987

THE BICENTENNIAL OF THE SIGNING OF THE U.S. CONSTITUTION FELL ON September 17, 1987, in Ronald Reagan's America, Hollywood in the White House. But the celebration had kicked off months before, in Orlando, Florida, with a nationally televised parade down Main Street U.S.A., the Constitution's two hundredth anniversary piggybacking on Walt Disney World's much-ballyhooed fifteenth birthday. Bea Arthur and Betty White, the wisecracking first ladies of television comedy, arrived by hot air balloon.[1] Mickey, Goofy, Donald Duck, and Chip the Chipmunk, dressed in eighteenth-century cloaks, knee breeches, and tricornered hats, carried an American flag through a Town Square decorated with red, white, and blue bunting. Ray Charles and Dolly Parton performed, and while a choir sang a medley of patriotic tunes, beginning with "America the Beautiful," Charlton Heston, in blue blazer, white shirt, and red tie, played the role of America's lantern-jawed historian, explaining the origins and meaning of the Constitution.

"Our leaders of tomorrow must be as dedicated to its preservation as were the leaders of yesterday and the leaders of today," Heston commanded sternly.[2] Former U.S. Supreme Court chief justice Warren Burger attended, too, as an official honoree. The *Washington Post* reported finding him "hunkered down at EPCOT Center in a reviewing stand with top Disney brass, waving with his two grandchildren as the marching bands, Mickey, Minnie, a giant rooster, dancing bears and the like paraded past in a remarkable flex of the hammerlock Walt Disney put on America." [3] In the

Day-Glo, Lite-Brite, Morning in America 1980s, the Constitution had become kitsch.

Launching the Constitution's bicentennial at Disney World had been arranged by a seventeen-member commission appointed by Reagan, a former television and film star who'd been groomed for political office since meeting William F. Buckley Jr. in 1961. Reagan's Commission on the Bicentennial of the United States Constitution included the first ladies of conservatism, Phyllis Schlafly and Lynne Cheney, and in a true coup, he'd convinced the seventy-seven-year-old Burger to head the commission: Burger resigned from the Court to accept the position.[4]

Burger, a Minnesotan, had been nominated to the Court by Nixon in 1969. Over the next decades, the parties became sorted by ideology (liberals as Democrats, conservatives as Republicans), the distance between the parties widened, and the ideological intensity of partisans increased. These three developments—ideological sorting, heightened partisanship, and intensifying polarization—were to a considerable degree driven by decisions made by the Supreme Court, particularly those about the constitutional status of women, women's bodies, and their eggs, embryos, and fetuses. The Jeffersonian question of whether a constitution could bind generations as yet unborn took on new meaning as an emerging pro-life movement insisted on the constitutional rights and legal personhood of unborn children.

As chief justice, Burger had been famously unwilling to speak to journalists, but during Disney World's four-day press junket, he delivered an address to six thousand reporters whose expenses—travel, lodging, and every Magic Kingdom meal—were all paid for by Disney. The only thing about Burger's speech that was newsworthy, according to the *New York Times*, was "the way the press debased itself" by reporting it.[5] Asked by one journalist who declined the dosh whether all this might be trivializing the Constitution, Burger said, "I wouldn't let it worry me too much." [6] And then in a televised ceremony, he presented Disney executive Michael Eisner with relics and replicas from the Constitutional Convention, on loan for the bicentennial: James Madison's desk, a vest worn by George Washington.[7] Days later, in Washington, a madman with a hammer tried to smash the glass protecting the Constitution and the Bill of Rights in the National Archives, the first-ever attack on the national shrine.[8]

The bicentennial was inescapable. Grocery store cashiers gave away free copies of the Constitution; the government printed enough for every American household.[9] A facsimile of the Constitution went on the road, along with an original of the Magna Carta, in a temperature-controlled forty-foot trailer truck that traveled to more than one hundred cities.[10] ABC-TV ran a series of "Bicentennial Constitutional Minutes" during Saturday-morning cartoons, featuring characters from Looney Tunes. Professor Bugs Bunny, dressed in cap and gown at the front of a lecture hall, sings an "Ode to the Amendments" that begins, "Our Constitution's really splendid, but sometimes we do amend it." Daffy Duck, dressed as a vaudevillian in waistcoat and spats, soft-shoes across the stage crying out, "Menda, menda, menda, menda!" And then Bugs belts out, "It was intended! To be amended!" [11]

And it was intended to be amended. But it was no longer amendable. Instead of producing constitutional amendments, the civil rights, women's liberation, marriage equality, reproductive rights, and environmental movements produced landmark legislative gains and rights-protecting Court decisions whose importance was matched only by their reversibility. Learning the lessons of the New Deal and the civil rights movement, and after 1982, reeling from the derailing of the Equal Rights Amendment, liberals abandoned both constitutional amendment and democratic deliberation. Conservatives notionally championed amendment, but learning from liberals and reeling from their own many failed amendment attempts, they too sought constitutional change in the judiciary. On the two hundredth anniversary of the Constitutional Convention, asked whether they would consider holding another one for the purpose of amending the Constitution, 71 percent of Americans said it was a bad idea.[12]

For the bicentennial, Burger wanted Congress to declare Constitution Day, September 17, 1987 (which happened to fall on his own eightieth birthday), a one-time national holiday. "This remarkable Constitution of ours, not perfect, but remarkable and getting better as time goes on, is something that should be brought into the consciousness of every person in this country," he told a congressional committee in April 1987.[13] The next month, in a speech in Hawaii, the aging Justice Thurgood Marshall declared his refusal to participate in the celebration. "I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia

Convention," the seventy-eight-year-old Marshall said. "Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound." [14]

Congress declined to declare Constitution Day a national holiday.[15] And when the day came, September 17, 1987, Reagan delivered a bicentennial address at Independence Hall in Philadelphia, calling the Constitution a "covenant with the Supreme Being," and CBS televised Philadelphia's Constitutional Parade.[16] But on C-SPAN that day, you could watch a very different discussion of the Constitution: Reagan's new Supreme Court nominee Robert Bork was explaining his understanding of the nation's founding document to Joseph R. Biden, chair of the Senate Judiciary Committee.

Reagan had nominated Bork, a Yale Law School professor, to the U.S. Court of Appeals for the DC Circuit in 1982; the Senate had confirmed his nomination unanimously. Burger's retirement in June 1986 had created a Supreme Court vacancy that Reagan filled with the brilliant and charming Antonin Scalia, whose appointment the Republican-led Senate approved by a vote of 98–0.[17] In the summer of 1987, when Reagan tapped the sixty-year-old Judge Bork to replace retiring Supreme Court justice Lewis F. Powell Jr., he expected opposition but not strenuous opposition, and he certainly did not anticipate defeat.

But when the Judiciary Committee opened hearings on Bork on September 15, 1987, the nominee faced a hostile Democrat-run committee. The abandonment of amendment had raised the stakes for Supreme Court appointments. Bork also proved unusually expansive in his answers. Where earlier nominees had followed a modified version of the Frankfurter Rule, placing strict limits on what they'd discuss, Bork announced, on the first day of his confirmation hearings, "I welcome this opportunity to come before the committee and answer whatever questions the members may have." He added that though he said he was happy to discuss his "judicial philosophy," he would demur on specific cases, a distinction that, as Ruth Bader Ginsburg would later remark, "blurred as the questions and answers wore on," not least because Bork appeared delighted by the attention.[18]

The televised Bork hearings brought originalism as a judicial philosophy into public view, in the character of a pompous and irascible man, just as Americans were being asked, even as they picked up a gallon

of milk at the corner convenience store, to think about the Constitution and to think about it in a very particular ye-olde way. Constitutional conservatism had come packaged with heritage tourism before, especially with the Colonial Revival of the 1920s. The brand advanced by Reagan's Justice Department in the 1980s had become, for the first time, the position of a political party, the GOP. It also advanced a new claim: that "the people" who ratified the Constitution of 1787 had established its democratic legitimacy and that therefore the liberal jurisprudence of the Supreme Court was fundamentally undemocratic, a betrayal not only of the nation's past but of democracy itself.[19]

Bork had first publicly stated his emerging judicial philosophy in 1971—the last year the Constitution was meaningfully amended—when he gave a lecture at Indiana Law School that, printed in the *Indiana Law Journal*, would become one of the most cited law review articles ever published.[20] His interest in the original intent of the framers had come in response to *Griswold v. Connecticut*, a 1965 Supreme Court case in which the Court declared state laws banning contraception for married couples to be an unconstitutional violation of a right to privacy. In 1972, pressed by the women's liberation movement, Congress passed the Equal Rights Amendment and sent it to the states for ratification; it was widely expected to earn a speedy ratification. The next year, in *Roe v. Wade*, the Supreme Court applied the logic of *Griswold* to abortion and declared state laws banning the procedure during the first semester to be an unconstitutional violation of a right to privacy. Opponents of *Roe* marshaled their forces against the ERA and triumphed; its ratification window expired in 1982.

Originalism as a method of constitutional interpretation had been greatly advanced in 1982 with the formation of the Federalist Society. It would earn a perch on the Court with Scalia's appointment in 1986, and despite the defeat of Bork's nomination in October 1987, it would become enmeshed in American popular culture through the celebration of the bicentennial.

The more power originalists gained in the federal judiciary during the Reagan Revolution, the less interest they expressed in Article V amendment. There was, however, an exception. Even as originalism came to prevail in the federal judiciary, a movement with origins in the fantasies of far-right extremists in the 1950s to achieve a list of constitutional outcomes that ranged from repealing the Sixteenth Amendment to

overturning *Brown v. Board of Education* was resurrected in the 1980s by supporters of a balanced budget amendment. Unable to get that amendment through Congress, fiscal conservatives began calling, once again, for a constitutional convention whose larger purpose swelled into a hope of dismantling the administrative state. Between 2014 and 2022, the legislatures of nineteen states—including nine of the eleven states of the Confederacy—passed resolutions calling for a convention to propose amendments to "impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and members of Congress." [21] Since no such convention had ever before taken place, how delegates would be selected and what rules a convention would follow remained entirely unsettled.[22]

Despite the growing conservatism of the Supreme Court, liberals did not seek change by way of Article V amendment. This made sense strategically, since even if they had been able to get an amendment through Congress, they were unlikely to achieve ratification in the states. Mocked as "Atari Democrats" who courted wealthy "knowledge workers" and tech entrepreneurs and who abandoned blue-collar voters, liberals lost control of state legislatures. In 1978 Democrats controlled legislatures in thirty-one states, Republicans in eleven. (Seven legislatures were split.) By 2015, the situation had flipped: Republicans controlled legislatures in thirty states, Democrats in eleven. (Eight legislatures were split.)[23] Democrats recovered in a handful of states; by 2024, Democrats controlled the legislatures in twenty-one states, and Republicans twenty-eight.[24]

Liberals interested in federal constitutional change proved unwilling to endorse either amendments or a convention. But having sought constitutional change under the Warren Court from 1953 to 1969, they found that as the composition of the Court changed, their gains were being reversed. In a 2013 decision, the Court undid much of the 1965 Voting Rights Act. In 2022, in *Dobbs v. Jackson Women's Health Organization*, the most formidable legacy of the counterrevolutionary originalist insurgency, a Supreme Court majority overturned the 1973 decision *Roe v. Wade*. After *Dobbs*, Republicans, whose party platform had since 1976 advocated a constitutional amendment establishing either a right to life or the personhood of fetuses, withdrew that plank.[25]

The risk of insurrection rose. Much of this risk came from contested presidential elections and the public's declining approval of the Supreme Court. In 1969, after a proposal to abolish the Electoral College by constitutional amendment passed in the House, it was only very narrowly defeated in the Senate, mostly due to the surprising opposition of strange bedfellows: the NAACP and Southern segregationists. As the distribution of the population changed, the likelihood of a presidential candidate winning the White House but losing the popular vote grew. George W. Bush lost the popular vote to Al Gore in 2000 but won the Electoral College vote after the Supreme Court halted a recount in a contested vote in Florida. In 2016, Donald Trump lost the popular vote to Hillary Clinton by nearly three million votes but won in the Electoral College. He appointed three justices to the Supreme Court, all originalists. Originalists had long insisted that the only way to change the Constitution was by Article V amendment. But even before conservatives gained control of the Supreme Court, they stopped calling for amendments, no more interested in bringing key constitutional changes to the public than were liberals. After Trump lost both the popular vote and the Electoral College vote to Biden in 2020, the president's followers staged an armed insurrection, invaded the U.S. Capitol in an attempt to halt the certification of the Electoral College vote, and called for the hanging of the vice president. After Trump was impeached in the House, the Senate voted 57–43 to convict him, falling short of the required two-thirds majority. In 2024, in a stunning political comeback, he won reelection, winning both the electoral and popular vote.

In the early 2020s, a divided nation witnessed rising political violence that included not only a failed insurrection and a mob calling for the hanging of a vice president but also the attempted assassination of President Trump and a plot to kill Supreme Court justice Brett Kavanaugh. Republicans' 2024 platform endorsed no constitutional amendments but did promise "a National Celebration to mark the 250th Anniversary of the Founding of the United States of America." [26] A nearly nine-hundred-page conservative policy agenda known as Project 2025 advocated not a single constitutional amendment; instead, it called for a constitutional revolution by the exercise of extraordinary executive powers.[27] Democrats proposed constitutional amendments—but only to diminish the power of the Supreme Court. Two and a half centuries after the American Revolution began, Americans appeared to have altogether abandoned the philosophy of

amendment. And the president seemed to have abandoned constitutionalism itself. Asked in 2025 whether he had a duty to uphold the U.S. Constitution, Trump said, “I don’t know.”

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11

The Subcommittee on Constitutional Amendments

Birch Bayh, November 8, 1968

No person, government, or governmental agency shall deprive any person of the right to a decent, clean environment.

—Failed amendment to the U.S. Constitution, introduced into Congress, 1970

Birch Bayh was counting votes. He'd been counting votes on this amendment for four years—in the Senate, in the House, in committees and conferences, in his sleep. The stern-jawed senator from Indiana, a man people sometimes called the Kennedy of the Midwest, wanted to abolish the Electoral College. The method of electing the president had been the subject of more proposed amendments than any other feature of the Constitution.

Six times it had passed one branch of Congress.[1] Bayh's version provided for a direct national popular vote, and in the event that no candidate won outright, a runoff would be held between the top two vote-getters. (Bayh's proposal eliminated the existing provision of throwing an Electoral College tie to the House of Representatives.) By September 1970, the Bayh amendment had passed in the House, 339–70; it enjoyed overwhelming popular support, polling at more than 80 percent in favor; and it had the (faint-hearted) endorsement of the president, Richard Nixon, the AFL-CIO, the American Bar Association, the League of Women Voters, and the U.S. Chamber of Commerce.[2] As debate began in the Senate, Bayh knew he had at least fifty-five solid votes. He needed sixty-seven. "The fate of one of the most sweeping constitutional changes ever put to a Senate test may depend on no more than a dozen votes," the *Washington Post* reported.[3] "One Man Can Make a Difference" had been one of Bayh's campaign slogans.[4] This time he needed twelve.

Aside from James Madison and Thaddeus Stevens, no American did more to amend the Constitution than Birch Bayh.[5] Americans ratified four amendments between 1961 and 1971, beginning with the Twenty-Third, which granted electors to the District of Columbia for presidential elections, and the Twenty-Fourth, prohibiting poll taxes in federal elections. Bayh, as chair of the Senate Judiciary Committee's Subcommittee on Constitutional Amendments, wrote both the Twenty-Fifth, providing for presidential succession, and the Twenty-Sixth, lowering the voting age to eighteen, and he sponsored and steered through passage in the House and Senate what was widely expected to become the Twenty-Seventh, the Equal Rights Amendment.[6] He also championed a DC representation amendment, an environmental rights amendment, and an amendment lowering the minimum age for the House (to twenty-two) and for the Senate (to twenty-seven).[7] And he celebrated and publicized the very idea of amendment by holding hearings on controversial, polarizing amendments on school prayer, busing, abortion, and much more. Senate Judiciary Committee chair James Eastland, who opposed most of what Bayh tried to get done, once confessed to him a grudging admiration. "Boy, you've got that abortion thing, you've got that prayer thing, you've got that busing thing. How do you survive all of that? Any one of those things could kill me at home." [8] But Bayh's most

ambitious amendment, the abolition of the Electoral College, was also his greatest failure.

Birch Bayh, born in Terre Haute in 1928, spent summers on his grandparents' farm. As a kid, he won a tomato-growing competition. He played football. He was a boxing champion. He met his wife, the Oklahoman Marvella Hern, in 1951 when they competed against one another in a speech competition; she won. They were married the next year.[9] Bayh liked to say, "She won the contest, and I won the girl." [10] Elected to the Indiana legislature in 1954, he won his first term in the Senate in 1962, backed by an award-winning jingle that was played, incessantly, on every Hoosier's radio and television set:

Hey look him over,
He's my kind of guy.
His first name is Birch,
His last name is Bayh.[11]

He was nearly the youngest member of the Senate. Friends called him "B2." He'd sidle up to guys, grab them by the arm, and say "Hiya, Tiger!" [12] B2 was keen to make his mark.

The Senate Judiciary Committee had notionally established a Subcommittee on Constitutional Amendments in 1947, but it hardly ever met and seems to have held only closed hearings. By the time Estes Kefauver became chair in 1955, the Subcommittee on Constitutional Amendments had become the graveyard where ideas for constitutional change went to die.[13]

"That obscure outfit had conducted almost no really important business since the nation decided to repeal Prohibition more than three decades ago," as the *New York Times* put it.[14] The 1959 hearings where David J. Mays testified, for instance, had marked the end of the road for Herman Talmadge's Lost Amendment; Mays had agreed to testify not out of any notion that the hearings marked the start of a successful campaign for the amendment but only in order to get his statement into the *Congressional Record*.

Kefauver had undertaken only one serious initiative, the reform of the Electoral College, a project to which he more fully dedicated himself in the

aftermath of the election of 1960, one of the closest in American history. John F. Kennedy won 49.72 percent of the popular vote to Richard M. Nixon's 49.55. The Electoral College result, 303 to 219, masked the narrowness of Kennedy's victory: the difference of fewer than twelve thousand votes in a handful of states would have led to a different outcome. Kennedy won Illinois's winner-take-all twenty-seven electoral votes even though he defeated Nixon by fewer than nine thousand votes. (And allegations of voter fraud in Chicago do not appear to have been unfounded.) On top of all that, "maverick electors" in Southern states cast their Electoral College votes for Harry F. Byrd. "Defenders of the electoral college are hard to find," Kefauver said, calling the Electoral College an "outmoded relic," the result of "a distrust of the people and conditions of geography and communications which no longer exist." [15]

Kefauver had held seven days of hearings and issued a report on December 15, 1960.[16] Hardly anyone disputed that change was not only necessary but urgent. "According to a poll of 254 heads of political science departments, almost 91 percent of them favor some constitutional amendment on the subject," his subcommittee reported.[17] But Kefauver had become bogged down in a slew of proposed reforms, unable to sift them. Nearly all the proposals on the table abolished the bizarre and antiquated role of the elector: if the Electoral College was to be retained, at the very least its votes should be cast automatically, by a clerk in the statehouse, say. Three different solutions were proposed to avoid a "minority president," a president who lost the popular vote but won the Electoral College vote: replacing the winner-take-all vote in the states with a proportionate vote; replacing the statewide electoral vote with a district vote; and holding a direct national popular election.[18] Kefauver had not been able to steer his subcommittee through this thicket.

When Kefauver died suddenly in August 1963, Bayh asked Eastland, as the head of Judiciary Committee, for the post, pointing out that he was the only Democrat on the committee without a subcommittee chairmanship. Eastland had planned to kill the subcommittee, deeming it a mostly useless waste of money and one subcommittee too many, but Bayh convinced him not to. Eastland called him up. "Birch," he said, "I think you'll make a splendid chairman of the Subcommittee on Constitutional Amendments." [19] The *New York Times* read the appointment more cynically: "it seemed a

suitable place to put a young Hoosier who had flunked his bar exam the first time and had practiced law only a couple of months before coming to Washington." [20] Bayh put it this way: "I found myself the keeper of the graveyard." [21]

Bayh hadn't favored a direct national popular vote when he first took his seat in the Senate. He'd only gradually come around to the idea. And Eastland hadn't much opposed a direct national popular vote when he appointed Bayh chair of the Subcommittee on Constitutional Amendments. But he came to believe that Bayh had to be stopped. On September 23, 1970, during the third week of a Senate filibuster on the Electoral College amendment, Bayh pointed out that his amendment had been subject to more days of debate than any other constitutional amendment in the last century. And still no date had been set for a vote. Bayh announced, defying the Democratic Party leadership, that he would block all Senate business—effectively shutting down the Senate—until a vote was held.[22] Southern segregationists were Bayh's chief opponents in this battle, but the NAACP was against abolishing the Electoral College, too. This battle was by no means the only constitutional amendment battle of the 1960s and '70s, but it was one of the most consequential.

Bayh made a difference. Under his leadership, Congress passed the Twenty-Fifth and Twenty-Sixth amendments, nearly abolished the Electoral College in 1970, and sent the Equal Rights Amendment to the states in 1972. But the era is more remarkable for the amendments that *didn't* pass than for those that did. Of the more than eleven thousand amendments introduced into Congress between 1791 and 2024, roughly 5,300—nearly half—were introduced between 1953 and 1979.[23] The growing size of Congress, along with a changed rule about co-sponsorship, accounts for some of this difference, but by no means does it account for all of it, and in any case, the number of representatives had been more or less stable since 1911.

A record-breaking 775 amendments were proposed in the Ninety-First Congress, from 1969 to 1970. One of the most important, an environmental protection amendment, never even went to committee. And for all its dynamism, the Bayh era marked the last flurry of constitutional amendment in American history. Bayh would hold hearings on the Electoral College once more, in 1977. But that year the Subcommittee on Constitutional

Amendments was dissolved. And amending the Constitution became, once again, no longer possible. The giant slept.

The Far Right

During the era of the Warren Court, from 1953 to 1969, most calls for constitutional amendment were sounded by what had come to be called the "far right": the array of anti-Communists, conspiracy theorists, vigilance societies, and white supremacists who believed the Supreme Court, the presidency, the federal government, the United Nations, the university, and much else had been taken over by a worldwide Communist conspiracy and that at stake was the Constitution itself. The John Birch Society (founded in 1958); For America; We, The People!; and the Committee for Economic Freedom, for instance, all supported the repeal of the Sixteenth Amendment, under the banner of what they called the liberty amendment.[24] The mimeographed newsletters of anti-Communist vigilance societies comprised just one element in a vast ecosystem of ultraconservative agitation, from Dan Smoot's televised broadcasts to the many radio programs aired across the country by and for conspiracy theorists and self-described constitutional patriots. Radically conservative ideas were spread by an old-fashioned means, too: the U.S. Postal Service. One of the Birchers' chief activities was writing letters to members of Congress. A Network of Patriotic Letter-Writers, based in Pasadena and founded in 1958 as an outgrowth of the local John Birch Society chapter, flooded state and national legislators with letters accusing everyone from Eisenhower to the PTA of Communist subversion. One of its leading campaigns was for the liberty amendment; another was for the impeachment of Earl Warren.[25]

At the start of this era, the parties were not sorted either by ideology or by race. Roughly, the GOP was the party of business, and the Democratic Party was the party of labor. There were liberal Republicans and conservative Democrats. Black voters had inclined toward the GOP since the days of Abraham Lincoln. But by the end of the Warren era, the parties had begun to sort themselves out, chiefly over Court decisions, especially those concerning civil rights, beginning with *Brown v. Board of Education*. First came the far right, then came the New Left. Conservative white Southerners left the Democratic Party for the GOP, and Black voters

became Democrats. In the 1970s and especially after *Roe v. Wade* in 1973, the parties themselves would polarize, Democrats moving further to the left, and Republicans moving considerably further to the right.[26] Once that polarization began, it would continue for decades.

It's not surprising that it became more difficult to amend the Constitution once party sorting and polarization set in. It's virtually impossible to achieve the two-thirds supermajority requirements of Article V in a polarized House and Senate, and ratification in three-quarters of the states is essentially inconceivable under such conditions. But the difficulty of amending the Constitution also *drove* polarization. It was because of the insurmountable hurdle of Article V that, with the failure of the Child Labor Amendment in the 1930s, liberals had sought constitutional change through the courts instead of by way of amendment. So did the civil rights movement. Liberals were also in thrall not only to the prospect of exercising the power of the judiciary through carefully chosen appointments but also to the ever-expanding power of the executive. The greater their successes, the stronger the backlash. The stronger the backlash, the greater the polarization. The greater the polarization, the greater the difficulty of amendment. The greater the difficulty of amendment, the greater the recourse to the courts. And then the wheel turned again.

The emergence of a far right and its clamor for constitutional amendments posed challenges to both Democrats and Republicans. Beginning in the spring of 1961, the Kennedy administration, even while hoping that the far right would splinter the GOP (in the end, it instead splintered the Democrats), sought means to diminish its influence. Out of a series of meetings and exchanges—among Walter Reuther, head of the United Auto Workers; Reuther's two brothers; and Kennedy's attorney general, Robert F. Kennedy—came a twenty-four-page proposal known as the Reuther Memorandum. It made four recommendations: adding right-wing organizations to a list of subversive organizations; directing the FBI to investigate them; denying them federal tax exemptions; and using the FCC to get far-right broadcasters off the air by way of the Fairness Doctrine. (The Kennedy administration in fact implemented the last two of these recommendations.)[27]

Democratic strategists sought to depict these agitators as a "lunatic fringe," and so, to a considerable extent, did Republicans. Robert Welch, head of the John Birch Society, believed both Eisenhower and his secretary

of state, John Foster Dulles, were Communists.[28] “Bob Welch is of course nuts on the Eisenhower-Dulles business,” William F. Buckley wrote to Arizona senator Barry Goldwater in March 1961. “But the society has some very good people in it.” Buckley was loath to disavow the Birchers, given their support, including financial support, for the agenda he advocated in the pages of the *National Review*. His own mother was a Bircher.[29] Buckley also knew what kinds of attacks he’d be subjected to if he tried to distance the magazine from the Birchers and their infamous letter-writing campaigns. “As you know, these idiots set off on a harebrained campaign to impeach Earl Warren,” James Kilpatrick wrote to Buckley. “The word got back to Welch that I thought the idea preposterous, whereupon he commanded all his faithful members to write Mr. Kilpatrick a letter. By God, they all did. The first 20 or 30 I answered with individual letters. The next 100 we answered with a mimeographed reply. The next 400, we filed.” [30] (Calls to impeach Warren, and the heightened public interest in the personnel on the bench, had consequences. Beginning in 1955, nominees to the Supreme Court regularly appeared before the Senate Judiciary Committee, where their confirmation, once routine, would by the end of the 1960s become the subject of heated dispute.)[31]

In April 1961, as the Kennedy administration was considering the Reuther Memorandum, Buckley published an editorial in the *National Review* gently denouncing Welch. “The point has come, if Mr. Welch is right, to leave the typewriter, the lectern, and the radio microphone, and look instead to one’s rifles,” Buckley wrote, insisting that Mr. Welch was not right, and that one could still argue policy positions and do things like write gentle editorials. In this piece and others, Buckley stopped well short of denouncing the Birch Society itself, whose members he continued to court. Instead, he blamed the press for “opportunizing on the mistaken conclusions of Robert Welch to anathematize the entire American right wing.” [32]

Meanwhile, a more respectable organization had emerged to advance what was increasingly called “constitutional conservatism”: Americans for Constitutional Action, a conservative counterpart to Americans for Democratic Action. The ADA had been formed in 1947 by Eleanor Roosevelt, John Kenneth Galbraith, Walter Reuther, Arthur Schlesinger Jr., and Reinhold Niebuhr, among others, for the purpose of preserving and

extending the New Deal. The ACA, founded in 1958, sought "to elect more constitutional conservatives" to Congress.[33] Its conservatism was indeed the conservatism of the far right; its founder, for instance, did not believe the Fourteenth Amendment had been properly ratified.[34]

The ACA was also a successor to the Campaign for the 48 States, which, at its dissolution in 1959, turned over the balance of its funds to the ACA. "Dedicated to the preservation of the spirit and principles of the Declaration of Independence and the Constitution of the United States as these were enunciated and promulgated by the Founders of our Republic," the ACA established a ratings system, the ACA Index—again, an answer to a method used by the ADA[35]—ranking each member for their adherence, or lack thereof, to conservative constitutionalism.[36] (Dan Smoot reprinted the ACA Index in his weekly newsletter.) In one ACA rating of U.S. senators in 1960, for instance ("FOR Private Ownership & AGAINST Government Ownership"), John F. Kennedy and Lyndon B. Johnson rated zero while Barry Goldwater and Harry Byrd both rated 100 and Strom Thurmond 75.[37]

In the spring of 1963, as a National Draft Goldwater Committee formed in Texas, urging the Arizona senator to enter the 1964 presidential race, Democrats decided to wage a campaign against the ACA. Both the far right and the possibility of a Goldwater bid for the presidency, which augured a possible conservative takeover of the Republican Party, were much in the news. Daniel Bell's *The Radical Right* appeared that year, an updated version of a collection he'd first edited in 1955. Richard Hofstadter revisited his earlier argument—that the far right ought to be considered as, essentially, only pseudo-conservative, on the argument that its concerns were not chiefly political but a matter of cultural politics—by dwelling on how fundamentalism had recast itself as anti-Communism. Yet he stood by his general description of the far right, that "it tolerates no compromises, accepts no half measures, understands no defeats" and in that way, exists "outside the frame of normal democratic politics, which is largely an affair of compromise." [38] Also in 1963 there appeared *The Far Right*, an investigative report by Bernard Eismann of CBS and Donald Janson of the *New York Times*. Eismann and Janson brought a storm down on the Kennedy administration by publishing parts of the Reuther Memorandum, which had been leaked to them. Kennedy sought to redirect attention to the far-right organizations themselves.

In May 1963, Kennedy held a press conference, mainly to talk about the situation in Birmingham, Alabama, where Martin Luther King Jr. had been arrested and thousands of schoolchildren marching in the streets, protesting the segregation of the schools, were met with a brutal assault by police deploying dogs and firehoses. Much of it had been broadcast on television. "We have waited for more than three hundred and forty years for our God-given and constitutional rights," King wrote from the Birmingham jail. "The nations of Asia and Africa are moving with jetlike speed toward the goal of political independence, and we still creep at horse-and-buggy pace toward the gaining of a cup of coffee at a lunch counter." [39] There would be no more waiting.

The Children's Crusade would change the course of the civil rights movement. It would lead Kennedy, weeks later, to address the American people on live television, calling for support for civil rights legislation. "The time has come for this Nation to fulfill its promise," Kennedy said. "The events in Birmingham and elsewhere have so increased the cries for equality that no city or State or legislative body can prudently choose to ignore them." [40]

At that press conference in May, though, reporters asked Kennedy about something else.

"Mr. President, you have spoken out before against the dangers of the so-called radical right in politics," began one reporter. "Could you update those observations today, in view of the fact that a dozen States or so, influenced in part by extremist groups, have given varying degrees of approval to legislation which would change the form of amending the Federal Constitution, and would undercut the powers of the Supreme Court as well?" [41]

Since 1954, eight states (Georgia, Idaho, Illinois, Indiana, Michigan, Missouri, South Dakota, and Texas) had petitioned Congress for a revision of Article V, and four states (Alabama, Arkansas, Florida, and Georgia) had called for a constitutional amendment countering the power of the Supreme Court.[42]

"It has always seemed to me remarkable that those people and organizations who are founded in order to defend the Constitution should seek to change it," Kennedy answered. Notably, he did not name any of these extremist groups.[43] But weeks later the House took up the question

and named names when California congressman Ronald B. Cameron, a lawyer and former Marine representing Los Angeles County, rose to speak. In 1962 Cameron, a Democrat, had earned his seat by defeating the incumbent Republican, John Rousselot, who then went on to serve as a regional director for the John Birch Society. Cameron had won, but nationally one hundred of 150 candidates supported by the ACA prevailed in the 1962 midterm elections, and in California, Birchers nixed Richard Nixon's gubernatorial campaign.[44] Cameron charged that the ACA was attempting to "clothe itself and the John Birch Society with an aura of respectability" by holding a gala in Washington, at which more than 150 members of Congress were to receive Distinguished Service Awards, honoring their "constitutional conservatism." Pointing out overlapping leadership and membership and funders, Cameron charged that the ACA was simply the John Birch Society by another name. A phalanx of congressmen rose to add to Cameron's evidence, blaming "the lunatic fringe of the right-wing" for giving conservatism a bad name. "Your ACA rating is—not entirely—but to a large degree, your Birch rating," said Morris Udall, in remarks that also suggested the extent of conservative organizing. Most of his mail, Udall said, "concerned the impeachment of Chief Justice Warren, getting out of the United Nations, Communists and homosexuals in the State Department, and so forth." [45]

Cameron also pointed out that among the amendments endorsed by the Campaign for the 48 States was a reform of the Electoral College, a reform that, Cameron charged, was designed "to weaken the voting power of urban areas"—in other words, to suppress the influence of Black voters.[46] This was the Mundt-Coudert amendment, which proposed to replace winner-take-all Electoral College voting with a district system.[47] Outside the far right, it had very little support. But the idea that Electoral College reform was part of a conspiracy designed to suppress the Black vote would one day come to haunt Birch Bayh's graveyard.

One heartbeat, one vote

Bayh's chairmanship of the Subcommittee on Constitutional Amendments began on September 30, 1963. Less than two months later John F. Kennedy was assassinated. Johnson was sworn in as president, but the nation no

longer had a vice president. Bayh set to work on what became the Twenty-Fifth Amendment to resolve the problem of what process is to be followed if a president needs to be replaced and who is to determine when a sitting president is no longer capable of holding the office. He also wrote a book about it, *One Heartbeat Away*, the only insider's account of the history of a constitutional amendment during its arduous travels through the House, the Senate, and the states.[48]

There had been plenty of problems with presidential disability and succession in the past. President William Henry Harrison died in office in 1841, Vice President Garret Hobart in 1899, FDR in 1945. James Garfield lingered for nearly eighty days, barely conscious, after being shot in 1881. William McKinley lived for more than a week after being shot in 1901. Woodrow Wilson remained in office for sixteen months after suffering a debilitating stroke in 1919. By the 1950s, there was also the fear that the president, his vice president, and possibly members of Congress, might be killed in a nuclear attack.

An amendment providing for presidential disability and succession had first been proposed by Dwight Eisenhower, who suffered a massive heart attack in 1955 and underwent two surgeries during his presidency. A poll conducted in 1957 reported that 64 percent of Americans favored such an amendment.[49] But it was only after Kennedy's assassination, and the proposal first introduced into the Senate by Bayh on December 12, 1963, that Congress finally took up the matter in earnest. Shrewdly, Bayh enlisted the aid of the American Bar Association.[50] By January 1964, he was able to open hearings on the issue in his subcommittee.[51]

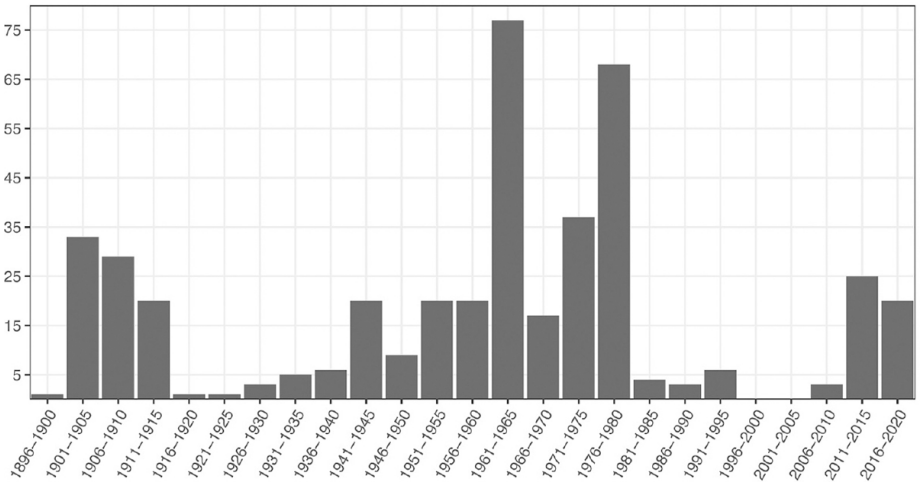
Meanwhile Johnson, on taking office, pledged himself to civil rights legislation. The Supreme Court's decision in *Gray v. Sanders* in March 1963 codified the idea of "one person, one vote": "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote," Justice William O. Douglas wrote in the 8–1 opinion in *Gray v. Sanders*, a decision that would also energize interest in abolishing the Electoral College in favor of a direct national popular vote.[52] So did the Court's next one-person-one-vote decision, handed down on June 15, 1964, in *Reynolds v. Sims*, requiring that both houses of a state legislature had to be equally

apportioned by population.[53] (This led to a flurry of state constitutional conventions to address reapportionment and redistricting. Rhode Island, Connecticut, Tennessee, New Jersey, New Hampshire, New York, Maryland, Pennsylvania, Hawaii, New Mexico, Arkansas, and Illinois all held constitutional conventions between 1964 and 1970.)[54]

More than 250,000 people marched on Washington in August 1963 to call on Congress to act on civil rights legislation. January 1964 saw the ratification of the Twenty-Fourth Amendment, prohibiting the poll taxes that had been a feature of the Jim Crow South since Reconstruction. But when the 1964 Civil Rights Bill got to the Senate, eighteen Southerners staged a filibuster that lasted for fifty-seven days. It was broken only by a cloture vote on June 10. On June 19, the day the Senate was scheduled to vote, Birch Bayh and Ted Kennedy were supposed to be speaking at the Massachusetts Democratic State Convention. They missed a planned flight to Springfield at two o'clock on the Kennedys' plane. They cast their votes, and the bill passed. Bayh and Kennedy, along with Marvella, the pilot, and a Kennedy aide, then boarded a twin-engine Aero Commander 680, at seven p.m. Three miles from the airport in western Massachusetts, the plane crashed into an apple orchard in a heavy fog. The pilot and Kennedy's aide died, but Bayh pulled his wife out through a window and went back into the plane to rescue Kennedy, dragging him through a hole in the fuselage. Kennedy, who had a broken back and a collapsed lung, would remain in the hospital for six months.[55] By July, Bayh had recovered enough to attend the signing ceremony, broadcast live on national television, as one of some seventy-five guests of the president. Johnson signed and then gave away pens as mementos. Robert F. Kennedy got six pens. Martin Luther King Jr. got one. "This will remain among my most cherished possessions," King said. "I really should have got a bunch." [56] Birch Bayh got one. So did Ethel Payne.[57]

FIGURE 6

Article V Convention Applications, 1896–2020



Follow for extended description

Weeks later Senate minority leader Everett Dirksen introduced a constitutional amendment to overturn the one-person-one-vote principle by leaving the power to determine legislative apportionments to the states.[58] Introduced twice more in 1965, with sizable numbers of co-sponsors, it failed to secure passage.[59] Dirksen then led the most significant campaign to call for a constitutional convention since the call in the 1910s that had produced the Seventeenth Amendment, a campaign that only grew in strength with the passage of the Voting Rights Act in 1965 (Figure 6). By 1966, twenty-eight states had petitioned Congress for a convention.[60] By the start of 1967, thirty-two out of the required thirty-four states had joined this campaign.[61]

Dirksen also supported a constitutional amendment overturning two decisions of the Warren Court, one in 1962 and one in 1963, prohibiting prayer and Bible reading in public schools. Beginning just weeks after the first of these two decisions, members of Congress had introduced more than three hundred proposed amendments constitutionalizing school prayer.[62] “They put the Negroes in the schools, and now they’ve driven God out,” said one Southern congressman.[63] But the conflation of the two issues was inept: a school prayer amendment enjoyed widespread national support; segregation did not.

Goldwater, endorsing a school prayer amendment, made the matter an issue in his presidential campaign, and the GOP included it on its 1964 platform. More than three in four Americans supported a school prayer

amendment.[64] And members of Congress had also been flooded with mail from constituents, nearly all of it supporting a school prayer amendment; the quantity of congressional mail broke all records. But most churches and the National Council of Churches opposed an amendment.

Bayh's pursuit of the presidential disability and succession amendment necessitated some horse-trading over the prayer amendment. Charged with reconciling the differences between the House and Senate versions of the presidential amendment, he visited Dirksen's office to seek his support. He was seated in a chair next to a table on which had been placed, quite deliberately, stacks of postcards endorsing the prayer amendment. In exchange for Dirksen's support on the presidential amendment, Bayh agreed to hold hearings on the prayer amendment, which he himself did not support.[65] "I thought I had committed political suicide," Bayh later said, but he came to believe, too, that holding the hearings had been a useful exercise in addressing a public concern and relieving the pressure on an issue.[66]

He may have been keeper of the graveyard, but it was an awfully busy graveyard, a place where Bayh presided over hearings for all manner of conservative amendments with which he disagreed. "I had to sit there and keep a lid on," he later said, knowing that his colleagues "were glad there was somebody willing to sit there and take heat for that." They were glad he wielded the spade and was willing to do the burying. "They didn't want it out on the floor where they'd all have to vote on it." [67] Both the House and the Senate held hearings, but the prayer amendment never came to a vote in either house. The presidential disability and succession amendment, however, passed Congress in 1965 and was ratified in 1967. Bayh's deft handling of the process earned him a national reputation. But the defeat of the prayer amendment, along with Goldwater's loss to Johnson in 1964, only heightened the frustration of conservatives.

The beginning, middle, and end of all constitutional inquiry

In March 1965, police outside Selma, Alabama, shot and killed a young Black man during a voting rights protest. On March 7, Bloody Sunday, six hundred protesters trying to cross the Edmund Pettus Bridge into Selma were met by dozens of sheriff's deputies and state troopers and possemen who attacked them with tear gas, billy clubs, and bullwhips, a confrontation

broadcast on television that night. One week later, during a joint session of Congress, Johnson introduced a voting rights bill, also known as the "act to enforce the Fifteenth Amendment," that prohibited discrimination in voting by race or color, outlawed literacy tests, banned poll taxes in state elections (the Twenty-Fourth Amendment had prohibited poll taxes in national elections), and required states that had, as of 1964, applied tests or taxes for voters to get clearance from the federal government for any changes in their voting laws.

In April the *National Review* published a cover story by James Kilpatrick called "Must We Repeal the Constitution to Give the Negro the Vote?" The piece followed on a campaign waged by Mays and Kilpatrick's Virginia Commission on Constitutional Government that had argued that the 1964 Civil Rights Act was unconstitutional. A year later Kilpatrick undertook to argue that the Voting Rights Bill was unconstitutional, too. While admitting that the South had been for a century engaged in "wilful defiance of the plain language of the Fifteenth Amendment," he argued that "the great bulk of Southern Negroes" were and remained "genuinely unqualified for the franchise." And in any event, determining qualifications and procedures for voting were powers reserved to the states. "It is possible to get at the evil with a scalpel instead of a cleaver," Kilpatrick wrote, urging a far narrower piece of legislation.[68]

Conservatives were on surer or at least more democratic ground when they contested Supreme Court decisions and damned a judicial oligarchy than when they questioned laws passed by Congress. By the mid-1960s, they increasingly raised those questions with reference to the intent of the framers, as had David Mays in his 1959 testimony before the Subcommittee on Constitutional Amendments under Kefauver. Kilpatrick often echoed Mays's arguments in opinion pieces and editorials and in the foreword to a 1960 pamphlet titled *Did the Court Interpret or Amend?* [69] They had amended![70] Hammered home by Birchers and segregationists, states' righters and constitutional conservatives, this position had become, by 1964, the position of the Republican candidate for president, Barry Goldwater, who in 1960 had written that the Fourteenth Amendment "was not intended to, and therefore it did not outlaw racially separate schools." [71]

Dan Smoot emerged as David Mays's most dedicated popularizer. "No court can validly consider such questions as whether the law would be good

or bad for the country or whether the people seem to want or not want the law," Smoot wrote in 1965. Instead, the courts can consider only "what the constitutional provision in question meant *at the time it was written and adopted, to the people who wrote and adopted it*." They were restricted, that is, to "the *original* intent of any provision," which "*must* be determined by the *original* historical record of that provision." Smoot, in a move adopted by later originalists, made a list of what those original historical records were: the debates at the Constitutional Convention, the *Federalist Papers*, and the records of the state ratifying conventions; and for a constitutional amendment, the records of Congress and the state legislatures or conventions that debated the amendment. No other historical records mattered. Reference to these and only these sources was the only way to interpret the Constitution, Smoot argued, just as Article V was the only way to change the Constitution.[72]

But a far more perceptive commentator had recently emerged. In the fall of 1965, the forty-five-year-old, New York–born political scientist Martin Diamond published an article in *Public Interest* called "Conservatives, Liberals, and the Constitution." [73] Diamond had never finished college, having interrupted his studies to serve in the Second World War but, on his merits, had been admitted to graduate school at the University of Chicago in 1950. Like many midcentury conservatives, Diamond had made a long political journey from left to right. He'd been a member of the American Socialist Party from 1937 to 1952, but his 1956 dissertation was at once a disavowal of socialism and an explanation of its decline in the United States, which he attributed to American constitutionalism (especially federalism), American democracy, and American prosperity: "The average American has always been only 'forty acres' or a generation away from the middle class." [74] (Diamond liked to joke that Americans were driven by—in the words of a country song—"Faster Horses, Older Whiskey, Younger Women, and More Money.")[75] At Chicago, Diamond fell under the influence of the German émigré Leo Strauss, a political philosopher who rejected modernity and called for a return to classical political ideas. It was Strauss who drew Diamond away from socialism; Diamond brought to Straussianism the same fervor he had brought to socialism.[76] In particular, he applied Straussianism to American constitutionalism, calling for a return to the ideas—and the original intentions—of the framers. American

Straussians were the original originalists. “Yet despite the Straussians’ contributions to history, they are not in fact historians,” as the historian Gordon Wood once remarked. “They are not really concerned with the way historians understand the past; they are usually interested, for example, in only a few documents of the late eighteenth century—the Declaration of Independence, the Constitution, the Convention debates. They have no conception of the process of history.” [77]

Diamond dedicated himself to a Straussian reading of the Constitution.[78] One of his first major essays appeared in 1959. In “Democracy and *The Federalist*: A Reconsideration of the Framers’ Intent,” Diamond set about dismantling Charles Beard’s 1913 *An Economic Interpretation of the Constitution*. Against Beard’s reading of the framers as having been motivated by economic self-interest, Diamond argued that in Madison’s conception of the Constitution, “the struggle of classes is to be replaced by a struggle of interests.” [79] That is to say, the framers intended for the Constitution to thwart class struggle by providing for democratic expression of the political will in the form of deliberative majorities moderated through specific mechanisms: the separation of powers, bicameralism, federalism, the Supreme Court, and the Electoral College. Refuting Beard and other Progressive-era historians, Diamond countered the charge that the amending process was undemocratic: “Everyone is familiar with the arithmetic which shows that a remarkably small minority could prevent passage of a constitutional amendment supported by an overwhelming majority of the people.” But, turning that arithmetic around, he argued that the object of Article V’s structure was “not at all to give power to minorities, but to ensure that passage of an amendment would require a *nationally* distributed majority, though one that legally could consist of a bare numerical majority.” [80]

Diamond’s “Conservatives, Liberals, and the Constitution” can be read as a reply to Kirkpatrick’s “Must We Repeal the Constitution to Give the Negroes the Vote?” Diamond observed that conservatives and liberals appeared to be moving toward opposite poles—conservatives cloaking themselves in constitutionalism and liberals in democracy—without realizing that this tension was both fundamental to a constitutional democracy, and productive. “The liberal is the intelligent foe of the Constitution and the conservative its foolish partisan,” Diamond wrote.

“Given the dominance of either, the Constitution would perish.” But neither fully understood the Constitution, and both seemed to have forgotten that their own positions were unstable. He pointed out, for instance, that while conservatives had very strongly favored judicial review in the 1930s, they did not like it in the 1950s and ’60s, while for liberals the opposite was true, and that this fickleness also applied to their appetite for constitutional amendment. “Liberalism long sought to evade a conservative Court and the frustrating Constitution by trying to substitute the methods of direct democracy—initiative, referendum, recall, abolition of the electoral College, legislation by amendment,” Diamond wrote. “Now it is the conservatives’ turn. It is they who . . . are now restive regarding the Electoral College, and who have introduced a spate of largely ill-considered constitutional amendments.” [81] He also rightly predicted that the tables would turn once again were the Court to become conservative.

But if Martin Diamond offered a careful and concerned account of the widening distance between liberals and conservatives, less nuanced commentators reached a different public with coarser accounts. These included Alfred Avins, a rogue political scientist and oppositional legal scholar. Avins, born in 1934, had studied at CUNY, Columbia, and the University of Chicago; he held many jobs for a very short time, from Rutgers to Memphis State. (“Numerous law schools will not consider me for a teaching post because of my race relations views,” he wrote to Buckley. “I admire your courage,” Buckley wrote back.)[82] But the defining intellectual commitment of Avins’s life was his opposition to the Court’s decision in *Brown v. Board of Education* as an incorrect reading of history.[83]

Beginning in the late 1950s, Avins set for himself the task of recovering the original intent and understanding of the Fourteenth Amendment in order to argue against the Warren Court and against civil rights more broadly. He opposed civil rights legislation as “special rights for Negroes” and objected to integration as a violation of “the right of the individual to choose to associate or decline to associate based on ethnic grounds.” [84] In 1965, when he was barely thirty, Avins had captured the attention of conservatives for his denunciation of civil rights legislation as unconstitutional. “The beginning, middle, and end of all constitutional inquiry is the original intent of the framers,” Avins wrote Buckley, a statement he used again, early in

1966, when he appeared before the Supreme Court to argue that a New York law requiring an English-language literacy test for Puerto Rican immigrants, notwithstanding the Voting Rights Act, was constitutional. "The Fourteenth Amendment covers only what were known in 1866 as civil rights and not political rights at all," Avins told the Court, after Chief Justice Warren introduced him as "Mr. Navins, Avins, whatever." Avins insisted that the Court can't "chop up the Fourteenth Amendment and make a toss green salad out of it because it doesn't like the original recipe. If it doesn't like the original recipe, it's got to get a new recipe. The way you get a new recipe is Article 5." Mr. Avins did not prevail. The New York law was overturned.[85]

Beginning in 1966, Avins published a series of law review articles with the subtitle "The Original Understanding." In each, disagreeing with Alexander Bickel's influential analysis, he purported to demonstrate that members of the Thirty-Ninth Congress would have opposed the decisions of the Warren Court.[86] And so, for instance, he defended whites-only clubs. "A law compelling a private club not to discriminate, far from being an enforcement of the fourteenth amendment as originally understood, is a violation of this amendment as originally intended by its framers, for it constitutes the taking of liberty without due process of law," Avins wrote.[87]

David J. Mays and James Kilpatrick, keen for the imprimatur of an academic authority, especially one from the North, for the Virginia Commission on Constitutional Government, arranged for Avins to edit a collection they wished to publish.[88] With Avins as editor, the commission published a nearly eight-hundred-page volume of excerpts from the *Congressional Record* during debates over the Reconstruction amendments. "The book should look as neutral as possible," Avins wrote Mays, "because once we lure them in with an interest in history we can deliver the punch much more effectively." [89] That punch was a sustained attack on integration. Published in 1967 and heavily advertised in the *National Review*, its preface, prepared by the commission, stated that "its belief in the absolute necessity for adherence to the will of the governed as announced in the Constitution leads it to the further belief that such result can only obtain by interpreting every portion of the Constitution, including the amendments thereto, in accordance with the intent and understanding of

the framers." [90] The founder of Americans for Constitutional Action wrote Avins a fan letter.[91]

In 1967, when Lyndon Johnson nominated Thurgood Marshall to the Court, Avins was working as staff for Strom Thurmond, who later praised him as "probably the greatest living authority on the legislative history of the so-called 'Reconstruction amendments.'" [92] Avins prepared a list of sixty questions for Thurmond to pose to Marshall whose purpose was "to show how ignorant he is of the legislative history of the 13th, 14th, & 15th Amendments." [93]

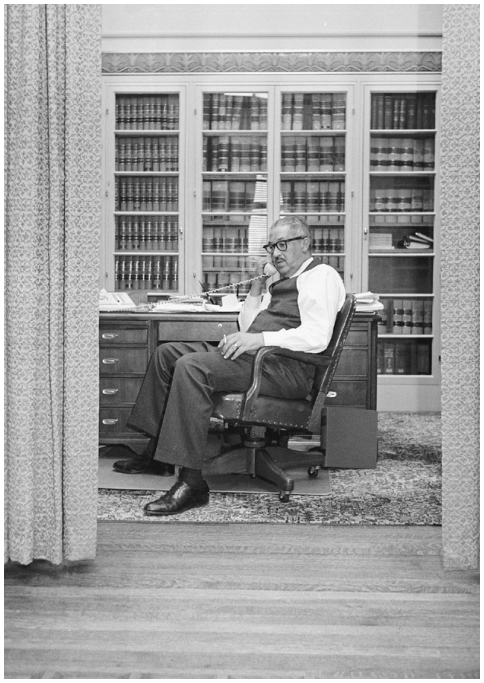
Thurmond questioned Marshall for more than an hour, administering a constitutional history exam, riddled with arcana.[94]

> THURMOND. What is the significance, if there is any in your view, in the interpretation of the 13th amendment, that it was first rejected by the House of Representatives, which did not have a two-thirds Republican majority, and finally proposed only because of a switch of votes of a group of Union Democrats?
> MARSHALL. I am not familiar with whether the facts are correct, and I have no opinion on it.

Thurmond's exam continued, each question more obscure than the last.

> THURMOND. What theories were then current in the Republican Party which gave support to the position that the Civil Rights Act of 1866 could be constitutionally passed by Congress to enforce the privileges and immunities clause of article IV. section 2 of the original Constitution?
> MARSHALL. I don't remember.
> THURMOND. Of what significance do you believe it is that in deciding the constitutional basis of the Civil Rights Act of 1866, Congress copied the enforcement provisions of this legislation from the fugitive slave law of 1850?
> MARSHALL. Senator, I just don't remember those debates, which were very voluminous, and I have not looked at them and have

not researched that point since either 1953 or 1954. I have not been called upon to do so.[95]



Thurgood Marshall in his office as solicitor general, 1965

Avins was pleased. “Marshall, as I expected, was utterly ignorant,” he wrote to David J. Mays. “This made him look pretty stupid.” (In the same letter to Mays, Avins endorsed the idea of deporting to Africa discontented American Blacks who participated in riots.[96] “Of course the first sentence of the 14th Amendment makes them all citizens,” he admitted, “but the need to relocate them may give rise to a redetermination of the validity of the amendment itself.”)[97] Before closing, the senator had posed several of Avins’s questions on constitutional interpretation.

THURMOND. Do you believe that the Supreme Court is bound, in construing the Constitution, to refrain from amending it in the guise of interpreting it?

MARSHALL. I agree.

THURMOND. Do you agree that if the Constitution was intended by the framers, those who wrote it, to mean one thing, the

Supreme Court is not entitled to hold that it means something else?

MARSHALL. I would say I am in general agreement with that statement.

But what if they did, Thurmond wanted to know: what if the justices knew the Constitution meant one thing but decided it meant something else? Marshall said he could not believe the justices would ever do that, but if they did, "the only recourse would be a constitutional amendment." [98]

Sam Ervin interrogated him along the same lines: "Is not the role of the Supreme Court simply to ascertain and give effect to the intent of the framers of this Constitution and the people who ratified the Constitution?"

"Yes, Senator," Marshall answered. "With the understanding that the Constitution was meant to be a living document." [99]

Against the opposition of Southern senators, Marshall's nomination went to the full Senate where, in an hour-long speech, Thurmond argued that Marshall was unqualified to sit on the Court due to his lack of knowledge of the Constitution.[100] Marshall was confirmed in the full Senate by a vote of 69–11.

Top-tier law reviews routinely rejected Avins's submissions as bizarre.[101] (He went on to found two law schools, both of which were denied accreditation by the American Bar Association.)[102] His work on the Fourteenth Amendment was almost universally derided by more established scholars, who associated it with the far right. One reviewer of Avins's 1968 collection of debates over the Reconstruction amendments accused him of selectively choosing excerpts to support his own positions, coming very close to charging Avins with academic fraud.[103] Another reviewer concluded, "The view that the Constitution must be construed according to the intent and understanding of the framers has been unkindly, but accurately, described as 'a filiopietistic notion that can have little place in the adjudicative process of the latter half of the twentieth century—if, indeed, it ever did.' And, indeed, as a faithfully followed dogma it never did!" [104]

But for all the agitation over *Brown v. Board* and the civil rights legislation of the 1960s, the real challenge to written constitutionalism and the philosophy of amendment would be another case: *Griswold v.*

Connecticut, from 1965, in which the Supreme Court struck down a state ban on contraception as unconstitutional.[105] *Griswold*, and the chain of cases that followed in its wake, especially *Roe v. Wade*, would become in the 1970s, for intent doctrine proponents, the new *Brown*. It would also come to stand for the Court itself: by 2009, when asked to name a Supreme Court decision, an overwhelming 84 percent of those who could name a case named *Roe*; after a precipitous drop, the second-most-named case was *Brown*, at 9 percent.[106]

The Anti–Civil Rights Amendment

Birch Bayh dedicated himself to abolishing the Electoral College in 1968, just after he decided to run for reelection, a decision that had been by no means obvious in the aftermath of the assassinations of Martin Luther King Jr. in April and of Robert F. Kennedy that June. In his campaign announcement, Bayh said he wanted to deal with America's "unfinished business." [107] That could have meant anything, but in August, speaking before the tumultuous and violent Democratic National Convention, he committed himself to putting an end to a constitutional menace: the "danger of electing a president who has fewer votes than the fella he's running against." [108]

Turning to the Electoral College was a natural progression for Bayh, after the Twenty-Fifth Amendment: both concerned the peaceful transfer of power. In both cases, Bayh was drawing on decades of discontent with a system riddled with problems. As he liked to point out, Truman did in fact beat Dewey in 1948, but given the quirks of the Electoral College, a change of thirty thousand votes in three states would have given the victory to Dewey. No one expected the 1968 election to be anything but a mess. After Minnesota senator Eugene McCarthy, running as an antiwar candidate, challenged Johnson for the Democratic nomination, Johnson withdrew. The Southern segregationist George Wallace ran as a law-and-order independent. Bobby Kennedy was widely expected to best McCarthy, but after he was assassinated, Democratic Party leadership would all but hand the nomination to Vice President Hubert Humphrey at the convention, even though he had not entered a single primary.

“We’re living in troubled times, we’re living in a dangerous world, where the stability of the United States of America is really the most important thing facing us,” Bayh said at the convention. “And we need to know that the president is the person elected by the people.” Outside, thousands of antiwar activists had gathered. They’d been surrounded by police in riot gear. “It’s extremely important that when the president of the United States is elected we know with confidence that he is the president of the United States.” [109]

Bayh had held hearings on the Electoral College in his subcommittee in February 1966. As the hearings began, he rejected a direct national popular vote out of hand. Instead, he supported a narrow amendment, supported by Johnson, that would have closed off the possibility of a “faithless elector” by eliminating the role of the elector. (After all, a state clerk could file a state’s Electoral College vote.) This measure had widespread support. Even the Virginia Commission on Constitutional Government found it unobjectionable.[110] But by the close of the hearings, Bayh had changed his mind: he now supported a national popular vote as the only possible solution.[111] He held hearings once again in 1967, this time inviting an MIT lawyer and engineer to present his alleged “mathematical proof,” calculated by computer, of the manifest unfairness of the Electoral College.[112]

Support for what came to be called the Bayh amendment was not, at least at the start, a partisan affair. Republicans were deeply alarmed by the results of the 1968 election, in which votes for Wallace had nearly rendered an Electoral College win for Nixon impossible. Bayh opened new hearings on January 23, 1969, just as soon as the next session of Congress began. The House opened hearings only two weeks later.[113]

Bayh hoped to use the same strategy here that he’d used for presidential disability and succession: he sought the support of the American Bar Association. It obligingly formed a commission on Electoral College reform and published a report in which it assessed various narrower reforms. Calling the Electoral College “archaic, undemocratic, complex, ambiguous, indirect, and dangerous,” it strongly endorsed the reform that, in a poll of more than 3,200 state legislators, more than 59 percent supported: a direct national popular vote.[114]

Bayh’s biggest problem, at this point, was the NAACP. Before the Civil War, the Electoral College had benefited slaveholding states; during the Jim

Crow era, it had continued to benefit the South. In 1944 the South had only 12 percent of the nation's population but more than 25 percent of its Electoral College vote.[115] Blacks were typically barred from voting in the South, so this benefit did not accrue to them. Nevertheless, the NAACP had opposed proposals to abolish the Electoral College since at least 1950, when an amendment calling for the proportionate reform passed the Senate. Because of the Great Migration, the Black population in the North—where Blacks *could* vote—was clustered in cities in a fairly small number of states. In 1950 the executive secretary of the NAACP had written to both the Republican and Democratic leaders of the House to express opposition to the amendment. "The purpose of this amendment is to destroy the effectiveness of the Negro vote in pivotal states," the association stated.[116]

In 1956, when the Senate was once again to vote on a proportionate amendment, the NAACP organized a national campaign to defeat it, dubbing it the "Anti–Civil Rights Amendment." Roy Wilkins, executive secretary, telegrammed branches in the states with the largest Black populations: "MOST URGENT YOU WRITE OR WIRE YOUR SENATORS TO OPPOSE ELECTORAL COLLEGE AMENDMENT DUE ON SENATE FLOOR THIS WEEK. PROPOSED AMENDMENT DRAFTED IN PART BY DANIEL OF TEXAS AND THURMOND OF SOUTH CAROLINA IS DESIGNED TO REDUCE POWER OF NEGRO VOTE IN NORTHERN STATES WHILE INCREASING INFLUENCE OF SOUTHERN STATES WHERE NEGROES HAVE LITTLE VOTE." [117] Americans for Democratic Action, too, had opposed the amendment, calling it "a concerted effort . . . to curb the political influence of liberal-labor forces in the Presidential nomination and election process." [118] When the amendment came up for a vote in the Senate, it failed to achieve the two-thirds majority, by 37–48, with eleven not voting. Of the nineteen senators who signed the Southern Manifesto just months later, seventeen had voted for the Electoral College amendment.

For all that had changed between 1956 and 1966—including that, after the 1965 Voting Rights Act, Blacks now *could* vote in the South—the NAACP refused to alter its position on an Electoral College amendment. This opposition was a feature of a position long taken by the NAACP, which was to oppose virtually all constitutional amendment proposals as either direct assaults on racial equality or distractions likely to delay genuine and achievable reform. In the 1940s and '50s, the NAACP had

opposed a constitutional amendment prohibiting the poll tax, the chief mechanism used to bar Blacks from voting in the Jim Crow South, on two grounds: that it was merely a GOP ruse to court Black voters without having to deliver anything, since ratification of such an amendment was impossible, and that pursuing a constitutional amendment to abolish poll taxes would interfere with abolishing poll taxes by statutory means. The NAACP's Roy Wilkins held on to this position even in 1962, when the poll tax amendment was making its way through Congress. Kefauver wrote to Wilkins to try to disabuse him of his impression that ratification was impossible—that the process "would bury the proposal in State legislatures for the next forty years"—by pointing out that the Twenty-Third Amendment had just been ratified, and very quickly, but Wilkins was unmoved.[119] By the mid-1960s, when the NAACP and other civil rights organizations were busy fighting proposed constitutional amendments that included Dirksen's campaign to overturn reapportionment and a proposal to make amending the Constitution easier, they dug in their heels against the abolition of the Electoral College. At its annual meeting in 1967, the NAACP formally supported LBJ's modest amendment—the elimination of the faithless elector—but "strongly and unalterably" opposed any proportionate or direct popular vote plan, objecting to "any change that will divide electoral votes in the states in accordance with the percentage of support received by the candidates." [120]

The American Bar Association pleaded with the NAACP to change its position, arguing that "over time a program of direct election of the President would be highly advantageous to the Negro community." [121] By 1969, the reform had also earned the support of the National Municipal League, which also tried to convince the NAACP to reassess its position, to no avail.[122]

Yet the NAACP's objections could not, alone, have thwarted the Bayh amendment's passage through the Senate. The greater obstacle was the decision of Southern senators to oppose a measure they had long supported, partly in an attempt to punish Bayh for his opposition to Richard Nixon's Supreme Court nominees.

Amendments Pledged on Party Platforms, 1964–80

Year	*Party*	*Amendment*

Year	*Party*	*Amendment*
1964	Republican	permitting public exercise of religion
1964	Republican	returning apportionment decisions to the states
1964	Democratic	DC voting representation in Congress
1968	Democratic	lowering the voting age to eighteen
1968	Democratic	DC voting representation in Congress
1968	Am. Independent	direct election of federal district judges
1968	Am. Independent	regular reconfirmation of Supreme Court judges
1972	Libertarian	banning treaties compromising U.S. sovereignty
1972	Libertarian	liberty amendment
1972	Democratic	equal rights regardless of sex
1972	American	abolish income tax
1972	Republican	equal rights regardless of sex
1972	Republican	antibusing
1976	American	Bricker amendment
1976	Republican	right to life
1976	Republican	school prayer
1976	Republican	opposing school assignment based on race (antibusing)
1976	Libertarian	abolish income tax (repeal Sixteenth Amendment)
1976	National Statesmen	right to life

Year	*Party*	*Amendment*
1979	Libertarian	limiting presidency to commander-in-chief role
1979	Libertarian	repeal Sixteenth Amendment
1979	American	Bricker amendment
1979	American	liberty amendment
1979	American	right to life
1980	Citizens	DC statehood
1980	Citizens	equal rights regardless of sex
1980	Republican	right to life
1980	Republican	balanced budget
1980	Democratic	equal rights regardless of sex
1980	Democratic	DC voting representation in Congress
1980	Socialist	equal rights regardless of sex
1980	National Unity	equal rights regardless of sex
1980	National Unity	DC voting representation in Congress

Bye, Bye, Bayh. Heah come de Judge

In May 1968, as part of his Southern strategy, Nixon had secured the support of Strom Thurmond and other Southern conservatives by promising to nominate a white Southerner to the Supreme Court.[123] With Warren retiring, Johnson had proposed promoting the liberal justice Abe Fortas to the chief justiceship, but the Senate Judiciary Committee had objected, and a series of scandals reported in the press, and the threat of impeachment, led to Fortas's eventual resignation. Once Nixon took office, he nominated Minnesota judge Warren Earl Burger. In the spring of 1969, the Senate confirmed the new chief justice 74–3, replacing Earl Warren with Warren

Earl. In August, to replace Fortas, Nixon nominated Clement F. Haynsworth Jr., a fifty-six-year-old federal judge from South Carolina on the Fourth Circuit Court of Appeals.

Bayh, meanwhile, had been attempting to work on the Electoral College amendment. He opened hearings on the Electoral College in his subcommittee on January 23, 1969, three days after Nixon's inauguration. The House Judiciary Committee opened hearings on February 5 and soon voted 29–6 in favor of an amendment quite close to Bayh's. Inauspiciously, four of those opposed came from the South. In September 1969 the House passed the amendment in a bipartisan 338–70 vote, though forty-seven of those opposed were Southerners.[124]

In the midst of these developments, the Senate Judiciary Committee undertook to review Nixon's Supreme Court nominee. Haynsworth was strongly opposed by the very labor unions who were Bayh's staunchest supporters. Nixon had pledged to nominate a "strict constructionist" to the Court, which was his way of thumbing his nose at the Warren Court. It also turned out that Haynsworth had insisted, as late as 1967, that the Fourteenth Amendment did not prohibit segregation. Bayh, slowly and with some reluctance, undertook to lead the opposition against Haynsworth in the Senate Judiciary Committee. In terms of seniority, it didn't make much sense for him to be the man to carry the ax. But the two more senior Democrats on the committee were up for reelection, Ted Kennedy was reeling from Chappaquiddick, and as the *New York Times* put it, "Bayh is a master of the gentlemanly shiv." [125]

Bayh sharpened his shiv. However fearful he was, according to his chief counsel on the Subcommittee on Constitutional Amendments, "of damaging bipartisan relationships essential to his most important objective, the passage of electoral reform," he proceeded all the same, gathering together a coalition of more than a hundred labor, welfare, and civil rights organizations. Press scrutiny, and investigations into Haynsworth conducted by Bayh's staff, turned up allegations of ethical and financial impropriety and especially his failure to recuse himself in cases involving his stock holdings and his directorship of corporations. "I didn't want to be against the guy," Bayh later said, describing it as "the most distasteful thing I have ever had to do in the Senate." But he waged a relentless campaign against him, alleging that at least four times the judge had sat on "cases involving cases in which he had a financial interest." [126] Massachusetts Republican

Edward W. Brooke, the first Black U.S. senator elected since Reconstruction, broke ranks with his party to work with Bayh to defeat the nomination.[127]

Bayh's campaign against Haynsworth earned him a national spotlight. There was talk of presidential possibilities.[128] By October 1969, Bayh's campaign had so eroded support for Haynsworth that the *Washington Post* urged Nixon to withdraw the nomination; Nixon refused. In November 1969 the Senate defeated the nomination 45–55, with seventeen Republicans voting no. Nixon, apoplectic, directed his chief Southern strategist, Harry Dent Sr., to look "farther South and further right." [129]

True to his word, in January 1970, Nixon nominated Fifth Circuit judge G. Harrold Carswell, a man Bayh believed "was not worthy of carrying Clement Haynsworth's briefcase." [130] Born in Georgia, Carswell had moved to Florida in 1949. Eisenhower had appointed him to the federal bench in 1958, and Nixon had placed him on the Fifth Circuit Court of Appeals in 1969. Haynsworth had committed ethical improprieties. Carswell was a dogged segregationist. The NAACP alleged that on the bench, his record was tainted by racial bias, especially in his treatment of Black lawyers.[131] In private life, he had advocated for a whites-only golf club and imposed a racially restrictive covenant when he sold his house. A month before Nixon nominated him to the Supreme Court, Carswell had told this joke at a meeting of the Georgia Bar Association: "I was out in the Far East a little while ago, and I ran into a dark-skinned fella. I asked him if he was from Indo china, and he said, 'Naw, suh, Ise from Outdo' Gawja.'" [132] The head of the AFL-CIO called his nomination "a slap in the face to the nation's Negro citizens." [133] Carswell was also a slovenly thinker and a weak and slow writer whose opinions, as Bayh's staff eventually discovered, had been overturned by higher courts more often than they were upheld.

The chances of defeating a second Nixon nomination seemed slim, and few in the Senate were eager to take on the fight. Bayh wanted, above all, to get his Electoral College amendment passed, but he had amassed tactics and ties in the campaign against Haynsworth. In a meeting in his office with aides and supporters where, Bayh said, "there was no stomach left for another battle," no one wanted to take this on. Carswell had made a speech in 1948, when, at twenty-nine, he was running for a seat in the Georgia

legislature, in which he said, “I yield to no man . . . in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed.” [134] When Bayh went around the room for comments, most people seemed to think it wasn’t worthwhile, or even fair, to hold someone to account for something he’d said at twenty-nine, in what was, arguably, a very different America. Clarence Mitchell, executive director of the NAACP, was nearly the last to speak. “Gentlemen,” he said, “I respect where you’re all coming from, but in my lifetime of experience, I’ve found that once a person ever feels that way, they never, ever really change their mind.” Bayh agreed to lead the campaign to defeat Carswell.[135]

The Senate Judiciary Committee held five days of hearings, beginning on January 27, 1970. Feminist organizations, including the National Organization for Women, opposed Carswell’s nomination, mostly on the grounds of his court’s refusal to rehear a case involving a woman who alleged that she had been denied a job because she had young children. Hawaii Democratic congresswoman Patsy Matsu Takemoto Mink called his nomination “an affront to the women of America.” [136] Mink charged the judge with “a lack of sensitivity for women’s struggle for equality.” [137] And all nine Black members of the House opposed the nomination. Michigan Democrat John Conyers, speaking on their behalf before the Senate Judiciary Committee, said, “I am here to prevail upon you to establish the basic principle that any person of a racist or segregationist persuasion is per se unqualified to serve on the Supreme Court.” [138] In a letter placed into the record by Bayh, 457 lawyers stated that aside from the judge’s record of “white supremacy and ugly racism, he does not have the legal or mental qualifications essential for service on the Supreme Court or any high court in the land, including the one where he now sits.” [139]

All this while, Bayh was trying to plot a strategy to get his Electoral College amendment onto the Senate floor. On February 3 he made a motion to tie a vote on Carswell to a vote on the Electoral College amendment. Strom Thurmond opposed the motion.[140] “The enemies Bayh made in the Haynsworth fight may unify to thwart him on this,” the *New York Times* observed in a long profile the next week, commenting on the possibility of a Bayh presidential bid in 1972.[141] But Bayh said he was tired of “getting the old shaft” and was finished “being a nice guy.” [142] He threatened to filibuster any vote on Carswell until the committee agreed on a date for a

Senate vote on the Electoral College amendment. The committee voted 10–2 to bring the Electoral College amendment to the full Senate for a vote by April 24, and it voted 13–4 to send the nomination to the Senate; Bayh and three other Democrats voted against.[143]

During the Senate debate, which lasted nearly a month, Ed Brooke again opposed Nixon's nominee. "I cannot in good conscience support confirmation of a man who has created such fundamental doubts about his dedication to human rights," Brooke said.[144] Bayh called Carswell "incredibly undistinguished" and read from Carswell's 1948 speech. What likely really doomed the nomination was a remark made by one of his supporters, Nebraska senator Roman Hruska. "Even if he was mediocre, there are a lot of mediocre judges and people and lawyers," Hruska said. "They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Cardozos and Frankfurters and stuff like that there." On April 8 the Senate defeated the nomination 45–51. Nixon then said, in a speech written by Pat Buchanan, "I have reluctantly concluded that it is not possible to get confirmation for a judge on the Supreme Court of any man who believes in the strict construction of the Constitution, as I do, if he happens to be from the South." He vowed not to nominate another Southerner.[145] Days later Carswell resigned from the bench and ran for the U.S. Senate. Supporters printed bumper stickers that read "BYE, BYE BAYH. HEAH COME DE JUDGE!" Carswell never made it to the Senate. He lost in November.

Whatever support Bayh had among Southerners in the Senate for abolishing the Electoral College began to wither in the face of the defeat of Nixon's two nominees. In May 1969 the Subcommittee on Constitutional Amendments voted 6–5 against his proposal, with three Southerners voting no and instead favoring a district plan. In the Senate Judiciary Committee, Eastland delayed consideration of the proposal, and Thurmond threatened to filibuster any vote in the Senate. Only Bayh's threat to filibuster a vote on the Carswell nomination had secured the promise of a full Senate vote.[146]

The Judiciary Committee voted 11–6 in favor of the Bayh amendment, but in a minority report, four Southerners—Eastland, Ervin, Thurmond, and Arkansas senator John McClellan—warned that abolishing the Electoral College would "endanger minority rights." "The Electoral College is one of

the South's few remaining political safeguards," wrote Alabama senator James Allen in October 1969. "Let's keep it." [147] And they did.

An Indian Manifesto

In 1965 the Standing Rock Sioux activist Vine Deloria Jr. went to Washington to meet with members of the Senate Judiciary Committee, including Birch Bayh. Deloria had thick dark hair, horn-rimmed glasses, and an eviscerating wit. No twentieth-century Native American would be more important in restructuring the constitutional relationship of indigenous peoples and the federal government. Born in 1933 in South Dakota, just outside the reservation of the Pine Ridge Oglala Sioux, Deloria served in the Marines in the Korean War, studied at Iowa State and at Illinois's Lutheran School of Theology, and then, only thirty, became the head of the National Congress of American Indians. He was a theologian and a scholar, an intellectual and a politician, a revolutionary and a constitutionalist.[148]

"This organization I run is kind of a miniature United Nations with everybody taking his shoe off and hammering on the desk," Deloria explained to the Senate Judiciary Committee's Subcommittee on Constitutional Rights in June 1965. That was his way of making sure the senators didn't lump all Native peoples together.[149]

In the 1960s, when Birch Bayh chaired the Judiciary Committee's Subcommittee on Constitutional Amendments, Sam Ervin chaired the Subcommittee on Constitutional Rights, which, in 1965, held hearings and prepared a report on "Indian Tribes and the Constitution." [150] Ervin served on Bayh's subcommittee, and Bayh served on Ervin's. Their work on Indian tribes and the Constitution did not involve proposing a formal constitutional amendment. Nor did it have much in common with the Supreme Court–centered litigation strategy of the civil rights movement. "Indian problems aren't civil rights problems," as Helen Peterson, Deloria's predecessor as head of the NCAI, pointed out in 1957, and integration, Peterson warned, was a form of assimilation likely to "wipe out tribes which 50 years from now we will be trying to resurrect." [151] But the Indian rights movement of the 1960s and '70s would nevertheless radically shape Americans' ideas about the Constitution as well as American Indians' amending of their own constitutions. As the legal scholar Maggie Blackhawk (of the Fond du Lac

Band of Lake Superior Ojibwe) has argued, Native advocacy before Congress created a distinctive kind of constitutionalism: legislative constitutionalism.[152]

Vine Deloria Jr., Red Rock Amphitheatre, 1976

After allotment, after the Indian New Deal, after termination, came, in June 1961, a Declaration of Indian Purpose, the result of a meeting of more than four hundred delegates from ninety tribes at the University of Chicago. The declaration, in tepid and obliging language, asked the federal government to abandon the termination policy and reorganize the Bureau of Indian Affairs to better provide services to recognized tribes.[153] Younger Indians considered the document an example of "appealing to the Great White Father again," as Clyde Warrior (Ponca) later said: "You know, 'Really, we like you Big Daddy, keep sending us things.'" That summer they founded the National Indian Youth Council.[154]

Indian activists didn't share the same goals as civil rights activists, but given the monumental legislative gains of the 1964 Civil Rights Act and the 1965 Voting Rights Act, younger Indian activists decided to borrow from the civil rights movement's vocabulary and strategies.[155] And so Deloria went to Washington, testifying before the House and Senate eight times between 1965 and 1968.[156]

Senator Ervin's subcommittee had first turned to the matter of Indians' constitutional rights in 1961, in response to the Declaration of Indian Purpose. It had held hearings in Arizona, California, Colorado, Nevada,

New Mexico, North Carolina, North Dakota, and South Dakota, meeting with representatives from eighty-five Indian tribes, in something of a reprise of the congresses that John Collier had held in 1934. The subcommittee had drawn up a legislative package of nine bills, including a Bill to Protect the Constitutional Rights of American Indians—essentially extending the U.S. Bill of Rights to Indians—sponsored by Ervin and Bayh, that attempted to draw a line between tribal and federal jurisdiction in matters of constitutional rights.[157]

Appearing before the subcommittee in 1965, Deloria offered lukewarm support to the legislative package, but he had a much bigger claim to make, a claim, essentially, about Indian law and unwritten constitutions. "What is the tendency among Indian tribes to alter and amend their tribal customs and traditions to meet the changing needs of a more modern society?" one senator asked him. Deloria insisted that tribal governments were "not vestiges of the past, but laboratories of the future." [158]

Ervin in 1968 attached an Indian Civil Rights Bill as an amendment to the Fair Housing Act. Deloria suspected Ervin of using Indian rights to kill fair housing, but if that was Ervin's plan, it backfired: both passed. The Indian Civil Rights Bill incorporated modified versions of the First through Eighth amendments to the U.S. Constitution into tribal governments. As Deloria would argue, the imposition of a constitutional order based on individual rights as a protection against government was a poor fit for Native societies based on mutual ties and obligations of community.[159]

Deloria's critique of the kind of constitutionalism the U.S. government wanted Native tribes to adopt led him in 1967 to begin studying law at the University of Colorado. In 1969 he published a blockbuster book, *Custer Died for Your Sins: An Indian Manifesto*. Part history, part philosophy, Deloria's book made a series of central arguments about the consequences of centuries of broken treaties, swindling, and betrayals that characterized the federal government's relationship with Indians, with the result that, as he wrote, "under the laws and courts of the present there is no way for Indian people to get the federal government to admit they have rights." [160] The year Deloria's manifesto came out, seventy-nine members of an organization called Indians of All Tribes began a nineteen-month-long occupation of Alcatraz, claiming possession under the terms of a treaty from 1868, issuing a proclamation that began, "We, the native Americans,

reclaim the land known as Alcatraz Island in the name of all-American Indians by right of discovery." [161] As Deloria would remark, "In 1969, non-Indians began to rediscover Indians." The nation had been beset by political violence: police brutality, race riots, political assassinations, the growing militancy of the antiwar movement. Under these circumstances, Deloria pointed out, Indians seemed to be everyone's favorite cause. "Conservatives embraced us because we didn't act uppity, refused to move into their neighborhoods, and didn't march in *their* streets," he wrote, with his characteristic acerbity. "Liberals loved us because we were the most oppressed of all the people who had been oppressed, and besides we generally voted Democratic." [162]

Deloria, who graduated from law school in 1970, became a constitutional theorist, publishing in 1974 the book *Behind the Trail of Broken Treaties: An Indian Declaration of Independence*, which examined a 1972 demand for a nation-to-nation constitutional order, "The Twenty Points Position Paper," which had been principally drafted by Hank Adams (of the Assiniboine Sioux).[163] He also brought a new voice and a decidedly different vantage point to the deepening critique of the Constitution that had become prevalent, in quite different ways, on both left and right. In October 1969, McGeorge Bundy, a professor of government at Harvard who had served as national security adviser in the Kennedy and Johnson administrations, and had been a chief architect of U.S. involvement in the Vietnam War, delivered an address at Mount Holyoke College in Massachusetts, in which he described the divisions in the United States as "sharper, more bitter, more violent and even perhaps more dangerous than anything we have known since the Civil War." Bundy made a prediction: "It is not unthinkable that this country may need a new constitution." [164]

Deloria used Bundy's speech as a jumping-off point for a remarkable treatise on "The New Constitution." The U.S. Constitution was founded to protect property and had been revised to protect rights, Deloria argued, but either way, it rested on a commitment to individualism and yet understood people of color only as groups (Indians, Blacks, Mexicans, Chinese). "We have never had a 'peoplehood' in this country because we have always been tied to a barren conception of man," he wrote. He didn't think a new Constitution was necessary, but he did think that "We the People" ought to be reread to mean "We the Peoples." [165]

Deloria and other Native activists had an uneasy relationship with a growing environmental movement that, at the time, was seeking to amend the U.S. Constitution and state constitutions. The modern environmental movement began in 1962 when Rachel Carson published *Silent Spring*. Its uneasy relationship with Indians had to do with environmentalists' tendency to romanticize them, while failing in any meaningful way to act as political allies.[166] In June 1969 the massively polluted Cuyahoga River in Cleveland caught fire. Deloria related a story about a non-Indian who told him that he was "really sorry about what had happened to Indians" but it was for the best because whites had better ideas about what to do with the land. After giving that notion some consideration, Deloria wrote, he decided that it was probably right because after all, "How many Indians could have thought of creating an inflammable river?" [167]

Our peace with nature

The environmental movement did not succeed in amending the U.S. Constitution (though it had some success in the states), but it did inaugurate a new chapter in the idea of amendment as improvement. Environmentalists rejected the twentieth-century idea of progress as economic growth and technological innovation. But in the 1970s, they could conceive of no way to constitutionalize this critique except by seeking a constitutional right to a decent environment.

On January 19, 1970, Wisconsin senator Gaylord Nelson, the proud son of the little town of Clear Lake, introduced into Congress a proposed constitutional amendment to read: "Every person has the inalienable right to a decent environment." [168] Nelson had dedicated himself to environmental protection both as governor of Wisconsin and since arriving in the Senate in 1962. In September 1969, two months after men from Earth landed on the moon, Nelson came up with the idea of Earth Day. Inspired by the teach-ins of the antiwar movement, he proposed a day of reflection, study, and action. He had bipartisan support. After the Cuyahoga River fire, Congress passed the National Environmental Policy Act, establishing the Environmental Protection Agency. And three days after Nelson called for a constitutional amendment, Nixon, in his 1970 State of the Union, ushered in the 1970s as the environmental decade. The great question of the decade, he said, was

“Shall we make our peace with nature and begin to make reparations for the damage we have done to our air, to our land, and to our water?” [169]

Proponents of Earth Day challenged an eighteenth-century idea of progress as moral improvement, a nineteenth-century notion of progress as technological advance, and the twentieth century’s obsession with economic growth. “Earth Day is a commitment to make life better, not just bigger and faster,” read a full-page ad in the *New York Times*. “It is a day to re-examine the ethic of individual progress at mankind’s expense.” [170] It was not clear then, and it would not be clear a half century later, whether this crucial commitment could be reconciled with the frame of government adopted in Philadelphia in 1787.

First Earth Day, Union Square, New York, April 22, 1970

The first Earth Day took place on April 22, 1970. It was the largest political protest in American history. Twenty million Americans, one in every ten, marked the day in one way or another. The House and Senate adjourned for the day. Governors all over the country declared it a holiday. Schoolchildren went out into the woods and studied ecosystems. College students picked up trash. Parts of New York City banned cars for the day. Protesters wore gas masks and surgical masks to draw attention to air pollution.[171] In a speech in Washington, civil rights leader James Farmer tied the burgeoning environmental movement to racial justice. “The garbage, the trash, the carbon monoxide, the junk? Who suffers most from

it if it is not the poor and so the poor, especially the ghettoized poor, the black and the brown and the red, stand to benefit first from any successes in cleaning up the environment." [172] In Albuquerque, Chicano activists made the same argument, tying together racial justice and environmental justice: "We're gonna make people understand that the kinds of things that come from air pollution and water pollution are the same kinds of things that cause racism, that cause poverty, and that cause hunger in this country," said one rallier. "So we're all gonna be marching today, okay? *Unidos marchemos, unidos venceremos, viva la raza! Viva!*" [173]

Nelson, in a speech in Colorado, called on the Ninety-Second Congress to operate as an Ecology Congress. "Our goal is not just an environment of clean air and water and scenic beauty," Nelson said. "Our goal is a new American ethic that sets new standards of progress, emphasizing human dignity and well-being rather than an endless parade of technology that produces more gadgets, more waste, more pollution." [174] As for how to fund reform, Nelson proposed ending the space program to pay for environmental programs.[175]

The Ninety-Second Congress did become the Ecology Congress, passing the Clean Water Act and the Clean Air Act. But it drew the line at amending the Constitution, which meant that future congresses or the Supreme Court could roll back every one of these measures.

Few constitutional amendments required a more radical restructuring of fundamental law than environmental amendments. Nelson's was not the first environmental protection amendment, and his was not especially well drafted either, a problem that plagued many quixotic amendments. (What is a "decent" environment?) But while environmental protection and environmental rights provisions were becoming a feature of constitutions all over the world beginning in the 1960s and '70s—taking off after the 1972 Declaration of the United Nations Conference on the Human Environment[176]—the United States has never adopted one. In this underdevelopment, as in so many other constitutional matters, American states more closely follow the model of national constitutions (Figure 7). In 1971, inspired by Nelson's proposed federal amendment, Pennsylvania became the first state to enact an environmental protection amendment, guaranteeing "a right to clean air, pure water, and to the preservation of the

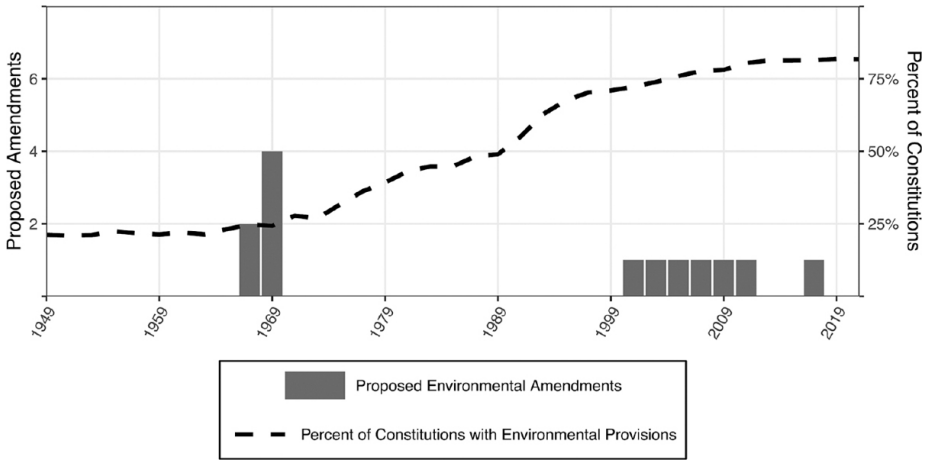
natural, scenic, historic and esthetic values of the environment." It was ratified in a popular referendum by a four-to-one margin.[177]

In the weeks and months and years after that first Earth Day, people from all over the country flooded Birch Bayh's Senate office with letters and petitions endorsing Nelson's environmental amendment.[178] A woman from Vicksburg, Michigan, wrote in to say she thought it was as important as any other right in the Bill of Rights.[179] Adding this amendment to the Constitution, wrote a woman from Balch Springs, Texas, would be "a greater wonder than landing on the moon." [180]

But that amendment, like the environmental movement itself, faced an army of opponents that included battalions of conservatives, Black activists, and feminists. Despite the support of the Republican president (who supported environmental measures mainly to outflank Edmund Muskie), conservatives opposed it. The John Birch Society, noting that April 22, 1970, was Vladimir Lenin's one hundredth birthday, called the protest a Communist plot.[181] The *National Review* ridiculed the entire environmental movement as merely the latest New Left fad. "Fallout, civil rights, Vietnam, ghettos, hunger, poverty—they've lost their kicks and something fresh must be added," its editorial page asserted, and "anti-pollution has got everything it takes." As for Earth Day, the *National Review* described it as "exciting petition campaigns and civic assemblies, to Save the Swamp, Ban Bangs, Deter Detergents, Suppress Sulphides, Annul Algae, Muzzle Monoxide, Clobber Corporations, and you name it." [182] (Curiously, a half century later, originalists would blame FDR for the failure of the environmental amendment in the 1970s, arguing that if he had not abandoned Article V as a method of constitutional change in 1937, the practice would not have languished, and Nelson would have succeeded. The implication—that conservatives would have supported Nelson—is false.)[183]

FIGURE 7

Environmental Provisions in Proposed Amendments and National Constitutions, 1949–2019



Follow for extended description

The environmental agenda faced still harsher criticism from civil rights activists, despite the endorsement of leaders like James Farmer. “The reformist solutions tendered by the current ecology movement emerge as somewhat ludicrous from the black perspective,” declared the Black sociologist Nathan Hare. “The real solution to the environmental crisis is the decolonization of the black race”—defeating white supremacy.[184] And in truth the major environmental organizations, with roots in wilderness conservation and land protection, did not express much interest in social justice or what would later be called “environmental justice.” A 1971 survey of members of the Sierra Club asked whether the club should “actively involve itself in the conservation problems of such special groups as the urban poor and the ethnic minorities.” Forty-one percent strongly disagreed with the statement. Only 15 percent strongly agreed.[185]

Feminists certainly did not, as a bloc, object to an environmental protection amendment, but they objected to giving it priority over an equal rights amendment. They wanted the Ninety-Second Congress to be the Gender Equality Congress. Birch Bayh supported Nelson’s amendment. But Nelson made his push for hearings in Bayh’s Subcommittee on Constitutional Amendments in the winter and spring of 1970, just when proponents of the Equal Rights Amendment were pressing for hearings on that amendment. They’d protested in the hall outside his hearings on the Electoral College amendment, and by the end of February, Bayh had announced that he would hold hearings on the ERA in May.[186] Bayh’s wife Marvella had been pressing him to hold those hearings for five years.[187]

They had every reason for high hopes. Bayh's subcommittee seemed to be getting things done. Bayh had succeeded with the Twenty-Fifth Amendment and seemed well on his way to succeeding with the Twenty-Sixth. Under pressure from the student antiwar movement, Congress had passed a law lowering the voting age from twenty-one to eighteen, but the Supreme Court declared that Congress had no power to change voting qualifications in state elections. By February 1971, Bayh's subcommittee had presented a report recommending what became the Twenty-Sixth Amendment. Urged on by the hope of squaring this away in time for the 1972 elections, both the House and Senate had passed the amendment by that spring, and it had been ratified by summer, breaking all records for speed. This, however, would not be the fate of the Equal Rights Amendment or of the Electoral College amendment.

The fact that it is so old

Birch Bayh failed to get the Electoral College amendment out of the Senate Judiciary Committee by just a handful of votes in 1969. Years later, after the agony of battles over amendments about abortion and equal rights, he tried one last time, only to confirm what he must have suspected: that the window for amending the Constitution had closed.

What had given him a spark of hope was the closeness of the 1976 presidential election. Had twenty thousand votes in Hawaii and Ohio gone the other way on Election Day that year, Gerald Ford would have been elected president instead of Jimmy Carter. After watching the returns, Birch Bayh called Oklahoma senator Henry Bellmon, a fellow advocate of the direct national vote, to ask, "Henry, do you think we ought to give it another try?" On January 10, 1977, as soon as the Ninety-Fifth Congress began, Bayh, still in the Senate and still chair of the Subcommittee on Constitutional Amendments, introduced his Electoral College amendment all over again. Carter's victory, Bayh told his colleagues, had been "one-hundredth of 1 percent of the popular vote" closer than in 1960, and closer than in 1968. During hearings in the Judiciary Committee, the head of the League of Women Voters expressed a certain exasperation. "I admit to being somewhat hard pressed to find something new to say on this subject," she said.

In yet another kind of déjà vu, Bayh had a hard time getting the committee to hold a vote, except this time the opposition came not from Southern segregationists but from the new Reagan conservatives. Reagan, who had lost the Republican nomination to Ford, declared that the national popular vote "would almost certainly result in presidential elections being decided by swing votes in a handful of the largest cities." [188] Meanwhile civil rights leaders including Vernon Jordan, strange bedfellows to the likes of Strom Thurmond and Ronald Reagan, continued to insist that abolishing the Electoral College would do something quite the opposite, by "diluting black voting power" in large Northern states. In vain did Carl T. Rowan plead with fellow Black Americans to stop "letting the foes of electoral progress hide behind the pretense that they are looking out for 'those poor black folk.'" [189]

In the summer of 1977, Birch Bayh held committee hearings. By now, Jimmy Carter had endorsed the amendment, and so had Gerald Ford, who had supported it since 1969, and so had Republican senators and presidential aspirants Howard Baker and Bob Dole. A February 1977 Gallup poll reported that Americans had favored a change to the Electoral College since 1948 and since 1966 had supported a direct popular vote. In 1977 a poll found that 73 percent of Americans favored Bayh's amendment, with only 15 percent opposed.[190] Support crossed party lines, enjoying the favor of 79 percent of Republicans, 82 percent of independents, and 71 percent of Democrats. It had the support of the American Bar Association, the AFL-CIO, the United Auto Workers, the League of Women Voters, and Common Cause.[191]

Martin Diamond that year published a book stating his opposition to the reform. Diamond, Daniel Patrick Moynihan would declare, had "almost singlehandedly . . . established the relevance of the thought and doings of the American founders for this generation." [192] He was keen to defend the Electoral College before Congress. Bayh called Diamond to testify on the second day of hearings, Friday, July 22, 1977, in room 235 of the Russell Senate Office Building.[193] Speaking to Bayh and his committee, Diamond, fifty-five, confessed that he was puzzled by why so many people seemed to have it in for the Electoral College.

"I suspect that part of what people have against the Electoral College," he began, "not Senator Bayh, perhaps, or other Members of the Senate, but

others around the country, others in the academic profession—part of what scholars have had against the electoral college—is the fact that it is so old. They suspect the old. It must be archaic. It must be outmoded. How can anything devised so long ago, for a simpler age—how can anything so old—still be good in this unprecedentedly modern time?" It was as if Diamond were offering a rebuttal to a speech FDR had given forty years before, in 1937.

Bayh had an aw-shucks, good-natured wit. He interrupted Diamond. "I just have not heard anybody come before this committee and say the reason they want to get rid of it is because it's been around for 200 years," he said, partly badgering his witness and partly ribbing him. "I have been studying this problem for about 10 years, and never have I had one witness—nor have I read any treatise—that says the reason he or she wants to get rid of the electoral college is that it's old and, therefore, per se, we should change it."

Diamond testified for half an hour. Then he stepped down and went to sit with the spectators, about thirty in all. A member of the West Virginia legislature came forward to testify. He'd introduced a resolution in his state, calling for a constitutional convention to be held in order to consider the Bayh amendment, the first state to do so. He was just explaining why even West Virginia, a small state, advocated a national popular vote when there was a commotion in the audience. At 10:53 a.m., Martin Diamond had a heart attack. Bayh and Senator Orrin Hatch both tried to revive him. For ten minutes, Hatch compressed his chest; Bayh gave him mouth-to-mouth resuscitation. Bayh adjourned the hearing at 11:18 a.m.[194] After a terrible delay, an ambulance finally arrived, but Diamond had died. Said Bayh: "It really shakes you up to think you're trying to breathe for someone and then find out later he's dead." [195]

He couldn't breathe life into the Bayh amendment, either. Once again, the Electoral College resisted reform. By then, the grueling public divide over equal rights and abortion had nearly put an end to amendment itself.

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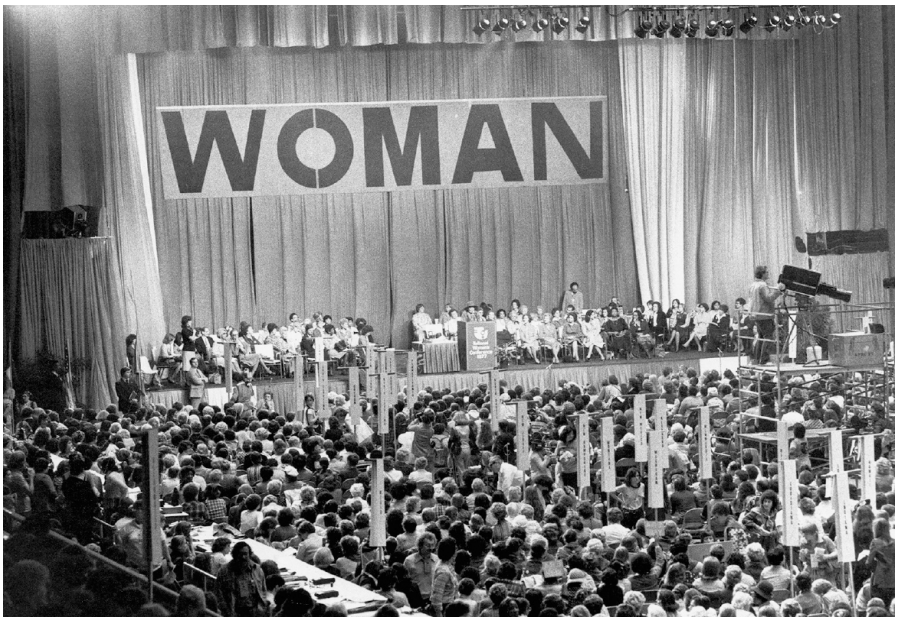
12

A Bill of Rights for Women



Follow for extended description

The National Women's Conference in Houston, 1977

200 YEARS IS ENOUGH. RATIFY THE E.R.A.

—Banner carried in Atlanta, 1976

Patsy Takemoto Mink, beaming, and with a lei draped around her neck, took to the stage in Houston on November 19, 1977, at a meeting that is the closest the United States has ever come to holding a second constitutional convention, unless you count the Confederate convention in 1861. This constitutional convention—two thousand delegates elected from the states and territories—was for women. Instead of meeting in an eighteenth-century two-story Georgian brick elegance in Philadelphia, this convention met in the nine-thousand-seat Albert Thomas Convention

Center, a flat-topped beige pancake of a building that could easily be mistaken for a parking garage. Mink, forty-nine, was there that day as a delegate from Hawaii.[1] “This Conference, for me, is the culmination of a life’s work,” she said. Its goal, she said, was for women to become “persons under our Constitution.” [2]

Born in Maui in 1927, the grandchild of Japanese sugarcane workers, Patsy Matsu Takemoto had listened to FDR’s fireside chats on the radio as a little girl with her father, a civil engineer.[3] When the Japanese bombed Pearl Harbor in 1941, he, like thousands of nisei, had been interrogated, suspected of being a Japanese spy.[4] Denied admission to medical school, Takemoto had gone to the University of Chicago Law School as an international student, graduated and married in 1951, given birth to a daughter, and then joined the law faculty at the University of Hawai‘i. She was elected to Hawai‘i’s territorial house in 1956 after campaigning with the slogan “Think, Vote Mink.” [5] She’d fought for statehood, complaining to Congress that the reason for delay in admitting Hawai‘i “is because of Hawai‘i’s large Oriental population.” [6] In 1959 she’d only just taken her place in the territorial senate when Hawaii became a state. After she lost a race for Hawaii’s new seat in Congress to Daniel Inouye, whose campaign spread a rumor that Mink’s daughter was “mentally retarded,” Mink debuted on national television at the Democratic Convention in 1960. Southern segregationists had threatened to walk out of the convention to protest the party’s plank advocating civil rights, but Mink, taking the stage, said, “I cannot sit silent in this historic moment without defending what I consider the truly, greatest blank in the Democratic platform.” [7] Commentators focused on her appearance, one calling her a “lovely Oriental doll,” but Mink was the new face of a Democratic Party that had driven from its ranks segregationists like David J. Mays.[8] When she won a seat in Congress in 1964, she became the first woman of color in the House. She went on to serve six terms. Her early and sustained opposition to the Vietnam War, at a time when a new “Asian American” political movement was being born, proved particularly powerful and also controversial. Critics, tarring her a Communist sympathizer, dubbed her “Patsy Pink.” [9]

Patsy Takemoto Mink insisted that she wasn’t a “women’s liberationist,” a term that hinted at radicalism, but she’s best remembered for what she did for women’s equality and especially for her advocacy on

behalf of poor women and working mothers. Early in 1970 she testified before the Senate Judiciary Committee during the Carswell hearings, explaining the consequences of the kind of discrimination against working mothers that she saw in his decisions. She supported both the Equal Rights Amendment and the legalization of abortion, the two constitutional issues crucial to the question of female personhood.[10] She co-authored Title IX, banning gender discrimination in higher education. ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.") In 1975, the bicentennial of the American Revolution, her advocacy proved crucial in gaining congressional funding for a national convention for women.

Patsy Takemoto Mink testifying before the Senate Judiciary Committee, 1970

No issue has proved a greater challenge to the 1787 Constitution than the status of women under the law. Despite Abigail Adams's having sent her husband a "List of Female Grievances" in 1776, reminding him that "all men would be tyrants if they could," demanding that men drafting constitutions "remember the ladies," and warning him that women will not

“hold ourselves bound by any Laws in which we have no voice, or Representation,” no early state constitution addressed those grievances in any way at all. At the Constitutional Convention in 1787, Madison had declared it to be a fundamental principle that “men cannot be justly bound by laws in making which they have no part.” [11] He did not mention women, nor did any other delegate; instead, they used the word *person* or *persons*—nearly two hundred times—and used those words as well in the Constitution itself. This caused some perplexity in 1866, during the Senate debate over the Fourteenth Amendment, when Jacob Howard, a Republican senator from Michigan, traded heated words with Reverdy Johnson, a Democrat from Maryland, about the meaning of *person* in the text of the amendment. Howard quoted a gloss that Madison had written about that speech he had given in 1787: “Under every view of the subject, it seems indispensable that the mass of citizens should not be without a voice in making the laws which they are to obey, and in choosing the magistrates who are to administer them.” Johnson then asked Howard whether he meant to suggest that women are “persons.”

> MR. JOHNSON. Females as well as males?
> MR. HOWARD. Mr. Madison does not say anything about females.
> MR. JOHNSON. “Persons.”
> MR. HOWARD. I believe Mr. Madison was old enough and wise enough to take it for granted that there was such a thing as the law of nature which has a certain influence even in political affairs, and that by that law women and children were not regarded as the equals of men. Mr. Madison would not have quibbled about the question of women’s voting or of an infant’s voting. He lays down a broad democratic principle, that those who are to be bound by the laws ought to have a voice in making them; and *everywhere mature manhood is the representative type of the human race*.[12]

“The Constitution makes no distinction of sex,” Victoria Woodhull had argued in 1871, attempting to found an equal rights doctrine on the back of the Fifteenth Amendment; Congress had rejected her argument.[13] The Nineteenth Amendment had guaranteed that “the right of citizens of the

United States to vote shall not be denied or abridged by the United States or by any State on account of sex." And while a doctrine might have evolved from that language to include women in the full meaning of personhood, it had not.[14] Instead, the Nineteenth Amendment had been doctrinally abandoned, a "constitutional orphan," as one legal scholar has called it.[15] The Civil Rights Act of 1964 prohibited discrimination based on race, religion, color, or national origin, and at the last minute, and in a failed attempt to defeat the bill, "sex" had been added to that list. But, as Patsy Takemoto Mink pointed out in 1977, women were still not persons under the Constitution.

In the 1970s, the silence of the Constitution on the subject of women was met with deafening discord, a series of heated political debates over the Equal Rights Amendment and abortion that divided women and reshaped the Democratic and Republican parties and American political culture itself. These debates also illustrate the American pattern of alternation between constitutional change by way of amendment and constitutional change by way of judicial interpretation. Except that these two issues also broke the pattern, because they really can't be reconciled with a Constitution written for individual rights-bearing men. Whether or not the framers had ever intended for women and children to be persons, constitutionally speaking, they certainly made no provision for the biological fact that women sometimes have beings living inside their bodies, including fetuses that at a certain stage of pregnancy can survive outside their mothers' bodies. The Constitution cannot contain them.

Nor was it possible to separate equal rights from abortion. Calls to liberalize abortion laws in the states had come from doctors and clergy, and from Republican legislators, up until the mid-1960s. But equal rights and abortion had both been added to a feminist agenda in November 1967, when the National Organization for Women drafted and ratified a Bill of Rights for Women. Notably, equal rights rose to the top of that agenda; interest in abortion trailed far behind. NOW resolved to campaign for the ERA by a vote of 82–3, over the strenuous objections of labor organizers, including some who left the meeting. And by a vote of 57–14, NOW called for the repeal of "all laws penalizing abortion." The ERA was the Bill of Rights for Women's first article; abortion its last.[16]

Feminists sought to achieve these two goals by different strategies: equal rights by way of constitutional amendment and the repeal of abortion

laws by lobbying in the states. In both efforts, feminists saw remarkably speedy results. The states began liberalizing or abolishing abortion bans in 1967; the Johnson administration issued a report the next year, recommending that all states do so. By the end of 1970, fourteen states had reformed their abortion laws. In 1972 Congress passed the Equal Rights Amendment and sent it to the states for ratification, and less than a year later, in *Roe v. Wade*, the Supreme Court declared all remaining state laws prohibiting abortion before the second semester to be unconstitutional. But by 1977, when twenty thousand women met for the National Women's Convention, the ERA's momentum had flagged, and Congress had enacted the Hyde Amendment, a restriction tacked onto a spending bill prohibiting the use of federal funds for abortion except to save the life of the mother.

If feminists sought constitutional change by both amendment and interpretation, anti-feminists and the right-to-life movement sought to halt that change by steady and determined grassroots and national organizing whose aim was to defeat one amendment, the ERA, and to pass another, a right-to-life amendment. By the time New York congresswoman Bella Abzug used a gavel once wielded by Susan B. Anthony to call the National Women's Conference to order in Houston, 145 right-to-life amendments had been introduced into Congress.[17] Even as the women's conference was meeting, thousands of women opposed both to *Roe v. Wade* and to the ERA held their own convention across town. Twelve thousand anti-feminists and right-to-life activists gathered for the Pro-Life, Pro-Family Rally at Houston's flying-saucer-style stadium, the Astro Arena.

The star of the slate of speakers was Phyllis Schlafly, age fifty-three, a political genius, a Catholic mother of six, and leader of the largest campaign ever waged to defeat a constitutional amendment. Born in St. Louis, Schlafly had been a leading conservative strategist since the 1950s, when she was an ardent anti-Communist. In a campaign funded by H. L. Hunt, Dan Smoot's onetime boss, she'd made a failed bid for Congress in 1952 and had become, instead, a Republican power broker, battle general of the millions of suburban housewives who were the foot soldiers of a conservative Republican army. Her support for Goldwater had in large part earned him the nomination in 1964, for which liberal Republicans had never forgiven her; in 1967, as the incumbent vice-president of the National Federation of Republican Women, she failed to earn the presidency. She'd come late to the ERA, but she brought to the campaign her extraordinary

tactical skills, an unmatched mailing list, and the shrewd observation that the best way to defeat the amendment was by attaching it both to abortion and to gay rights. In Houston, delegates at the National Women's Conference adopted a plank for lesbian and gay rights. At the counterrally, one protester held up a sign that read "ERA Is 90% Gay."

Schlafly took to the stage in her signature blond French twist, wearing a red stop sign button on her red sweaterdress. STOP ERA stood for Stop Taking Our Privileges but it was also a callback to William F. Buckley's *National Review*'s cri de coeur: "Stand athwart history and yell 'Stop.'" Schlafly knew what she wanted to stop, and she knew how to stop it: she was, at the time, in law school, months away from completing her JD. "The American people and the American women do not want ERA," Schlafly said crisply into the podium microphone. "They do not want abortion. They do not want lesbian privileges." [18] She would change the law. She would save the Constitution.

Phyllis Schlafly in front of the White House, 1977

In the early 1970s, America's political future might have seemed to lie with women like Patsy Takemoto Mink, who sought the Democratic presidential nomination in 1972, vying with New York congresswoman Shirley Chisholm, the first Black woman to run for president. But the wind was behind not their backs but Schlafly's. After Houston, Schlafly reported in her newsletter, *The Phyllis Schlafly Report*, that the showdown between the National Women's Conference and the Pro-Life, Pro-Family Rally had

been a turning point in the war between feminists and anti-feminists; the antis were winning.[19] In the longer sweep of American history, there would be many more skirmishes and many more wins for Schlafly and for American conservatism. Ronald Reagan would ride to the White House in 1980 tied to her apron strings. By 1982, a decade after the Equal Rights Amendment passed Congress, it would be defeated, and the pro-life movement would abandon its campaign for a right-to-life amendment in favor of seeking to overturn *Roe v. Wade* in the courts by allying with the new brand of constitutional conservatism calling itself "originalism."

Equality of Rights Under the Law

Birch Bayh did not want to hold hearings on the Equal Rights Amendment. But on February 17, 1970, as his subcommittee was holding a vote on the voting age amendment, the forty-two-year-old Pittsburgh librarian Jean Witter and some twenty other members of NOW disrupted the meeting. Witter's frustration was immense. NOW had adopted its Bill of Rights for Women in 1967, and nearly eight hundred bills proposing an equal rights amendment in Congress had been introduced between 1960 and 1970, but efforts to make any headway on the ERA in the House had been blocked by the chair of the House Judiciary Committee, Emanuel Celler, and Witter determined that starting out in the Senate was her best hope.[20] Bayh, fuming, conceded.

Ten men served on Bayh's subcommittee, but aside from the chair, only two turned up when Bayh's promised hearings opened on May 5, 1970: Eastland had called a full meeting of the Senate Judiciary Committee to begin at the same hour.[21] Bayh, in his opening statement, said he hoped the hearings would "prick the national conscience." [22] For three days, a parade of feminists from Gloria Steinem and Betty Friedan to Shirley Chisholm took their seats before the scant remnants of Bayh's subcommittee. Press coverage was hardly sympathetic. The women who walked into the Senate Caucus Room wore "everything from miniskirts to midifrocks," the *New York Times* reported, and "not a male showed up in the audience." [23]

Patsy Takemoto Mink's House Committee on Education and Labor held hearings on Title IX the next month. A number of people testified at both sets of hearings, since they involved many of the same fundamental issues

of discrimination. Legislators, in short, were pursuing equal rights on multiple fronts, on the theory that trusting the courts to interpret the Fourteenth Amendment as guaranteeing women equal protection of the law was simply too risky. New federal statutes were needed, and so was a new constitutional amendment, to make sure the courts honored those statutes. In August, Michigan representative Martha Griffiths, who testified at Mink's Title IX hearings, instituted a discharge petition to force the bill out of the House Judiciary Committee.[24]

Mink supported equal rights, but she declined to sign Griffiths's petition; instead, she circulated a Dear Colleague letter to members of the House arguing that the ERA could have adverse consequences for poor women, and "mothers of young children could be forced out of the home into the job market against their will." [25] Mink took the position once taken by Florence Kelley, that women still required protective labor legislation. But her preferred solution was to seek a guarantee that no statutes that applied either to men or to women separately would be narrowed by the ERA but instead would be broadened. She wrote to Griffiths to ask that she consider adding language to the proposed amendment, to read "Provided that any State or Federal Law which confers rights, benefits or privileges on one sex only shall be construed to be extended to apply to both sexes equally." [26]

This Griffiths would not do. When Griffiths's discharge petition succeeded and the amendment was finally debated in the House, Mink rose to introduce her amendment to the ERA. California had a minimum wage law that applied only to women, she explained; with her amendment, the revised ERA would mean that men in California would benefit from the minimum wage law, too. Griffiths had assured her that this "amendment is not needed because it is implicit in the constitutional amendment as presented." Mink read her amendment into the record as a clarification but had decided not to withhold her support.[27] The unmodified ERA passed, 352–15.[28]

Back in the Senate Judiciary Committee, Sam Ervin objected to the amendment, agreeing only to hold more hearings in 1971. He had opposed equal rights for women since he was first elected to the Senate in 1954. If he couldn't stop the amendment, he wanted to cripple it. Ervin wanted to add to the proposed amendment language exempting women from the draft

and requiring ratification within five years of passage.[29] Bayh managed to defeat the draft exception and to negotiate for a seven-year ratification window. He also, to the great consternation of NOW, drafted a new version of the amendment—"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex"—and introduced it into the full Senate.[30] Bayh's version prevailed.

On March 22, 1972, after two years of wrangling, and after another House vote, 354–23, the Senate passed the ERA, 84–8. These massive vote margins gave advocates every expectation of swift ratification. Less than half an hour later Hawaii, once ruled by Queen Lili'uokalani, became the first state to ratify it.[31] Four more states ratified within forty-eight hours of the Senate vote, and by the end of the year a total of twenty-two had ratified.

No one had any particular reason to expect opposition, not even Birch Bayh, who'd wrangled with Ervin over the Electoral College and seemed to understand the challenge of amending the Constitution better than any living American. But the bottleneck, in Bayh's experience, had been the Senate, not the states. Of all the amendments Bayh had championed, the ERA was, he'd come to believe, the one least likely to encounter real opposition in the states. "Maybe some other folks thought of it," Bayh would later say, looking back. "I didn't." [32] Martha Griffiths didn't, either. Both Griffiths and Bayh expected the ERA to achieve ratification quickly, possibly even faster than the Twenty-Sixth Amendment, which had taken only one hundred days, a record; that's why they hadn't put up much of a fight against an expiration date, which turned out to be a fateful miscalculation. (It also appears to have been unnecessary; the amendment would have passed without acceding to this demand by its opponents.)[33] And no one seems to have given any thought to the idea that, given the very high public support for the ERA, as measured by public opinion surveys, ratification by state conventions, rather than by state legislatures (dominated by men), might have been a better path.[34]

Because then came the great deceleration: eight states ratified in 1973, three in 1974, one in 1975, none in 1976; in 1977, only one. Meanwhile five states voted to rescind their earlier ratifications (an action whose constitutionality has been questioned). Notably, resistance was strongest in the South.[35] Heading toward the seven-year-deadline in 1979, the

amendment was three states short of the required thirty-eight. Jean Witter, after her experience lobbying the Senate, went to law school and, when the ERA appeared likely to fail of ratification by its seven-year-deadline in 1979, it was Witter who wrote the legal memo arguing that the deadline could be extended by another three years (another action whose constitutionality has been questioned).[36]

The Equal Rights Amendment would have prohibited discrimination on the basis of sex, but its supporters understood it as fighting, too, what the Black constitutional theorist Pauli Murray called "Jane Crow." In a statement to the Senate Judiciary Committee during its second round of hearings in 1971, Murray told the story of her grandmother "born in slavery, the progeny of rape by a white master," and of her own life. "The road over which I have travelled is the experience of most Negro women in America," she said. "Born in genteel poverty, I have shared the experience of domestic workers, service workers, lower paid clerical workers." Tracing the history of everything from sexual violence to employment discrimination, she told the committee that the Black woman "stands almost alone and must appeal to the fundamental law of the land to give her a footing upon which to build some semblance of stability for herself and for her children." Black women, she told the Senate Judiciary Committee, have, as a group, "the most to gain from the adoption of the Equal Rights Amendment." Murray argued for the ERA as essential to the future of a liberal constitutional democracy: "The adoption of the Equal Rights Amendment and its ratification by the several States could well usher in an unprecedented Golden Age of human relations in our national life." [37]

The ERA would not have ushered in a golden age, but it would have comprehended women within the nation's fundamental law. Ruth Bader Ginsburg and others would later argue for the existence of a "de facto ERA," the series of statutes and cases that together operate to prohibit discrimination on the basis of sex.[38] But the ERA was a constitutional settlement that would have established equality in a way that no statute or Court decision ever could. If its advocates had spent a little time studying the history of early amendment and anti-amendment campaigns, especially the campaigns for and against the suffrage and Child Labor amendments, one historian has argued, they would have better anticipated the strength of the opposition, and they would have better understood the necessity of

waging an early, sustained, and targeted ratification effort in the states.[39] There is no end to the what-ifs. But perhaps no lesson from history could have prepared advocates of the ERA for what became ratification's greatest obstacle: the inseparability of equal rights from *Roe v. Wade*.

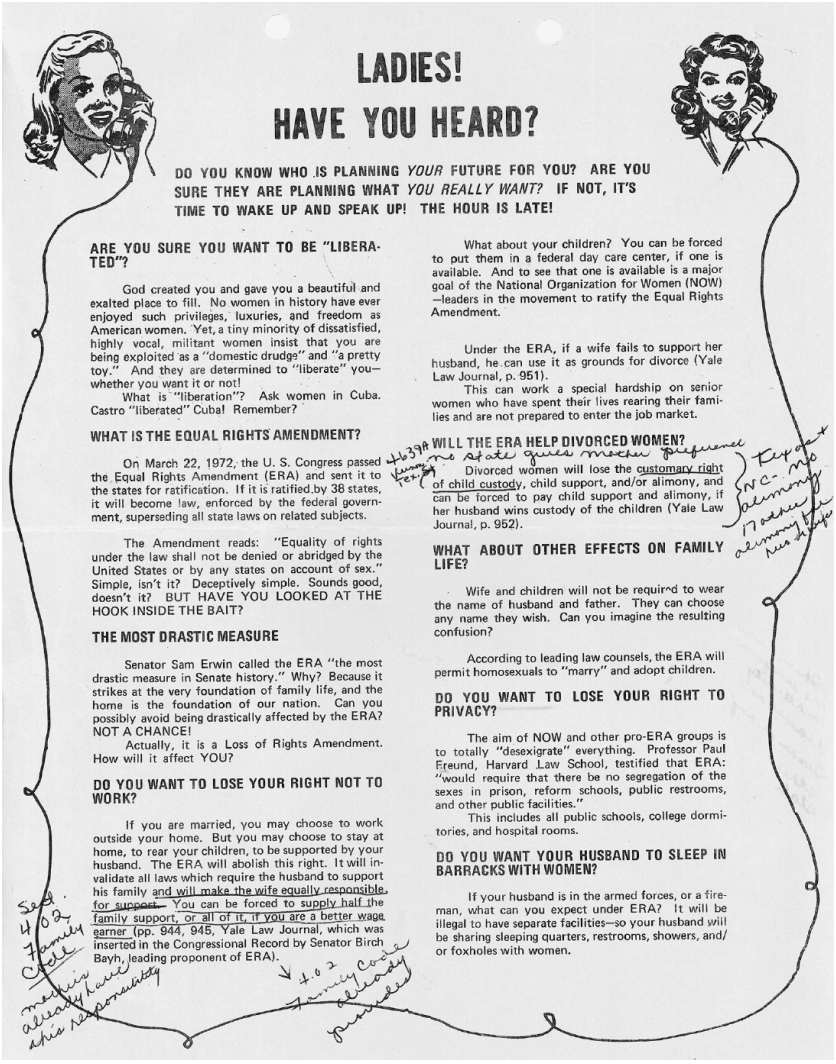
Ladies! Have you heard?

Phyllis Schlafly started working against the Equal Rights Amendment even before it got out of Congress, at the behest of Sam Ervin. Ervin, having hobbled the amendment with a deadline, knew that all he needed to do was slow down the pace of ratification. In December 1971, Schlafly had declined an invitation to debate the ERA because at that point she didn't know what side she was on. But Ervin and others persuaded her to come out against it, not least because the National Federation of Republican Women, which had spurned her, had come out in favor of it.[40] He sent Schlafly copies of his Senate speeches, which she then printed and distributed across the country.[41] Dedicating herself to the task, she began offering up her own objections. In February 1972 she devoted the whole issue of her *Phyllis Schlafly Report* to "What's Wrong with 'Equal Rights' for Women." "Suddenly, everywhere we are afflicted with aggressive females on television talk shows yapping about how mistreated American women are," she wrote, but "the truth is that American women never had it so good. Why should we lower ourselves to 'equal rights' when we already have the status of special privilege?" [42] Schlafly and Ervin needed only to defeat or even only to delay ratification in thirteen states. At a time when ERA proponents were celebrating and engaging in national politicking, Schlafly carefully plotted out a grassroots strategy, state by state.[43] That December she faced Birch Bayh in a television debate moderated by Barbara Walters.[44] Bayh complained that debating a woman with "absolutely no legal training" and "no legislative experience" made him want to "commit mayhem." His contempt led Schlafly to decide to go to law school.[45]

Birch Bayh might have seen what was coming if he had more carefully read his mail. His office kept excellent files on the letters he received from constituents over the course of his fourteen-year tenure as chair of the Subcommittee on Constitutional Amendments. His archives are stuffed with

letters, postcards, and telegrams supporting or opposing amendments of all stripes. A lot of people sent him their own personal proposals for amendments. “They may be pretty bad ideas,” warned a man from Louisiana, sending along a few actually pretty good ones.[46] Other senators who got nutty amendment ideas in the mail asked Bayh to handle them.[47] Eastland fobbed off onto Bayh a constituent who proposed an amendment that would “lead to the development of a United States of Inter-Galactic AMERICA.” (“We receive and review thousands of proposed amendments each year,” a Bayh staffer solemnly wrote back under Bayh’s name, “But your interesting suggestion is one which had never before come to our attention.”)[48] “Nothing would serve the communists more than direct elections of the President,” one Indiana constituent warned the senator.[49] Another opponent of the Electoral College amendment complained that it would give too much political power to people living in cities who are “not representative of our finest citizenry.” [50]

The more successful and controversial the amendment, the greater the quantity of Bayh’s correspondence. But no topic generated more mail to his office than the Equal Rights Amendment, and much more of it was con than pro. It also tended to take the form of stock letters, even fill-in-the-blank letters, as letter-writers, following instructions from coordinated letter-writing campaigns pioneered by the John Birch Society spinoff, the Network of Patriotic Letter-Writers, simply copied out language printed in newsletters or newspapers. STOP ERA generated “Dear Candidate” letters, urging candidates and later officeholders to “preserve the legal rights of women and the dignity of womanhood by voting NO on the ERA” and then carried those letters, by the basketful, to legislators’ offices.[51]



LADIES!
HAVE YOU HEARD?

DO YOU KNOW WHO IS PLANNING *YOUR* FUTURE FOR YOU? ARE YOU SURE THEY ARE PLANNING WHAT *YOU REALLY WANT?* IF NOT, IT'S TIME TO WAKE UP AND SPEAK UP! THE HOUR IS LATE!

ARE YOU SURE YOU WANT TO BE "LIBERATED"?

God created you and gave you a beautiful and exalted place to fill. No women in history have ever enjoyed such privileges, luxuries, and freedom as American women. Yet, a tiny minority of dissatisfied, highly vocal, militant women insist that you are being exploited as a "domestic drudge" and "a pretty toy." And they are determined to "liberate" you—whether you want it or not!

What is "liberation"? Ask women in Cuba. Castro "liberated" Cuba! Remember?

WHAT IS THE EQUAL RIGHTS AMENDMENT?

On March 22, 1972, the U. S. Congress passed the Equal Rights Amendment (ERA) and sent it to the states for ratification. If it is ratified by 38 states, it will become law, enforced by the federal government, superseding all state laws on related subjects.

The Amendment reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any states on account of sex." Simple, isn't it? Deceptively simple. Sounds good, doesn't it? BUT HAVE YOU LOOKED AT THE HOOK INSIDE THE BAIT?

THE MOST DRASTIC MEASURE

Senator Sam Erwin called the ERA "the most drastic measure in Senate history." Why? Because it strikes at the very foundation of family life, and the home is the foundation of our nation. Can you possibly avoid being drastically affected by the ERA? NOT A CHANCE!

Actually, it is a Loss of Rights Amendment. How will it affect YOU?

DO YOU WANT TO LOSE YOUR RIGHT NOT TO WORK?

If you are married, you may choose to work outside your home. But you may choose to stay at home, to rear your children, to be supported by your husband. The ERA will abolish this right. It will invalidate all laws which require the husband to support his family and will make the wife equally responsible for support. You can be forced to supply half the family support, or all of it, if you are a better wage earner (pp. 944, 945, Yale Law Journal, which was inserted in the Congressional Record by Senator Birch Bayh, leading proponent of ERA).

What about your children? You can be forced to put them in a federal day care center, if one is available. And to see that one is available is a major goal of the National Organization for Women (NOW)—leaders in the movement to ratify the Equal Rights Amendment.

Under the ERA, if a wife fails to support her husband, he can use it as grounds for divorce (Yale Law Journal, p. 951).

This can work a special hardship on senior women who have spent their lives rearing their families and are not prepared to enter the job market.

WILL THE ERA HELP DIVORCED WOMEN?

Divorced women will lose the customary right of child custody, child support, and/or alimony, and can be forced to pay child support and alimony, if her husband wins custody of the children (Yale Law Journal, p. 952).

WHAT ABOUT OTHER EFFECTS ON FAMILY LIFE?

Wife and children will not be required to wear the name of husband and father. They can choose any name they wish. Can you imagine the resulting confusion?

According to leading law counsels, the ERA will permit homosexuals to "marry" and adopt children.

DO YOU WANT TO LOSE YOUR RIGHT TO PRIVACY?

The aim of NOW and other pro-ERA groups is to totally "desexigrate" everything. Professor Paul Freund, Harvard Law School, testified that ERA: "would require that there be no segregation of the sexes in prison, reform schools, public restrooms, and other public facilities."

This includes all public schools, college dormitories, and hospital rooms.

DO YOU WANT YOUR HUSBAND TO SLEEP IN BARRACKS WITH WOMEN?

If your husband is in the armed forces, or a fireman, what can you expect under ERA? It will be illegal to have separate facilities—so your husband will be sharing sleeping quarters, restrooms, showers, and/or foxholes with women.

Follow for extended description

Women Who Want to Be Women, leaflet, 1974

Schlafly's campaign against the ERA was in many ways a rerun of *Woman Patriot*'s campaign against the Child Labor Amendment in the 1920s. And it was equally effective—or no, it was far more effective.[52] Where Mary Kilbreth and *Woman Patriot* had warned voters that under the terms of the Child Labor Amendment, no parent could require a child to wash the dishes or chop firewood, Schlafly warned women that under the terms of the Equal Rights Amendment, women would be drafted, there would be no girls' and boys' bathrooms in schools, and divorced women would lose their rights to custody and alimony. Voters' confusion about these claims is nicely illustrated in the letters received at Birch Bayh's

Senate office. In 1974 a woman from Texas sent him a very alarming leaflet she'd received—put out by the conservative Christian organization Women Who Want to Be Women and distributed through church newsletters—and asked, "Is this description of the ERA true?" [53]

Anyone could believe Phyllis Schlafly, who knew how to point out the elitism of the feminist movement and its vicious contempt for women who enjoyed housekeeping and preferred to stay at home with their children. On television, she was unbeatable. She was smart and relentlessly strategic. In her newsletter, and to conservative audiences, she denounced her opponents with precision and delight. To television audiences, she sold happiness and contentment like so much laundry detergent. In 1974, when she went on *The Phil Donahue Show* in a trim red dress, she was funny, and she smiled a lot, and she made the host, in his polka-dot tie and trademark helmet of gray hair, look anguished and needy, which is also how she painted feminists. "Everybody's got problems, but you don't have to look to the Constitution to solve it," she said, as if she were pleasantly scolding a willful child.[54] That she was misrepresenting the consequences of the ERA pained but also seemed to paralyze the liberal Donahue, whose shoulders sagged as he begged the audience, "Help me out here." Her critique of the women's liberation movement—they're selling you sisterhood but what about motherhood?—was sharp and straightforward, and to Donahue's audience of mostly middle-class housewives, it rang true as a bell. "The whole thing is erected on a lie," Schlafly said, "the lie that women are not persons." This description of the ERA was not true. Donahue did not challenge it.[55]

The right to privacy

In 1965, in *Griswold v. Connecticut*, Justice William O. Douglas, writing for the majority, argued that a fundamental constitutional "right to privacy" exists, even though the word *privacy* does not appear in the Constitution; instead, it is to be found in the "penumbra," or shadow cast by other words in the Bill of Rights and in the Fourteenth Amendment. The Court found that a Connecticut law banning contraception, even for married couples, violated that right.[56] (Perhaps not irrelevantly, Douglas, sixty-seven, had been married three times, including in 1963 to a twenty-three-year-old woman who had written a college paper about him; in 1966, shortly after

another divorce, he was married, for the fourth and final time, to a twenty-three-year-old college student.)

Meanwhile the doctors, lawyers, and clergy, mostly men, who were advocating for the liberalization of state abortion laws to protect a woman's life or to allow for termination in case of a grave fetal defect, or in instances of rape, were having considerable success. Colorado, North Carolina, and California passed reform laws in 1967; Maryland and Georgia in 1968; Arkansas, Delaware, New Mexico, Kansas, and Oregon in 1969; South Carolina and Virginia in 1970. But advocates were discovering that simply reforming those laws was insufficient: lifting certain restrictions made it easier only for women who had the resources to find a doctor willing to perform an abortion. And environmentalists concerned about population growth began to push not for the reform of abortion laws but for the repeal of all restrictions on abortion, especially after the publication of Paul Ehrlich's best-selling book *The Population Bomb* in 1968. Alaska, Hawaii, New York, and Washington repealed all restrictions on abortion in 1970.[57] The sexual revolution played a part in the calls for decriminalization of abortion, but not a major part. In 1968 affiliates of Planned Parenthood, then a Republican-dominated family planning service provider, not a feminist organization, voted to support a campaign not to reform but to repeal all state abortion laws. The next year activists founded the National Abortion Rights Action League (NARAL)—Shirley Chisholm agreed to serve as its honorary co-president—and the California Supreme Court overturned that state's abortion restrictions, arguing that that "the fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right to privacy.'" [58] Not until the late 1960s did abortion become a leading issue not only for doctors, lawyers, and clergy interested in public health, family planning, and population control, but also for feminists. In a speech in Chicago in 1969, at a national conference sponsored by the Illinois Citizens for the Medical Control of Abortion, Betty Friedan said, "There is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process." [59]

Nixon, like other leaders of the Republican party, including George H. W. Bush and Ronald Reagan, had supported abortion, but he began reconsidering his position after his strategist, Kevin Phillips, advised him in

1969 that the GOP could recruit alienated Democrats to their party, including both white Southerners and Catholics. By 1971, Nixon, citing "the sanctity of human life," instructed the Department of Defense to reverse its position on abortion, implemented only the year before, allowing military hospitals to perform abortions. In a memo on "Dividing the Democrats," Nixon adviser Pat Buchanan told him that abortion was "a rising issue and a gut issue with Catholics." [60] By 1972, Schlafly had joined that effort, in her first published attack on the ERA, in which she charged that "women's libbers . . . are promoting abortions instead of families." [61]

In the years when abortion was becoming a feminist issue, the GOP was courting Catholics by beginning to oppose it, and Schlafly was linking abortion to the ERA, feminist legal theorists were exploring several possible routes to secure equal protection of the laws, beyond what had been put in place under the 1964 Civil Rights Act. The ACLU's Equality Committee, led by Pauli Murray, reported in 1968 that "clarity of the law has not been achieved in the area of discrimination based on sex" and began considering how to firmly and permanently establish that women were persons under the Fourteenth Amendment.[62] In 1969 a brilliant young law school professor from Brooklyn, Ruth Bader Ginsburg, mother of two, began volunteering for the ACLU, where, building on the earlier work of Murray and Dorothy Kenyon, she founded a Women's Rights Project. Ginsburg was not enchanted by right-to-privacy arguments. Instead, following Murray's line of argument, she wanted to convince the courts that the equal protection clause of the Fourteenth Amendment—"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws"—prohibited not only discrimination by race but also discrimination by sex.[63] (Victoria Woodhull had attempted the same thing, a century before, with no luck.)

Ginsburg scored her first victory in 1971 in a case called *Reed v. Reed*.[64] In 1972 she was hired by Columbia—"Columbia Law Snares a Prize in the Quest for Women Professors," the *New York Times* announced—while working on a case involving Air Force Lieutenant Susan Struck. When Struck became pregnant, she was told she would need to have an abortion to terminate the pregnancy or else would lose her job. In *Struck v. Secretary of Defense*, Ginsburg argued that the Air Force's policy violated Struck's

Fourteenth Amendment rights, since no man was forced to leave the Air Force if he were to have a child.

Struck v. Secretary of Defense was consistent with the underlying logic of the Equal Rights Amendment: it sought to establish the constitutional equality of men and women. If the ERA had been ratified before Struck became pregnant, the Air Force policy would have quite plainly violated the Constitution's latest amendment: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." But that was not what happened, and not only because the ERA was not ratified. Before the case was heard, the Department of Defense changed its policy, under Nixon's direction, and the case was dismissed.[65]

Struck v. Secretary of Defense did not involve a right to privacy. It involved a reading of the Fourteenth Amendment's equal protection clause. But a right to privacy did lie at the heart of the abortion case the Court heard instead of *Struck*: *Roe v. Wade*.

Roe v. Wade, like *Brown v. Board of Education*, was argued twice, first on December 13, 1971, and then again on October 11, 1972. Between those two dates, on March 22, 1972, Congress sent the ERA to the states, and on the same day, the Supreme Court handed down a decision in *Eisenstadt v. Baird*, extending the right to contraception, by way of a right to privacy, to unmarried people.[66]

Easily forgotten in the storm that followed the Court's decision in *Roe* is just how widespread was support for abortion in 1972, and how little that support divided along any partisan or religious lines; to the degree that it did follow party lines, Republicans were more likely to support the decriminalization of abortion than Democrats. In a Gallup survey conducted in the summer of 1972, Americans were asked whether they agreed "with the statement that 'the decision to have an abortion should be made solely by a woman and her physician.'" Sixty-four percent of those surveyed said yes, including 56 percent of Catholics, 68 percent of Republicans, and 59 percent of Democrats. Justice Harry Blackmun, who would write the *Roe* decision, clipped out that poll and slipped it into his case file.[67] Abortion did not begin as a partisan issue; partisans made it into a partisan issue. This effort began before *Roe*, as part of the Nixon campaign's effort to woo alienated Democrats. "The people who are alienated are the ones who don't want pot, who don't want abortion, who don't want to pay one more cent in

taxes," reported Kevin Phillips in 1972.[68] But it intensified after *Roe*, when GOP strategists made abortion into a partisan issue by demonizing *Roe*, the Court's method of judicial interpretation, and eventually the Court itself.

In *Roe v. Wade*, the twenty-one-year-old Texas plaintiff Norma McCorvey, who was called in the court documents "Jane Roe," sued Dallas County district attorney Henry Wade, alleging that the state's ban on abortion violated the Fourteenth Amendment. A key difference between the two cases was that Susan Struck wanted to have a baby while Norma McCorvey wanted to have an abortion. Ginsburg had believed the *Struck* case was a better platform on which to erect an argument about reproductive choice. McCorvey, who had relinquished custody of two earlier children, was represented by a young Texas lawyer, Sarah Weddington, recently graduated from the University of Texas Law School. In 1970 a lower court had ruled in McCorvey's favor, deeming the Texas abortion ban a violation of the "fundamental right to choose whether to have children." This decision did not come in time for McCorvey, who gave birth to a daughter and gave her up for adoption.[69]

Weddington and her colleagues, in the brief they submitted to the Supreme Court in *Roe v. Wade*, placed their argument in line with *Griswold* and *Eisenstadt*. "The Constitution does not specifically enumerate a 'right to seek abortion,' or a 'right of privacy,'" they wrote. "That such a right is not enumerated in the Constitution is no impediment to the existence of the right." [70]

Although the Supreme Court held oral arguments in *Roe v. Wade* in December 1971, the bench was short two justices. The chief justice decided to postpone reargument until two new justices had been appointed. In the meantime, the very line of argument that McCorvey's lawyers made in their brief came into question in a law review article that is generally credited as founding the modern era of the doctrine of original intent.[71] In the spring of 1971, Yale Law School professor Robert Bork delivered a lecture at Indiana University's law school; the lecture appeared in the *Indiana Law Journal* that fall, in time to warn the justices against ruling in favor of Jane Roe.

All Supreme Court decisions which involve women are

unconstitutional

Robert Bork had frizzy red hair and a pointy Don Quixote moustache and beard. His deep-set eyes gave him, even in early middle age, a look of exasperated weariness.[72] Born in Pittsburgh in 1927, the same year as Patsy Takemoto Mink, Bork served in the Marine Corps during the Second World War and again in the early 1950s. He and Mink overlapped at the University of Chicago Law School and had also married within months of one another. Mink joined the faculty of the University of Hawai‘i Law School; Bork joined the law faculty at Yale. From there, their paths diverged.

Robert Bork in 1973

Bork was an expert in antitrust law, though he delighted in writing for a broader public as a contributor to *Fortune* and *The New Republic*. He worked for both the 1964 Goldwater campaign and the 1968 Nixon campaign.[73] He opposed key decisions of the Warren Court, including its one-man-one-vote decisions, and he also opposed both the 1964 Civil Rights Act and the Equal Rights Amendment.

In his 1971 article, Bork sought to offer a sustained critique of judicial activism by looking at several cases but especially at the Court’s 1965 decision in *Griswold v. Connecticut*. The right to privacy does not exist, Bork argued; the Court had invented it. A legitimate court, he wrote, “must be controlled by principles exterior to the will of the Justices”; these

principles must be neutral principles, not an expression of the values cherished by the justices, "because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society." In *Griswold*, the Court had made decisions that were not "neutrally derived" from the text of the Constitution and the intent of its framers and that ran counter to the text and history of the Constitution and to "the political practice of Americans from colonial times up to the day the Court invented the new formula." [74]

The original intent doctrine that Bork proposed had been espoused by conservatives since *Brown v. Board of Education*, in the clench-jawed television appearances of Dan Smoot, and in the quiet but determined advocacy of David J. Mays. Still, before the 1970s, it had had limited purchase either on the Court or in public discourse. Strom Thurmond's constitutional history quiz, administered to Thurgood Marshall during his 1967 confirmation hearings, had been an embarrassment. But four years later, in the fall of 1971, when the Senate Judiciary Committee held hearings for two new justices, interest in original intent doctrine had moved from the fevered mind of Alfred Avins to the scholarly musings of Yale Law School's distinguished Professor Bork. This wasn't only about partisanship and political power; Johnson nominated Marshall, while Nixon nominated William Rehnquist and Lewis Powell, and the Democratic majority in the Senate was slimmer in 1971 than it had been in 1967. It was also about the difference between discrimination on the basis of race and discrimination on the basis of sex.

Nixon had wanted to nominate a woman—NOW had demanded that he do so, reiterating a demand that women had been making since Florence Kelley first complained about the Supreme Court's "monopoly of men" in 1924. A half century later, of the nation's ten thousand judges, fewer than two hundred were women, and only 3 percent of lawyers were women.[75] Nixon had chosen one, Mildred L. Lillie, a California court of appeals judge, a Catholic, and a conservative Democrat. White House counsel John Dean told Nixon aide Bob Haldeman, who told Nixon, that Lillie's "a goddamn jewel." But when Chief Justice Warren Burger heard what Nixon was contemplating, he wrote a letter to Nixon's attorney general, John Mitchell, telling him that if Nixon appointed a woman, Burger would resign from the bench. Nixon relented.[76]

In November 1971, the Senate Judiciary Committee considered Nixon's two nominees, Rehnquist and Powell, in a single set of hearings. (Nixon called it his "double play.") Bork submitted a letter in support of Rehnquist to the committee, praising his "commitment to the commands of the Constitution, interpreted in the light of its text and its history." [77] During questioning, Rehnquist told the committee that judges were limited by "the language used by the framers" and by "the historical materials available" and that he, for one, would not "disregard the intent of the framers." [78] Much attention was given, during the process, to a memo Rehnquist had written in 1952, while a clerk for Robert Jackson, during deliberations over the school segregation cases. "I think *Plessy v. Ferguson* was right and should be reaffirmed," Rehnquist wrote. He insisted that this had been the justice's view, not his own.[79]

Seven representatives of right-to-life organizations testified and asked that the committee inquire into the nominees' positions on abortion and reject them if they did not agree that a constitutional right to life existed. The right-to-life activists who spoke at the hearings did not know how the nominees stood on this question, and they neither opposed nor supported them. They simply wanted the committee to concern itself with the question. They did not inquire as to what the framers intended.[80] That line of inquiry would not have helped their cause because while the widening influence of a Borkian doctrine of original intent posed a problem for anyone hoping to repeal state laws regulating abortion under a constitutional right to privacy, it also posed the very same problem for people hoping to defeat those efforts by citing a right to life. Neither phrase can be found in the Constitution.

There's a "right to life" in the Declaration of Independence, but there is no "right to life" in the Constitution, in the same way that there is no "right to privacy" in the Constitution. Neither is an enumerated right, though the argument can be made that both rights are implied. The right-to-life slogan of the antiabortion movement began as a religious teaching, when opposition to abortion came chiefly from the Catholic Church, especially after the church in 1968 issued *Humanae Vitae*, an encyclical in which Pope Paul VI condemned both abortion and contraception. Mapping a religious commitment onto a rights-based constitutional order is a complicated undertaking. Like abolitionists before them, to whom right-to-lifers often

compared themselves, they found support in the Declaration of Independence. Testament to the right-to-life movement's indebtedness not to the Constitution but to the Declaration of Independence can be found in the Declaration of Purpose of Americans United for Life: "We believe, in the words of the Declaration of Independence, that 'all men are created equal'; and thus that to be true to its heritage, this nation must guarantee to the least and most disadvantaged among us an equal share in the right to life." [81]

Ginsburg looked to the equal protection clause of the Fourteenth Amendment to argue for a right to abortion; right-to-life lawyers looked to its due process clause. In 1967 Thomas L. Shaffer, professor and later dean of Notre Dame Law School and an expert on legal ethics, argued that abortion violated a fetus's Fourteenth Amendment rights, in the sense that the right to due process is a person's right not to be deprived of one's life by the state without due process of law.[82] But this line of argument required establishing that a fetus is a person. Also, making Shaffer's argument required engaging in the same act of interpretation—leaning on implied rights—that the Court had done in *Griswold* and *Eisenstadt.* A brief by the Americans United for Life would note this shared method of constitutional interpretation when, citing *Griswold* and its "penumbra," it attempted to define the right to life as "implicit in other, more explicitly protected rights." What right-to-life arguments could not do was to cite the framers' original intentions.[83] The framers, in short, had no answers.

The most strenuous objection to Rehnquist and Powell came from NOW, and it did involve the framers' intent. NOW's president objected to the two candidates both because they were men and because they were known to favor a mode of constitutional interpretation that was "unjust for women." How fair could it be to interpret the Constitution exclusively according to the original intent of the framers, she asked, when "women were excluded from the writing, the content and intent of the Constitution"? (Jean Witter went further, arguing, "It is possible to make a case that all Supreme Court decisions which involve women are unconstitutional, since there has never been a woman on the Supreme Court.")[84]

Despite the newsiness of Bayh's fierce and remorseless opposition to Nixon's earlier nominees, Rehnquist and Powell's nominations did not explode on a partisan battlefield, even though Rehnquist's position on

Brown was the subject of considerable discussion.[85] (Rehnquist's elevation to chief justice in 1986 would be more controversial.)[86] A new era of battle over Supreme Court nominees would turn on neither abortion nor segregation, though it would not begin until some years after *Roe*, a case that was first argued one week after the Senate confirmed Powell, 89–1, and three days after confirming Rehnquist, 68–26. On Rehnquist, Birch Bayh voted nay.[87]

How about the fetus?

In October 1972, when the Supreme Court met for reargument in *Roe v. Wade* and a companion case, *Doe v. Bolton*, with Rehnquist and Powell now on the bench, Justice Byron R. White asked Norma McCorvey's attorney, Sarah Weddington, whether it was critical to her case that a fetus not be a person. Weddington, speaking in a slow Texas drawl, tried to turn from that question about fetal personhood back to the matter of *women's* rights:

> WEDDINGTON. It seems to me that it is critical first that we prove this is a fundamental interest on behalf of the woman, that it is a constitutional right and, second—
> WHITE. Yes, but how about the fetus?

Weddington tried to move on, but White pressed her.

> WHITE. Under the federal constitution, is the fetus a person for the purpose of the protection of the Due Process Clause?
> WEDDINGTON. All of the cases, the prior history of this statute, the common law history would indicate that it is not. . . .
> WHITE. Well, what if—would you lose your case if the fetus was a person? [88]

Weddington didn't have any real answer to that hypothetical, and neither did the Court. On January 22, 1973, Justice Harry Blackmun issued the opinion for the Court's 7–2 majority. "The Constitution does not define 'person' in so many words" (and the Fourteenth Amendment refers to

"persons born"), and no case had ever held that a fetus is one. For what Bork had cherished as "the political practice of Americans from colonial times," Blackmun had little use: he offered a survey of the history of criminal statutes relating to abortion, dating to antiquity, only to set it aside. Instead, citing *Griswold*, he held that state laws banning abortion were unconstitutional violations of an unenumerated but implied right to privacy, and he determined that restrictions on abortion after the first trimester through viability were allowed only when reasonably related to the health of the mother.[89] Rehnquist, joined by White, wrote a dissent in which he averred that the majority had managed "the seemingly impossible feat of leaving this area of the law more confused than it found it," pointing out that the majority had discovered "within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment" and, in applying different rules to different stages in a pregnancy, had written a ruling that "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." [90]

In an influential article in the *Yale Law Journal* that appeared within months of the decision, law professor John Hart Ely, who was neither a conservative, nor an originalist, nor a supporter of the right-to-life movement, eviscerated the opinion as lacking any real foundation in the Constitution. Ely called *Roe* "a very bad decision" and a terrible example of judicial overreach; he compared the Court's construction of a right to abortion to the invention of a "liberty of contract" in *Lochner*. Few women sat in legislatures, he admitted, "a fact I believe should bear some relevance —even without an Equal Rights Amendment—to the appropriate standard of review for legislation that favors men over women," but "*no* fetuses sit in our legislatures." [91] (As the Yale scholar Reva Siegel would later observe, Ely "failed to explain how all-male legislatures were constitutionally adequate to represent either.")[92]

Reproductive rights lawyers jubilantly celebrated the decision, and though they expected backlash, they hoped that, unlike the decision in *Brown v. Board of Education*, the clarity of *Roe* would defeat a campaign of massive resistance. "I think we envision not having to go through what Blacks had to go through after *Brown*," said one advocate, "because in *Roe* and *Doe* the Court was quite clear in terms of what the state could or could

not do, whereas they never drew up desegregation plans in *Brown*." This attitude nurtured complacency when, in truth, *Roe* inaugurated massive resistance on a scale and for a duration unseen in the aftermath of *Brown*.[93]

Would you lose your case if the fetus was a person? Justice White had asked. Within a month of the Court's decision in *Roe*, a coalition of predominantly Catholic right-to-life organizations, led by the National Right to Life Committee (half of whose original funding came from the U.S. Catholic Conference) decided to undertake a concerted campaign to press Congress for a constitutional amendment specifying that life begins at conception and that a fetus is a person.[94] That spring North Carolina Republican senator Jesse Helms introduced a right-to-life amendment identical to one introduced into the House by Larry Hogan Sr. of Maryland.[95] Unlike the strategy pursued by opponents of *Brown v. Board* nearly two decades before, they opposed any amendments that returned abortion to the states, the National Right to Life Committee resolving that such an amendment would "reaffirm the Court's decision." [96] Wrote one Catholic bishop: "It is the considered judgment of legal scholars that the only way to provide a constitutional base for legal protection of the unborn is by amending the Constitution." [97]

In pursuing a constitutional amendment, the right-to-life movement placed itself in somewhat of the same dilemma as had abolitionists in the decades before the Civil War. (The two movements in fact have much in common, including that both were moral crusades.) To call for an amendment is to concede that you lack a constitutional right and need an amendment to establish it. But given the difficulty of amendment, as FDR had learned the hard way with the Child Labor Amendment, it can be more strategic to try to persuade the Supreme Court to change its mind and to find the right you're looking for somewhere in the Constitution. Either way, nothing about the right-to-life position aligned with a doctrine of original intent.

Before *Roe*, the right-to-life movement had involved a loose array of organizations, but *Roe* accelerated the movement's development, especially under the aegis of national organizations that included Americans United for Life, a public law firm, and the National Right to Life Committee, which after January 1974 newly had financial support from the National Committee for a Human Life Amendment, a corporation formed by the

nation’s Catholic bishops.[98] The movement suffered from divisions and disagreements, especially over the language for a constitutional amendment; it was interested in hiding the prominence of the Catholic Church in its activities. But its opposition to *Roe* was felt passionately and deeply and urgently. Members lobbied Congress. They asked their supporters to write and call their representatives in Washington. Birch Bayh received eighty letters a day urging him to hold hearings on a right-to-life amendment.[99]

The destruction of unborn children

On January 22, 1974, the one-year anniversary of *Roe v. Wade*, antiabortion activists held a March for Life in Washington. By then, twenty-seven proposed amendments either banning abortion or sending the issue back to the states had been introduced into Congress. In March, Birch Bayh, pressed by Catholic bishops, finally opened subcommittee hearings to consider two right-to-life amendments: one proposed by Helms and one introduced by New York senator James L. Buckley (William F. Buckley’s brother, elected as a member of New York’s Conservative Party).

Both amendments would have prohibited abortion nationwide and would have established that life begins at conception. The Buckley amendment included an exception for the life of the mother; the Helms amendment did not. The Buckley amendment defined “persons” as “all human beings, including their unborn offspring at every stage of their biological development,” and hence guaranteed a constitutional right to life. The Helms amendment specified that it extended the Fourteenth Amendment’s guarantees of due process and equal protection of the law to “any human being, from the moment of conception.”

Pro-life demonstrators outside the White House, 1979

Although leaders of the National Committee for a Human Life Amendment feared that the hearings were only "a delaying tactic," right-to-life groups began organizing in the states, in hopes of winning a ratification battle in the years to come.[100] "We're going to be here as long as it takes," the head of the National Right to Life Committee told the press in March 1974. "That may be five years or ten years." [101]

Bayh, who had helmed so many of these hearings, was plainly nervous. "There are more strong emotions and deep convictions on both sides of the issue than any issue I have seen before this committee since I have had the privilege of being its chairman," he said, to begin.[102] (The House Judiciary Committee, consumed by impeachment proceedings and their aftermath, delayed holding abortion hearings until August.)

As the hearings opened, Bayh asked Helms if he truly meant for his amendment to render contraception unconstitutional. Helms was puzzled, even confused. Bayh attempted to explain the issue that certain methods of contraception, like the IUD, stop implantation rather than ovulation or fertilization. "Well, the chairman has expertise in this subject that I apparently don't have," Helms admitted.[103] Bella Abzug, one of only sixteen women in the 435-member House, pointed out in her Senate testimony that there was not a single woman in the Senate and "these are amendments aimed exclusively at women, which have been introduced by men, and submitted to a legislative body consisting entirely of men." [104]

Bayh himself was personally opposed to abortion and during his time in the Senate did not waver from that position. He was also overwhelmed both by the moral difficulty of the issue and by the prospect of an amendment that would have overturned a Supreme Court decision. Yet early on, long before the issue of abortion had become a partisan one, Bayh's position—moral anguish, political caution—was not an unusual one, and it also earned him at least some support from the Catholic Church and from within the emerging pro-life movement. Thomas L. Shaffer, the dean of Notre Dame Law School who had developed the idea that abortion violates a fetus's Fourteenth Amendment right to due process, was appalled by the fury of the movement to which he belonged. "The less vocal 'right to life' people are much more quizzical about 'when life begins' than public discussion would suggest," Shaffer wrote to Bayh privately.[105] Shaffer also took this position publicly, in an op-ed for the *South Bend Tribune* in which he noted both that Bayh gave pro-life advocates more time at hearings and that he appeared to be personally keen for an amendment but was being careful not to push too hard or too fast.[106] "I yield to none in my opposition to legalized abortion and in my efforts to see overruled the Supreme Court's decision," Shaffer wrote elsewhere. "It is clear to anyone who has discussed this issue with Senator Bayh that he also favors substantial modification of the Court's ruling, and that he is deeply disturbed at the destruction of unborn children" and that he favored an amendment but was obligated to consider it with the gravest deliberation.[107]

Bayh, however, was playing both sides and seems to have had genuine sympathy with both sides, too. He was all this time still stumping for the Equal Rights Amendment, which he had introduced into the Senate and whose ratification he hoped to take credit for. Arguably, *Roe* was killing the ERA.[108] Schlafly was exceptionally skilled at translating opposition to abortion into opposition to the ERA. "The E.R.A. means abortion," she wrote in her newsletter, insisting that if ratified the ERA would make it impossible to ban or in any way restrict abortion.[109] But it wasn't just anti-ERA groups that linked the ERA and abortion. NOW did that sometimes, too. And feminist lawyers, in defending abortion rights in the states, tended to cite state equal rights amendments, which gave fuel to ERA opponents who wanted to argue that the ERA, if ratified, could be used to advance abortion rights.[110] Sarah Weddington, who in 1975 became president of the

National Abortion Rights Action League, met with Bayh and urged him to derail the right-to-life amendments, telling him that "women cannot take advantage of opportunities guaranteed under the ERA if they cannot control their fertility." [111]

Weddington was correct. And Bayh may well have agreed with her. In any event, the earliest stage of opposition to *Roe* ended in failure. Members had introduced an amendment to an appropriations bill that would have banned the use of federal funds for abortion. In June and again in November 1974, Bella Abzug, Shirley Chisholm, and Patsy Mink led a successful campaign to defeat it.[112] On September 17, Constitution Day, 1975, the Subcommittee on Constitutional Amendments decided against reporting any right-to-life amendment to the full Senate Judiciary Committee. Bayh, in a speech to the Senate, cited as among the reasons for the subcommittee's decision the degree to which the proposed amendments would prohibit the use of certain forms of contraception.[113]

"I am, and always have been, personally opposed to unrestricted abortion," Bayh would write in letters to inquiring constituents, for years, quoting from his Senate speech. "It is not a question of my personal views nor the personal views of any of the members of the Subcommittee. The question is whether we, as elected representatives, feel that amending the Constitution to impose one conception of life on all our citizens is indeed the most responsible course of action. I have concluded that it is not. Each of us must make that decision for herself or himself." [114]

The New Constitutionalism

The right-to-life movement's early response to *Roe v. Wade* took place in the shadow of a scandal that would undo the Nixon administration. The Senate Watergate Committee, chaired by Sam Ervin, opened hearings in May 1973, after which there ensued a constitutional crisis not resolved until Nixon's resignation more than a year later. (Nixon had appointed Bork as solicitor general in 1973, and he then served briefly as acting attorney general; in that role, he executed Nixon's order to dismiss the Watergate special prosecutor, Archibald Cox.) But the polarized response to the Supreme Court's decision was also set against sweeping and sometimes radical challenges to the constitutional order, generally from the left, that

regularly made headlines in the late 1960s and early ’70s and contributed to the sense that the constitutional order was unraveling. A new brand of revolutionary constitutionalism had been set forth by the antiwar Students for a Democratic Society, under the mantra “Let the People Decide.” [115] So many different groups seeking social change spoke in constitutional terms that in 1969, McGeorge Bundy himself had wondered whether the United States needed “a new Constitution.” In 1971 NBC ran a television special examining both the long list of proposed amendments before Birch Bayh’s Subcommittee on Constitutional Amendments and the seemingly very real possibility of a new constitutional convention.[116]

Revolutionary constitutionalism often included calls for a new kind of constitutional convention, of the sort that women would hold in Houston in 1977. In 1970 the Black Panthers called for a Revolutionary People’s Constitutional Convention to meet in DC. After Howard University refused to host the convention, the plan began to fall apart.[117] The convention, though, did take place, and if it did not draft a constitution, it did issue a series of resolutions and declarations that mainly indicted “the evils of capitalism, imperialism, and racism,” even as it endorsed the very basis of modern liberalism: “all people from all communities have the right to write their own constitutions.” [118]

In March 1972 four thousand Black delegates from all fifty states attended a Black National Convention in Gary, Indiana, whose leaders included Amiri Baraka, where they considered a draft of a national Black political agenda that called for proportionate racial representation in Congress and a new national constitutional convention to be held within twelve months because “the existing system cannot effect the changes that are necessary.” [119] It was, in some ways, the realization of the first “colored convention” held a century and a half before, in 1829. Angela Davis was there, and Betty Shabazz, and Bobby Seale, and Coretta Scott King. Shirley Chisholm, who was seeking the Democratic nomination for president, was not (and the convention elected not to endorse her). “To hell with both parties,” declared Reverend Jesse Jackson, in a keynote speech that brought the convention to its feet on its first day. “Cut us in or we’ll cut out.” [120]

But the Black National Convention was also divided and disjointed. Ethel Payne, who reported from the convention, compared it to the French Revolution and its leaders to Robespierre.[121] On the convention’s third day,

Baraka chaired a session, meeting in the gymnasium of West Side High School, whose purpose was to ratify the agenda. Dispensing with Robert's Rules of Order, Baraka proposed running the meeting by "African consensus." But Coleman Young and the UAW-heavy Michigan delegation refused to ratify what Young called the "Black Magna Carta." The Michigan delegation then walked out.[122] The remaining delegates ratified the agenda and a series of resolutions, including one denouncing school busing and one calling for the handing over of Israel to Palestinians. (At the time, 52 percent of Americans favored an amendment against compulsory busing, with only 33 percent opposed.[123] Two years later 72 percent would favor an antibusing amendment.[124] "Have You Ever Seen the Words Forced Busing in the Constitution?" asked protesters in Boston in 1975.)[125] The Congressional Black Caucus then publicly distanced itself from the convention, issuing instead its own Black Bill of Rights. The NAACP, reviewing the preamble of the "Gary Declaration," deemed it to be "not an acceptable document for the NAACP." [126] Bayard Rustin scoffed that the entire convention had been a meaningless exercise in which nothing constructive had been accomplished. And the editor of the *Chicago Defender* called the convention "a Babel of ideologies, half-baked dilettantism, and infantile assumptions." [127]

That fall caravans of Indians traveled from all over the country to Washington in what was known as the Trail of Broken Treaties, organized by the American Indian Movement's (AIM's) Russell Means (Oglala Lakota) and Dennis Banks (Ojibwe).[128] They met in Minnesota and wrote a twenty-point position paper calling on the federal government to recognize its treaty obligations, return a minimum of 110 million acres of land, and honor indigenous rights. The caravans arrived, as planned, during the week of the presidential election, only to find that previously scheduled meetings with federal officials, including at the Bureau of Indian Affairs, had been canceled. Nearly a thousand Indians then occupied the BIA offices, barricading themselves inside for days. In February 1973, weeks after the Roe decision, some two hundred AIM activists, mostly Oglala Lakota, began occupying the Pine Ridge Reservation in the South Dakota village of Wounded Knee, where in 1890 U.S. troops had massacred hundreds of Lakota men, women, and children. Their standoff with U.S. marshals lasted seventy-one days. The occupations led by AIM combined with a call for

self-determination led to a new wave of constitution-writing among Native nations, beginning in 1975 when many rewrote or amended their Indian Reorganization Act constitutions.[129]

Oglala Lakota stand guard outside a church at Wounded Knee, 1973

Judy Heumann and other disability rights protesters in San Francisco, 1980

By 1977, a stunningly courageous disability rights movement had commanded the attention of the press, too. The movement had origins in the 1960s and in 1973 achieved a landmark success with the passage of a

federal Rehabilitation Act whose Section 504 barred discrimination against people with disabilities in any program receiving federal funds, the first civil rights legislation for disabled people. Instrumental in its passage was Judy Heumann, a twenty-five-year-old elementary school teacher, who in 1972 led a protest in Manhattan that had stopped traffic. Born in Philadelphia, Heumann, who contracted polio at eighteen months, had earned a master's degree in public health at the University of California at Berkeley but had been denied a teaching license in New York (on the argument that, in a wheelchair, she would be encumbered in a fire evacuation). She sued, and the Board of Education had settled. But by 1977 the promise of Section 504 had not been realized. The American Coalition of Citizens with Disabilities staged a nationwide protest, with rallies in ten cities and sit-ins at regional offices of the Department of Health, Education and Welfare. At the office in San Francisco, more than a hundred activists staged an occupation that lasted twenty-six days, even as the authorities disconnected electrical service and water. The Black Panthers, urged on by Brad Lomax, whose multiple sclerosis had confined him to a wheelchair, provided food to the protesters. After the sit-in ended, twelve activists, including Heumann, went to Washington. "I can tell you that every time you raise issues of 'separate but equal,' the outrage of disabled individuals across this country is going to continue," she told members of Congress. "There will be more takeovers of buildings until finally maybe you begin to understand our position. We will no longer allow the government to oppress disabled individuals. We want the law enforced." [130]

The gay rights movement, too, achieved landmark successes in the 1970s, including antidiscrimination ordinances in dozens of cities. But in 1977, after Dade County, Florida, passed a gay rights ordinance—following dozens of other cities—the singer and born-again Christian Anita Bryant had launched a movement that she called Save Our Children to overturn such measures. "Homosexuals cannot reproduce, so they must recruit," Bryant warned, claiming that lesbians and gay men were attempting to entice children, especially by teaching in public schools. Dade County repealed its ordinance, and other cities followed.

Black Power, Red Power, women's liberation, disability rights, environmentalism, gay rights: there seemed to be a lot of revolutions going on, all of which strengthened the growing conservative movement. During the bicentennial of the American Revolution, many Americans' views were

clouded by uncertainty about the future of the United States. Constitutional mandates enacted by the federal government influenced Americans' lives in a thousand ways, many of them involving the most intimate aspects of their world. As the political scientist and ERA activist Jane Mansbridge would remark, in *Why We Lost the ERA*, Americans who were not participants in these movements were easily persuaded that amending the Constitution would introduce only more uncertainty into their lives, and it wasn't hard to understand why. "If 'equal protection' could mean busing white children to black neighborhoods, if 'due process' could bar punishing people who everyone agreed had committed serious crimes, and if the 'penumbra' of the Bill of Rights gave women a right to abortions," Mansbridge wrote, "one did not have to be a certifiable paranoid to suppose that guaranteeing men and women 'equality of rights under the law' might turn out to have substantive consequences that legislators who supported the Amendment had not anticipated and that many of them would have opposed." [131] Who knew what an amendment might do?

Justice for American Women

The call for the National Women's Conference, another revolutionary constitutional convention, began in June 1975, when Patsy Takemoto Mink and Bella Abzug traveled to Mexico City as delegates to the United Nations' World Conference of the International Women's Year. The IWY, which advocated "equality for men and women" but was run and dominated by men, was hobbled by dissension and disunion, and in the end, it adopted an anodyne and unachievable ten-year plan of action with the goal of ending discrimination against women and girls.[132] But to Phyllis Schlafly's great consternation, Mink and Abzug introduced legislation into Congress seeking funding to hold a National Women's Conference, which, as Mink wrote, might be "one way to carry forward some of the concepts adopted" at the Mexico meeting.[133] Seeking votes, they pledged that "the national conference is not a stage for ERA" or for "abortion reform.[134]

This proposal had the support of Nixon's successor, the mild-mannered former football star Gerald Ford, and especially of his wife, Betty Ford, a strenuous supporter of both reproductive rights and the ERA. "Do you tend to agree or disagree with Mrs. Betty Ford when she said . . . she favors

passage of the Equal Rights Amendment on women's rights?" a poll asked in 1975; 70 percent of Americans favored passage, with only 15 percent opposed.[135] The president established a National Commission on the Observance of International Women's Year, to be chaired by the Republican feminist Jill Ruckelshaus. Furious that everyone on the commission was a feminist, Schlafly called Ruckelshaus "a pro-abortionist and pro-ERAer known to many as the 'Gloria Steinem of the Republican Party.'" [136] (Schlafly derided all such status-of-women commissions as SOWs, her answer to feminists who called male chauvinists "pigs.")[137]

Mink and Abzug wanted to hold the National Women's Conference in 1976, to mark the bicentennial of the Declaration of Independence. And although they secured $5 million from Congress, there were worries about the process, which involved a series of state meetings to elect delegates that, as one feminist warned, might "stir up protests by Schlafly and ERA opponents." The bill was approved in December 1975, though Ford insisted that the state conferences not begin until after the November elections.[138]

Proponents of the Equal Rights Amendment had expected a lightning-fast ratification. When that didn't happen, they set their sights on July 4, 1976, the two hundredth anniversary of the Declaration of Independence. That didn't happen, either. Ruckelshaus's IWY Commission published a nearly four-hundred-page report, *To Form a More Perfect Union: Justice for American Women*, on July 1, 1976, just in time for the bicentennial's Fourth of July fireworks over the Washington Mall and on town commons all over the country. Although the report enthusiastically endorsed the ERA, most of its discussion involved debunking claims made by its opponents: that it would invalidate rape laws, end alimony, deprive divorced mothers of the custody of their children, and require all-sex bathrooms.[139] The IWY Commission also opposed "any proposed constitutional amendment denying or limiting the option of legal abortion services" and, "with the exception of three members," endorsed *Roe v. Wade*.[140] Public opinion surveys continued to report that Americans were evenly divided on an amendment banning abortions except to save the life of the mother.[141] Support for the ERA fell to 57 percent.[142]

That summer at the Republican National Convention, Schlafly nearly persuaded the GOP to drop the ERA from its platform. Only an intervention by Ford, at the behest of GOP feminists, thwarted the effort. But Schlafly

did succeed in convincing Republicans to add to their platform a right-to-life statement drafted by Jesse Helms. ("We affirm our support of a constitutional amendment to restore protection of the right to life for unborn children.") In a remarkable shift within the party, Reagan, who as governor of California in 1967 had signed a liberal abortion law, courted the support of Catholics and the emerging Christian right by taking a strong stand against abortion. Given the strength of Reagan's support, Republican feminists could not stop the right-to-life plank, and Ford, keen to defeat Reagan for the nomination, refused to stand in its way.[143]

At the Democratic National Convention, held in Madison Square Garden, Jimmy Carter, a born-again Christian from Georgia, promised to secure the ratification of the ERA, and while he opposed abortion, he pledged that he would not support a right-to-life amendment. ("Carter promised to do for women what President Johnson did for Blacks," Abzug said.)[144] The Democrats' abortion plank was hardly a celebration of reproductive rights, venturing only that "it is undesirable to attempt to amend the U.S. Constitution to overturn Supreme Court decisions in this area." But forty-year-old Texas congresswoman Barbara Jordan, in a mint-green suit, electrified the convention when she delivered a showstopping address; she was both the first woman and the first Black American to deliver a keynote speech. "We are a people in search of a national community," she said with a sternness that resounded across the hall. "We are attempting to fulfill our national purpose, to create and sustain a society in which all of us are equal." [145]

Carter did not inspire such awe, but he narrowly defeated Ford. And if his support for *Roe* was limited, he avidly supported the Equal Rights Amendment. Both he and his wife Rosalynn campaigned for the ERA. A phone call from the first lady, at the request of Birch Bayh, is said to have given the ERA the last vote it needed to secure ratification in Indiana in January 1977.[146] Only three more states were now needed, but that spring Arkansas, Oklahoma, Virginia, North Carolina, and Florida all very narrowly voted no. Idaho voted to rescind its earlier ratification. And even the Carters' home state of Georgia failed to ratify.

On abortion, too, feminists were losing ground. "It is my view that the issue will gradually die down," Mink wrote in 1974.[147] But it did not. In 1976 Abzug and Mink—having for two years defeated amendments to

appropriations bills that would have barred the use of federal funds for abortion except to save the life of the mother, at a time when Medicaid was funding more than three hundred thousand abortions annually—lost that fight. Illinois congressman Henry Hyde had reintroduced the measure, which passed the House 207–167. “This amendment is inappropriate, unconstitutional, discriminatory, and cruel,” said Mink in a House floor speech.[148] And though women in the House tried to convince the Senate to defeat it, the Hyde Amendment passed.[149] Passage of the Hyde Amendment gave the right-to-life movement hope of further gains, as if it were “a harbinger of the Human Life Amendment.” [150] Congress renewed the Hyde Amendment in 1977, and in June of that year, the Supreme Court had upheld its constitutionality in a 6–3 opinion in *Maher v. Roe*, after Robert Bork, as solicitor general, prepared a memo arguing that the “fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment.” [151] That September Patsy Mink addressed the twelve hundred delegates to a conference of the National Women’s Political Caucus, meeting in San Jose. “The tragedy of denial of funds for abortions under Medicaid is that we are denying women basic constitutional rights,” Mink said.[152] But in Congress, feminists didn’t have the votes to defeat it. Nor did they have the votes on the Court. Meanwhile, Robert Bork’s view of constitutional interpretation had found a new convert.

Government by Judiciary

In October 1977, a Harvard Law scholar named Raoul Berger published a blockbuster called *Government by Judiciary: The Transformation of the Fourteenth Amendment*. “No book on the Constitution, with the possible exception of Charles A. Beard’s *Economic Interpretation of the Constitution* (1913), has elicited such a storm of controversy,” remarked one well-positioned observer.[153] To great acclaim and with uncanny timeliness, Berger had during the Watergate crisis published books on *Impeachment* (1973) and *Executive Privilege* (1974). His work had contributed to the downfall of Richard Nixon (although, as one reviewer wrote at the time, his constitutional theory appeared “far more compatible with the constitutional

approach of those who would have impeached Earl Warren than with that of those who would impeach Richard Nixon").[154] He made memorable appearances testifying in Congress. In a hearing about Nixon and executive privilege in 1973, he told the Senate: "You don't need more hearings, you need gumption. You'll be treated like office boys until you stand up and kick them in the slats." [155] Originally a professional violinist, he had become a professional pugilist. He'd also become an academic star and media darling, profiled in the *New York Times*, *Newsweek*, and *The Atlantic*.[156]

Berger was born in Russia, grew up poor in Chicago, and pursued a career as a professional violinist for decades before he went to law school in his mid-thirties. Chicago law firms refused to hire Jews, but he won a fellowship to study at Harvard Law and then, in 1938, went to Washington to work first at the Securities and Exchange Commission and then at the Justice Department. He did not begin teaching law until he was sixty-one. Garry Wills described him as a man who "has felt an outsider all his life, an intense striver with a set of grievances." [157] A New Deal liberal who had worked in both the FDR and Truman administrations, Berger regarded segregation "as a blot on our society." He nevertheless believed that *Brown v. Board of Education* had been wrongly decided.[158] In doing so, he offered a full-throated indictment of the judicial activism of the Warren Court and specifically castigated Warren for his failure to defer to the original intention of the framers of the Fourteenth Amendment. The evidence, so far from being "inconclusive," seemed to Berger perfectly clear: the framers did not mean for the Fourteenth Amendment to end segregation, in schools or anywhere else.[159] "To 'interpret' the Amendment in diametrical opposition to that intention is to rewrite the Constitution," Berger concluded, accusing Warren of an act of amendment.[160] The Court had thus assumed "a power not granted in order to correct an evil that the people were, and remain, unready to cure." Such a usurpation was the very sort of thing that paved the way "from Weimar to Hitler." [161]

Berger had encountered some friction in his attempt to get the book published with his longtime publisher, Harvard University Press. He'd received a detailed and perceptive and quite critical reader's report that charged him with breaking no new real ground and failing to fully support his claims. "Berger takes criticism, both from the Left and from the Right,

not only with equanimity but with a gamecock's happy pugnacity," Wills had remarked.[162] He did more than take criticism. He welcomed it, stirred it up, egged it on. In a truly ferocious eight-page reply to his anonymous reader in which Berger threatened to withdraw the book from the press, he laid out his argument against the two then-leading interpretations of the Fourteenth Amendment: Jacobus tenBroek's argument that the amendment had antislavery origins and therefore broader applications (Berger called this theory "wishful thinking") and Alexander Bickel's theory that although the Thirty-Ninth Congress did not intend to end segregation, it left the amendment open-ended, to allow for its possibility. (Berger charged Bickel with endorsing the view that "words are to mean one thing when passed and precisely the opposite a century later.")[163] Once Berger learned the identity of the reviewer—the very distinguished legal historian James Willard Hurst—he wrote him a much softer and more obliging reply. In an illuminating postscript, he revealed his broader aim in writing the book, in the form of a warning: "The present generation will cheerfully concede the history and say we can't be bound by the dead hand of the past. They are for elitist rule, the 'highly educated' plus a fortuitous Warren. That is in the process of changing under the Burger impact." [164]

A few days before the book's publication date, Berger appeared in a riveting episode of William F. Buckley's *Firing Line*.[165] Sitting in red vinyl swivel chairs, their black laced shoes toe to toe, the two men wore matching gray suits and pale blue shirts. Buckley, leaning back in his chair, a clipboard in his lap, was, at fifty-one, at the height of his powers and irrepressibly delighted. Introducing his guest, Buckley observed that many opponents of the Court's interpretation of the Fourteenth Amendment had been unsavory segregationists and "assorted anti–civil libertarians"—one thinks of Dan Smoot and Alfred Avins—but "quietly, however, the scholarly juices have been running," and here was a Harvard professor, the seventy-six-year-old Berger, become apostate. The white-haired Berger came in his boxing ring best, keen to emphasize the attacks he anticipated. "I expect to be torn limb from limb," he said. Repeating the heated reply he'd made to Hurst's reader's report, he said that his historical research was both groundbreaking and irrefutable but predicted that "the academic community is going to find it very hard to face up to the facts here." As for the Dan Smoots and White Citizens' Councils of the world, Berger took no

pleasure in their company. “I have been a lifelong liberal,” he said. “I find myself in bed with people I detest.”

Buckley used the occasion of inquiring into the nature of Berger’s dispute with other scholars to explain what would soon be called originalism. “You make a great deal in your book over the whole question of original intention,” he said. “You point out that we ask this question of wills and contracts. And then you apply that method to the Fourteenth Amendment.” This was Buckley’s great talent, the art of explanation. If words in a will or a contract are ambiguous, what do you do? You try to discover the author’s intent. Why should this method not also apply to a constitution?

Buckley next drew from Berger his larger claim, about the danger of government by the judicial rather than the legislative branch. “Is your objection to the distortion by the Supreme Court of the Fourteenth Amendment a formalistic objection, in the sense that you as a scholar know perfectly well that it was not intended that they should exercise these rights,” he began, “or is it also, as a philosopher, in believing that your liberties are strategically better protected by the legislature than by the judiciary?”

Berger gently objected to the question. “I don’t think there’s anything formal at all about insisting that the democratic system depends on representative assemblies, assemblies that the people can elect and cast out, presidents that they can elect and can cast out.”

“Are you saying we are better off giving such power to Congress because there is reason to believe that representative democracy will better serve its people if there is a closer tie between ruled and ruler?”

Berger conceded that point as an obvious truth, but allowing that Jim Crow was wrong and insisting that the Supreme Court had no right to end it while its victims had every reason to want to end it, he urged not legislation but amendment. “George Washington said, if our constitutional system requires change, let it be by amendment. He said no matter how beneficial change is, change by usurpation is the method by which every democratic system has been destroyed.” [166]

Not long after *Government by Judiciary* came out, Berger said constitutional law professors all over the country had deemed him a “moral leper.” [167] The published reviews suggest no such development. Instead, Berger’s thesis was quite effectively dismantled and demolished in shrewd

reviews by distinguished lawyers, legal scholars, and political scientists in *Commentary* (calling attention to the "inherent contradiction between Berger's notion that the immutable Constitution is all that protects our liberties and his view that the slightest change in constitutional interpretation calls for an amendment");[168] *The New Republic* (arguing that Berger has disingenuously supposed the framers "to have had meaningful intentions about a social, ideological [and even physical] reality they could not have begun to have imagined");[169] the *New York Times* ("Berger's argument fails on its own terms: for neither the text nor the history of the Amendment supports his view");[170] *Political Science Quarterly* ("to equate a constitution with a will, or a contract, or a statute, strikes me as a very odd thing to do");[171] and the *American Political Science Review* ("For each generation to apply the great principles embodied in the Constitution to new and varied objects and situations is not, as Berger believes, to make shambles of constitutional law. Rather, it is to act in the only way appropriate—to use the principles and goals of our fundamental law as directive and binding guides to our ever-changing condition as a nation").[172]

He was uniformly denounced if not ridiculed by historians for his fairly shocking naïveté or downright ignorance of the methods, sources, and rules of evidence in historical research, including in the *American Historical Review* ("Berger misinterprets and misuses historical evidence");[173] in *Reviews in American History* (castigating both his lack of nuance as a reader of history and the narrowness of his research, "grounded exclusively in the published debates of the 39th Congress, the words of which he accepts throughout in absolutely literal fashion");[174] and in the *Journal of American History* ("Berger seems incapable of distinguishing between the artificial lawyer's convention called 'legislative intent' and the multiplicity of social forces and individual motivations that actually produce congressional action, or of understanding that while the former is properly sought only in the official record, the latter are unlikely ever to be fully revealed there").[175]

Raoul Berger was not torn limb from limb. "Mr. Berger never ducked an intellectual battle," the *New York Times* would write in his obituary. He spent years responding to his critics, in rebuttals published in the form of forty law review articles as well as a book.[176] That didn't make him right.

But it did exhaust his opponents. And by the end of the 1970s, for all that Raoul Berger insisted that the only way to change the Constitution was to use Article V, nothing in his work improved the prospects of amending the Constitution.

Federal Financing of a Foolish Festival for Frustrated Feminists

Beginning in February 1977, some 130,000 American women participated in meetings held in all fifty-six states and territories to elect delegates to the National Women's Convention. Like the Black National Convention of 1972, the project harked back to the alternative constitutional conventions of the nineteenth century. But no convention had ever taken place on so grand a scale. As a percentage of the U.S. population, participation in the 1977 state women's conventions was roughly equal to participation in the all-male conventions held in the 1780s to ratify the Constitution. Women from all walks of life met in hotels and civic centers, and in the halls of college campuses, in meetings that were both federally funded and open to the public. Much of the funding was used to cover the travel and lodging costs of women who couldn't afford to pay their own way. Everyone was given a copy of the Ruckelshaus Committee's report, *To Form a More Perfect Union: Justice for American Women*; there were audiotapes for the blind. A Spanish edition was made available, including to six hundred women who met in Puerto Rico. New Jersey sent out notices folded into telephone bills; North Dakota spread the word in beauty parlors; Georgia handed out information at basketball games.[177]

From the start, conservatives warned that the project was attempting to counterfeit a national consensus in favor of the ERA, abortion, and lesbian and gay rights. James Kilpatrick called it "Bella's Boondoggle," a "national whoop-te-doo" whose whole purpose was to use federal tax dollars to fund, if not abortion, then the ERA. Schlafly denounced it as "Federal Financing of a Foolish Festival for Frustrated Feminists." [178]

Each meeting was another deliberation where—unlike in state legislatures, which were almost entirely composed of men—women voted on the key constitutional issues of the day. A thousand women showed up for Vermont's meeting, in the middle of a snowstorm. Nearly eight hundred

women—out of a state population of ten thousand—showed up in Alaska. Eleven thousand women turned up for New York's meeting in Albany and waited in line for up to eight hours to cast ballots.[179] At Rhode Island's conference, held on the campus of Brown University, where elections were overseen by the League of Women Voters, the ERA was approved by a vote of 439–337 and a right-to-life amendment was rejected, 359–385. A resolution in support of lesbian and gay rights passed as well. At California's raucous 6,500-person meeting, held on the campus of the University of Southern California, gay men turned up to support gay women, and that meeting, too, supported the lesbian and gay rights resolution. "There were about 2,000 lesbians in attendance wearing all kinds of lesbian T-shirts," Schlafly wrote, reporting that gangs of lesbians whose shirts asked "How dare you presume I am heterosexual?" had stalked conservative women and even "threatened them with violence." [180]

Public opinion polls counted one in five American women as followers of Schlafly's agenda.[181] Schlafly and other conservative women organized in advance of the meetings—forming and training IWY citizens' review committees—hoping to ensure that conservative voices would be represented. Conservatives managed to defeat a handful of motions in state conferences, and they even prevailed in a few delegate elections. The Ohio conference voted in favor of ERA, but a coalition of right-to-lifers and Stop ERAers elected a delegation in which four out of five members were conservative.[182] In most state meetings conservative women were vastly outnumbered, but in some states, they showed up in force, and in nine of the fifty-six state and territorial meetings, they prevailed. In Birch Bayh's Indiana, conservatives won thirty-one out of thirty-two delegate seats. Patsy Takemoto Mink's home state of Hawaii, the first to ratify the ERA, elected a majority-conservative delegation that was also 63 percent Mormon, in a state in which Mormons comprised only 3.2 percent of the population. A Honolulu newspaper reported that the Mormon Church had sent busloads of Mormon women to the meeting.[183] Nor did the meetings escape violence. In Montgomery, Alabama, a supporter of Schlafly walked up to a Black college student who was arguing for abortion rights and slapped her in the face, shouting, "God is going to punish you." [184] In the end, about 15 percent of the nearly fifteen hundred elected delegates opposed the ERA.[185]

At state conference after state conference, women endorsed the resolutions put forward by the national leadership, which included support both for the ERA and for abortion rights, tying the two even more closely together. This arguably achieved exactly the opposite of what Mink and Abzug had aimed for: it diminished what remained of the support among pro-life women for the ERA and strengthened the coalition between the right-to-life movement and Stop ERA. In 1975 the National Right to Life Committee had voted down an anti-ERA proposal; in 1977 that proposal passed.[186]

After the last meeting adjourned, Schlafly dedicated the entirety of *The Phyllis Schlafly Report* to an account of the process. Calling it "A Front for Radicals and Lesbians," she alleged that everything from the naming of the commission, which included "admitted-lesbian Jean O'Leary" (a former nun who had founded a lesbian rights organization in New York in 1972 and led a coalition of lesbian and gay activists to a three-hour meeting at the White House), to the elections in the states, coordinated by a staff that was " 100 percent pro-ERA," had been rigged.[187]

Having persuaded the right-to-life movement to oppose the ERA, Schlafly's next piece of business would be to ensure that the GOP fell in line with her anti-ERA, antiabortion agenda. But first she went to Houston.

Two, four, six, eight, ratify in every state

On the stage, behind Rosalynn Carter, Betty Ford, and Lady Bird Johnson, a green banner reading WOMAN had been draped across a blue curtain as the National Women's Conference opened on Saturday morning, November 18, 1977. On the floor, women waved signs naming their delegations and wore emblems to designate them: New Yorkers carried apples; Californians wore golden bandannas; Puerto Ricans wore *jibaro* hats. Runners in tube socks and sneakers arrived bearing a torch that had been carried, runner by runner, all the way from Seneca Falls, for twenty-six-hundred miles and across fourteen states, while by the side of the road, women and girls gathered to chant, "Two, four, six, eight, ratify in every state." [188] The head of the Girl Scouts called the meeting to order with a gavel once used by Susan B. Anthony. Presiding officer Bella Abzug, in a floppy brown felt hat, gave the opening address, her half-moon glasses sliding down her nose as she called

on the delegates to make American democracy “what it should have been two hundred years ago.” [189]

Barbara Jordan delivered the keynote and did not disappoint. “Women are human,” she said, hunched over the podium, and humans need human rights. “The cause of equal and human rights will reap what is sown November 18th through November 21st, 1977,” she said, charging her audience with a solemn duty. “What will you reap? What will you sow?” [190]

The organizers had presented a plan of action of twenty-six planks, each to be introduced by a handpicked delegate. Before the voting, they met in caucuses, including minority caucuses—an African American Caucus, a Hispanic Caucus, an Alaska Native Caucus, an Asian and Pacific American Caucus, and more—but delegates objected to being ghettoized, and their objections to the plan of action’s lack of attention to their interests proved the most powerful and lasting critique. They formed a coalition minority caucus whose leader, Maxine Waters, introduced an amended plank that passed by voice vote.[191] A Republican mother of eight introduced the reproductive freedom plank; Sarah Weddington spoke on abortion. Conservative women got little speaking time, but during that debate, the National Right to Life Committee’s Ann O’Donnell, a delegate from Missouri, argued against the plank, which she considered a betrayal of feminism. “If we do not drive this flaw from what is called the feminist movement, this flaw would be responsible for the death of the women’s movement.” [192] Over the protests of pro-life women, who held up giant posters of fetuses, the reproductive freedom plank passed 5–1. On Saturday evening, in time for prime-time television, Ann Richards, a rising star in Democratic Texas politics, introduced the most important plank of the conference: “The Equal Rights Amendment should be ratified.” When the resolution passed, the crowd went wild, chanting “Ratify the ERA!” and, to the tune of “The Yellow Rose of Texas,” singing “The ERA Was Passed Today.” [193] The next day, to the surprise of many, the irascible grand dame of second wave feminism, Betty Friedan, endorsed the lesbian and gay rights plank, and it too passed. Of the twenty-six original resolutions, only one calling for a cabinet-level Department of Women failed.[194]

Conservative women had been doubtful about holding their own conference, a kind of anti-conference. Schlafly had initially opposed the idea, favoring disrupting the main conference instead. But Lottie Beth

Hobbs, from Texas, and head of Women Who Want to Be Women, expected to be able to bring a big enough crowd to Houston to make a strong showing. Over at the Pro-Life, Pro-Family Rally, buses arrived from all over the country; many women brought their children. Unlike the National Women's Conference, which was remarkable for its racial and ethnic diversity, the Pro-Life, Pro-Family Rally was overwhelmingly white.[195] It also had the character of a religious revival. Looking back, it marked not a triumph of feminism but the rise of the New Right.

For all the jubilation of the thousands of women who gathered in Houston in November 1977 for the largest constitutional convention in American history, that gathering represented the high point of the campaign for the Equal Rights Amendment. Indiana's ratification proved to be the last. Nor did any other amendment make headway. Birch Bayh's Subcommittee on Constitutional Amendments died. James Eastland, in one of his last acts as chair of the Senate Judiciary Committee before resigning in 1978, dissolved it. Partly this was a result of efforts to modernize the Senate, and partly it was a result of the Legislative Reorganization Act of 1977. Also, the chair of the Subcommittee on Constitutional Rights hadn't been reelected, so Eastland decided to merge it with Bayh's old subcommittee, dubbing the new one the Subcommittee on the Constitution.[196] Of constitutional amendments still under consideration in Congress, abolishing the Electoral College had by far the broadest popular support, polling with 73 percent approval[197] (compared to the ERA, with 57 percent approval[198]; an antibusing amendment, 51 percent; and an antiabortion amendment, 33 percent).[199] Bayh finally got his Electoral College amendment out of committee again in the summer of 1979, but on the Senate floor it was defeated 51–48. Southerners and Reagan conservatives voted against it, but so did liberals, responding to pressure from civil rights organizations.[200]

Patsy Takemoto Mink, who left the House to seek a seat in the U.S. Senate, was defeated. In 1979 Carter fired Bella Abzug. In 1980 she managed to get planks supporting both gay rights and federal funding for abortion onto the Democratic Party's agenda.[201] At the GOP convention, Schlafly controlled the agenda, and Reagan and his vice-presidential choice, George H. W. Bush, both of whom had earlier supported both abortion and

the ERA, opposed them. Jesse Helms drafted a GOP platform that drove feminists from the party.[202]

But in November, Reagan defeated Carter in a landslide for which the pro-life movement fairly took credit. Republicans, who had not held a majority in either the House or the Senate since 1954, took back the Senate and gained seats in the House where, as Patsy Takemoto Mink wrote in a note, " 51% of the House are regarded as conservative." [203]

Feminists fought for the ERA till the bitter end. For years, it had needed only three more states. In May 1982 seven women in Illinois went on a hunger strike to try to convince the legislature to pass it, and in June seventeen people chained themselves to the Illinois Senate chamber. Opponents of the ERA protested the protesters by eating candy bars in front of them. Police arrived to remove the fasters with bolt cutters. On June 22, when the Illinois legislature voted, the ERA failed to achieve the required supermajority by only four votes, even though polls showed that 62 percent of Illinois voters supported it. With delight, Schlafly announced that the ERA had gone the way of the Child Labor Amendment.[204] In 1982, having failed ratification by the required number of states by the ten-year deadline, the ERA was declared dead.[205] Efforts to get it out of Congress all over again came to a vote in the House the next year, but it was defeated 278–147 (six votes short of two-thirds).[206]

By then, the pro-life movement had given up on a constitutional amendment. No one could get a constitutional amendment passed in this particular America. Opponents of abortion began to look, instead, to the courts. For this campaign, they did not look to the constitutional theorizing of Robert Bork or Raoul Berger. They looked to a whip-smart Catholic judge from Queens.

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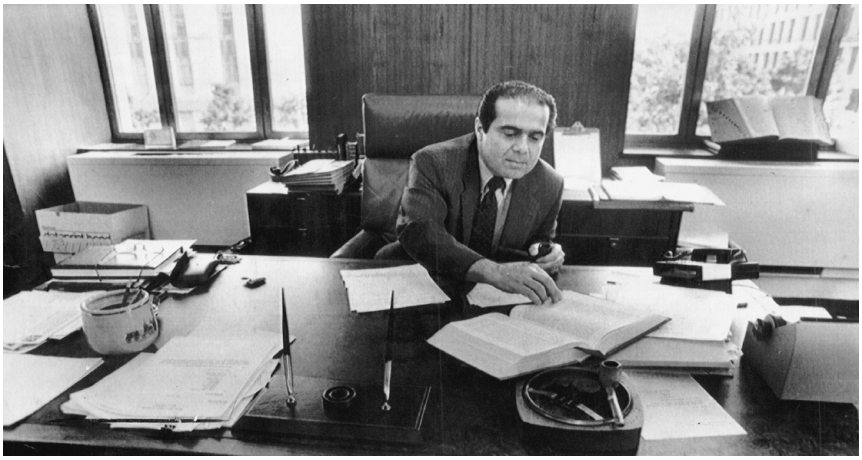
13

The Constitution Is Dead!



Antonin Scalia in his office, c. 1986

> *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms* when serving in the Militia *shall not be infringed.*
>
> —Amendment to the Second Amendment, proposed by retired Supreme Court justice John Paul Stevens, 2018

Bushy-browed, pipe-smoking, piano-playing Antonin Gregory Scalia, Nino, the scourge of the left, knew how to work a crowd. He loved opera; he loved theater; he loved show tunes. In high school, he played the lead role in *Macbeth*: "I have no spur to prick the sides of my intent but only vaulting ambition" (Act I, Scene 7). As clever as he was combative, Scalia, short and stocky, was known, too, for his slightly terrifying energy and for his eviscerating sense of humor. He studied Greek for five years, Latin for six. He loved nothing better than a dictionary. He fished and hunted: turkeys and ducks, deer and boar, alligators. He played tennis. He argued to win. He seemed to read more, to write more, and even to *say*

more than anyone else on the federal bench. He was one of the Supreme Court's sharpest writers ever, and he was among its severest critics.[1] "It's hard to get it right," he'd tell his clerks, sending back their drafts; they had that engraved on a plaque.[2] Few justices have done more to transform American jurisprudence, not only from the bench but also from the seminar table, the lecture hall, and the eerie velveteen intimacy of the television stage. He gave one speech so often that he kept its outline, scribbled on a scrap of paper, tucked in his suit pocket. The Constitution is not a living document, he'd say. "It's dead. Dead, dead, dead!" [3]

Antonin Scalia was one of only a handful of professors nominated to the Supreme Court since Felix Frankfurter. He'd been a judge for only four years; most of his published writing consisted of law review articles and speeches, not opinions from the bench. He grew up in Queens, the only child of an Italian immigrant who'd become a professor of Romance languages. He inherited his first gun from his grandfather, who grew up hunting in Sicily and used to take little Nino to Long Island to shoot rabbits. As a kid, he played street hockey on roller skates. A devout Catholic, he attended a Jesuit military school, where he was on the rifle team; he used to ride the subway from Queens to Manhattan carrying his .22 carbine target rifle. "When I was growing up in New York, people weren't afraid of people with guns," he'd say.[4] He went to Georgetown and then to Harvard Law School. In the 1960s he was a Goldwater conservative. He served in the Nixon and Ford administrations and taught on the law faculty of the University of Virginia and the University of Chicago before Reagan appointed him to the DC Court of Appeals in 1982.[5]

On the first day of his confirmation hearing, he was welcomed by the eighty-three-year-old committee chair, Strom Thurmond, a one-man timeline of the political and constitutional history of the twentieth century. Thurmond had been a Democratic governor of South Carolina, the Dixiecrat Party's 1948 presidential candidate, a drafter of the Southern Manifesto, and after 1964, when he endorsed Barry Goldwater, a Republican. No one in the U.S. Senate had more fiercely fought for segregation and against civil rights or more expansively used Judiciary Committee meetings to advance a doctrine of original intent. That the elderly Thurmond had become a standard-bearer for a Republican Party headed by Ronald Reagan suggested just how far the GOP had shifted to

the right. And nothing better illustrated the journey that the doctrine of original intent had taken from the 1950s to the ’80s than the contrast between Thurmond’s interrogation of Thurgood Marshall in 1967 and his welcoming of Antonin Scalia in 1986.

“You have got a lot of children there,” said the South Carolina senator affably. “I believe you have eight of them here?” [6]

Scalia, fifty, was a father of nine. “All nine are here,” he told Thurmond, beaming. “I think we have the full committee.” [7]

Thurmond counted himself as having four children, but in fact he had five. Only after his death at nearly 101 in 2003 would a seventy-eight-year-old Black retired schoolteacher, Essie Mae Washington-Williams, reveal that Strom Thurmond was her father. He’d gotten her mother pregnant in 1925, when she was fifteen and working for his family as a maid.[8]

Thurmond had very few questions for Scalia. He did ask him about the difference between serving on a circuit court and on the Supreme Court.

“There’s no one to correct your mistakes when you’re up there,” Scalia answered, “except the constitutional amendment process.” [9]

That process was by then no more than a chimera.[10] Members of Congress had proposed more than twenty-one hundred constitutional amendments between 1980 and 2020. Congress, more polarized with each passing year, approved none. In roughly that same stretch of time, state legislatures introduced almost five thousand amendments and passed nearly four thousand.[11] Even the states, though, were getting sheepish: Rhode Island’s constitutional convention, in January 1986, would be the last full-dress constitutional convention held in any American state.

The more difficult it became to amend the Constitution, the more politicized were nominations to the Supreme Court. Scalia’s, though, was a breeze, partly because liberals had decided to focus their efforts at questioning the elevation of William Rehnquist to the chief justiceship. Also: Scalia was witty. He was charming. He had been exceptionally well briefed. Aides had peppered him with questions in practice sessions and provided him with memos with titles like “Likely Areas of Interest Arising Out of Your Writings,” warning him, about *Roe v. Wade*, “You have probably said a little more on this topic than you think.” [12] (In 1978 Scalia had said that in his view the Supreme Court, in cases like *Roe*, had “found rights where society never believed they existed.”)[13] In a typed, numbered

list in Scalia's briefing packet titled "Talking Points," number one was abortion. Scrawled below in black ink were two tips: " 1. Professional, not adversarial" and " 2. Don't get sucked in." [14]

Thurmond, after a friendly chat with the nominee, yielded the floor to Edward Kennedy, who, without so much as a hello, jumped in:

> KENNEDY. Judge Scalia, if you were confirmed, do you expect to overrule *Roe v. Wade*?
>
> SCALIA. Excuse me?[15]

Scalia had also been advised by the White House that senators had been frustrated by the answers provided by Sandra Day O'Connor during her nomination hearings. When asked about *Roe v. Wade*, she gave answers that some senators "found to be nonresponsive." [16]

Scalia would have to tread carefully. *Roe* was the new *Brown*. Up until O'Connor's appointment in 1981, the pro-life movement had remained unwavering in its dedication to overturning *Roe* with a constitutional amendment. It had placed many on the table, starting in 1972. Jesse Helms introduced a Human Life Bill into the Senate in 1981; it would have declared life to begin at conception.[17] Still, the pro-life movement had pursued other avenues to end or limit the practice of abortion, including by restricting the use of federal funding and making abortion more difficult to obtain in the states by imposing waiting periods, consent requirements, and all manner of obstacles. There was one other way to overturn *Roe*. In 1980 the GOP had vowed in its party platform to appoint "judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life." [18]

Reagan, in his two terms in office, would appoint more than four hundred federal judges, amounting to half the federal judiciary, more than any other president in history; all were screened for their views on abortion.[19] (Reagan's administration had other influences on the judiciary as well: later Supreme Court justices Roberts, Thomas, and Alito all worked in the administration.) Screening judges for their views was, at the time, both novel and controversial. Members of Reagan's Justice Department defended the practice by insisting that they were screening, instead, for originalism, which they then described as the only legitimate method of

judicial interpretation. As an assistant attorney general put it in a memo to the attorney general, “The idea of ‘original intent’ must not be marketed as simply another theory of jurisprudence; rather it is an essential part of the constitutional framework of checks and balances,” emphasizing that “contrary to allegations, we are not choosing judges who will impose a ‘right-wing social agenda’ upon the Nation, but rather those who recognize that they, too, are bound by the Constitution.” [20]

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This week, the United States Senate will vote on two bills which could deprive you of your most fundamental personal rights: the right to have the number of children you want. When you want them. Or to have none at all.

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All seemed to be going as planned. In 1981 Reagan nominated Robert Bork to the DC Court of Appeals. “*Roe v. Wade* is an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority,” Bork had written in a statement.[21] To opponents of abortion, O’Connor’s hearings were far less reassuring. O’Connor, at fifty-one, said she was personally opposed to abortion but then added, “I am not going to be pregnant anymore, so it is perhaps easy for me.” [22] This response had alarmed pro-lifers and greatly contributed to the movement’s decision to abandon constitutional amendment in favor of influencing the

nomination process.[23] “The intensity of right-to-lifers on the issue of judicial power should not be underestimated,” a Reagan adviser reported.[24]

Ronald Reagan, Phyllis Schlafly, and Republican strategists hoped to make the GOP the party of the pro-life movement as a way to expand the party’s base, bringing in Catholics and white evangelicals. Part of the process of party realignment that had begun under Nixon in 1968, it happened very slowly. Not until 1979 were Republican members of Congress more likely to vote against abortion than Democrats. That year Jerry Falwell founded the Moral Majority, and a new evangelical Christian right joined the moral crusade against abortion. Only after Republicans in Congress began aligning with the pro-life movement did the rest of the party follow, but again only gradually: Republicans were more pro-choice than Democrats until at least 1990.[25] Only during Reagan’s presidency did this effort begin to involve attacking the legitimacy of the Court’s decision in *Roe*. During the confirmation hearings for John Paul Stevens in 1975—the first justice named to the Court since *Roe*, and by a Republican president, replacing the most liberal justice, William O. Douglas—no one asked him even a single question about *Roe*.[26] That would change under Reagan.

Reagan’s courting of the New Right proved crucial to his landslide reelection in 1984, after which he appointed Edwin Meese as his attorney general. Meese’s Justice Department would soon fill up with young lawyers who were members of a new organization known as the Federalist Society, formed in 1982 by law students at Yale, studying with Professor Bork, and at the University of Chicago, studying with Professor Scalia.[27] Keen to avoid the word *conservative*, they chose instead to emphasize the original intent of the framers and, in naming the organization, honored both the original Federalists and a Reagan doctrine known as New Federalism, which sought to transfer power from the federal government to the states. (They also adopted a decidedly nonoriginal silhouette of James Madison as their logo; Bork’s son found the nose on the actual Madison “too ugly.”)[28] Their first meeting, at Yale in April 1982, featured twenty invitees, all white male academics and judges, including Bork and Scalia. Some Yale law students perceived the meeting to be hostile to both reproductive rights and civil rights. Two years earlier an underground feminist organization, sneaking into the law school at night, had hung paper plates, on which were

drawn women's faces, over the faces of the portraits of Yale faculty, all aging white men.[29] The Federalist Society was a reaction. In 1982 a poster objecting to the Federalist Society symposium warned, "New Federalism means Old Bigotry. —> Support Civil Rights." Mary Dudziak, a second-year law student, picketed. She carried a handwritten sign with the feminist slogan, "If men could get pregnant, Abortion would be a sacrament." [30]

Soon after Meese took office in 1985, he announced that the official policy of the Reagan Justice Department would be to pursue a "Jurisprudence of Original Intention" as the only legitimate and properly democratic method of constitutional interpretation.[31] Meese, who hired the founders of the Federalist Society and trained them up as a "farm team," aimed to sell originalism not only to the legal community but also to the public as a modest and humble deference to the wisdom of the framers, in contrast to the unrestrained imperiousness, the judicial oligarchy, of the Supreme Court.[32]

This strategy raised liberals' hackles, and it raised historians' hackles, too. Justice William Brennan, in a speech delivered at Georgetown, called the doctrine of original intent "arrogance cloaked as humility" and speculated that proposals endorsing the idea "must inevitably come from persons who have no familiarity with the historical record." [33] What really rankled was Meese's claim that original intent was democratic, since it was quite clear that, having failed in their efforts to amend the Constitution, conservatives had changed course, instead using judicial selection to pursue objectives they could not achieve by democratic means. "The aim is now to accomplish in the courts what the Administration failed to persuade Congress to do—namely, adopt its positions on abortion, apportionment, affirmative action, school prayer and the like," wrote the political scientist David O'Brien in the *Los Angeles Times*.[34] Nor did Meese's jurisprudence escape censure as realpolitik. "Mr. Meese's version of original intent is a patent fraud on the public," wrote the historian Arthur M. Schlesinger Jr. in the *Wall Street Journal*. "The attorney general uses original intent not as a neutral principle at all but only as a means of getting certain results for the Reagan administration. He is shamelessly selective." [35] He was also undeniably effective.

Before Reagan moved into the White House, the pro-life movement had not been especially interested in originalism, on the theory that there is no

"right to life" in the Constitution, any more than there's a "right to privacy." But after Reagan pledged to use opposition to *Roe* as a litmus test in appointing federal judges, litigation seemed a far better approach than amendment. In 1984 Americans United for Life held a conference called "Reversing *Roe v. Wade* through the Courts." [36] Two years later NARAL observed in a report on the Scalia and Rehnquist nominations that the pro-life movement, having failed to amend the Constitution, had turned to a legislation-litigation strategy.[37]

How this played had become clear. In 1985, in oral argument in *Thornburgh v. American College of Obstetricians and Gynecologists* (a challenge to the constitutionality of a Pennsylvania law drafted by Americans United for Life), the Meese Justice Department directed acting solicitor general Charles Fried to ask the Court to overturn *Roe* and to base the government's argument on original intent; Fried obliged. (A young Samuel Alito, working in the Office of Legal Counsel and having stated his opposition to abortion in his application for the position, worked on the brief.)[38] "There is no explicit textual warrant in the Constitution for a right to an abortion," Fried's brief read. "It is true, of course, that words, and certainly the words of general constitutional provisions, do not interpret themselves. That being said, the further afield interpretation travels from its point of departure in the text, the greater the danger that constitutional adjudication will be like a picnic to which the framers bring the words and the judges the meaning." And offering a statement of method, he asserted that "constitutional interpretation retains the fullest measure of legitimacy when it is disciplined by fidelity to the framers' intent as revealed by history." [39] Fried's brief, which asked the Supreme Court to take away a constitutional right, elicited a storm of protest, including from five former solicitor generals. Only narrowly did the Court decide against overturning *Roe*. On June 11, 1986, the Court issued its decision in *Thornburgh*, declaring Pennsylvania's law unconstitutional, in a 5–4 decision in which Warren Burger, who had joined the majority in *Roe*, now dissented. Six days later he announced that he was resigning to devote himself to the celebration of the Constitution's bicentennial.[40]

And so it had come to pass that in August 1986 Antonin Scalia sat before the Senate Judiciary Committee and stumbled over Senator Kennedy's question.

"Excuse me?"

Kennedy repeated the question: "Do you expect to overrule *Roe v. Wade*?"

Scalia said it would be improper to answer a question about any case that he might one day have to act on. Thurmond interrupted to bolster that position, "I agree with you." [41]

Kennedy had been stalling for time, waiting for the committee's ranking Democrat, Joseph Biden, the junior senator from Delaware, to arrive from another meeting. First elected to the Senate in 1972, when he was not yet thirty, Biden sought a national stage, but when he got it, he often talked for too long and without making a great deal of sense. "Obviously, I don't know what the hell I'm talking about," he once said in the middle of remarks at the Judiciary Committee. Biden, who had lost his first wife and young daughter to a tragic car accident just before taking office, was a devout Catholic, but he was opposed to a constitutional ban on abortion. In 1983 he had considered making a play for the 1984 Democratic presidential nomination. (He would make his first bid in 1988.) As Scalia's briefing materials warned, Biden had "gradually lived down his early reputation as an *enfant terrible* and positioned himself to be an influential Democrat for decades to come." Biden was affable, goofy even, and Thurmond liked working with him so much that he called him "My Henry Clay." [42]

Biden and Scalia had much in common: gregarious and animated, Catholic, middle-aged men, from industrial Eastern cities, with young families and thinning hair and big dreams and funny jokes, though Scalia's humor was more studied. (He once famously began an opinion with this sentence: "This case, involving legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck's aphorism that 'No man should see how laws or sausages are made.'")[43] Biden gave the judge his wide smile, told him he'd read all the speeches of his that he could find, wished he'd had him as a professor, and said he was pretty darn interested in this "newfound, newly enunciated doctrine of original intent." [44] He began by asking Scalia about a speech he'd given two months before, at a conference hosted by Meese days after the Court's decision in *Thornburgh*.

Scalia had known when he delivered that speech on June 14, 1986, that he was being considered for a position on the Court. Warren Burger had

visited the White House on May 27 to tell Reagan he intended to retire and to give him a list of possible replacements for the chief justiceship, including Scalia and Bork. By June 12, Reagan had decided to nominate Rehnquist for the chief justiceship and leaned toward replacing Rehnquist with Scalia, mainly because he was nearly a decade younger than Bork, though there was some concern about his temper. Scalia was scheduled to meet with the president on June 16.[45]

Scalia, the wise guy, started out his speech with a long setup for a joke about how he'd been trying to figure out something he could say that would be "sufficiently obnoxious" and an angel ("who sounded a bit like Robert Bork") had dared him: "Criticize the doctrine of original intent." Riffing on the flap between Meese and Brennan, Scalia cataloged the weaknesses of the doctrine of original intent, including by pointing out that the early Supreme Court could not possibly have followed it, since Madison's notes were not available until 1840. What people who talked about original intent must mean, then, Scalia argued—essentially offering Meese a way out of the box he'd locked himself in (and for which Brennan had thrown away the key)—was not the original intent of the *framers* but of the *Constitution*: "It is not that 'the Constitution must mean this because Alexander Hamilton thought it meant this, and he wrote it'; but rather that 'the Constitution must mean this because Alexander Hamilton, who for Pete's sake must have understood the thing, thought it meant this.'" The doctrine of original intent, Scalia concluded, just needed a better name; he proposed "the doctrine of original meaning." [46]

Biden, noting Scalia's reputation as a provocateur and a devil's advocate, seemed baffled by the distinction between original intent and original meaning. Scalia, guarding his words, said he'd be happy to explain the distinction but it wouldn't be worth it since "it's not a big difference." [47] Scalia did say that he was averse to the idea of a "living Constitution," but he managed to evade most other queries. As for that June speech, Biden told Scalia wearily, "I just hope you do not mean it." [48]

Scalia did mean it. He spent thirty years on the Supreme Court. He didn't live to see *Roe* overturned, but he would have been gratified by the Court's 2022 opinion, written by Samuel Alito, *Dobbs v. Jackson Women's Health Organization*, in which the majority determined that "the Constitution makes no reference to abortion, and no such right is implicitly

protected by any constitutional provision." [49] Two years later two award-winning journalists would explain the "fall of Roe"—the nod is to the fall of Rome—as the result of a vast right-wing conspiracy, writing about how "secretly, an elite strike force of Christian lawyers and power brokers orchestrated a campaign to end abortion rights and remake American womanhood." [50] There was no secret, elite strike force. There was no conspiracy. There was only electoral politics, social movement organizing, and the inevitable consequence of the abdication of amendment in favor of the Constitution as scripture and the Court as its priests.

Kicking the Amendment Habit

Originalism in the 1970s and '80s, which is sometimes referred to as the "old originalism," was an outsider's game. Like the Progressives who criticized the conservative court of the *Lochner* era, originalists criticized the Supreme Court for judicial overreach; charged the justices with amending the law, including by creating new rights; and insisted not only that Article V amendment is the only legitimate method of constitutional change, because it is the only democratic method, but also that originalism is the only legitimately democratic method of constitutional interpretation because it shackles judges and justices to the writings of delegates and representatives elected to the Constitutional Convention, to ratifying conventions, and to Congress. This position turned out to be untenable once originalists gained power in the Justice Department and on the Supreme Court.

From the start, though, originalism, which aligned with social conservatism, had existed in some tension with actual proposals for constitutional amendment, especially with fiscal conservatives' interest in seeking constitutional change through a constitutional convention called by the states. Constitutional conservatives had now and again called for constitutional conventions since the days of James Montgomery Beck. Among their more notable efforts was a campaign in 1939 to call a convention to repeal the Sixteenth (income tax) Amendment. And for the entirety of the Warren and Burger courts, there had been calls for a convention: in the 1950s to overturn *Brown v. Board*, in the 1960s to repeal

reapportionment, and in the 1970s to secure a balanced budget amendment.[51]

The 1960s push had nearly met with success, but that near-success had led to dire warnings by political opponents and some legal scholars of unforeseeable and unknowable dangers of what people by now had taken to calling a con-con.[52] Because no federal constitutional convention had been held since 1787, no one knew quite what to expect, and efforts in Congress to establish rules for any such convention had met with defeat. The concern was not so much with a so-called "limited" convention, a convention to consider one or more specific amendments, but with the possibility of an "open" or "runaway" convention, which, after all, is what the Convention of 1787 had been: delegates to that convention, charged only with the task of amending the Articles of Confederation, had scrapped them entirely. Might not the same thing happen again? In 1963 Charles Black, a distinguished constitutional scholar who had written crucial briefs in *Brown v. Board*, wrote an influential article in which he warned that, given the states' rights backlash against *Brown*, amendments put forward at a constitutional convention "would return us to a Confederacy." [53] Nevertheless, by 1967, in an effort led by Everett Dirksen, Congress had received thirty-two out of the needed thirty-four state petitions calling for convention to amend the Constitution to allow states to apportion representation in one chamber on a basis other than population.[54] The campaign stalled when members of Congress questioned whether all the petitions had been properly drafted or remained in force and could be counted, and when Dirksen died in 1969, the apportionment convention movement died with him.[55]

The idea for a balanced budget amendment had been floated in 1950s by the Campaign for the 48 States but only really took hold during the economic malaise of the 1970s as a response to rising federal debt and unchecked federal spending and earned broader support during the Great Tax Revolt of 1975. Interest accelerated in 1978 when California voters ratified a constitutional amendment known as Proposition 13, limiting the state's property tax. Patsy Takemoto Mink reported in an Americans for Democratic Action newsletter that the political climate "is stirred by a backlash against government programs, government spending, and government regulation" and that liberals, having expended their energies on

single issues, from “abortion rights, gay rights, gun control” to Proposition 13 and the ERA, “have little time left over in which to organize against the attack.[56]

By 1979, twenty-eight states had called for a convention to adopt a balanced budget amendment.[57] In *The New Yorker*, the celebrated but ailing Washington correspondent Richard Rovere predicted that Congress would pass the balanced budget amendment, which would then become the Twenty-Eighth Amendment, “except in the improbable event that an anti-abortion or an equal-rights amendment is adopted earlier.” Rovere, who died later that year, believed that the convention call was a bluff, as presumably it had been in 1911 and 1912, when the states managed to convince the Senate to pass the Seventeenth Amendment, and that Congress would pass the stand-alone amendment in order to avoid the terrifying prospect of a convention. “It is at least theoretically possible that another convention could reinstate segregation, and even slavery,” Rovere wrote darkly. Sounding the alarm that had been sounded in 1963 by Charles Black, Rovere warned that a convention might “throw out much or all of the Bill of Rights (free speech, free press, separation of church and state, the prohibition against unreasonable searches and seizures); eliminate the Fourteenth Amendment’s due-process clause and reverse any Supreme Court decision the members didn’t like, including one-man-one-vote rule; and perhaps, for good measure, eliminate the Supreme Court itself.” Rovere thought a convention could lead “possibly even to civil war.” [58]

Any amendments proposed in a convention would still have to be ratified by three-quarters of the states (a brake on change not mentioned by Rovere), which makes the degree of this panic difficult to understand, except insofar as liberals in these decades were far more committed to constitutional change through the courts than through amendment, with the notable exception of the ERA. Still, it was not unreasonable to fear that, as had been done in Philadelphia in 1787, a convention could also change the rules for ratification.[59]

Soon after Rovere’s piece appeared in *The New Yorker*, Gallup conducted a nationwide poll asking Americans whether, in the event of a con-con, they would favor or oppose six amendments “that might be proposed at such a convention”:

Gallup Survey on a Proposed Constitutional Convention, 1979

	Favor	Oppose
An amendment to limit government spending	84%	11%
An amendment to assure equal rights for women	72%	23%
An amendment to permit prayers in public schools	75%	20%
An amendment to control the sale of handguns	63%	34%
An amendment to prohibit busing for purposes of school integration	61%	31%
An amendment to make abortions illegal unless the mother's life is at stake	46%	48%[60]

Sixty-five percent of Americans favored such a convention.[61] Liberals, who could still be found in both parties, had good reason to oppose a convention because, if the polls were right, they would have won on ERA (which they expected to win without a convention), but they would have lost on government spending, prayer in schools, and school busing, and they would have rolled the dice on abortion, a subject about which, in any event, liberals did not at that point hold strong or inalterable views.[62] (The control of handgun sales was, in 1979, even less of a strictly partisan issue; that, too, would come later.) For both fiscal and social conservatives, a convention looked more promising.

After the Gallup results were published, the American Enterprise Institute convened a panel discussion on the subject of "A Constitutional Convention: How Well Would It Work?" to which they invited University of Chicago law professor Antonin Scalia. Asked whether the prospect was really all that dangerous, Scalia joked that it was always possible a constitutional convention would eliminate Christmas or "pass a bill of attainder to hang Richard Rovere," but he said he wasn't too worried about it and that he was "willing to accept what seems to me a minimal risk of intemperate action." He agreed that there was no way to know how a convention would behave but asked, "What is the alternative? The alternative is continuing with a system that provides no means of obtaining a constitutional amendment, except through the kindness of the Congress,

which has demonstrated that it will not propose amendments—no matter how generally desired"—that would limit congressional power.[63]

The panel discussion offers an interesting glimpse of Scalia before he became a judge and before he became an originalist. (When Paul Brest coined the term *originalism* in a law review article in 1980, he did not mention Scalia; instead, he cited Raoul Berger.)[64] Scalia liked to say that he had been born an originalist and that the whole purpose of the Constitution was to prevent change. More accurate would be to say that his originalism was born out of his frustration over social conservatives' inability to amend the Constitution by Article V, and liberals' success at doing so by judicial interpretation. "It is not as though we have a sacrosanct, untouched Constitution," he said during that con-con discussion in 1979. "The Constitution has been changed, whether we have liked it or not, during the last 200 years, and not merely by the ratification process. Many of the decisions of the Supreme Court have made fundamental alterations without giving us any opportunity to say whether we liked them." He didn't like *Roe*. "Nobody in his right mind" would want an open convention, he said, but under the circumstances, he'd run that risk for one purpose only: for "a convention on abortion." [65]

One person who was decidedly unwilling to run that risk was Phyllis Schlafly. Schlafly must have found the results of that Gallup survey horrifying. A convention called for a balanced budget might undo all her work to defeat the ERA, since it could reintroduce and ratify it. Like Rovere, she believed that holding a convention was like playing a constitutional game of Russian roulette.[66] After all, she had only just reported on that extraconstitutional convention in Houston, in 1977, where thousands of women elected in meetings held in all fifty-six states and territories had endorsed an agenda that she despised, including not only the ERA but also gay and lesbian rights and reproductive rights. And now her fellow conservatives wanted to call an Article V convention?

Schlafly, who had a conspiracy theorist's worldview, grew more concerned in 1981 when the liberal Gore Vidal, who was, among many other things, an advocate of sexual freedom, came out in favor of a convention in a provocation in *The New York Review of Books*. "There is more than the usual amount of irony in the fact that our peculiar Constitution is now under siege from those who would like to make it either

more oppressive (the Right-to-Lifers who want the Constitution to forbid abortion) or from those sly folks who want to make more and more money out of their real-estate shelters," Vidal wrote. "But no matter what the motive for change, change is now very much in the air; and that is a good thing." [67] Vidal, Schlafly warned, had "let the cat out of the bag": liberals planned to take over the convention to overthrow the Constitution itself.[68]

In 1982, the year the ERA's extended ratification window closed, the Senate passed the balanced budget amendment, which Reagan endorsed, but the House, which held the purse strings, voted it down.[69] By then, thirty-two states had called for a convention, which would have opened up that ERA window all over again. "After we buried the Equal Rights Amendment for the second time," Schlafly later said, "we then discovered that there was this silly effort to plunge us into a new constitutional convention." Deploying the infrastructure she'd used to defeat the ratification of the ERA in the states, she went to war to stop any more states from calling for a convention. "We had knock-down, drag-out battles, just like ERA, in Kentucky, Michigan, New Jersey, and Montana, and we beat them," she said. Aside from defeating the ERA and "making the Republican Party pro-life," she considered defeating the con-con in the 1980s her signal achievement.[70]

Herein lie the origins of Antonin Scalia's originalism. Faced with an activist, liberal Supreme Court, conservatives considered their very limited options. Social conservatives couldn't get a right-to-life amendment through Congress. Fiscal conservatives couldn't get a balanced budget amendment through the House. Social and fiscal conservatives disagreed about holding a constitutional convention. It was in this context that Antonin Scalia became attracted to originalism, and it was at this moment that the Federalist Society was founded.

Originalism did not arise from a belief that amendment was the only democratic way to change the Constitution. It arose from the failure of conservatives to change the Constitution by democratic means.

An inherent, fundamental, and inalienable right to exist and thrive

Skittishness about a federal constitutional convention had a knock-on effect. A not-unusual number of states held conventions in the 1970s and early ’80s: Montana, North Dakota, Tennessee (1971); Louisiana (1973); New Hampshire, Texas, Tennessee (1974); Hawaii, Arkansas (1978); New Hampshire (1984); and Rhode Island (1986). But with the alarm about runaway conventions, and a loss of public faith in democratic deliberation, states grew skittish about holding constitutional conventions, too. (Louisiana’s limited and failed not-quite-convention in 1992 was the last.)[71] Mandated ballot questions asking voters whether they would like to hold a convention appeared regularly on ballots in states across the country. Voters kept answering no.[72] Under the terms of New York’s 1846 constitution, for instance, voters are asked every twenty years—Jefferson’s preferred once-a-generation—whether to hold a convention. (New York had earlier held conventions in 1801 and 1821.) Voters saying yes led to conventions in 1867, 1894, and 1938, and the legislature itself called for a convention in 1967, but voters said no in 1957, 1977, 1997, and 2017. Scholars started talking about “conventionphobia.” [73]

The abandonment of the practice of citizens convening to deliberate over their state constitution and whether it needed amending or replacing reflected a decline in other forms of democratic participation, too. Deliberating is a muscle that can easily atrophy; the less frequently people meet and debate, the less able they are to do so. In a public opinion survey conducted in 2016, 40 percent of Americans agreed with the statement “I have lost faith in American democracy.” More than two-thirds agreed that “you need to be very careful in dealing with people,” with only 31 percent agreeing that “most people can be trusted.” [74]

Strikingly, while the states abandoned the practice of constitutional convention, it thrived among Native nations, who gained faith in deliberative democracy as non-Natives lost that faith. Between 1970 and 2023, Native American nations held more than 126 constitutional conventions.[75] Many replaced constitutions they’d adopted in 1934 under the Indian Reorganization Act. Many others wrote new constitutions in the wake of efforts, begun in 1973, to restore the rights of the more than nine

dozen tribes whose federal status had been terminated during the termination era.[76]

A number of people initiated efforts to address Indians' ambiguous relationship with the U.S. Constitution. In 1980 Russel Barsh and James (Sákéj) Youngblood Henderson (Chickasaw), proposed an eight-part constitutional amendment clarifying the status of Indian tribes (defining them as "'States' for all purposes"); asserting limited sovereignty ("All Constitutional powers of State self-government not hereafter expressly delegated to the United States by the vote of three-fourths of the members of an Indian Tribe are reserved by that tribe, and cannot be divested by Congress"); and providing for a Tribal Senate Caucus of one delegate from each tribe, and a Tribal House Caucus of one delegate for every five thousand members of every tribe; two senators and two representatives would serve as well in the U.S. Senate and House.[77] This proposal met a quiet death.

Decades later the condition of Native nations under the U.S. Constitution remained as ambiguous as it had been when Vine Deloria Jr. first testified before Congress in 1965.[78] In a concurrence in *United States v. Lara* in 2004, Justice Clarence Thomas remarked that tribes, unlike states, "are not part of this constitutional order, and their sovereignty is not guaranteed by it"; they both are and are not sovereign at the same time, Thomas asserted, pointing to the muddle of sovereignty cases, which he called "schizophrenic." [79]

In 2009, in a book dedicated to Deloria, Frank Pommersheim, who directed the Dakota Plains Legal Service clinic in the 1980s and later served as chief justice for the Cheyenne River Sioux Tribal Court of Appeals as well as associate justice for the Rosebud Sioux Supreme Court, set aside the amendment proposed by Barsh and Henderson as inelegant and "even potentially unworkable." Opposing statelike status for Native nations, Pommersheim instead recommended an amendment to the U.S. Constitution to "re-constitutionalize" Indian sovereignty:

> The inherent sovereignty of Indian tribes within these United States shall not be infringed, except by powers expressly delegated to the United States by the Constitution. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

Pommersheim made plain that a constitutional amendment was the "surest constitutional footing" for Indian sovereignty. Then he did the math and, assuming that states without federally recognized tribes would likely support this amendment, suggested that support would be in fact quite high.[80]

That proposal, too, was left on the shelf while Native nations within the United States, tied to a worldwide indigenous rights movement, experimented with new constitutional ideas, or rather with constitutionalizing some very old indigenous ideas, including language about the conservation of natural resources and the protection of the environment.[81] The 1985 constitution of the Poarch band of the Creek Tribe in Alabama included a section that asserted the tribe's "inherent sovereign power to manage and regulate environmental protection on the reservation."[82] In 2005, for instance, the preamble to the constitution of the "Pokagon Band of Potawatomi Indians, historic dwellers of the greater St. Joseph River Valley, a band of the Potawatomi Indian Nation," expressed a commitment "to conserve and develop our natural resources."[83]

Native nations in the United States and around the world also began experimenting with granting rights to nature (something akin to the way the U.S. Constitution grants rights to corporations as legal persons). The Anishinaabeg of the White Earth Nation, a band of Ojibwe, held a convention and ratified a new constitution in 2009, just as Ecuador and Bolivia were adopting new national constitutions that granted rights to nature.[84] "The Anishinaabeg of the White Earth Nation are the successors of a great tradition of continental liberty, a native constitution of families, totemic associations," its preamble begins. "The Anishinaabeg create stories of natural reason, of courage, loyalty, humor, spiritual inspiration, survivance, reciprocal altruism, and native cultural sovereignty."[85] In 2016, after the Standing Rock Sioux protested the Dakota pipeline, the Ho-Chunk Nation in Wisconsin amended its constitution, becoming the first Native American nation to grant rights to nature. The amendment reads, "Ecosystems and natural communities within the Ho-Chunk territory possess an inherent, fundamental, and inalienable right to exist and thrive."

The Ponca Nation in Oklahoma adopted a similar amendment to its constitution the following year.[86]

In 2018 the White Earth Nation passed a law granting rights to wild rice, a sacred crop that had for decades been threatened by Minnesota's violations of Ojibwe treaty rights but that had become newly threatened in the 2000s by the introduction of genetically modified rice. The 2018 law read: "Manoomin, or wild rice, within all the Chippewa ceded territories, possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation." When an oil company began building a pipeline in Minnesota in 2021, the tribe sued the Minnesota Department of Natural Resources in White Earth Tribal Court for violating the rights of *manoomin*.[87] The suit failed, but it would not be the last attempt to enforce rights of nature in tribal and nontribal courts. In marked contrast to the constitutional generativity among indigenous peoples in the United States and around the world, an increasingly originalist Supreme Court pursued a policy of constitutional restoration.

The Right to Bear Arms

The history of originalism as advanced by Scalia has everything to do with abortion, and everything else to do with guns. "If I'd been required to identify the Ninth Amendment when I was in law school or in the early years of my practice, and if my life depended on it, I couldn't tell you what the Ninth Amendment was," Scalia once said.[88] That used to be the case with the Second Amendment, too. It began to change once Reagan took office.

Many Americans own guns that they use for marksmanship and especially for hunting, both for recreation and for supplying their families with food. American police have also for a very long time carried guns; so have criminals, serial killers, and would-be assassins. Since the founding of the republic, towns, cities, and states have routinely passed gun safety measures, and from the earliest days of the polling industry, Americans have consistently supported those measures. (In 1938, for instance, Gallup found that 84 percent of adults supported a law requiring owners of handguns to register with the government; in 1967, that percentage was 73 percent.)[89] But support for strict gun control measures began to erode in the

1960s. In 1959 Gallup reported that 60 percent of adults supported a law banning the possession of handguns (except by the police); by 1975, that support had fallen to 41 percent; by 2023, it was 25 percent.[90]

Declining support for strict gun control measures tracks with the polarization of the parties. The politicization of guns did not begin until the 1970s, when guns became a weapon in party realignment and in the fight over the federal judiciary. American gun owners and nonowners alike became so many pawns in the parties' struggle for power. As partisanship strengthened and polarization worsened, guns and abortion became the defining constitutional issues in the life-and-death, winner-take-all fury of modern American politics. On the left, abortion would come to mean freedom and guns to mean murder, and, on the right, guns came to mean freedom and abortion to mean murder. That neither of these statements can be defended didn't matter, since they succeeded in what political campaigns were most eager to use them to do: get voters to the polls. One in three Americans owns a gun; one in four American women will have an abortion in her lifetime.[91]

In 1976 the District of Columbia passed a law that all but banned the possession or sale of any handgun.[92] That year there were two assassination attempts on President Ford. The National Council to Control Handguns proposed a national ban.[93] In 1976 the California legislature debated a similar bill; opponents of the bill proposed a state constitutional amendment guaranteeing a right to keep and bear handguns, rifles, and shotguns.[94] According to that public opinion survey from 1979, nearly two-thirds of Americans supported a constitutional amendment to control the sale of handguns, though this by no means seemed necessary. The first federal firearms laws, in the 1930s, had been upheld by the U.S. Supreme Court in 1939 in *United States v. Miller*. In an 8–0 decision, the Court agreed with the government's argument that the Second Amendment is "restricted to the keeping and bearing of arms by the people collectively for their common defense and security" and that the language of the amendment establishes that the right "is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state." [95] In any case, the Court had long read the Second Amendment

as concerning only the keeping and bearing of guns for military purposes and limiting only the federal government, not the states.[96]

Of nearly three hundred state gun control laws in place by the year 2000, nearly 40 percent had been passed before 1970.[97] Calls for Congress and the states to pass legislation restricting the sale and ownership of guns began in 1963, after the assassination of John F. Kennedy. Nearly 80 percent of Americans supported mandatory handgun permits; support was particularly strong among Catholics. One hundred and fifty gun control bills were introduced in the states and eighteen into Congress.[98] To counter these proposals, the argument was floated that the Second Amendment might protect an individual right to own a gun.[99] "We should find the lost Second Amendment, broaden its scope and determine that it affords the right to arm a state militia and also the right of the individual to keep and bear arms," wrote the author of a 1965 article called "The Lost Amendment." (The Second Amendment was "lost" in the sense that no one ever bothered to cite it since it had no real relevance in the modern world.)[100] But in 1968, after years of racial violence and the assassinations of Robert Kennedy, Martin Luther King Jr., Medgar Evers, and Malcolm X, Congress passed a Gun Control Act that prohibited the selling of guns through the mail, and banned certain guns. A House committee reviewing the bill reported that the Second Amendment offered no obstacle because "The reference to a 'well regulated Militia' would seem to govern the phrase 'the right of the people to keep and bear Arms' which means in its context the right of the States to organize a Militia." [101]

The National Rifle Association had endorsed the 1968 Gun Control Act. Until the 1970s, the NRA had been a hunting, sporting, and marksmanship organization whose motto, since 1957, had been "Firearms Safety Education, Marksmanship Training, Shooting for Recreation." But in the mid-1970s, with plans to move to a new, recreational shooting center in Colorado, the NRA began organizing in opposition to handgun control laws. The law-and-order Republicanism that had begun under Richard Nixon might have been seen to support gun regulations, but Reagan took a different and libertarian position: he opposed that legislation and also argued that it was unconstitutional. In an article published in *Guns and Ammo* in 1975, Reagan maintained that "The Second Amendment is clear, or ought to be. It appears to leave little if any leeway for the gun control

advocate." [102] In 1977 the NRA moved its annual meeting from Washington, in protest of the new law, and instead met in Cincinnati where, in a conservative rebellion known as the Cincinnati Revolt, the organization's bylaws were rewritten. The planned move to Colorado was canceled. Remaining in Washington, where it became essentially a lobbying organization, the NRA had a new motto displayed at the door of its building: "THE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS SHALL NOT BE INFRINGED." [103]

In 1981 Strom Thurmond appointed Utah senator Orrin G. Hatch, a former bishop of the Church of Jesus Christ of Latter-day Saints, to Birch Bayh's old position as chair of the Senate Judiciary Committee's Subcommittee on the Constitution. Hatch liked to say that in this role he had been "exposed to more proposals . . . to amend the United States Constitution than any other member of Congress since James Madison." Hatch himself had proposed a right-to-life amendment (returning the issue to the states), a school prayer amendment, and an amendment outlawing affirmative action. Reagan considered naming him to the Supreme Court.[104] Hatch's greatest interest was not in a new amendment but in an old one. "Immediately upon assuming chairmanship," he said, he called for a report on the original meaning of the Second Amendment.[105]

Even as Hatch's subcommittee was at work, Reagan was shot in an assassination attempt; his press secretary, James Brady, was shot in the head. Reagan maintained his opposition to gun control legislation; Brady became an advocate for it. In February 1982, Hatch's subcommittee published a report called *The Right to Keep and Bear Arms*. Having undertaken historical research, the subcommittee reported that it had found "clear—and long-lost—proof that the second amendment to our Constitution was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms." [106] That November, after the National Rifle Association waged a well-funded campaign against California's handgun control bill, voters resoundingly defeated it in a statewide referendum.[107] The NRA also funded research that favored its interpretation of the Second Amendment.[108]

In 1982 the Reagan administration, preparing for the Constitution's bicentennial, appointed two hundred present and former elected officials,

scholars, and business and labor leaders to a committee charged with considering possible constitutional reforms. In its final report, in 1985, the co-chairs urged Americans not to treat the Constitution as "immutable, like the Ark of the Covenant," but to be open to changes, including amendments. It recommended six, including congressional term limits and bonus seats in the House for the party that wins the presidency.[109] None of these ideas made any headway. It wasn't voters who were opposed to amendments.[110] The hurdle was Congress—and conservatives in the Reagan administration.

Typical was the recommendation, in 1984, of James McClellan, who left his position as a staffer at the Senate Judiciary Committee to become the president of a newly formed Center for Judicial Studies: he urged conservatives to "kick the habit" of Article V.[111] "There is something fundamentally wrong with our system if we are driven to amend the Constitution so as to restore its original meaning," McClellan wrote. "We should resist efforts to add amendments to our fundamental law to correct misinterpretations rendered by the Supreme Court." [112] Better to effect constitutional change under the guise of *restoring* the Constitution's original meaning. That would require taking over the Court.

By 1984, guns, like abortion, had become a partisan issue. The Democratic platform called for "tough restraints on the manufacture, transportation and sale of snub-nosed handguns," while the GOP platform opposed gun control.[113] Hatch's report proved to be a landmark in the emergence of originalism. Meese became attorney general in 1985 and announced that originalism would be the official interpretive position of his Justice Department.

Justice John Paul Stevens would later recall that between 1975, when he joined the Court, and 1986, when Scalia joined, "no judge or justice expressed any doubt about the limited coverage of the amendment." The opinion in *Miller* held.[114] But in 1986 Congress passed the Firearms Owners Protection Act, which repealed parts of the 1968 Gun Control Act by invoking "the rights of citizens . . . to keep and bear arms under the second amendment." [115] (Robert Bork, for one, did not endorse this theory. Bork was unpersuaded by the NRA. "I'm not an expert on the Second Amendment," he said in 1989, "but its intent was to guarantee the right of states to form militia, not for individuals to bear arms.")[116] From retirement

in 1991, Warren Burger, appearing on PBS and holding a pocket Constitution in his hands, said that if he were writing the Bill of Rights, he wouldn't include the Second Amendment. Moreover, he said, the NRA's individual rights interpretation was "one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime." [117] The test of originalism would be whether this interpretation would be accepted by the Supreme Court.

Original Meaning Jurisprudence

At the start of the bicentennial year of 1987, Meese's Office of Legal Policy issued a two-hundred-page sourcebook on "original meaning jurisprudence," containing excerpts from the work of Raoul Berger, Robert Bork, Antonin Scalia, and Meese himself, with Brennan as a counterpoint. It alleged that until the 1960s, original meaning jurisprudence had been "the dominant form of constitutional interpretation during most of our nation's history." [118] It drew from the speech Scalia had given in June 1986, in which Scalia had elaborated on the obligation for judicial interpretation to be bound by whatever was "the most plausible meaning of the words of the Constitution to the society that adopted it—regardless of what the Framers might secretly have intended." [119]

The Reagan administration pursued a domestic agenda under the banner "Let's Make America Great Again," whose aim was to roll back social programs and government regulations and to design a foreign policy to bolster American military power in a final confrontation with the Soviet Union.[120] The economy grew, military spending skyrocketed, the national debt nearly tripled, the Cold War ended, and the gap between the wealthiest and the poorest Americans widened. Among his lasting legacies would be a transformation of the judiciary. Not since FDR had a single president replaced so many judges.[121] That Reagan's nomination of Bork was defeated masked a much broader success: during Reagan's second term, Scalia-style original meaning originalism became canonical.[122]

Reagan nominated Bork to the Supreme Court in July 1987, but from the start the prospects for the candidate's confirmation were mixed at best. Reagan was a visibly aging lame duck and reeling, too, from the Iran-

Contra scandal; Republicans had lost the Senate in the 1986 midterms, with the result that Joe Biden, not Strom Thurmond, was now chair of a Democratic Senate Judiciary Committee. Scalia had replaced Rehnquist, which meant that his appointment wouldn't change the balance on the Court, but Bork would be replacing the swing voter Lewis Powell. Scalia was warm and witty. Bork was imperious and obnoxious. Bork had also been more public in stating his opposition to the ERA, abortion, and more.[123]

Democrats on the Senate Judiciary Committee readied for battle. Biden had been advised not to center his attack on abortion but instead to call attention to Bork's "judicial philosophy," which was a way both to defeat the nominee and to make a broader bid with the public to diminish support for Meese's agenda of originalist jurisprudence. Bork's opponents waged a remorseless and relentless campaign against his confirmation. On the day Reagan announced the appointment, Ted Kennedy made a fiery speech warning about "Robert Bork's America."

> Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.[124]

Bork afterward insisted that "there was not a line in that speech that was accurate," but it set off fireworks. The hearings, which lasted for twelve days, were televised, including the five days of Bork's own testimony, in which he came across as both high-handed and cold-hearted. And in an unprecedented campaign against a Supreme Court nominee, People for the American Way aired a television ad, narrated by Gregory Peck. "He doesn't believe the Constitution protects your right to privacy," Peck warned, urging Americans to contact their senators to voice their opposition, "because if Robert Bork wins a seat on the Supreme Court, it will be for life. His life and yours." [125] If Biden didn't lead with abortion, the press did, and so did a three-hundred member Block Bork Coalition, which argued that Bork would "turn back the clock" on civil rights, women's rights, and workers' rights.[126] Making the case that Bork would have no hesitation in overturning *Roe*, despite his protestations to the contrary

before the committee, Kennedy played an audio recording from 1985 in which Bork had said, “I don’t think that in the field of constitutional law, precedent is all that important. . . . And if you become convinced that a prior court has misread the Constitution, I think it’s your duty to go back and correct it.” [127] In a cover story published on September 21, four days after the We the People parade on Constitution Day, *Time* magazine warned that, if Bork were confirmed, *Roe* might go.[128]

Roe did not go, at least not then. Bork went instead. Although the committee voted against him, 5–9, he refused to withdraw, and the nomination went to the Senate where, in a nearly straight party-line vote, he was defeated in October, 42–58. Bork’s failed nomination had many consequences. For those in the pro-life movement who still dreamed of a constitutional amendment, that dream died. If Bork had been confirmed, they came to believe, *Roe* would have been overturned.[129] The campaign waged against Bork influenced every nomination thereafter, turning the process into ad-money-driven political theater that contributed to the polarization both of Congress and of the electorate. If Bork’s nomination had been a referendum on originalism, originalism had in one sense lost. But originalism also won, by being brought so entirely, so dramatically, and so regularly into the public eye. Democrats on the Senate Judiciary Committee gave originalism 115 days of free television time, at the height of the nation’s celebration of the bicentennial of the Constitution.

“No nominee since Felix Frankfurter was as schooled in constitutional law as Bork,” Raoul Berger would write, “and his rejection was a deplorable loss to the Court.” [130] Bork, who had endured a truly brutal series of attacks, many of them unwarranted, sought his vindication in *The Tempting of America*, his version of *Government by Judiciary*, in which he advanced his brand of originalism, explained that the fight over his nomination was just one battle in a war over the Constitution, and recounted his experience of the process in a tell-all, filled with facts like how stories about him on CBS television ran eight against him to one in favor. The book, while allegedly intended to tamp down the politicization of Supreme Court appointments, had the effect only of inflaming it.[131]

The Notorious RBG

In 1989 abortion again came before the Court, where Anthony Kennedy had taken the seat that Bork had been denied. *Webster v. Reproductive Health Services* involved an abortion-restricting 1986 Missouri law. Rehnquist wrote a draft opinion that both upheld the constitutionality of the restrictions and, almost as if an afterthought, essentially overturned *Roe* by arguing that the key elements of *Roe* "are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle." Liberal justice John Paul Stevens then dropped out of the majority, circulating a memo in which he said that he'd rather not overturn *Roe*, but if it had to be done, he'd rather give it "a decent burial instead of tossing it out the window of a fast-moving caboose." [132] O'Connor agreed, which everyone assumed would elicit a strong reaction from Scalia. "The expected 'Ninogram' will arrive this morning," Harry Blackmun's clerk wrote, anticipating Scalia's fury that the majority opinion, while it would hold, would fall short of overturning *Roe*. Both Blackmun and Scalia, in separate opinions, raised alarms about the legitimacy of the Court itself. "We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators urging us—their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will," scolded Scalia in his concurrence. "I fear for the future," warned Blackmun, in a dissent joined by Marshall and Brennan. "I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this Court. I dissent." [133]

Three years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court again upheld *Roe*, which had now held for nearly three decades.[134] If Scalia had been guarded about *Roe* in his nomination hearings, he was not guarded afterward. If you want a right to abortion, he said, "pass a law," and "if you didn't want it, you had to pass a law against it." The point of the Constitution was to stop change. "To change, to evolve, you don't need a constitution, all you need is a legislature and a ballot box," he said. "The only reason you need a Constitution is because some things

you don’t want the majority to be able to change.” Those things are fundamental rights, and Scalia did not believe that a woman’s right to decide whether to end a pregnancy, even were her life in danger, was one of them.[135] Unlike the right to bear arms.

Because neither side in the abortion debate had succeeded in amending the Constitution, the right asserted from *Roe* to *Casey* remained vulnerable. And every decision only further widened the divisions between the electorate over fundamental questions about life and death, privacy and equality. Partisans engaged in political rhetoric of extraordinary extremism, under whose terms abortion was either murder or routine medical care. By the end of the 1980s, the parties had sorted themselves over this issue, with all its implications for American constitutionalism. Few were the commentators who would honestly acknowledge that the divided views on abortion were real, and deeply felt, and irreconcilable. The feminist scholar Joan C. Williams was an exception. The originalism of the New Right, Williams observed, was little more than a thinly veiled justification for its efforts to overturn *Roe*. “I, for example, am convinced, absolutely convinced without hesitation, that the Constitution protects a woman’s right to choose abortion as a basic, undeniable political right, a right without which many other political rights are worthless,” Williams wrote. “And yet I can see how the conclusion that seems so obvious to me can seem foreign, even repulsive, to” others—“a celibate priest, say, or a mother of five”—and “I must acknowledge that consensus on this issue is not in the cards.”[136]

Nor would consensus be in the cards during the presidencies of George H. W. Bush or William Jefferson Clinton. In 1991, when Bush nominated DC Court of Appeals judge Clarence Thomas to replace Thurgood Marshall in what some called the “black seat” on the Court, opponents of the conservative justice again braced for battle, especially because Bush was replacing one of the Court’s most liberal justices with a man certain to be among its most conservative appointments. This time the hearings took a turn when Anita Hill, a law professor and former colleague of Thomas’s, testified before an all-male, all-white Senate Judiciary Committee that Thomas had sexually harassed her. Hill’s allegations had come up during an FBI background check on Thomas. Other women had made similar allegations, but only Hill had been called to appear before the committee, where Biden, as chair, failed to restrain Senators Orrin Hatch, Arlen

Specter, and Alan Simpson from essentially placing Hill on trial. Thomas, citing his own right to privacy, refused to answer questions about "what goes on in the most intimate parts of my private life or the sanctity of my bedroom." [137] Questions about Thomas's qualifications to serve as a justice were set aside, overwhelmed by the attention given to the allegations of sexual harassment.

The Anita Hill–Clarence Thomas hearings set a precedent, prefiguring the airing of charges of sexual assault levied at Trump Supreme Court nominee Brett Kavanaugh in 2018 and the reckless, remorseless, and almost entirely partisan news coverage in which liberal news organizations appeared less interested in reporting on the nomination than in defeating it, while conservative organizations sought only to secure the confirmation. The confirmation process had become a proxy war. The tit for tat had begun in 1967, when Strom Thurmond had tried to trip up Thurgood Marshall with obscure questions about constitutional history in an attempt to prove that Blacks were racially inferior to whites. Birch Bayh had then defeated the nominations of Haynsworth and Carswell by introducing evidence that they were secretly segregationists. Feminists had defeated Bork by claiming he would turn back the clock on women's rights and overturn *Roe*. By the time Bush nominated Thomas, sexual harassment was the topic of the day. No longer did views about racial segregation animate the treatment of nominees by both the Judiciary Committee and the press; now it was views about women and sex.

The more polarized the parties had become, and in particular, the more polarized the press, the less was the consensus on any of these nominees. The left tended to believe and sympathize with Anita Hill; the right tended to believe and sympathize with Clarence Thomas. After hearings nearly as controversial and polarizing as the Bork hearings, the Senate confirmed Thomas, 52–48. "I wish I could have been there to do with him what we were able to do with Haynsworth and Carswell," Birch Bayh said near the end of his life. "I like to think I wouldn't have let that son of a gun get on the bench. I think he, to this very day, is a blight on the Court." [138] But neither Thomas nor his wife, Ginni, would forget the trial he had endured.

Clinton's nomination of Ruth Bader Ginsburg, in 1993, lacked scandal, but not controversy. Clinton desperately needed to appoint a woman.

"Judge Ginsburg, welcome," Biden said softly as the first day of the hearings began. "And, believe me, you are welcome here this morning." [139]

Ginsburg was rightly celebrated as the Thurgood Marshall of women's rights. She'd first appeared before the Supreme Court in 1973, on behalf of Sharron Frontiero, an Air Force lieutenant, in *Frontiero v. Richardson*. Frontiero had been denied benefits for her husband that were granted to men for their wives. "I ask no favor for my sex," Ginsburg said, quoting the nineteenth-century women's rights advocate Sarah Grimké. "All I ask of our brethren is that they take their feet off our necks." [140] In case after case, Ginsburg, as head of the Women's Rights program at the ACLU, methodically chipped away at discrimination on the basis of sex, each case another "small, guarded step." [141] She refused to take on cases that would have required her to defend *Roe*, which she believed to have been badly decided.[142] "The Court's gender classification decisions overturning state and federal legislation, in the main, have not provoked large controversy," she explained, while "the Court's initial 1973 abortion decision, *Roe v. Wade*, on the other hand, became and remains a storm center. *Roe v. Wade* sparked public opposition and academic criticism, in part, I believe, because the Court ventured too far in the change it ordered and presented an incomplete justification for its action." [143]

Carter had named her to the DC Circuit in 1980.[144] "Feminist Picked for U.S. Court of Appeals Here," announced the *Washington Post*.[145] She had been a moderate on that court, where she served alongside Scalia and Bork. In 1993, delivering the Madison lecture at New York University, she'd cited *Roe* as an example of a bad judicial decision, an illustration of the rule that "doctrinal limbs too swiftly shaped, experience teaches, may prove unstable." [146] When Clinton nominated her to the Supreme Court, women's groups refused to endorse her. "The women are against her," Clinton said, surprised.[147] "Coulda, woulda, shoulda," NOW's president said, waving aside Ginsburg's contention that an equal protection case, rather than a right-to-privacy case, would have established reproductive rights on firmer constitutional ground. Pro-life activists who were, at the time, bombing abortion clinics, she wrote, "don't care about the legal theory—they care about stopping abortion and controlling women's lives." [148] Only the efforts of Ginsburg's husband nudged the nomination back on track. He arranged for all manner of statements of support, including a letter signed by fourteen members of the faculty of NYU Law School who had been in the audience for the Madison lecture and who wrote to say they

were “distressed that her remarks at NYU have been misconstrued as anti-choice and anti-women.” [149]

Ruth Bader Ginsburg during her confirmation hearings in 1993

On the first day of Ginsburg’s hearings, Biden told her that he’d read the *New York Times* on the train to Washington that morning and that finding no scandal about her in the paper “was the most wonderful thing that has happened to me since I have been chairman of this committee.” [150] The Senate confirmed her 96–3. The fact that she had grave doubts about *Roe* would be forgotten and, by the left, forgiven.

Today Ginsburg has, instead, the very unfortunate distinction of being remembered not for her confirmation hearing, nor even for any of her many opinions on the Court, but for her refusal to step down. At the start of Barack Obama’s second term, the president had asked her to resign, which would have allowed him to nominate a liberal justice to replace her. But Ginsburg expected Hillary Clinton to defeat Donald J. Trump in the 2016 election and liked the idea of the first female president having the opportunity to replace the most important woman ever to sit on the bench. She bet wrong. Instead Trump won, and when Ginsburg died in September 2020, he replaced her, with record-breaking speed, with Amy Coney Barrett, a former law professor and judge from the Seventh Circuit known for her acumen and integrity. (Senate Republicans, having refused to hold hearings on Barack Obama’s appointment of a new justice in 2016 on the argument that eight months before the election was too close, held hearings on Barrett eight *days* before the election in 2020.) She was also a

constitutional conservative, a mother of seven, and as opposed to *Roe v. Wade* as was Antonin Scalia. Two years later Barrett joined the five-justice majority in *Dobbs*, overturning *Roe*.

Stupid but constitutional

"If elected president, what criteria would you use to select the new Supreme Court justices?" a voter asked Vice President Al Gore in a town hall debate in March 2000. Gore was seeking the Democratic nomination in a race against former New Jersey senator Bill Bradley. "I would look for justices of the Supreme Court who understand that our Constitution is a living and breathing document, that it was intended by our founders to be interpreted in the light of the constantly evolving experience of the American people," he answered. "The right of privacy, just to take one example, was found by Justice Blackman in the Constitution, even though the precise words are not there." Bradley agreed. He didn't want anyone "lopped into an original interpretation of the Constitution as if 1787 is the year 2000." [151] Gore was expected to win the nomination easily, and that spring rumor in Washington had it that if Gore were to win the presidency, Scalia would resign, at age sixty-four. "A Gore presidency would eliminate his chance of becoming Chief Justice and ensure that his jurisprudence will never be more than a footnote," one reporter wrote.[152]

The Constitution became still more sclerotic. Presidents from Jefferson, Madison, and Jackson to Grant, Roosevelt, and Taft had proposed constitutional amendments. This practice had fallen off until the 1980s, when Reagan publicly supported five constitutional amendments: school prayer, a balanced budget, the right to life, presidential line-item veto authority, and repeal of the Twenty-Second Amendment. That flurry of proposals led to a diagnosis of "constitutional amendmenditis." [153] But Reagan's interest in amendments was atypical. Bill Clinton supported only a single amendment: victims' rights. And George W. Bush, in 2004, calling for a defense of marriage amendment, was the last sitting president to propose amending the Constitution until Joseph Biden who, after stepping down from his campaign for reelection in 2024, proposed a constitutional amendment to reverse the Supreme Court's decision granting the president

considerable immunity to criminal prosecution, in *Trump v. United States*.[154]

Support for the defense of marriage amendment, North Carolina, 2012

Amendments Pledged on Party Platforms, 1984–2024

Year	*Party*	*Amendment*
1984	Republican	right to life
1984	Republican	balanced budget
1988	Democratic	equal rights regardless of sex
1988	Republican	right to life
1988	Republican	congressional term limits
1988	Republican	balanced budget
1992	Republican	congressional term limits
1992	Republican	balanced budget
1992	Republican	right to life

Year	*Party*	*Amendment*
1996	Republican	right to life
1996	Republican	balanced budget
1996	Republican	limiting birthright citizenship
1996	Republican	banning flag desecration
1996	Republican	guaranteeing victims' rights
1996	Democratic	guaranteeing victims' rights
2000	Republican	right to life
2000	Republican	guaranteeing victims' rights
2000	Republican	banning flag desecration
2000	Republican	balanced budget
2000	Democratic	guaranteeing victims' rights
2004	Republican	banning flag desecration
2004	Republican	right to life
2004	Republican	defense of marriage
2004	Republican	guaranteeing victims' rights
2008	Republican	right to life
2008	Republican	defense of marriage
2008	Republican	guaranteeing victims' rights
2012	Republican	right to life
2012	Republican	balanced budget
2012	Democratic	campaign finance reform
2016	Republican	parents' rights
2016	Republican	defense of marriage

Year	*Party*	*Amendment*
2016	Republican	right to life
2016	Democratic	equal rights regardless of sex
2016	Democratic	campaign finance reform
2020	Democratic	campaign finance reform
2020	Democratic	equal rights regardless of sex
2024	Democratic	campaign finance reform
2024	Democratic	equal rights regardless of sex

Presidencies, and presidential elections, weren't about constitutional amendments. But they were about Supreme Court appointments.

In November 2000, the election between Gore and Texas governor George W. Bush proved distressingly close. Gore won the popular vote by a mere handful of votes, but victory in the Electoral College turned on the state of Florida. Gore conceded, then un-conceded, then asked for a recount in Florida, where Bush's brother Jeb, as governor, had certified the results as a victory for Bush. By the end of the month, the Supreme Court had agreed to hear an appeal from Bush, who wanted recounts stopped. "When you have to call us in, someone has screwed up," Scalia told the *Washington Post*. "Something has gone terribly wrong." (One of Scalia's sons was at the time a partner in the law firm that represented Bush, though he was not involved in the case.)[155] In a bitter and unsigned but wholly partisan opinion, a 5–4 majority reversed the Florida Supreme Court and issued a stay, ending the recounts, and resolving the disputed election results in favor of Bush, who was, at that point in the counting, ahead. The four liberal dissenters argued that the Supreme Court ought never to have agreed to review the case. "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the loser is perfectly clear," Justice John Paul Stevens wrote in dissent. "It is the Nation's confidence in the judge as an impartial guardian of the rule of law." [156] At ten p.m. on December 12, five weeks after the election, the Court announced its opinion. Instead of reading their opinions from the bench, the justices simply issued them to the press and left the building by way of an underground garage, "with no word to dozens of journalists from

around the world who were waiting in the crowded pressroom," as Linda Greenhouse reported in the *New York Times*.[157]

Scalia, widely thought to have been behind the majority's opinion, which did not engage in any originalist argument, may have destroyed his chance of becoming chief justice. Rehnquist, in any event, elected to postpone retirement, which would have exposed the Court to the unwanted scrutiny of another nomination process.[158] After *Bush v. Gore*, Scalia, who had generally failed to build a conservative coalition on the Court, became more isolated as its centrist jurists, Anthony Kennedy and Sandra Day O'Connor, increasingly sided with the liberals. In *Lawrence v. Texas* (2003), the Court found laws banning homosexual conduct to be unconstitutional. Scalia, in a dissent that he read from the bench, said that while he did not endorse the Texas law—he once said he wished all judges were given a stamp that said "Stupid but constitutional," then someone sent him one[159]—the Court had no right to overturn it and was, instead, taking sides in a culture war.[160] (Where did the Court find the right to homosexual behavior in the Constitution? he would later ask. "On the basis of, I don't know, the sexual preference clause of the Bill of Rights?")[161]

Conservatives outside the Court proposed a constitutional amendment banning same-sex marriage. Amendments defining marriage as between one man and one woman were first introduced into Congress in 2002.[162] Two years later the GOP platform endorsed such an amendment for the first time. But public opinion increasingly favored same-sex marriage. Fifty percent of Americans favored a constitutional amendment banning gay marriage in 2003; that had fallen to 36 percent by 2008.[163] In 2015, in *Obergefell v. Hodges*, the Court held that same-sex marriage is protected under the Fourteenth Amendment.[164]

If Scalia had waved aside Biden's question, in 1986, about the difference between original intent and original meaning, by 1996, the justice had settled the matter in his own mind. In a speech he gave ten years later, he explained the difference. "The theory of originalism treats a constitution like a statute, and giving it the meaning that its words were understood to bear at the time they were promulgated," he explained.

> You will sometimes hear it described as the *theory of original intent*. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the

> framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.[165]

Unable to persuade his fellow justices of this view, Scalia brought his case to the public, in books and in a series of interviews and speeches that pundits called the Dead Constitution Tour.[166] "The Constitution is not a living organism, for Pete's sake," he said in a speech he gave regularly. "It is dead, dead!" [167] (This was usually an effective laugh line—except when Scalia delivered it outside the United States, where it was met with silence and bafflement.) "I am first of all a textualist, and secondly an originalist," he'd said in 1996.[168] By 2005, he was first of all an originalist. "I have my rules that confine me. I know what I'm looking for. When I find it—the original meaning of the Constitution—I am handcuffed." He pressed his hands together, as if bound.[169]

If for Scalia originalism was a tool of judicial restraint, it became, on the Court, something altogether different from a pair of handcuffs: not an eighteenth-century musket, or a twenty-first-century assault weapon, but a ticking bomb.

News Flash: The Constitution Means What It Says

It wasn't only amendments that Congress couldn't pass in the decades between Reagan and Trump; legislation stalled, too, and while the economy grew, income inequality, rates of poverty, and maternal and infant death rates all rose. With a handful of notable exceptions, including the Affordable Care Act and the Inflation Reduction Act, neither Democrats nor Republicans, however much they continued to fight over an elusive Middle America, were able to make any real headway at turning back the suffering caused by industrial decline, a global marketplace, the alienation caused by the emergence of the internet and social media, and the public health crises caused by a series of drugs, from crack to over-the-counter opioids to fentanyl sold on the streets. By 2018, for the first time in a century, American life expectancy was consistently *falling*. College-educated Americans prospered, but high school graduates of the white working class, and those with less education, found few paths out of poverty in the age of global finance capitalism. Public health researchers coined the term *deaths*

of despair to describe the vertiginous rise in the number of deaths among white working-class adults due to suicide, alcoholism, and drug overdose.[170]

Populism had its origins in the indifference to that suffering on the part of the Clinton and Obama administrations. In a politics driven by polarizing culture wars, in which cosmopolitan elites favored immigration while blue-collar workers feared it, progressives increasingly viewed the white working class and especially devout Christians with nothing short of contempt. “You go into these small towns in Pennsylvania and, like a lot of small towns in the Midwest, the jobs have been gone now for 25 years and nothing’s replaced them,” Obama said in remarks to a fundraiser in San Francisco in 2008. “And they fell through the Clinton administration, and the Bush administration, and each successive administration has said that somehow these communities are gonna regenerate and they have not. And it’s not surprising then they get bitter, they cling to guns or religion or antipathy toward people who aren’t like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations.” [171] All that anyone remembered from that speech, in which Obama was attempting to offer compassion, was that, before an audience of Silicon Valley donor prospects, he had mocked Americans who “cling to guns or religion.” For people from whom much had been taken by the forces of capitalism, corporate greed, progressive indifference, and the machinations of Silicon Valley, guns and religion meant a great deal. And so did the Constitution, especially as marketed to Americans as something else that progressives were trying to take away from them.

The case Scalia had been waiting for finally came before the Court in March 2008, in oral arguments in *District of Columbia v. Heller*, a challenge to DC’s 1976 handgun ban. Two years before, speaking before a turkey hunting association, he’d confessed his personal frustration with the anti-gun attitude in the United States. “That attitude of associating guns with nothing but crime is what has to be changed,” he said.[172] But as for laws restricting or regulating gun ownership, those could be changed by restoring the original meaning of the Constitution, or at least, that was what the *Heller* case gave him the chance to do.

Scalia often talked about the Constitution in the language of James Montgomery Beck, calling it “that anchor, that rock.” [173] Not a living

organism, and not Jell-O. The work of discovering the original meaning of the Constitution, he believed, was "a task sometimes better suited to the historian than the lawyer." [174] But in case after case, he set aside briefs submitted by historians in favor of his own reading of a provincial and narrow set of historical documents, as if this *were* a reading of history.[175] No application of this method was more consequential than his reinterpretation of the Second Amendment in *DC v. Heller* in 2008, an opinion that Scalia considered to be his originalist masterpiece. "I think it's the most complete originalist opinion I've ever written," he told NPR.[176]

"The court had before it all the materials needed to determine the meaning of the Second Amendment at the time it was written," Scalia explained. "With these in hand, what method would be easier or more reliable than the originalist approach taken by the Court?" [177] He then set aside all of the briefs written by serious scholars of American history who disagreed with his interpretation of the Second Amendment.

"Historians are often asked what the Founders would think about various aspects of contemporary life," read an amicus brief submitted signed by fifteen eminent university professors of early American history, including Jack Rakove, Alan Taylor, Pauline Maier, and Fred Anderson, two of whom had won Pulitzer Prizes in History. "Such questions can be tricky to answer. But as historians of the Revolutionary era we are confident at least of this: that the authors of the Second Amendment would be flabbergasted to learn that in endorsing the republican principle of a well-regulated militia, they were also precluding restrictions on such potentially dangerous property as firearms, which governments had always regulated when there was 'real danger of public injury from individuals.'" [178]

Scalia ignored that brief and relied instead on his own study of the distant past. In June 2008, in a 5–4 opinion written by Scalia—in which he was joined by the three other conservatives on the Court, Clarence Thomas, Chief Justice John Roberts, and Samuel Alito, and by the swing vote, Anthony Kennedy—Scalia insisted that the historical record supports the interpretation of the Second Amendment supplied by Orrin Hatch's 1982 report on *The Right to Keep and Bear Arms*: that it protects the right of citizens to bear arms not only to defend the state in a militia but also to defend themselves as individuals.

Curiously, much in the language of Scalia's opinion in *Heller* can be read as a treatise on the difference between rights that entered the Constitution as amendments and rights that entered the Constitution by judicial interpretation. The justice wrote, about the Second Amendment, that "the very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is really worth insisting upon." (Abortion was a right that the Court had decided, case by case, since 1973.) "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all" (a fair description of the vulnerable right established by *Roe* and *Casey*). But unlike an unenumerated right, an enumerated right, like the right to keep and bear arms, is among those rights "enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." [179]

The day after the Court issued its opinion, the *Wall Street Journal* ran an op-ed by Randy Barnett under the heading "News Flash: The Constitution Means What It Says." Barnett, a Georgetown law professor and author of the book *Restoring the Lost Constitution*, argued that "in the future, we should be vetting Supreme Court nominees to see if they understand how Justice Scalia reasoned in *Heller* and if they are committed to doing the same." [180] This proved prophetic.

If Scalia did not endorse the form that originalism had taken among the votaries of the far right, he was pleased by the following it had gained in law schools. "I used to be able to say with a good deal of truth, that one could fire a cannon loaded with grape-shot in the faculty lounge of any law school in the country and not strike an originalist," Scalia, delighted with his triumph in *Heller*, said at a Federalist Society meeting. "That's no longer true." [181] But the criticism of *Heller* had been deafening, too, beginning with sharply worded dissents written by Justices Stevens and Breyer. Stevens, after he retired from the bench, formally proposed amending the Second Amendment to avoid this "misinterpretation," such that it would read, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms *when serving in the Militia* shall not be infringed." [182]

Criticism of *Heller* had also come from conservative quarters. J. Harvie Wilkinson III, a retired conservative Fourth Circuit Court of Appeals judge,

argued that Scalia had done exactly what he charged "living originalists" of doing: he had found in an emanation of the Constitution a new right, a "right of self-defense," a "right that the Court had never acknowledged in the more than two hundred years since the amendment's enactment." [183] And when the Court extended Scalia's Second Amendment interpretation in *McDonald v. City of Chicago* (2010), Stevens described Scalia's opinion as part of a "rudderless, panoramic tour of American legal history" that was "not only bad history but also bad constitutional law." [184]

By now, the Second Amendment had come to feature in judicial confirmation hearings. Elena Kagan, nominated to the Court by Barack Obama in 2010, was asked so many questions about whether she had ever hunted or even held a gun (she hadn't) that, in a private session with a member of the Senate, she promised that if confirmed she would go hunting with Justice Scalia. And when she was confirmed, she did. He took her to his shooting club in Virginia, after which they went on trips to hunt for quail and pheasants, antelope and deer. On one trip to Wyoming, Kagan later said, she shot a deer, but Scalia told her it was the wrong kind of deer, and he could've shot it in his own backyard.[185]

If friendships like that between Scalia and Kagan—and, more famously, between Scalia and Ginsburg—bridged the ideological divide on the Court, the political-campaign-fueled culture war over abortion and guns was not quieted by the decisions the Court issued, including those made after Scalia's death. In 2018, retired justice John Paul Stevens, frustrated at the Court's changed interpretation of the Second Amendment, proposed simply repealing it, but a survey found that 79 percent of Americans opposed such a repeal, with only 17 percent in favor.[186] Instead, the reach of the new interpretation was extended with Clarence Thomas's incoherent opinion in the 2022 gun rights case, *New York State Rifle & Pistol Association v. Bruen*.

In *Bruen*, Thomas invented a new "text, history and tradition" test, requiring lawyers to demonstrate the existence of an ancient "historical analogue" to any law that in any way restricted or regulated the ownership of firearms. If no analogue could be found, the law violated the Second Amendment.[187] ("Tradition is a living thing," Justice John Marshall Harlan II once wrote; the Roberts Court disagreed.)[188] It turned out, though, that American history is shot through with gun laws at the municipal, county,

and state level, rules and restrictions of nearly every kind and variety, which meant that lawyers and organizations all over the country were left to dedicate countless hours to arcane historical research to meet the requirements of *Bruen*. An entirely new field of the history of firearms law emerged, documenting that if anything could fairly be said of American text, history, and tradition, it was that Americans had always been interested both in owning guns and in imposing rules on their ownership, manufacture, use, and sale. Two years after *Bruen*, in *United States v. Rahimi*, the Court would attempt to walk back *Bruen* by clarifying that its intent was not to suggest "a law trapped in amber." (Justice Thomas dissented; he very much believed that laws are trapped in amber.)[189] But originalism, like the text, history, and tradition test, had become so confused that seven of the nine justices found it necessary to offer separate opinions in *Rahimi* in which they attempted to explain what originalism was or was not, or ever was or wasn't.[190] Without Scalia, and with conservatives having risen to power, originalism disintegrated.

Tea Partiers at a gun rights rally in DC, 2010

What would the founders do?

In 2009 "The Constitution means what it says" became the unofficial motto of the anti-tax Tea Party movement. It had been formed in opposition to the bailout plan of the Bush administration and continued by the incoming Barack Obama administration; Tea Partiers objected as well to Obama's proposed healthcare plan, the Affordable Care Act. At the extremes, some

Tea Partiers also took issue with Obama himself, the nation's first Black president. Tea Partiers dressed in eighteenth-century costumes asked James Beck's favorite question ("What would the Founders do?"), met in constitutional reading groups, and unfurled and signed gigantic copies of the Constitution, in rallies all over the country. A growing right-wing populist movement adopted originalism as a theory of revolution. If the movement was scattered and drew together Americans with many different kinds of political discontent at a time when economic growth was leaving millions of Americans behind, it also offered new opportunities for gun rights advocates to form coalitions with economic and social conservatives, all under the banner of originalism as popular constitutionalism.[191]

After the Tea Party movement wound down, its leaders began to reconstitute themselves in the 2010s under the banner of yet another call for a constitutional convention, this time with the larger and supposedly novel aim of dismantling the administrative state. In reality, this plan was the revival of the nearly century-old campaign to repeal the Progressive-era amendments and the New Deal. Originalists were not enthusiastic about this idea; they were doing very well changing the Constitution on the Court. In 2014, asked if he could pass one amendment to the Constitution, what it would be, Scalia said he'd make the Constitution easier to amend but added, "I certainly would not want a Constitutional Convention. I mean, whoa, who knows what would come out of that." [192]

Originalism as a serious and considered theory of constitutional interpretation parted company with an increasingly extreme right-wing political movement long before the emergence of the Make America Great Again or MAGA-ism of Donald Trump. A so-called Convention of States movement held a simulated convention in 2016, featuring, among others, John Eastman, a lawyer who would later be disbarred for his role in the Trump campaign's attempt to overturn the results of the 2020 election. A group called Citizens for Self-Governance, based in Austin, Texas, and passionately endorsed by Governor Greg Abbott, called for a convention, too.[193] "We need to channel the energy to restore and reclaim this country's traditional values and founding principles of limited government closest to the people and individual freedom and responsibility," the failed Republican presidential candidate Rick Santorum said in Pennsylvania in 2022.[194]

In the decades between Roosevelt and Reagan, Americans' views about the amendability of the Constitution had remained relatively stable. In 1937, the year FDR tried to pack the Court, the Gallup poll asked, "Should the Constitution be made easier to amend?": 28 percent of Americans said yes, and 60 percent said no.[195] Asked in another survey in 1987, the year of the Constitution's fraught bicentennial, "Do you think it is too easy or too hard to amend the Constitution, or is the process about right?" the spread was roughly identical: 20 percent of respondents said amending was too hard, and 60 percent said it was about right.[196] But by the 2020s, that decades-long consensus had changed. Progressives had been particularly alarmed by the Court's 2010 decision in *Citizens United v. Federal Election Commission*, granting free speech rights to corporations.[197] In a survey conducted in 2022 (before the Supreme Court handed down its decisions in *Dobbs* and *Bruen*), 41 percent of Americans agreed with the statement that the Constitution is "basically fine as it is" while 48 percent agreed that either "the Constitution should be more frequently amended" or that it "should be entirely rewritten and replaced." [198]

Signing a copy of the Constitution to protest the Supreme Court's decision in *Citizens United*, 2010

Americans seemed to be getting unhappier with the Constitution. Exactly how, though, was strikingly polarized: 80 percent of conservatives agreed that the Constitution was basically fine as is while nearly 85 percent of people who were very liberal agreed the Constitution should be reviewed and amended more frequently or else entirely rewritten. And the results

were also generational. Older Americans, including 62 percent of the Silent Generation (born between 1928 and 1945) believed the Constitution to be fine as is, while 66 percent of Gen Zers (born between 1997 and 2013) wanted to change it. Also divided by generation were responses to a question about the meaningfulness of the Constitution: 90 percent of the Silent Generation said the Constitution is "very meaningful," a proportion that fell with each generation, down to 35 percent of Gen Zers.[199]

As ever, the more conservative the Court became, the more likely were their political opponents to call for constitutional amendment. Many of the federal constitutional amendments that the left had once fought for, they began fighting for again, with renewed efforts to ratify both the Child Labor Amendment and the Equal Rights Amendment, and to get Congress to pass an amendment to eliminate the Electoral College and replace it with direct popular election.[200] None of these measures had even a remote chance of success.

In a 2018 essay in the *New York Times*, Duke Law School's Jedidiah Purdy called on progressives to "reclaim the Constitution." [201] But Harvard and Yale law school professors Ryan D. Doerfler and Samuel Moyn argued that since "liberals have been attempting to reclaim the Constitution for 50 years—with agonizingly little to show for it," the better plan would be "to reclaim America from constitutionalism." [202] Purdy, in an article in *The Atlantic* called "The Constitutional Flaw That's Killing American Democracy," urged Americans to revise Article V, to make amending the constitution easier. "This would be a way of empowering ourselves to become founders, over and over, and not just inheritors," Purdy wrote. In the aftermath of the *Dobbs* and *Bruen* rulings, Purdy, echoing Progressives of a century before, argued that amending the amendment provision was the only means to end "judicial oligarchy." Like Jefferson, Purdy recommended holding a constitutional convention once every generation. "In American constitutional law, silence—the fact that we have not amended the Constitution—counts as consent," he wrote. "But because amending the Constitution is nearly impossible, our silence is compelled, then laundered into consent." [203] And even Doerfler and Moyn agreed with that, conceding that any effort at "altering our fundamental law" would probably begin "by making the Constitution more amendable than it is now." [204]

By the 2020s, some progressives were becoming interested in holding a convention to pursue a progressive agenda, or else in planning for defending progressive positions against a conservative-led convention, even as some alleged that the chief financiers of the convention movement were advocates of fossil-fuel extraction and that its likeliest consequences, as one scholar warned, would be amendments that "would devastate environmental protection and hobble effective responses to climate change." [205] Nevertheless, most progressives continued to fear a convention. "This could gut our Constitution," Wisconsin senator Russ Feingold warned the *New York Times* in 2022, promoting a new book, *The Constitution in Jeopardy*. "There are smart people and a few on the progressive side who are willing to roll the dice," Feingold admitted, but not him. "For me, it is crazy to take the chance." [206] Yet Feingold, too, was determined that the Constitution had to be made easier to amend. And even the conservatives asked by the National Constitution Center to draft a new constitution decided to make amendment easier ("but not too much easier").[207] When the journal *Democracy* assembled a group of liberal scholars and charged them with the same task, the single most important provision of their Democracy Constitution was a new amendment process, under which Congress could pass an amendment by a simple majority in consecutive sessions, to be ratified by a national referendum.[208]

It was even possible to guess what the outcome of such a referendum might be. A survey conducted in 2022, shortly before the Court issued its opinions in *Dobbs* and *Bruen*, found that, in a hypothetical national referendum, a constitutional amendment passed by Congress abolishing the Electoral College would be ratified (47 to 35), as would one guaranteeing same-sex marriage (62 to 38), and one guaranteeing a right to abortion (57 to 43), but paradoxically, so would an amendment restricting abortion (51 to 49), while an amendment ending birthright citizenship would be only very narrowly defeated (49 to 51), and no proposal to clarify or revise the Second Amendment would win ratification.[209] Still, none of these findings much mattered, since there was no chance of any of them being passed by Congress, let alone being submitted to voters in a ratification process never before tried or even honestly considered.

Reading Law

Antonin Scalia hoped to replace the philosophy of amendment with the philosophy of originalism. He considered *Heller* to be originalism's triumph and his most important legacy. But he also wanted to leave behind a textbook, a version of Joseph Story's *Commentaries on the Constitution* or Francis Lieber's *Legal and Political Hermeneutics*. Scalia's opus appeared in 2012, jointly authored with the legal scholar and lexicographer Bryan Garner. Like Robert Bork's *Tempting of America*, the book was also meant as a vindication, an answer to all his critics.

In *Reading Law*, Scalia and Garner discussed *Heller* in a chapter called "Thirteen Falsities Exposed" under the heading "The false notion that lawyers and judges, not being historians, are unqualified to do the historical research that originalism requires." Historical research is not a difficult endeavor, they alleged. Nor are historical sources difficult to discover or to read. Nor is such a reading likely to be inconclusive. The historical record is, instead, legible, unitary, and dispositive.[210] Learning how to "read law" required three years of law school and the study of many books, like the more-than-five-hundred-page textbook *Reading Law*, but reading history was easy and straightforward. Those who said otherwise "exaggerate the task." [211]

This, unsurprisingly, did not quiet Scalia's adversaries. *Heller* is the most criticized of all of Scalia's opinions, claimed Seventh Circuit judge and Reagan nominee Richard Posner, in a review of the book. "*Reading Law* is Scalia's response to the criticism," Posner wrote. "It is unconvincing." Scalia and Garner had suggested that one tool that made reading history so simple was the availability of so many amicus briefs written by actual historians. But as Posner observed, "The book's defense of the *Heller* decision fails to mention that most professional historians reject the historical analysis in Scalia's opinion." [212] Scalia must have known that the historical record is scarcely ever unambiguous. In *Heller*, Justice Stevens had stacked his historical evidence up against Scalia's. What made Scalia's history into law was that he got five votes, and Stevens got only four. That didn't make Scalia's history right.

Ironically, Scalia may have wielded his greatest influence not on the Court but outside it. At a certain point, he seems to have become more

interested in having his say, speaking to his admirers off the Court, than in winning votes on it. He had an insatiable appetite for intellectual battle, but as political rhetoric heated up after the election of Barack Obama in 2008, Scalia found himself the subject of ceaseless personal attack. Understandably, he grew weary and isolated. Like so many Americans, he found the polarization of the press unbearable. The crazier the far-right press of Fox News got, the crazier became MSNBC, CNN, and even the nation's newspapers of record. At the beginning of Obama's second term, Scalia told a reporter that he didn't read the *New York Times* and had given up reading the *Washington Post*: "it just . . . went too far for me. I couldn't handle it anymore." He was, by then, he said, getting most of his news from talk radio.[213]

Heller, he began to fear, had been originalism's high point. But after *Heller*, originalism soared, both as the popular constitutionalism of the Make America Great Again movement and on the Supreme Court, as Trump added three originalist justices to the bench. Progressives, expecting originalism to prevail on the Supreme Court for years and even decades to come, attempted to devise something called "progressive originalism," endorsed by the Biden-appointed Justice Ketanji Brown Jackson.[214] "If conservative judges are making selective use of history to make originalist arguments for conservative results, then the only way to show this is to make better originalist arguments to the contrary," wrote one law professor in 2022.[215]

Would judging law be reduced to the act of choosing between competing accounts of the past written by different groups of historians, based on some as-yet-undefined method of determining which account is the correct one? It didn't work out that way. In a series of crucial cases, the Trump-era Court cited history if it supported a preferred outcome, and if history did not support that outcome, the Court simply ignored the past. After Donald Trump incited an invasion of the U.S. Capitol during the certification of the Electoral College results in 2021, historians offered an originalist interpretation of the disqualification clause of the Fourteenth Amendment, arguing that Trump, like Jefferson Davis, could not run for president. The Court set that history aside.[216] When the U.S. Justice Department pursued criminal charges against Trump associated with the insurrection, Trump, in the case *Trump v. United States*, insisted that

presidents are immune from criminal conviction; historians submitted an originalist interpretation of constitutional immunity demonstrating that there existed no historical evidence whatsoever for Trump's claim. The Court set that history aside. The lead author of the historians' brief assessed the majority opinion in *Trump v. United States*: "The Supreme Court has effectively ruled that 250 years of U.S. history under a republic is enough." [217] A leading conservative commentator concluded that in the disqualification and immunity decisions, "the court's originalist majority neglected its originalism." [218] Or as the liberal justice Sonia Sotomayor observed ruefully, in a scorching dissent in *Trump v. United States*, "It seems history matters to this Court only when it is convenient." [219]

The Constitution is dead! Scalia liked to say. To many Americans in the Trump and Biden years, it had begun to seem that way, although half the country blamed Republicans, and the other half blamed Democrats. By 2021, one in three Americans said they'd consider either abolishing the Supreme Court or limiting its power.[220] Elizabeth Warren, a Massachusetts senator and former Harvard law professor, co-sponsored a new Judiciary Act to restructure the Court. Hearkening back to the objections of Progressives to a conservative court of men like George Sutherland a century earlier, Warren charged the conservative six-justice supermajority with pursuing a "deeply unpopular and partisan agenda at odds with the Constitution and the settled rights of our citizens. " [221] The next year Trump, citing "Massive Fraud" in the 2020 election and seeking reelection, called for "the termination of all rules, regulations, and articles, even those found in the Constitution." [222] Democrats called for two justices, Thomas and Alito, to recuse themselves in cases relating to the January 6 insurrection; when they refused, at least one Democrat in Congress called for their impeachment.[223]

After *Dobbs* and *Bruen*, public estimation of the legitimacy of the Court fell to record lows, though it divided along strictly partisan lines.[224] In 2024 two climate change activists poured red powder on the glass case enclosing the Constitution in its shrine in the rotunda of the National Archives, where it had been carried, seventy-two years before, under armed guard. (This was the first attack on the Constitution since the bicentennial in 1986.)[225] "We are determined to foment a rebellion," one of the protesters said, quoting a letter written by Abigail Adams in 1776. "We will not be held accountable

to laws in which we have no voice and representation." Said the other, "We all deserve clean air, water, food and a livable climate." [226]

Antonin Scalia did not live to witness this crisis in constitutionalism. "For all I know, 50 years from now I may be the Justice Sutherland of the late-twentieth and early-21st century," he said in an exceptionally candid interview near the end of his life. "And I don't care." [227] Long before, playing Macbeth on stage, he'd uttered some of Shakespeare's most aching lines:

> *Life's but a walking shadow, a poor player,*
> *That struts and frets his hour upon the stage,*
> *And then is heard no more.*[228]

Did he ever wonder if that might be true of the Constitution, if he had been wrong, and if it were, all along, a living thing, grown stunted, thwarted, ailing? In 2016, during a quail-hunting trip in Texas, he died in his sleep, age seventy-nine.

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Epilogue

The Future of Constitutionalism

Follow for extended description

Sonya Clark, *The Descendants of Monticello*, 2024

> *As an AI language model, I do not have personal beliefs or opinions. However, based on current public opinion, here are three possible amendments to the U.S. Constitution.*
>
> —ChatGPT post on Reddit, 2023

The Constitution of the United States rests on three eighteenth-century beliefs: that a constitution is a machine, that the human mind is driven by reason, and that history moves in the direction of progress.

No one more clearly stated these views than Thomas Jefferson. “Laws and institutions must go hand in hand with the progress of the human mind,” he wrote in 1816, on the fortieth anniversary of the Declaration of Independence, musing that constitutions that could be readily amended

might last forever, “if anything human can so long endure.” An inveterate tinkerer, Jefferson knew about machines. At Monticello, on Mulberry Row, he oversaw a manufactory where, as he reported, “a few women, children & invalids who could do little in the farm”—humans too little or sick or old to do more strenuous work—produced two thousand yards of cloth a year, double what Monticello had been able to manufacture before Jefferson imported the latest carding, spinning, and weaving machines.[1] And when those machines broke down, as all machines do, they could be mended, and even improved.

One new kind of machine would have fascinated Jefferson. In 1801 a weaver in France designed a machine that used punched cards to program a loom to weave cloth in any pattern. The punch-card loom inspired the first computers, tabulators, and calculators that could count and sort information, machines whose descendants can not only produce patterns but also detect them, faster and more accurately than any human mind. The human mind may or may not be driven by reason, but the computing mind is driven by calculation. Since the 1950s and the rise of the general-purpose computer, but especially since the 1990s and the opening of the internet, the architecture of human communication has been ceaselessly updated, from minor patches to major version changes, a collaborative process of ongoing revision and overwriting that lies far distant from the slow and painstaking practice of amending written constitutions through democratic deliberation. In the twenty-first century, a world in which ideas circulate not by way of goose quills and sheepskin parchment and lead type but by way of crystalline silicon, iron ore, and integrated circuits, an artificially intelligent machine can read all the constitutions in the world and draft a new one or interfere in the operation of an old one. In the 2020s, the Biden White House issued a proposal for an AI Bill of Rights, which didn’t grant rights to machines but instead promised to protect humans against “the use of technology, data, and automated systems in ways that threaten the rights of the American public.” [2] Legal theorists began discussing “constitutional artificial intelligence,” hoping to coax artificially intelligent machines to align their output with constitutional principles like the rule of law and human rights.[3] One think tank produced the Digitalist Papers, an age-of-AI analog to the Federalist Papers.[4] But the algorithmic architecture of twenty-first-century communications threatens to end the liberal nation-state and

replace it with what I have called the Artificial State.[5] It could even augur the end of constitutionalism itself.

Machines progress. Does history? In the first decades of the twenty-first century, faith in progress proved elusive in American constitutional culture. During the Age of Trump, a philosophy of doom replaced the philosophy of amendment. Conservatives told a tale of constitutional catastrophe involving the expansion of the power of the federal government through the judiciary's creation of new rights and sought to terrify Americans into defending a sacralized Constitution against alteration as if to stop the passage of time itself. Progressives warned of a different dystopia, the retraction of constitutional rights, and lavishly lamented the plot of a constitutional story substantially of their own devising.[6] Everyone, it seemed, agreed to abandon the philosophy of amendment.

A philosophy of doom is an undemanding doctrine, and doomsday books are easy to write. Aside from the U.S. Constitution, nearly every constitution mentioned in this book is defunct, and nearly all the people in this book are dead, too. Mary Wollstonecraft died at thirty-eight in 1797, due to complications from childbirth. Anne Willing Bingham died at thirty-six in 1801, not long after the birth of her third child. Thomas Jefferson and John Adams died on the same day, July 4, 1826, the fiftieth anniversary of the Declaration of Independence. Joseph Pope died that same summer, after having moved from Boston to Hallowell, Maine, to live with his son, where he invented a threshing machine (a machine to separate grain from stalks and husks).[7] It was said that this new machine, unlike Pope's orrery, would not break down, since it depended "neither on metal springs, which may break; nor on complicated movements, which may be disordered; nor on a multitude of parts, which may create confusion, or call for frequent repairs." [8]

Jefferson seems to have kept the promise he made to Sally Hemings in Paris in 1789, that he would free her children when they came of age. He did not free Hemings, who died in Charlottesville in 1835, at sixty-two.[9] Mary Jane Richardson and John Jones are buried side by side in a cemetery in Chicago. Charles Beard had the great misfortune of living just long enough to be disgraced.[10] In 1948, while he was dying of anemia in a hospital in New Haven, *The Atlantic* published a venomous review of his last book.[11] If he was lucky, no one showed it to him.[12] Mary Church

Terrell lived to be ninety, meeting her end in Maryland two months after *Brown v. Board of Education*. David J. Mays died in 1971, having arranged that upon his death his diaries would be given to the Virginia Historical Society.[13] Ethel Payne died of a heart attack at home in 1991. Patsy Takemoto Mink succumbed to pneumonia at seventy-four in 2002, after winning a primary from her hospital bed in Honolulu.[14] Vine Deloria died of a complication from an aneurism in Colorado in 2005; he was seventy-two, remembered at his memorial as "whip smart and coyote clever." [15]

In 2008, William F. Buckley, eighty-two, collapsed in his study. After his death, his son published a political satire called *Supreme Courtship*, in which a Senate Judiciary Committee chairman conspires to defeat two nominees to the Court, after which the president next names a reality TV judge, leading Congress to pass a constitutional amendment limiting the presidency to one term, whereupon the president seeks reelection in a race against the former Senate Judiciary Committee chairman (now playing the president on TV) and wins but only after the states have ratified the one-term amendment so the election is thrown to the Supreme Court, where the justice casting the tie-breaking vote is sleeping with the chief justice but refuses to recuse herself, leading to calls for her impeachment.[16] In the Trump era this plot didn't seem so funny anymore. "I like to think as a country, as we grow older, we learn," ninety-year-old Birch Bayh, white-haired and stooped, told a reporter in the last interview he gave before his death in 2019. "It just makes such good sense." [17]

Whether or not that is true of people, it does not appear to be true of constitutions. Constitutions submit to general rules.[18] One of those rules is that outdated constitutions undermine democratic governance.[19] The influence of the U.S. Constitution is on the decline, but it remains the most influential constitution in the world.[20] Over all seven continents, many of the world's constitutions are indebted to it, were inspired by it, and borrow language from it. Ninety-six percent of the world's written constitutions include an amendment provision.[21] Yet around the world, written constitutions lie in various states of stagnation, decay, misuse, and nonuse.[22] Legislators abuse them. Autocrats ignore them.[23] As constitutions age, they become more difficult to amend because people tend to venerate old constitutions—"that veneration which time bestows on every thing," as

Madison put it—and also because, as populations grow and become more diverse and more polarized, the political obstacles to amendment increase in both number and power.[24]

How long can or should a constitution last? Is there is a point beyond which a constitution cannot be stretched, like a uterus, swollen with life, and instead breaks, like a fractured bone? Jefferson believed that, with regular amendment, a constitution might last until the end of time, *if anything human can so long endure*. But the world contains more than things human.

The two and a half centuries since the American Revolution are remarkable for the extension of the franchise and the assertion of human rights, for technological progress, for ever-widening and even profound knowledge of the natural world, for increases in life expectancy and the standard of living, and for economic prosperity and astounding population growth, and yet they are also remarkable for the scale of human violence, the poisoning of the earth, the development and deployment of weapons of mass destruction, the mass extinction of wildlife, catastrophic climate change, and the invention of artificial persons. If, for a large portion of humankind, these two and a half centuries represented progress—freedom from want and freedom from fear—every other living thing on the planet saw only decline.

The human population of the planet was about 800 million when the U.S. Constitution was written; by the 2020s, it had reached nearly eight billion.[25] In the last ten thousand years, the earth has lost about a third of its forest; almost all that loss has happened over the last three hundred years.[26] Since 1880, the seas have risen nine inches, nearly four inches just since 1993, and another six to eight inches between 1993 and 2022.[27] Wildlife habitat is disappearing at a rate of thousands of acres a day.[28] Between 1970 and 2020 alone, wildlife populations fell by two-thirds.[29] Birds have disappeared, fish are dying, seas are warming, storms are worsening. The very dirt is exhausted and barren, desperately in need of amendment.[30]

We the People. America's eighteenth-century constitution is an artifact of a chain-of-being understanding of humans and the natural world: we the people rule over all creatures great and small. No fundamental law restrains what humans can do to the natural world. The loam, the sheep, the geese, the wasps, the oaks: the Constitution of parchment and ink is made of them.

It presumed their world but made no allowance for it or for them, set no force in motion to restrain the tyranny of humans over all other creatures, the birds of the sky, the fish of the sea. Nor has any amendment provided for them. And yet a world without them is a blank page, a void, "darkness . . . upon the face of the deep." [31] What, in such a world, does amendment any longer mean?

Most federal measures currently in place to protect the natural world—clean water, clean air—date to the early 1970s, when Wisconsin senator Gaylord Nelson proposed a constitutional amendment to read "Every person has the inalienable right to a decent environment." [32] But by then, when a majority of the world's nations were adding environmental provisions to their constitutions, Article V was already breaking down.[33] Out of 196 constitutions in the world, 148 address environmental protection or environmental rights.[34] Most are mere gestures; they haven't stopped the earth from burning.[35] But without these and stricter, more enforceable constitutional provisions, the prospects for halting or reversing climate change are dim. In the absence of any language in the U.S. Constitution regarding the natural world, laws are repealed, orders unenforced, lower court decisions reversed.[36] Native nations and municipal, state, and even national governments around the world have tried granting rights to rivers and streams, to mountains and valleys, to plants and animals, and while it is not clear that granting rights to nature is feasible or judiciable, it is clear that no change to fundamental law about the relationship between humans and the natural world can happen without a restoration of the philosophy of amendment.

Article V is a sleeping giant. It sleeps until it wakes, and then it roars. On June 23, 1970, on what must have been the last or very nearly the last day of school, on one of the very last days that Americans had reason to believe they could still amend their Constitution, 429 students from a high school in Fargo, North Dakota, signed their names to a petition handwritten on notebook paper, in blue ink.

"We, the undersigned, are suffering," the kids from Fargo wrote, calling on Congress to pass Nelson's environmental rights amendment. "Our environment is degraded, our society endangered, our culture in danger of wilting with last week's news." They placed their faith in constitutional amendment, "in the hope that that world will choose <u>not</u> to condemn itself

to desolation, disease, and death." They had not consented to a constitution that was written in 1787 and that had nothing to say about the natural world, and they wanted to mend it. "We are young, but we ask, and we demand, the right to an environment in which we can grow old." [37] They signed their names with the dreamy, loopy, handwriting they used to sign their high school yearbooks. Stacy and Bruce, Cathy and Jeri. Darlene and Kevin and Jeff and Ruth. And then they sent copies of that petition to Birch Bayh at the Senate Judiciary Committee's Subcommittee on Constitutional Amendments, and to senators from Minnesota, North Dakota, and Illinois, and to President Richard Nixon. Bayh's staff wrote back to anyone who inquired about the environmental amendment that he was "looking into possible hearings on this subject." [38] He never held those hearings. No one ever held them.

No constitution can be kept forever, like a butterfly under glass, tacked down with pins. *In danger of wilting.* To constitute is to become or establish; to amend is to mend, correct, repair, and improve. Americans might learn again to amend, or else they could invent a new instrument to guarantee liberty, promote equality, nurture families, knit communities, thwart tyranny, and avert the destruction of a habitable earth. Constitutions began with stones and seashells, with old books and oak trees, with sheepskin and goose feathers. From the burning, scorched earth, new ideas might arise once more, seedlings, sprouting, tendrils wending to the sun.

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Notes

In lieu of reproducing very long URLs pointing to individual records in large digital projects, including the Amendments Project at Harvard (amendmentsproject.org), the American Presidency Project at the University of California Santa Barbara (presidency.ucsb.edu), the Avalon Project at Yale Law School (Avalon.law.yale.edu), Founders Online at the National Archives (founders.archives.gov), and the Roper Center for Public Opinion Research at Cornell University (ropercenter-cornell.edu), these notes simply provide identifying information to direct readers to records that can be found in those sites, abbreviated as Amend, APP, Avalon, Founders, and Roper.

Introduction: The Philosophy of Amendment

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11 Laurel Thatcher Ulrich, "Wheels, Looms, and the Gender Division of Labor in Eighteenth-Century New England," *William and Mary Quarterly* 55 (1998): 3–38.

12 Emily Dickinson, for instance, once wrote that while "devils cannot mend," the Devil can be "amended." Emily Dickinson, "The Devil, had he fidelity," in *The Single Hound: Poems of a Lifetime* (Boston: Little, Brown, 1914), 99. See also *Henry IV*, Act III, Scene 1; Jeremiah 26:13; Richard Saunders and Theophilus Grew, *Poor Richard, 1745: An Almanack for the Year of Christ 1745* (Philadelphia, 1745); Richard Saunders, *Poor Richard Improved: Being an Almanack and Ephemeris . . . for the Year of Our Lord 1756* (Philadelphia, 1756); "Amend," Samuel Johnson's Dictionary Online.

13 Noah Webster, *A Compendious Dictionary* (New Haven, CT, 1806), 11. I argue that the American idea of amendment embraces all these meanings. Other scholars have argued that only some of these meanings apply. See, e.g., Charles Leedham, *Our Changing Constitution* (New York: Dodd, Mead, 1964), 1 (arguing that "the great majority of amendments should really be called 'additions'"). Deeming some amendments to be something other than amendments changes the number of amendments: see, e.g., Sanford Levinson, "How Many Times Has the Constitution Been Amended?" in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, ed. Sanford Levinson (Princeton, NJ: Princeton University Press, 1995). Richard Albert argues that to *be* an amendment, an amendment must entail "unbroken unity with the constitution being amended." Not all ratified amendments to the U.S. Constitution are, by his definition, amendments. Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (New York: Oxford University Press, 2019), 79–80. Elsewhere, Albert identifies three kinds of formal constitutional change—(1) constitutional amendment, (2) constitutional dismemberment, and (3) constitutional replacement—and suggests that the Thirteenth, Fourteenth, and Fifteenth amendments, for instance, are dismemberments, rather than amendments. Richard Albert, "Why Rawls Was Wrong About

Constitutional Amendment," in *Edward Elgar Research Handbook on Constitutionalism and Legal Theory* (forthcoming, 2025).

14 Matthew Hale, *Some Necessary and Important Considerations* (London, 1697); Montesquieu, *Spirit of the Law*, bk. 29, chap. 15. See also John R. Vile, *The Constitutional Amending Process in American Political Thought* (New York: Praeger, 1992), introduction; David Hume, *Essays, Moral, Political and Literary* (1758; London, 1898), 452. On longevity, see Zachary Elkins et al., *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009).

15 David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution 1776–2015* (Lawrence: University Press of Kansas, 2016), ix. Gienapp suggests the possibility that it was the principle of amendment that committed early Americans to the idea that the words in a written constitution were fixed. Gienapp, *Against Constitutional Originalism: A Historical Critique* (New Haven, CT: Yale University Press, 2024), 141–46.

16 Kyvig, *Explicit and Authentic*, 18.

17 "Prior to 1787 no national constitution other than the Articles of Confederation contained a formal mechanism for constitutional change; before this time, indeed, written constitutions had essentially not been invented." Vile, *Constitutional Amending*, 1.

18 "Attempts to Revise the Articles of Confederation," Center for the Study of the American Constitution, University of Wisconsin–Madison Department of History; Alexander Hamilton, Federalist no. 15 (December 1, 1787), Founders; George Mason, speech, Philadelphia, June 11, 1787, Avalon.

19 Ralph R. Martig, "Amending the Constitution—Article Five: The Keystone of the Arch," *Michigan Law Review* 35 (1937): 1253–85.

20 James Wilson, "Of the Study of the Law in the United States" (1791), in *Works* (Philadelphia, 1804), 1:21.

21 James Madison, Federalist nos. 49 (February 2, 1788) and 43 (January 23, 1788), both at Founders.

22 On non–Article V methods of amendment, see Graber, *New Introduction to Constitutionalism*, 151–53. For a proposal that "there is a third, usually ignored, possibility: constitutional amendment by direct appeal to, and ratification by, We the People of the United States," see Akhil Reed Amar, "Philadelphia Revisited: Amending the Constitution Outside Article V," *University of Chicago Law Review* 55 (1988): 1043–1104. Notable contributions to the vast literature on Article V include Sanford Levinson, "The Political Implications of Amending Clauses," *Constitutional Commentary* 13 (1996): 107–23; and David Pozen, "The Puzzles and Possibilities of Article V," *Columbia Law Review* 121 (2021): 2317–95.

23 Nor are its formal amendments exceptionally powerful; one legal scholar has gone so far as to argue that the ratified amendments are "irrelevant." David A. Strauss, "The Irrelevance of Constitutional Amendments," *Harvard Law Review* 115 (2001): 1457–505.

24 John Stuart Mill, *Nature, the Utility of Religion, and Theism* (London, 1874), 26.

25 For representative works, see David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill & Wang, 2010); Linda Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill & Wang, 1999); Maggie Blackhawk, "The Constitution of American Colonialism," *Harvard Law Review* 137 (2023): 1–152.

26 Kyvig emphasizes the importance of Article V amendment over other means of constitutional change, especially judicial interpretation: "Unless they comply with Article V's requirements, innovations in constitutional understanding have limited weight." *Explicit and Authentic*, 10.

27 I am indebted here to Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2016), chap. 4.

28 Some legal scholars contend that the ERA in fact *was* ratified, in 2020, but its ratification has not been certified by the Archivist of the United States. Alex Cohen and Wilfred U. Codrington

III, “The Equal Rights Amendment Explained,” January 23, 2020, BrennanCenter.org.

29 Ullmann v. United States, 350 U.S. 422 (1956).

30 See especially David A. Strauss, “Common Law Constitutional Interpretation,” *University of Chicago Law Review* 63 (1996): 877–935. On the relationship between state and federal amending, see Robinson Woodward-Burns, *Hidden Laws: How State Constitutions Stabilize American Politics* (New Haven, CT: Yale University Press, 2021); and Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (New York: Oxford University Press, 2018). On constitutional change by statute, see Stephen M. Griffin, “Constitutionalism in the U.S.,” in Levinson, *Responding to Imperfection*, chap. 3; William N. Eskridge and John A. Ferejohn, *A Republic of Statutes: The New American Constitution* (New Haven, CT: Yale University Press, 2010); and Maggie Blackhawk, “Legislative Constitutionalism and Federal Indian Law,” *Yale Law Journal* 132 (2023). And for a comparative study of constitutional change by referendum, see Zachary Elkins and Alexander Hudson, “The Constitutional Referendum in Historical Perspective,” in David Landau and Hanna Lerner, eds., *Comparative Constitution Making* (Edward Elgar, 2019): 142–64.

31 See, broadly, Heather Gerken, “The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution,” *Drake Law Review* 55 (2007): 933 (“An informal amendment process exists because formal amendment is so difficult”); Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991); and Ackerman, “The Living Constitution,” *Harvard Law Review* 120 (2007): 1737–812. Ackerman pays particular attention to American history since the New Deal when he writes, “The formal system of amendment no longer marks the great changes in constitutional course ratified by the American people over the last seventy-five years” (1757).

32 See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004); Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus & Giroux, 2009); and for an important assessment, Vicki C. Jackson, “Democracy and Judicial Review, Will and Reason, Amendment and Interpretation,” *University of Pennsylvania Journal of Constitutional Law* 13 (2010): 413–54.

33 Classically, see Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962).

34 Kyvig adheres to a strict conception of amendment as formal amendment, as opposed to informal amendment (which emphasizes American history since 1933): “To argue, as some have, that enduring transformative constitutional change can be achieved without resort to Article V seems a foreshortened misreading of the long sweep of American experience.” David E. Kyvig, ed., *Unintended Consequences of Constitutional Amendment* (Athens: University of Georgia Press, 2000), 2–3.

35 On rival theories of interpretation, see Cass R. Sunstein, *How to Interpret the Constitution* (Princeton, NJ: Princeton University Press, 2023).

36 On its origins, see Mary Sarah Bilder, “The Corporate Origins of Judicial Review,” *Yale Law Journal* 116 (2006): 502–66; on its practice, see Keith E. Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (Lawrence: University Press of Kansas, 2019).

37 For a recent popular account, see Nikolas Bowie and Daphna Renan, “The Supreme Court Is Not Supposed to Have This Much Power,” *Atlantic*, June 8, 2022.

38 Gerken has described this pattern as hydraulic arguing that, “by blocking most formal amendments, Article V effectively redirects those constitutional energies into different, potentially more productive channels.” “Hydraulics,” 927. For an argument that identifies nonoriginalism, not Article V, as the wrench in the machine, see John O. McGinnis and Michael B. Rappaport, “Originalism and the Good Constitution,” *Georgetown Law Journal* 89 (2010):

1747 (“It is not that the constitutional amendment process operates poorly and therefore nonoriginalism is required. Rather, it is that nonoriginalism prevents the constitutional amendment process from operating effectively”). For challenge to the hydraulic model, see Michael Besso, “Constitutional Amendment Procedures and the Informal Political Construction of Constitutions,” *Journal of Politics* 67 (2005): 69–87.

39 Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (Halifax, Nova Scotia, 1860).

40 Abraham Lincoln, Inaugural Address, March 4, 1861, APP.

41 Sam Ervin, “The Power to Interpret Is Not the Power to Amend,” *U.S. News & World Report*, May 11, 1959.

42 Richard Albert, “The World’s Most Difficult Constitution to Amend?” *California Law Review* 110 (2022): 2005–22; Donald S. Lutz, “Toward a Theory of Constitutional Amendment,” *American Political Science Review* 88 (1994): 355–70. But see Tom Ginsburg and James Melton, “Does the Constitutional Amendment Rule Matter at All?: Amendment Cultures and the Challenges of Measuring Amendment Difficulty,” *I•CON* 13 (2015): 686–713. Albert persuasively argues that many of the foreign constitutions that are difficult to amend “were designed to be unamendable—impervious to amendment—whereas the U.S. Constitution was not.” Albert calls the first “codified unamendability” and refers to the U.S. Constitution as suffering from “constructive unamendability,” a condition that arises when a constitution “is freely amendable in theory but unamendable in practice.”

43 On legislators’ motives, see David R. Mayhew, *Congress: The Electoral Connection* (New Haven, CT: Yale University Press, 2004).

44 The search for a pattern in the history of amendment is a long one. Examples include Mary Frances Berry, *Why ERA Failed: Politics, Women’s Rights, and the Amending Process of the Constitution* (Bloomington: Indiana University Press, 1986), 3, 10–11; Hannah Arendt, *On Revolution* (1963; reprint New York: Penguin, 2006), 18–19, 25; and most influentially in recent years, Ackerman’s theory of cyclical constitutional change in “Living Constitution,” 1757.

45 The pioneering compilation of proposed amendments is Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History* (Washington, 1897); John R. Vile has reprinted Ames’s volume and its successors in *Proposed Amendments to the U.S. Constitution, 1787–2001* (Clark, NJ: Lawbook Exchange, 2011), 4 vols. For accounts of the history of amendment, see Kyvig, *Explicit and Authentic*, and John F. Kowal and Wilfred U. Codrington III, *The People’s Constitution: 200 Years, 27 Amendments, and the Promise of a More Perfect Union* (New York: New Press, 2021). A popular account is Richard B. Bernstein, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (New York: Random House, 1993). For an invaluable overview of the scholarship before 1996, see Kyvig, *Explicit and Authentic*, preface. And for an overlooked early reckoning, see John Bach McMaster, “A Century of Constitutional Interpretation,” *Century* 37 (April 1889): 866–78; reprinted in McMaster, *With the Fathers: Studies in the History of the United States* (New York, 1896), 182–221.

46 *Debates of the Missouri Constitutional Convention of 1875*, 11:393, quoted in John J. Dinan, *The American State Constitutional Tradition* (Lawrence: University Press of Kansas, 2009), 47.

47 John Dinan, *State Constitutional Politics: Government by Amendment in the American States* (Chicago: University of Chicago Press, 2018), chap. 1.

48 John Dinan, “Explaining the Prevalence of State Constitutional Conventions in the Nineteenth and Twentieth Centuries,” *Journal of Policy History* 36 (2024): 297–335.

49 State amendment data is regularly reported in *The Book of the States*, a reference tool that has been published annually by the Council of State Governments since 1935. In 1981 the number of amendments to currently-in-place constitutions submitted to voters in forty-nine states totaled 7,953, of which 4,988, or 62.7 percent, had been adopted. *Book of States* (Lexington, KY:

Council of State Governments, 2022), 53:115–17. John Dinan reported the data as of January 1, 2018, in *The Book of States* 50 (Lexington, KY: Council of State Governments, 2018), 50:4. The percentage of amendments approved by voters in 2021 was 69.6.

50 Steven Levitsky and Daniel Ziblatt, *Tyranny of the Minority: Why American Democracy Reached the Breaking Point* (New York: Crown, 2023).

51 Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (Fall 1971). For a lawyer's debunking, see Erwin Chemerinsky, *Worse Than Nothing: The Dangerous Fallacy of Originalism* (New Haven, CT: Yale University Press, 2022); and Madiba K. Dennie, *The Originalism Trap: How Extremists Stole the Constitution and How We the People Can Take It Back* (New York: Random House, 2024). Dennie heatedly argues that "originalism gives the judiciary extraordinary power to put historically marginalized people 'back in their place' and buttress the country's long-standing stratification of power and wealth" (14). For a historian's debunking, see Gienapp, *Against Originalism.* Gienapp argues persuasively that "no critique of originalism is more fundamental than the historical one" (3).

52 The term was coined by Paul Brest, a critic of originalism, in "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60 (1980): 204–34. Oxford English Dictionary, under "originalism (n.)." For usefully different accounts of the history of originalism, see Joel Alicea, "Originalism and the Rule of the Dead," *National Review*, Spring 2015; and Logan Sawyer, "Principle and Politics in the New History of Originalism," *American Journal of Legal History* 57 (2017): 198–222.

53 Jennifer Senior, "In Conversation with Antonin Scalia," *New York Magazine*, October 7, 2013.

54 Stephen Brooks, *American Exceptionalism in the Age of Obama* (New York: Routledge, 2013), 95.

55 Jamal Greene, "The Origins of Originalism," *Texas Law Review* 88 (2009): 11.

56 *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary, U.S. Senate*, 111th Cong. 62 (2010) (testimony of Elena Kagan).

57 Sunstein, *How to Interpret*, 8. Dennie's answer is "inclusive constitutionalism," which she defines as "an interpretive framework that disentangles the Constitution's ideals from originalist ideology and instead emphasizes the transformative goals of the Reconstruction Amendments." Dennie, *Originalism Trap*, 42–44. Similar terms are used by originalists. William Baude, "Is Originalism Our Law?" *Columbia Law Review* 115 (2015): 2354 (arguing that an "inclusive" version of originalism is our law). Vicki Jackson has argued, instead, that judicial originalism is exclusionary, and "exclusionary originalism is incompatible with the very purpose of having a constitution." Jackson, "Exclusionary Originalism as Anti-Constitutionalist: *Dobbs* and *Bruen* as Threats to Constitutionalism," *Harvard Law and Policy Review* 18 (2024): 221. Another rejoinder to Sunstein is pragmatism. See Stephen Breyer, *Reading the Constitution: Why I Chose Pragmatism, Not Textualism* (New York: Simon & Schuster, 2024).

58 Keith Whittington, "The New Originalism," *Georgetown Journal of Law and Public Policy* 2 (2004): 599–613. There is also (this list is not exhaustive): original methods originalism, original-law originalism, progressive originalism, Reconstruction originalism, and living originalism. As Gienapp has pointed out, originalism has descended into "a veritable latter-day equivalent of medical scholasticism, defined by a density of argumentation and theoretical distinctions that would have baffled earlier American constitutionalists," while "in practice, the differences between originalists often melt away." Gienapp, *Against Originalism*, 20.

59 See especially Johnathan G. O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore: Johns Hopkins University Press, 2005). Scalia maintained that until *Brown*, originalism, by other names, had been orthodoxy. Elaine McArdle, "In Inaugural Vaughan Lecture, Scalia Defends the 'Methodology of Originalism,'" *Harvard Law Today*, October 3, 2008. He claimed that everyone from Blackstone to Oliver Wendell Holmes

to “anyone who wrote before 1950” was an originalist. Posner countered “The fact that loose constructionists sometimes publicly endorse textualism is evidence only that judges are, for strategic reasons, often not candid.” Posner, “The Incoherence of Antonin Scalia,” *New Republic*, August 24, 2012.

60 See Ken I. Kersch, *Conservatives and the Constitution: Imagining Constitutional Restoration in the Heyday of American Liberalism* (New York: Cambridge University Press, 2019).

61 For the Fourteenth Amendment, ratified in 1868, originalists consult the records of the 39th Congress. For a pessimistic assessment of the possibility of Reconstruction Originalism advancing the project of racial equality, see Guy-Uriel E. Charles and Luis E. Fuentes-Rohwer, “Race, Originalism, and Skepticism,” *University of Pennsylvania Journal of Constitutional Law* 25 (2023): 1241–77; they argue that “Reconstruction Originalism and racial justice are deeply incompatible because the equality project is necessarily future oriented and forward looking, whereas Reconstruction Originalism is necessarily about the past and backward looking” (1247).

62 Eric L. Muller, “Originalism Was Impossible,” *Atlantic*, September 24, 2024.

63 The fullest argument against originalists’ claim that the framers were originalists can be found in Gienapp, *Against Originalism*, chap. 8.

64 James Madison, Federalist no. 14 (November 30, 1787), Founders.

65 Annals of Cong. 5 (1796): 776 (remarks of Rep. Madison).

66 James Madison to Edward Livingston, April 17, 1824, Founders.

67 Thurgood Marshall, “The Constitution’s Bicentennial: Commemorating the Wrong Document?” *Vanderbilt Law Review* 40 (November 1987): 1337–42.

68 Reva Siegel, who distinguishes between originalism as an avowedly value-neutral interpretive method (studied in law schools) and originalism as a value-driven political practice (studied by historians and political scientists), argues that originalists locate constitutional authority in “imagined communities of the past, entrenching norms, traditions, and modes of life associated with old status hierarchies.” Reva Siegel, “Memory Games: *Dobbs*’s Originalism as Anti-Democratic Living Constitutionalism—and Some Paths of Resistance,” *Texas Law Review* 101 (2023): 1138.

69 “At stake in constitutional memory is which historical figures and movements will count as makers of constitutional meaning for the present.” Jack M. Balkin, *Memory and Authority: The Uses of History in Constitutional Interpretation* (New Haven, CT: Yale University Press, 2024), 7 and chap. 12.

70 On originalism as in this sense antidemocratic and exclusionary, see Adam M. Samaha, “Originalism’s Expiration Date,” *Cardozo Law Review* 30 (2008): 1344–63; Vicki C. Jackson, “Exclusionary Originalism as Anti-Constitutionalist: *Dobbs* and *Bruen* as Threats to Constitutionalism,” *Harvard Law and Policy Review* 18 (2024) (“exclusionary originalism is incompatible with the very purpose of having a constitution”); Siegel, “Memory Games,” 1201–3.

71 For criticism that judges and justices both rely on and produce bad history, see, e.g., Alfred H. Kelly, “Clio and the Court: An Illicit Love Affair,” *Supreme Court Review* 1965 (1965): 119–58; Joseph Ellis, “Immaculate Misconception and the Supreme Court,” *Washington Post*, May 7, 2010; Jack N. Rakove, “Tone Deaf to the Past: More Qualms About Public Meaning Originalism,” *Fordham Law Review* 84 (2015): 969–76; Saul Cornell, “Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning,” *Law and History Review* 37 (2019): 821–45; Gienapp, *Against Originalism*, especially chaps. 9 and 10; and Posner, “Incoherence of Scalia.”

72 “It may be a necessary fiction for lawyers and jurists to believe in a ‘correct’ or ‘true’ interpretation of the Constitution in order to carry on their business, but we historians have different obligations and aims,” the historian Gordon Wood observed in 1987. Gordon S. Wood,

"Ideology and the Origins of Liberal America," *William and Mary Quarterly* 44 (1987): 632–33. "The reverse is true as well," answered two originalist legal scholars in 2019: lawyers and justices, unlike historians, have to issue rulings and decide cases. William Baude and Stephen E. Sachs, "Originalism and the Law of the Past," *Law and History Review* 37 (2019): 820. They argue, "Courts solve today's cases through the application of yesterday's laws, not out of admiration for their ancient wisdom or fealty to the dead hand of the past, but simply because those old laws remain good law today" (810). See also Balkin, *Memory and Authority*, esp. chap. 14. Balkin refers to originalism as an "obedient" use of history (5) and endorses what he calls "living originalism" as a synthesis of originalism and living constitutionalism (9).

73 Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), 144.

74 Balkin notes that when originalists talk about "public meaning" they generally really mean "legal meaning." Balkin, *Memory and Authority*, 60–61.

75 Joel Alicea, "Originalism and the Rule of the Dead," *National Affairs* 61 (Fall 2024).

76 Balkin, *Memory and Authority*, 9.

77 I will not write of positivism, realism, Thayerism, tiers of scrutiny, and the like. Nor do I develop a distinction between interpretation and construction. This distinction was important to Francis Lieber (see chap. 5) and remains important, but I am persuaded by Sunstein (*How to Interpret*, 84–88) that it is frequently overstated.

78 Jacob Tanger, "Amending Procedure of the Federal Constitution," *American Political Science Review* 10 (1916): 689–99. Tanger was chair of political science at Penn State.

79 "No part of a constitution is more important than the procedures we use to change it," Richard Albert has argued, but "the overwhelming interest among scholars of constitutionalism in techniques of informal amendment—changes in constitutional meaning without a corresponding modification to the constitutional text—now dominates our learning about how constitutions change, and today almost entirely occupies the field." Albert, *Constitutional Amendments*, 2.

80 Thomas Jefferson to Samuel Kercheval, July 12, 1816, Founders.

81 As Jamal Greene put it, "If democratic legitimacy is the measure of a sound constitutional interpretive practice, then Justice Scalia needs an account of why and how rote obedience to the commitments of voters two centuries distant and wildly different in racial, ethnic, sexual and cultural composition can be justified on *democratic* grounds." Greene, "Selling Originalism," 659. For prominent efforts to craft a "more inclusive constitutional history" (rather than to propose an "inclusive originalism"), see Jamal Greene, "Originalism's Race Problem," *Denver University Law Review* 88 (2011): 517–22; Reva Siegel, "The Politics of Constitutional Memory," *Georgetown Journal of Law and Public Policy* 20 (2022): 19–58; and Gregory Ablavsky and W. Tanner Allread, "We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution," *Columbia Law Review* 123 (2023): 243–318.

Part One: The Invention of the Constitution, 1774–1791

1 [Francis Hopkinson], “Account of the Federal Procession,” *Columbian Magazine*, July 1788. See also Whitfield J. Bell Jr., “The Federal Processions of 1788,” *New-York Historical Society Quarterly* 46 (1962): 5–39; and Dietmar Schloss, “The Nation as Spectacle: The Grand Federal Procession in Philadelphia, 1788,” in *Celebrating Ethnicity and Nation: American Festive Culture from the Revolution to the Early 20th Century*, ed. Jürgen Heideking, Geneviève Fabre, and Kai Dreisbach (New York: Berghahn Books, 2022).

2 “Monthly Review of New American Books,” *Massachusetts Magazine*, March 1791.

3 “Three Hundred Sickles” (advertisement), *Pennsylvania Gazette*, July 9, 1788.

4 James Wilson, “Oration Delivered on the Fourth of July 1788, at the Procession Formed at Philadelphia to Celebrate the Adoption of the Constitution of the United States” (speech, Philadelphia, July 4, 1788), National Center for Constitutional Studies.

5 Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York: Simon & Schuster, 2010).

6 “Federal Procession,” *Pennsylvania Packet* (Philadelphia), August 6, 1788.

7 *Discrimination Against Women: Hearings Before the Subcomm. on Education, Comm. on Education and Labor, U.S. House of Representatives*, 91st Cong. (1970) (testimony of Pauli Murray).

Chapter 1: The Constitution of a Clock

1 [Benjamin Wadsworth], "History of the Orrery Constructed by the Late Mr. Joseph Pope, Watch-Maker in Boston," *Boston Patriot and Mercantile Advertiser*, September 9, 1826. On his relationship to Benjamin Franklin, see Charles Henry Pope, *A History of the Dorchester Pope Family, 1634–1888* (Boston, 1888), 6, 8, 300–301.

2 "Boston, April 24," *Massachusetts Gazette*, April 24, 1787; "Mr. Joseph Pope, Description of an Orrery of His Construction," *Memoirs of the American Academy of Arts and Sciences* 2 (1804): 43–45.

3 James Madison, Federalist nos. 14, 58, 65, and Hamilton, Federalist no. 9, Founders.

4 [James Bowdoin], "An Improvement Proposed for Telescopes," *London Magazine* 30 (1761): 602–3; and Gordon E. Kershaw, *James Bowdoin: Patriot and Man of the Enlightenment* (East Syracuse, NY: Salina Press, 1976).

5 John Adams, diary, entry for January 18, 1766, Adams Family Papers Electronic Archive.

6 For influential accounts of this era, see, e.g., Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (Baltimore: Johns Hopkins University Press, 1979); and Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Knopf, 1997).

7 Pekka Hämäläian, *Indigenous Continent: The Epic Contest for North America* (New York: Liveright, 2022), 304–5.

8 See coverage in *Massachusetts Spy*, January 28, 1773, 199; *Boston Post-Boy*, May 3, 1773, 3; May 10, 1773, 4; May 17, 1773, 4; *Boston Evening-Post*, May 17, 1773, 3; *Boston Gazette*, May 17, 1773, 3; *Massachusetts Spy*, May 13, 1773, 3; May 20, 1773, 4; *Boston Gazette*, August 23, 1773, 4 ("Conscience"); *Massachusetts Spy*, February 10, 1774, 3 ("AFRICA"). For Caesar's appeal, see Caesar Sarter, "Messers. Printers," *Essex Journal*, August 17, 1774, 1; and "For the Massachusetts Spy," *Massachusetts Spy*, September 1, 1774, 2.

9 Jared Ross Hardesty, *Unfreedom: Slavery and Dependence in Eighteenth-Century Boston* (New York: New York University Press, 2016), 167–68.

10 Petition for freedom to Massachusetts Governor Thomas Gage, His Majesty's Council, and the House of Representatives, May 25, 1774, Jeremy Belknap Papers, Massachusetts Historical Society.

11 James J. Allegro, "'Increasing and Strengthening the Country': Law, Politics, and the Antislavery Movement in Early-Eighteenth-Century Massachusetts Bay," *New England Quarterly* 75, no. 1 (March 2002): 20–21.

12 Jeffrey A. Lenowitz, *Constitutional Ratification Without Reason* (New York: Oxford University Press, 2022), 67–68.

13 Declaration and Resolves of the First Continental Congress, October 14, 1774, Avalon.

14 On symbols and the Continental Congress, see Benjamin H. Irvin, *Clothed in Robes of Sovereignty: The Continental Congress and the People Out of Doors* (New York: Oxford University Press, 2011), and on this seal, see 19–20.

15 Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill: University of North Carolina Press, 1980), chap. 1.

16 Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* (Chapel Hill: University of North Carolina, 1997), chap. 2. See also Adams, *First Constitutions*, 18–22.

17 Lenowitz, *Ratification Without Reason*, 69.

18 Declaration of the Causes and Necessity of Taking Up Arms, 1775, Avalon.

19 Robinson Woodward-Burns, *Hidden Laws: How State Constitutions Stabilize American Politics* (New Haven, CT: Yale University Press, 2021), 29–30; Adams, *First Constitutions*, chap. 2, quotation at 58; Lenowitz, *Ratification Without Reason*, 69–70.
20 Jonathan Gienapp, "Written Constitutionalism, Past and Present," *Law and History Review* 39 (2021): 337–39. See also Mary Sarah Bilder, "Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter," *North Carolina Law Review* 94 (2016).
21 John Adams, "Thoughts on Government," in *The Adams Papers*, *Papers of John Adams*, vol. 4, *February–August 1776*, ed. Robert J. Taylor (Cambridge, MA: Harvard University Press, 1979), 86–93; Woodward-Burns, *Hidden Laws*, 30–31.
22 Thomas Paine, *Common Sense* (Philadelphia, 1776).
23 Lenowitz, *Ratification Without Reason*, 71.
24 James Madison, Federalist no. 48 (February 1, 1788), Founders.
25 Thomas Paine, *The Rights of Man* (London, 1791), chap. 4.
26 Adams, *First Constitutions*, 5.
27 Richard Henry Lee to John Adams, May 18, 1776, Founders.
28 Robert F. Williams, "The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism," *Temple Law Review* 62 (1989): 541–86.
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Chapter 2: All Men Would Be Tyrants

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Chapter 3: Every Gentleman May Propose Amendments

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Chapter 5: The Whole Rebellion Is Beyond the Constitution

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21 “Remonstrating against any constitutional amendment or compromise except on the basis of the abolition of slavery,” 36th Cong. (1861) (petition submitted to the House by citizens of Vandalia, MI), Amend. “Praying that no attempt be made to amend the Constitution of the United States during the continuance of the present unusual excitement in the country,” 36th Cong. (1861) (petition submitted to the House by citizens of Adrian, MI), Amend.
22 “That property in slaves, recognized as such by the local law of any of the States of the Union, shall stand on the same footing in all constitutional and Federal relations as any other species of property,” 36th Cong. (1860) (constitutional amendment proposed by Sen. Jefferson Davis), Amend.

23 “To divide the whole number of judges, as near as may be practicable, into three classes,” 36th Cong. (1860) (constitutional amendment proposed by Sen. Andrew Johnson), Amend.
24 “All the above amendments, together with the existing provisions for slave representation upon the three-fifths basis, shall forever be irrepealable and unamendable,” 36th Cong. (1860) (constitutional amendment proposed by Rep. Thomas Hindman), Amend. “No future amendment of the Constitution shall affect the five preceding articles,” 36th Cong. (1860) (constitutional amendment proposed by Sen. John Crittenden), Amend.
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70 Or as John Fabian Witt prefers to call it, “Lincoln’s Code.” See Witt, *Lincoln’s Code*, esp. chap. 8.
71 “General Orders No. 100: The Lieber Code,” Avalon.

72 Lieber to Sumner, December 11, 1864, in Perry, *Life and Letters of Lieber*, 346.
73 Quoted in Vorenberg, "Emancipating the Constitution," 24. Vorenberg writes: "Lieber was one of the first to conceive of revising the Constitution as an alternative to methods of reconstruction commonly termed radical by the opposition. He was also the first person during the war to devise a bold rationale for tampering with the document the nation revered so deeply."
74 "Speech of Wendell Phillips," *Liberator*, January 1, 1864.
75 Andrew Kull, *The Color-Blind Constitution* (Cambridge, MA: Harvard University Press, 1992), 54–59.
76 Quoted in Kate Masur, *Until Justice Be Done: America's First Civil Rights Movement, from the Revolution to Reconstruction* (New York: Norton, 2021), 283–85.
77 John Jones, *The Black Laws of Illinois and a Few Reasons Why They Should Be Repealed* (Chicago, 1864).
78 For instance, he sent Sumner a copy on March 5, 1864. Perry, *Life and Letters of Lieber*, 342.
79 Drew Gilpin Faust, *This Republic of Suffering: Death and the American Civil War* (New York: Knopf, 2009).
80 "Too many theories have seized on the minds of men, and the present period is plainly not favorable to the creation of a new constitution. The many State constitutions of recent date do not show a general progressive improvement in this respect." Lieber, *Amendments*, 35.
81 Lieber, *Amendments*. See also John R. Vile, "Francis Lieber and the Process of Constitutional Amendment," *Review of Politics* 60 (1998): 525–43. On the possible influence of Lieber's draft on the Thirteenth and Fourteenth Amendments, see 541.
82 Lieber to Sumner, December 11, 1864, in Perry, *Life and Letters of Lieber*, 352.
83 Vorenberg, "Emancipating the Constitution," 27.
84 Freidel, *Lieber*, 357.
85 *Chicago Evening Journal*, February 6, 1865; *Illinois State Journal*, February 7, 1865. Five years later Jones would be elected county commissioner, becoming the first Black man elected to public office in Chicago. Charles A. Gliozzo, *John Jones and the Repeal of the Illinois Black Laws* (Duluth: University of Minnesota, 1975).
86 Richard K. Perkins, *A Brief History of the Lewis F. Powell, Jr., United States Courthouse, 1858–2012* (Richmond: Office of the Chief Executive, U.S. Court of Appeals for the Fourth Circuit, 2003).
87 Dwight J. Davis, "The Legal Travails of Jefferson Davis: A Review and Lessons Learned," *Journal of Southern Legal History* 23 (2015): 27–28.
88 Quoted in Cynthia Nicoletti, *Secession on Trial: The Treason Prosecution of Jefferson Davis* (New York: Cambridge University Press, 2017), 32–33.
89 Ken Lawrence, "Yes, John Wilkes Booth Did Speak Those Notorious Words at Lincoln's Last Speech," History News Network, May 10, 2020.
90 Lieber to Henry Halleck, April 15, 1865, in Freidel, *Lieber*, 359.
91 Witt, *Lincoln's Code*, 317.
92 Andrew Johnson, Establishing Rewards for Arrest of Certain Confederate Officers, May 2, 1986, APP. See Lieber to Sumner, May 4, 1865, Charles Sumner Papers, Houghton Library, Harvard (hereafter cited as Sumner Papers). On the military trials, see Witt, *Lincoln's Code*, chap. 10.
93 Witt, *Lincoln's Code*, 288.
94 He was originally and hastily indicted, for treason, in Washington, on May 26, 1865; "Indictment of Davis," *New York Times*, May 27, 1865.
95 "Trial of Henry Wirtz," Andersonville National Historic Site, National Park Service.
96 For Chase's account of the whole case, see Jefferson Davis, *Jefferson Davis, Constitutionalist, His Letters, Papers, and Speeches*, ed. Dunbar Rowland (Jackson: Mississippi Department of

Archives and History, 1923), beginning on 138. The original indictment, from the summer of 1865, has been lost, as Chase notes.

97 Quoted in David Herbert Donald, *Charles Sumner and the Rights of Man* (New York: Random House, 1970), chap. 6.

98 Ian D. Mitchell, "The Trial of Jefferson Davis and the Treason Controversy," *Northern Kentucky Law Review* 39 (2012): 768.

99 Witt, *Lincoln's Code*, 286.

100 "Treason must be made odious," Johnson said. "The American people should be educated and taught what is a crime, and that reason is a crime, and the highest crime known to the law and the Constitution." Quoted in Nicoletti, *Secession on Trial*, 21.

101 Freidel, *Lieber*, chap. 16; Nicoletti, *Secession on Trial*, 34, 36; and Witt, *Lincoln's Code*, 319–21.

102 Quoted in Nicoletti, *Secession on Trial*, 155. For the contemporary parsing, see William Baude and Michael Stokes Paulsen, "The Sweep and Force of Section Three," *University of Pennsylvania Law Review* 172 (2024): 605–745.

103 Quoted in Mitchell, "Trial of Davis," 762.

104 Lieber, *Amendments*, art. XV. On the draft, see Lieber, "Amendments to the Constitution: Notes and Clippings," Box 91, Lieber Papers. On Lieber's authoritarianism, see Richard Salomon, "The Unsuspected Francis Lieber" (MA thesis, CUNY Graduate Center, 2018), chap. 5.

105 Lieber to Sumner, August 4, 1865, in Perry, *Life and Letters of Lieber*, 358.

106 Lieber to Sumner, November 8, 1865, Sumner Papers. Wirz was found guilty on October 24.

107 This was November 1865. Nicoletti, *Secession on Trial*, 125, 144.

108 Quoted in Nicoletti, *Secession on Trial*, 25.

109 Robert Icenhauer-Ramirez, *Treason on Trial: The United States v. Jefferson Davis* (Baton Rouge: Louisiana State University Press, 2019).

110 Nicoletti, *Secession on Trial*, 34.

111 Lieber, Amendment D, in Box 91, Folder: "Amendments to the Constitution: Notes and Clippings," Lieber Papers.

112 Nicoletti, *Secession on Trial*, 125.

113 "Salmon P. Chase," American Biographical Dictionary.

114 Roy Franklin Nichols, "United States vs. Jefferson Davis, 1865–1869," *American Historical Review* 31 (1926): 266–84.

115 Icenhauer-Ramirez, *Treason on Trial*.

116 October 1865, quoted in Nicoletti, *Secession on Trial*, 46.

117 Nichols, "United States vs. Davis," 271.

118 Icenhauer-Ramirez, *Treason on Trial*.

119 Quoted in Nicoletti, *Secession on Trial*, 60.

120 Lieber to Halleck, May 19, 1866, in Perry, *Life and Letters of Lieber*, 375.

121 Quoted in Nicoletti, *Secession on Trial*, 156. *The Nation* blamed Johnson, too, accusing of him of delaying the trial on purpose. *Nation*, June 14, 1866. Not everyone was willing to see Davis walk free. There were, by now, rumors of a conspiracy of Black men to assassinate him. Davis, *Davis, Constitutionalist*, 134.

122 "The Trial of Davis," *Harper's Weekly*, November 25, 1867. O'Conor hired a literary agent and publicist to promote a book called *Is Davis a Traitor?* to demonstrate that he wasn't. Nicoletti, *Secession on Trial*, 161.

123 Quoted in William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, MA: Harvard University Press, 1988), 44–45.

124 Lieber to Sumner, February 12, 1864, Sumner Papers.

125 Kull, *Color-Blind*, 62.

126 Kull, *Color-Blind*, 70.

127 Quoted in Nelson, *Fourteenth Amendment*, 41.
128 Gerard N. Magliocca, "Amnesty and Section Three of the Fourteenth Amendment," *Constitutional Commentary* 37 (2021): 91. See also Mark A. Graber, *Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform after the Civil War* (Lawrence: University Press of Kansas, 2023).
129 William Mithoff to John Sherman, December 17, 1865, and John Kirkwood to Salmon P. Chase, December 4, 1865, both quoted in Nelson, *Fourteenth Amendment*, 41.
130 M. Stone to John Sherman, December 27, 1865, quoted in Nelson, *Fourteenth Amendment*, 42.
131 *Report of the Joint Committee on Reconstruction* (Washington, DC, 1866), 142 (testimony of General Alfred H. Terry).
132 "Remonstrating against the restoration of any State lately in rebellion until adequate security has been obtained against a renewed attempt to secede," a series of petitions submitted to the 39th Cong., as follows: February 13, 1866 (from citizens of Illinois); February 14, 1866 (from citizens of the United States); February 19, 1866 (from citizens of Maine); April 5, 1866 (from citizens of Maine); February 20, 1866 (from citizens of Massachusetts); March 5, 1866 (from citizens of Massachusetts); March 5, 1866 (from citizens of New Jersey); February 13, 1866 (from citizens of Buffalo, NY); March 19, 1866 (from citizens of New York); April 4, 1866 (from citizens of Ohio); March 16, 1866 (from citizens of Ohio); March 5, 1866 (from citizens of Ohio); March 23, 1866 (from citizens of Wisconsin).
133 Petition of N. T. Hill and 150 Others, Bucksport, ME, March 12, 1866; from Chester, PA, March 5, 1866; and from Lewis Holmes and Others from Bridgewater, MA, March 2, 1866, U.S. House of Representatives, Committee on the Judiciary, Petitions and Memorials, RG 233, National Archives, quoted in William A. Blair, *With Malice Toward Some: Treason and Loyalty in the Civil War Era* (Chapel Hill: University of North Carolina Press, 2014), 296–97.
134 "Praying such an amendment of the Constitution of the United States as will provide that no State shall be represented in Congress by any but persons who have ever been loyal to the Union," 39th Cong. (March 9, 1866) (petition submitted by citizens of the United States). See also "Praying that such conditions may be imposed upon the States lately in rebellion, precedent to their restoration, as will require them to render ineligible to office all persons who have been voluntarily engaged in the late rebellion," 39th Cong. (March 9, 1866) (petition from citizens of the United States).
135 Cong. Globe, 38th Cong. 1st Sess., 1203 (1864).
136 William H. Barnes, ed., *History of the Thirty-Ninth Congress of the United States* (1868; reprinted New York: Negro Universities Press, 1969); and Benjamin B. Kendrick, ed., *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865–1867* (New York: Columbia University, 1914).
137 Kull, *Color-Blind*, 66–68.
138 Cong. Globe, 39th Cong., 1st Sess., 429–31 (1866) (remarks of Rep. Bingham).
139 *Report of the Joint Committee on Reconstruction* (1866), x.
140 *Report of the Joint Committee on Reconstruction* (1866), 242–43 (testimony from Virginia, North Carolina, and South Carolina, including the testimony of J. W. Alvord).
141 *Report of the Joint Committee on Reconstruction* (1866), 21 (testimony from Virginia, North Carolina, and South Carolina, including testimony of John Hawkshurst).
142 *Report of the Joint Committee on Reconstruction* (1866), 5 (testimony from Arkansas, Georgia, Mississippi, and Alabama, including testimony of Maj. Gen. Edward Hatch).
143 "John C. Underwood," American Biographical Dictionary.
144 Nichols, "United States vs. Jefferson Davis," 276–77. The original is in Davis, *Davis, Constitutionalist*, 128.
145 *Report of the Joint Committee on Reconstruction* (1866).
146 Quoted in Nelson, *Fourteenth Amendment*, 46.

147 Kull, *Color-Blind*, 73.
148 Kull, *Color-Blind*, 74.
149 Cong. Globe, 39th Cong., 1st Sess., 2545, 2460 (1866).
150 Cong. Globe, 39th Cong., 1st Sess., 2768 (1866) (remarks of Sen. Clark).
151 This was on April 28, 1866.
152 Kyvig, *Explicit and Authentic*, 165–67.
153 Kull, *Color-Blind*, 64.
154 Joseph B. James, "Southern Reaction to the Proposal of the Fourteenth Amendment," *Journal of Southern History* 22 (1956): 477, 485, 491, 495–96.
155 *Gallipolis Journal*, February 21, 1867. See also Gerald N. Magliocca, "Shooting Fish in a Barrel: The Presidency and Section 3," *Balkinization* (blog), January 2, 2024.
156 Quoted in Icenhauer-Ramirez, *Treason on Trial*, 177.
157 Icenhauer-Ramirez, *Treason on Trial*, 179, 181.
158 Icenhauer-Ramirez, *Treason on Trial*, 182–84.
159 Icenhauer-Ramirez, *Treason on Trial*, 198. As Varina Davis wrote to Charles O'Conor, "He is bent upon running for the Presidency. Mr. Johnson and he thus being rivals for the succession Mr. Davis is the subject of a regular game between them. How to deal with Mr. Davis is an embarrassing problem. Each wishes to avoid any mischief to himself and to work all possible mischief to his opponent. Hence the delay and indecision of both."
160 Icenhauer-Ramirez, *Treason on Trial*, 192–93.
161 Witt, *Lincoln's Code*, 313–14.
162 Twenty-five seats had been reserved for journalists, including newspaper illustrators. "Jefferson Davis: The State Prisoner," *Louisville Daily Journal*, May 17, 1867.
163 "Jeff Davis in Richmond," *Staunton Spectator* (Virginia), May 14, 1867.
164 Nicoletti, *Secession on Trial*, 272.
165 Michael B. Chesson, "John Oliver (d. 1899)," *Dictionary of Virginia Biography* online.
166 "George Lewis Seaton: Uncovering the Legacy of an Alexandria Trailblazer," GravestoneStories.com; and "George Lewis Seaton (ca. 1822–1881)," EncyclopediaVirginia.org. For Lucinda having belonged to George Washington, see Dorothy S. Provine, *Alexandria County Virginia Free Negro Registers 1797–1861*, 98–99. Thanks to Georgia J. Brown, Historic Records Manager, Fairfax Circuit Court, and Samantha Snyder, Research Librarian and Manager of Library Fellowships, George Washington Presidential Library, Mount Vernon, VA.
167 "First Mixed Jury, April 18, 1897," BlackVirginia.Richmond.edu. That he was a shoemaker: "United States Circuit Court," *Staunton Spectator* (Virginia), May 14, 1867.
168 "There Any Justice for the Black?" *New Orleans Tribune*, December 15, 1864.
169 James Forman Jr., "Juries and Race in the Nineteenth Century," *Yale Law Journal* 113 (2004): 895–938.
170 Letter from Texas, *Baltimore Sun*, August 6, 1867.
171 Lieber disagreed with Gerrit Smith on this point. See Lieber to Sumner, June 4, 1866, Reel 80, Sumner Papers.
172 Lieber wholly disagreed with this understanding. Lieber to Sumner, August 11, 1865, Reel 79, Summer Papers.
173 Smith quoted in Robert Penn Warren, *Jefferson Davis Gets His Citizenship Back* (Lexington: University of Kentucky Press, 1980), 84.
174 Nicoletti, *Secession on Trial*, 176 and chap. 8.
175 Act of July 2, 1862, chap. 128, 12 Stat. 502.
176 *New-York Tribune*, November 13, 1867.
177 "Jeff Davis in Richmond," *Staunton Spectator* (Virginia), May 14, 1867.
178 Quoted in Nicoletti, *Secession on Trial*, 166.

179 *New York Herald*, November 23, 1867; *Richmond Dispatch*, November 26, 1867.
180 For more on attitudes toward Black jurors, see, e.g., "Negro Jurors," *Republican Banner*, October 25, 1867; and "Value of Negroes on a Jury the Life of a Human Being at Stake," *Daily Courier*, June 24, 1868.
181 Icenhauer-Ramirez, *Treason on Trial*, 223.
182 Icenhauer-Ramirez, *Treason on Trial*, 179.
183 One New York newspaper wondered whether he "is a fit person to sit in judgment upon the dethroned leader." Icenhauer-Ramirez, *Treason on Trial*, 181.
184 "Mr. Davis Released," *Staunton Spectator* (Virginia), May 21, 1867.
185 Lynda L. Crist, ed., *The Papers of Jefferson Davis* (Baton Rouge: Louisiana University Press, 2008), 12:250.
186 The new trial was set for November 25, 1867. Icenhauer-Ramirez, *Treason on Trial*, 241.
187 Nicoletti, *Secession on Trial*, 185.
188 Icenhauer-Ramirez, *Treason on Trial*, 242.
189 Icenhauer-Ramirez, *Treason on Trial*, 254
190 "Virginia: Public Interest in the Trial of Jefferson Davis," *New York Times*, November 28, 1867.
191 Icenhauer-Ramirez, *Treason on Trial*, 255.
192 Icenhauer-Ramirez, *Treason on Trial*, 235.
193 Lieber to Thayer, March 2, 1868, in Perry, *Life and Letters of Lieber*, 381.
194 Nichols, "United States vs. Jefferson Davis," 279.
195 Note the new indictment in March 1868, signed by Chandler; it can be found in Davis, *Davis, Constitutionalist*, 179–95.
196 Quoted in Nicoletti, *Secession on Trial*, 233.
197 Icenhauer-Ramirez, *Treason on Trial*, 260.
198 Nicoletti explains how this happened: *Secession on Trial*, 293–95. See also Magliocci, "Amnesty," 101–4.
199 Davis, *Davis, Constitutionalist*, 199–200.
200 Davis, *Davis, Constitutionalist*, 208.
201 Mitchell, "Trial of Davis," 771.
202 Nichols, "United States vs. Jefferson Davis," 283.
203 Andrew Johnson, *Granting Full Pardon and Amnesty to All Persons Engaged in the Late Rebellion* (Washington, DC, 1868).
204 "Speech of Frederick Douglass," *Baltimore American*, May 20, 1870.
205 Ulysses S. Grant, Third Annual Message, December 4, 1871, APP.
206 Magliocca, "Amnesty."
207 Harriet Beecher Stowe, "The Death of Another Veteran," *Christian Union*, January 7, 1874.
208 "First Mixed Jury," *Richmond Planet*, April 18, 1896; Evelyn Brooks Higginbotham, "The Cost of Remembrance: Reflections on David Blight's *Race and Reunion*," presented at the symposium "Race, Religion and Nationalism: Three Books," Amherst College, October 27, 2001. On the history of Black juries, see James Forman Jr., "Juries and Race in the Nineteenth Century," *Yale Law Journal* 113 (2004): 895–938; and Thomas Ward Frampton, "The First Black Jurors and the Integration of the American Jury," *New York University Law Review* 99 (2024): 515–77.
209 Philip Stanley, "Lewis Lindsey (1843–1908)," *Dictionary of Virginia Biography*.
210 Brent Tarter, "John B. Miller, Jr. (fl. 1859–1875)," *Dictionary of Virginia Biography*.
211 "Deed of Manumission for Lucy Goode Brooks and Three Children," *Remaking Virginia: Transformation Through Emancipation*.
212 The broach is visible in a photograph at John Kneebone, "Lucy Goode Brooks (1818–1900)," *Dictionary of Virginia Biography*.
213 Evelyn Brooks Higginbotham, interview by author, October 20, 2023.

Chapter 6: No Amendment Is Necessary

1 "Woman Suffrage Before Congress," *New-York Tribune*, January 12, 1871; "The Woman in Council," *New York Times*, January 12, 1871; Lois Beachy Underhill, *The Woman Who Ran for President: The Many Lives of Victoria Woodhull* (New York: Penguin, 1996), 100–101.

2 Memorial of Victoria C. Woodhull, December 19, 1870; Victoria Woodhull, *The Victoria Woodhull Reader*, ed. Madeleine B. Stern (Weston, MA: M&S Press, 1971), 95. All cited Woodhull writings can be found in this anthology unless otherwise noted. Ellen DuBois has argued that "the termination of the constitutional amendment process in 1870 did not immediately signal the end of hopes for women's equal political rights but, instead, heightened struggle over the meaning of the Constitution as amended." "Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1870," *Journal of American History* 74 (1987): 837.

3 Manisha Sinha, *The Rise and Fall of the Second American Republic: Reconstruction, 1860–1920* (New York: Liveright, 2024), 227.

4 Elizabeth Cady Stanton, letter to the editor, *National Anti-slavery Standard*, December 26, 1865.

5 Elizabeth Cady Stanton to Gerrit Smith, January 1, 1866, in Laura E. Free, *Suffrage Reconstructed: Gender, Race, and Voting Rights in the Civil War Era* (Ithaca, NY: Cornell University Press, 2015), 104–5.

6 Free, *Suffrage Reconstructed*, chap. 5.

7 Sinha, *Rise of Second Republic*, 213–27.

8 "The right of suffrage in the United States shall be based upon citizenship, and shall be regulated by Congress; and all citizens of the United States, whether native or naturalized, shall enjoy this right equally, without any distinction or discrimination whatever founded on race, color, or sex," 40th Cong. (December 8, 1868) (constitutional amendment proposed by Rep. George Julian); and "praying that in any amendment to the Constitution of the United States to extend or regulate suffrage, no distinction be made between men and women," 40th Cong. (January 6, 1869) (petition submitted by citizens of Missouri), Amend.

9 Elizabeth Cady Stanton, Susan B. Anthony, and Matlida Joslyn Gage, *History of Woman Suffrage* (Rochester, NY, 1887), 2:382–90.

10 Ann D. Gordon, *The Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony* (New Brunswick, NJ: Rutgers University Press, 2000), 2:196.

11 Suffrage based on citizenship, without distinction of sex, 41st Cong. (March 15, 1869) (constitutional amendment proposed by Rep. George Julian), Amend.

12 Underhill, *Woman Who Ran*, 79.

13 "The Coming Woman," *New York Herald*, April 2, 1870, reprinted as Victoria C. Woodhull, *The Argument for Women's Electoral Rights . . . A Review of My Work at Washington, DC, in 1870–1871* (London, 1887).

14 "The Coming Woman," *New York Herald*, April 2, 1870.

15 Underhill, *Woman Who Ran*, 86–89.

16 Underhill, *Woman Who Ran*, 94–99.

17 Paul Herron, *Framing the Solid South: The State Constitutional Conventions of Secession, Reconstruction, and Redemption, 1860–1902* (Lawrence: University Press of Kansas, 2017), 125.

18 *Journal of the Proceedings and Debates in the Constitutional Convention of the State of Mississippi, August, 1865* (Jackson, MS, 1865), 73.

19 *Report of the Joint Committee on Reconstruction* (Washington, DC, 1866),12.

20 Robert D. Miewald, *The Nebraska State Constitution* (New York: Oxford University Press, 2011), pt. 1.
21 *Proceedings of the Constitutional Convention of South Carolina: Held at Charleston, S.C., Beginning January 14th and Ending March 17th, 1868* (Charleston, SC, 1868), 925.
22 *Journal of the Proceedings in the Constitutional Convention of the State of Mississippi: 1868* (Jackson, MS, 1871), 130. See also Herron, *Framing the Solid South*.
23 Sinha, *Rise of Second Republic*, 237–44.
24 Herron, *Framing Solid South*, 163–64, 172–73, and table 5.1.
25 *Proceedings of the Constitutional Convention of South Carolina*, 354.
26 Travis Crum, "The Unabridged Fifteenth Amendment," *Yale Law Journal* 133 (2023).
27 Crum, "Unabridged Fifteenth Amendment."
28 *Congressional Reports on Woman Suffrage. The Majority and Minority Reports of the Judiciary Committee of the House of Representatives on the Woodhull Memorial* (New York, 1871), 40.
29 Victoria C. Woodhull, *A Lecture on Constitutional Equality Delivered at Lincoln Hall, Washington, DC, Thursday, February 16, 1871* (New York, 1871).
30 Underhill, *Woman Who Ran*, 99–106.
31 *Report of the Committee on the Judiciary to Whom Was Referred the Memorial of Victoria C. Woodhull*, 41st Cong., 3d Sess., January 30, 1871.
32 *Report of the Committee on the Judiciary . . . Memorial of Victoria C. Woodhull*, 41st Cong., 3d Sess., February 1, 1871 (views of the minority).
33 Underhill, *Woman Who Ran*, 110–11.
34 Woodhull, *Lecture on Constitutional Equality.*
35 Victoria C. Woodhull, *A Speech on the Principles of Social Freedom, Delivered in New York City, November 20, 1871, and Boston, January 3, 1872* (London, 1894), 23–24.
36 Ellen Carol DuBois, "Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878," *Journal of American History* 74 (1987): 856–57.
37 Underhill, *Woman Who Ran*, 145.
38 Underhill, *Woman Who Ran*, 176–77.
39 Victoria C. Woodhull, *Carpenter and Cartter Reviewed: A Speech before the National Suffrage Association at Lincoln Hall, Washington, DC, January 10, 1872* (New York, 1872).
40 Underhill, *Woman Who Ran*, 204–5.
41 Underhill, *Woman Who Ran*, 208.
42 Underhill, *Woman Who Ran*, 228.
43 Rush to Adams, June 1789, in Eric Slauter, *The State as a Work of Art: The Cultural Origins of the Constitution* (Chicago: University of Chicago Press, 2009), 244. See also Slauter's very cool investigation of the presence or absence of God in late eighteenth-century imprints, broadly.
44 Charles Slattery, *Felix Reville Brunot, 1820–1898: A Civilian in the War for the Union, President of the First Board of Indian Commissioners* (New York: Longmans, 1901), 249.
45 John Alexander, *History of the National Reform Movement* (Pittsburgh, 1893), 24.
46 National Association to Secure the Religious Amendment of the Constitution of the United States, *Proceedings of the National Convention to Secure the Religious Amendment of the Constitution of the United States: Held in Cincinnati, Jan. 31 & Feb. 1, 1872: With an Account of the Origin and Progress of the Movement* (Philadelphia, 1872), iii–xvi. The first petition was submitted in 1864.
47 In March 1865, Isaacs met with Senators Sumner and Trumbull, chair of the Judiciary Committee, and "received their assurance" that the petition "did not have their sympathy, and that there was no probability of the petitions in question resulting in the desired amendments of the U.S. Constitution" and that if any such amendment made any headway, they "should be at once afforded an opportunity of appearing in opposition." *Proceedings of the Board of*

Delegates of American Israelites at Their Session for 5625 [1865] (New York, 1865), 6–8, in Box 1, Folder 1, Annual Reports and Proceedings, 1859–1877, Center for Jewish History.

48 Steven K. Green, *The Bible, the School, and the Constitution: The Clash That Shaped Modern Church-State Doctrine* (New York: Oxford University Press, 2012), chap. 4.

49 For a discussion of the petition movement, see Green, *Bible, School*, chap. 4. For a list, see search results for "official religion," January 1, 1864, to January 1, 1901, Amend.

50 Felix R. Brunot, *Proceedings of the National Convention to Secure the Religious Amendment of the Constitution of the United States* (New York, 1873), 33.

51 Steven K. Green, *The Second Disestablishment: Church and State in Nineteenth-Century America* (New York: Oxford University Press, 2010), chap. 9; and Green, *Bible, School*, chap. 7.

52 There might seem to be distinctions to be drawn between God Amendments and Jesus Amendments, but Green, following the reformers themselves, simply refers to all of them as the "Christian amendment." Green, *Bible, School*, chaps. 4 and 5.

53 Bruce L. Ruben, *Max Lilienthal: The Making of the American Rabbinate* (Detroit: Wayne State University Press, 2011); and Naomi W. Cohen, *Jews in Christian America: The Pursuit of Religious Equality* (New York: Oxford University Press, 1992).

54 *New-York Tribune*, December 3, 1869, 5.

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56 *Christian Statesman*, February 28, 1874, 35.

57 Anthony Cowley, "From Whence We Came: A Background of the National Reform Association," NationalReformAssociation.Weebly.com.

58 *Index*, November 4, 1875, 517.

59 Green, *Bible, School*, chap. 4.

60 *House Miscellaneous Reports*, vol. 1623, no. 143, 43rd Cong., 1st Sess. (1873–74).

61 Green, *Bible, School*, chap. 4; *Index*, January 1, 1874.

62 Quoted in Green, *Second Disestablishment*, chap. 9.

63 Ulysses S. Grant, Seventh Annual Message, December 7, 1875, APP.

64 "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof," 44th Cong. (December 14, 1875) (constitutional amendment proposed by Rep. James Blaine), Amend.

65 *Nation*, March 16, 1876, 173.

66 Green, *Bible, School*, chap. 5; 4 Cong. Rec. 5189–246 (August 4, 1876).

67 Republican Party Platform, 1876, APP.

68 Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

69 Frank L. Wells, "But Three Classes," *Los Angeles Times*, March 27, 1896, 11.

70 On the exporting of American moral reform, see I. R. Tyrrell, *Reforming the World: The Creation of America's Moral Empire* (Princeton, NJ: Princeton University Press, 2010).

71 Samuel Unger, "A History of the National Women's Temperance Union" (PhD diss., Ohio State University, 1933), 1–6; Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the American State* (New York: Norton, 2015), chap. 1.

72 Unger, "History," 20.

73 "Praying the prohibition of the manufacture and sale of intoxicating liquors throughout the United States by amendment to the Constitution of the United States," 41st Cong. (February 11, 1871) (petition of citizens of Buena Vista, Oregon), Amend.

74 "Praying such an amendment to the Constitution as will render all persons addicted to the use of intoxicating liquors ineligible to office," 42nd Cong. (January 16, 1872) (petition of citizens of the United States), Amend. "Praying an amendment to the Constitution rendering all persons ineligible to office who use intoxicating liquors as a beverage," 42nd Cong. (May 9, 1872) (petition of citizens of the United States) Amend.

75 “For an amendment of the Constitution which shall prohibit the making, selling, importation, and exportation of intoxicating liquors,” 43rd Cong. (January 30, 1874) (petition of George Eley and others) Amend.
76 Unger, “History,” 52.
77 Prohibition of liquor traffic, 44th Cong. (December 12, 1876) (constitutional amendment proposed by Rep. Henry Blair), Amend.
78 Unger, “History,” 31–33.
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Chapter 7: We Began This Quilt

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Chapter 8: Mr. Constitution

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Chapter 9: Miss Bolsheviki

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148 TenBroek published a series of articles attacking the intent doctrine. As he explained in the first in the series, "In the course of this series of articles, the proposition, hitherto so fundamental to the doctrines of the abstract writers, that the object of constitutional construction is the

discovery of the intention of those who framed or adopted the instrument will be controverted, and another approach to the problem will be suggested." Jacobus tenBroek, "Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction," *California Law Review* 26 (1938): 287–308, quotation at 288. On the influence of the articles, see Matson, *Blind Justice*, 80–82.

149 Jacobus tenBroek, "Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction," *California Law Review* 26 (1938): 437–54. He also argued that the Court's reliance on the Federalist Papers on the assumption that they revealed the intent of the framers was "unsupportable." Jacobus tenBroek, "Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction," *California Law Review* 27 (1938): 157–81. And he criticized the methods by which the Court had attempted to understand the Constitution by way of a "history of the times": Jacobus tenBroek, "Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction," *California Law Review* 26 (1937): 664–81. See also Matson, *Blind Justice*.

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Chapter 10: The Lost Amendment

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Chapter 12: A Bill of Rights for Women

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Chapter 13: The Constitution Is Dead!

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that we could have won it politically, but coulda, shoulda, woulda is not relevant any more." Kim Grandy, board meeting minutes, [on or before] July 20 1993. After the nomination, NOW's LDEF issued a press release declaring, "We are . . . proud to claim Judge Ginsburg as our own; she served on the NOW LDEF Board of Directors in the early 1970s." Adding, "We applaud her interest and commitment to exploring legal strategies concerning a woman's right to choose." Box 432, Folder 12, NOW Papers, Schlesinger Library.

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JILL LEPORE is the David Woods Kemper ’41 Professor of American History at Harvard University and professor of law at Harvard Law School. She is also a staff writer at *The New Yorker*.

The daughter of public school teachers, Lepore always wanted to be a writer, but spent years working odd jobs: newspaper girl, chambermaid, prep cook, secretary, public opinion survey caller, and shoe store clerk. She went to Tufts University on an ROTC scholarship as a math major but ended up graduating with a BA in English in 1987. After an MA in American culture from the University of Michigan, she finished a PhD in American studies at Yale University in 1995.

She began teaching at Harvard in 2003 and started writing for *The New Yorker* in 2005. Her books and essays have been widely translated, including in German, Spanish, Italian, Portuguese, Latvian, Swedish, French, Chinese, and Japanese. In 2012, she was named Harvard College Professor, in recognition of distinction in undergraduate teaching; she joined the Harvard Law School faculty in 2023. A member of the American Academy of Arts and Sciences and the American Philosophical Society, she is also past president of the Society of American Historians.

Much of Lepore’s scholarship explores absences and asymmetries of evidence in the historical record. She likes to think about how people know what they know. Her earlier work includes a political history trilogy: *The Name of War: King Philip’s War and the Origins of American Identity* (1998), winner of the Bancroft Prize; *New York Burning: Liberty, Slavery, and Conspiracy in Eighteenth-Century Manhattan* (2005), a finalist for the Pulitzer Prize; and *Book of Ages: The Life and Opinions of Jane Franklin* (2013), a finalist for the 2013 National Book Award for Nonfiction. Her

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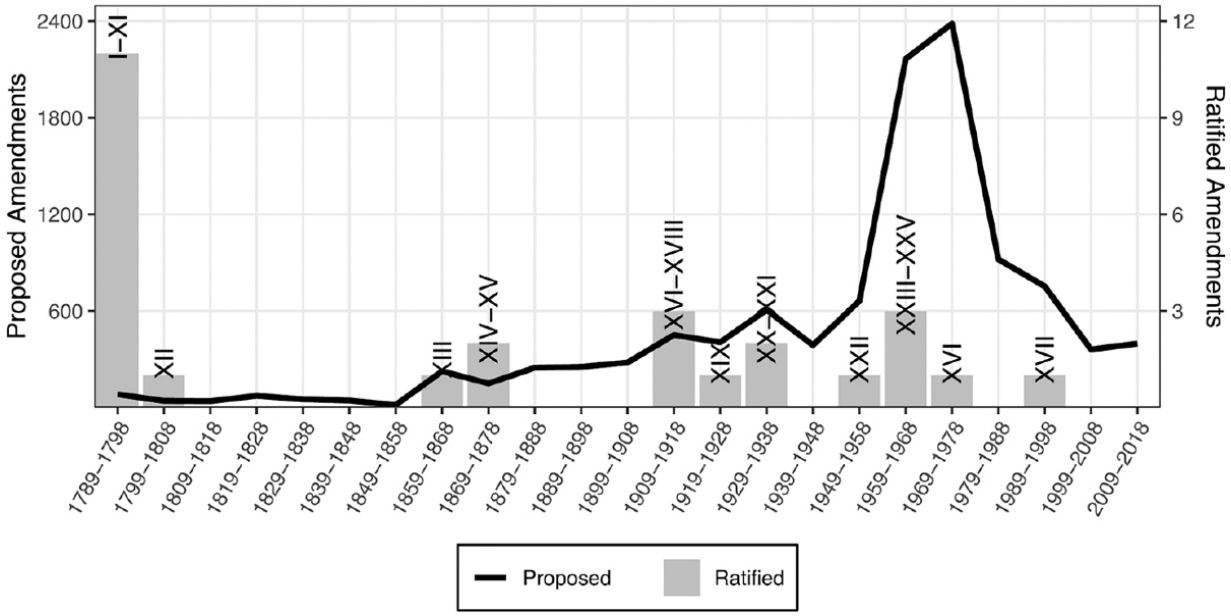

The horizontal axis spans decades from 1789 to 2018 in ten-year increments. The left vertical axis measures the number of proposed amendments, ranging from 0 to 2400, while the right vertical axis tracks ratified amendments, ranging from 0 to 12. A dark line represents the number of proposed amendments, beginning near zero in 1789 and remaining low until the mid-19th century. It then rises steadily, peaking at approximately 2400 proposals between 1969 and 1978, before declining to below 600 by 2018. Gray vertical bars indicate the number of ratified amendments per decade. Roman numerals atop the bars mark the specific amendments ratified during each period. Notable clusters include: 1790s to 1800s: Amendments I to XII; 1860s to 1870s: Amendments XIII to XV; 1910s to 1920s: Amendments XVI to XIX; 1930s: Amendments XX to XXI; 1950s to 1960s: Amendments XXII to XXV; 1970s: Amendment XXVI; 1990s: Amendment XXVII. The chart highlights periods of heightened amendment activity, particularly in the early 20th century and the civil rights era. All values are approximate.

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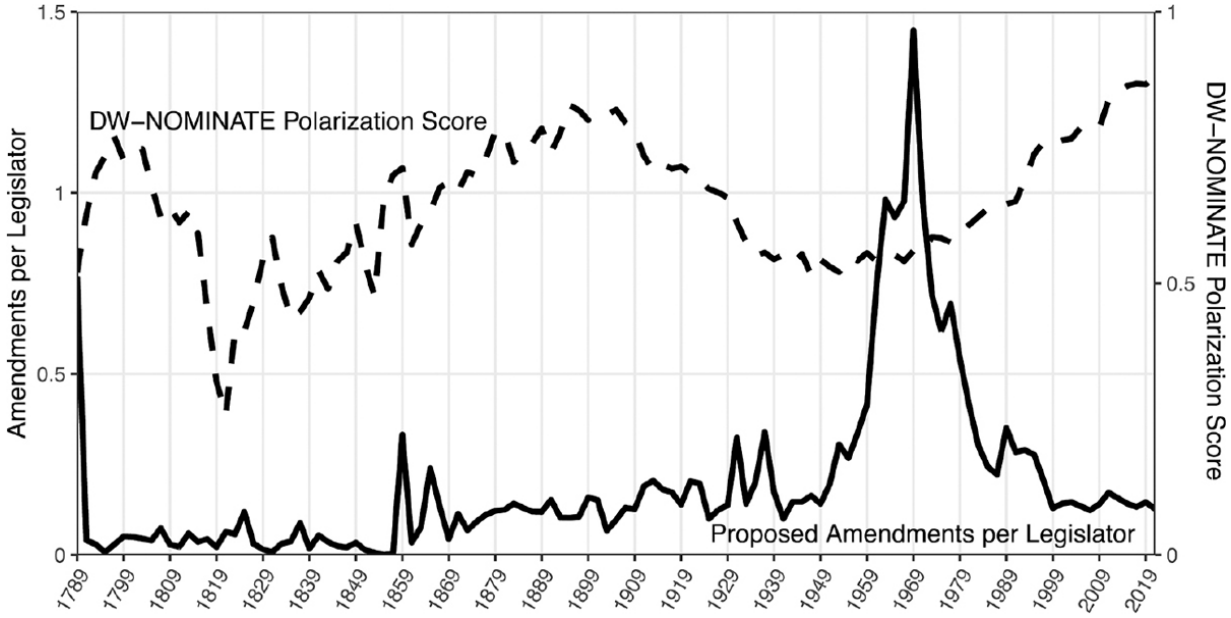

The data of the graph are as follows: the horizontal axis has years from 1789 to 2019 in increments of ten years. The vertical axis on the left has values from 0 to 1.5 in increments of 0.5 labeled Amendments per legislator, and on the right, it has values from 0 to1 in increments of 0.5 labeled DW Nominate Polarization score. A trend representing the Proposed Amendments per Legislator starts at about 0.7 in 1789 and stays at almost zero till 1859, when it rises to about 0.3, and stays almost the same until 1969 when it rises to 1.5, dips to 0.7 in 1979, and gradually decreases to almost zero in 2019. A dotted trend representing DW Nominate Polarization score rises from 0.5 in 1789, grows to 0.7 in 1799, and stays almost at an average of 0.8 till 1899 when it rises to almost 1, then gradually decreases until its end at almost 0.8 in 2019. All values given are approximate.

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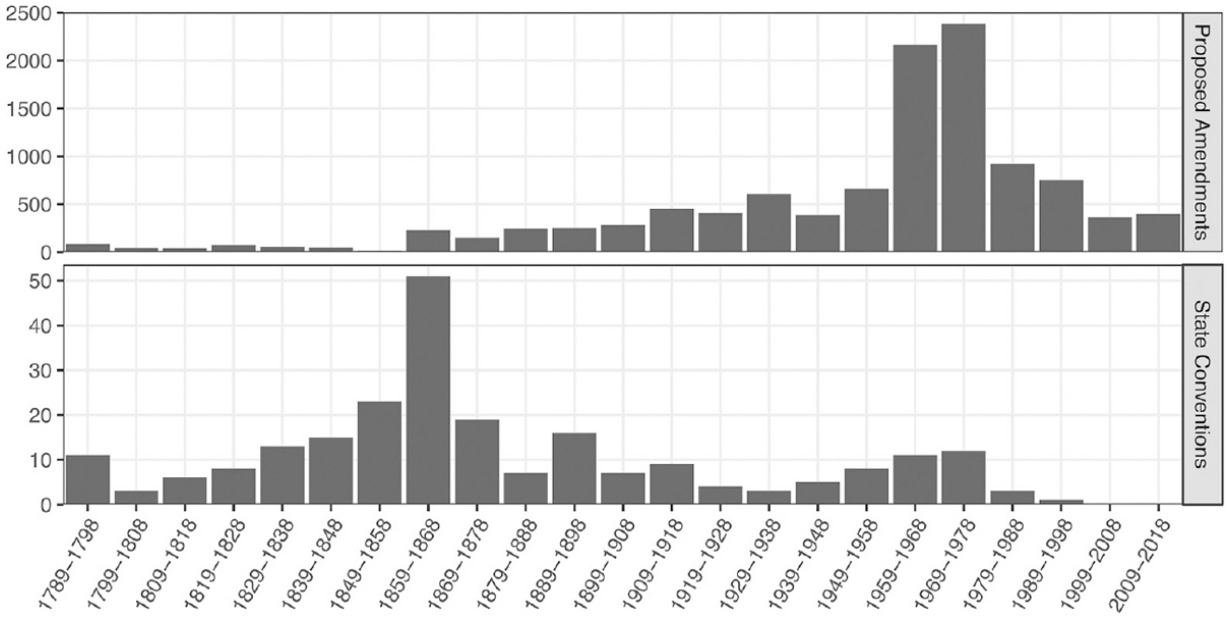

The data of the first graph representing Proposed Amendments are as follows: The horizontal axis represents the years from 1789 to 2018 in increments of 10 years. The vertical axis represents values of Proposed Amendments from 0 to 2500 in increments of 500. The bar values are as follows: from 1798 to 1858: 0, 1868: 250, 1878: 150, 1888 to 1898:250, 1908: 300, 1918: 490, 1928: 480, 1938: 520, 1948: 470, 1958: 520, 1968: 2100, 1978: 2400, 1988: 900, 1998: 700, 2008: 480, 2018: 490. The data of the second graph representing State Conventions are as follows: The horizontal axis represents the years from 1798 to 2018 in increments of ten years and the vertical axis represents the values of State conventions from 0 to 50 in increments of ten. The bar values are as follows: 1798: 10, from 1808 to 1828: less than 10, 1838: 12, 1848: 15, 1858: 22, 1868: 50, 1878: 19, 1888: 5, 1898: 17, 1908: 5, 1918: 10, 1928 to 1958: less than 10, 1968: 10, 1978: 11, 1988 to 1998: less than 5, 2008 to 2018: 0. All values given are approximate.

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Extended image description for Figure

At the center, a woman sits at a table and holds a quill while a man stands beside her and leans onto her. On the other side of the table, another individual writes on a large sheet of paper with a second quill. Nearby, a

woman seated in a chair holds a hammer, and another rests with a handheld fan on her lap. In the background, people engage in various lively activities: some pour drinks from bottles, others examine a vessel, and one person holds an ink pot with a quill inside. Under the table, a child plays with a dog.

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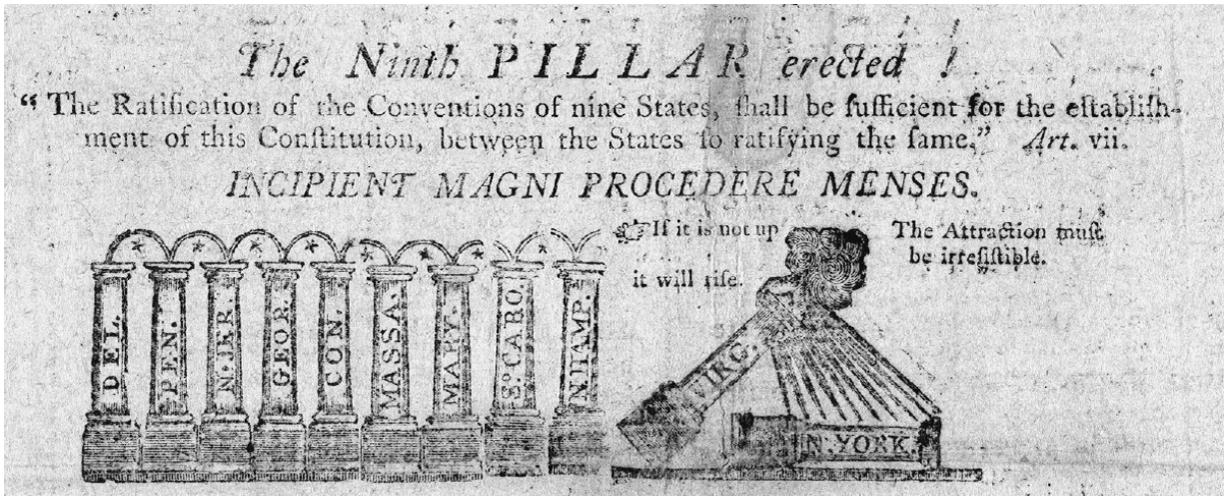

Other text in the ad: “The Ratification of the Conventions of nine States, shall be sufficient for the establishment of this constitution, between the states of ratifying the fame.” Translated Latin text: “The great months will begin to proceed.”

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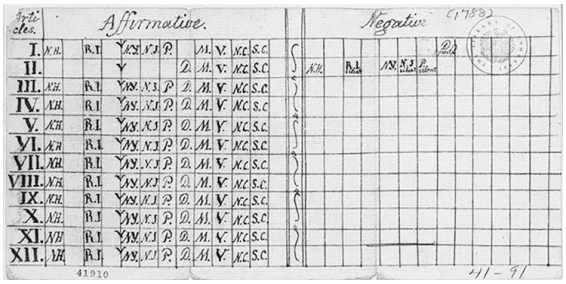

Each of the twelve rows represents each of the first twelve amendments of the constitution. The right side named Negative remains empty. This is Thomas Jefferson’s tally of votes between 1789 and 1791.

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Extended image description for Figure

The central photograph is of uniformed soldiers marching astride on horsebacks, with the American flag and photographs of historical figures. The lithograph is titled, “Celebration at Baltimore on May 19, 1870. Fifteenth Amendment and its Rescue.” It bears an inset portrait of Abraham Lincoln at the top of the gate’s arch encircled by a laurel wreath, flanked by allegorical figures, one holding a shield named Liberty on the left and

another holding the US flag on the right. The arch bears the text, “Shall not be Denied or Abridged by the United States or Any State on.” the left and right pillars of the arch read, “Education” and “Science.” Text at the bottom reads, “Dedicate do the colored citizens of the U S of America, A D 1870, by Schneider and Fuch.”

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It features a group of formally dressed men being addresses by a man in an indoor setting.

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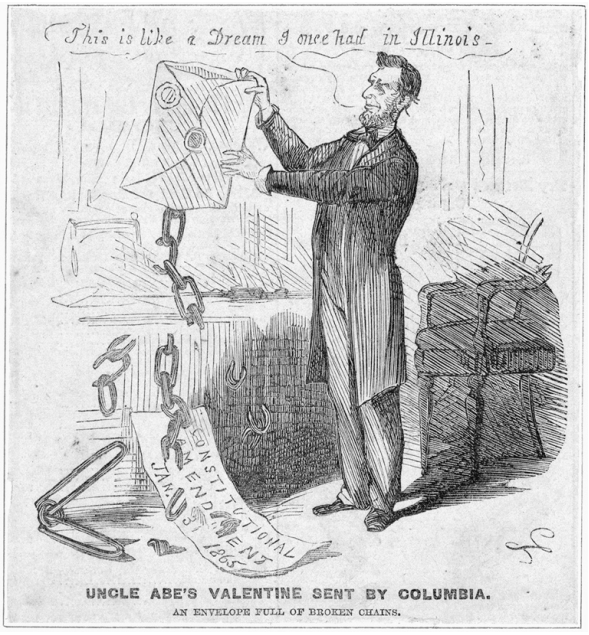

Text on the cartoon reads, “Uncle Abe’s Valentine sent by Columbia. An envelope full of broken chains.”

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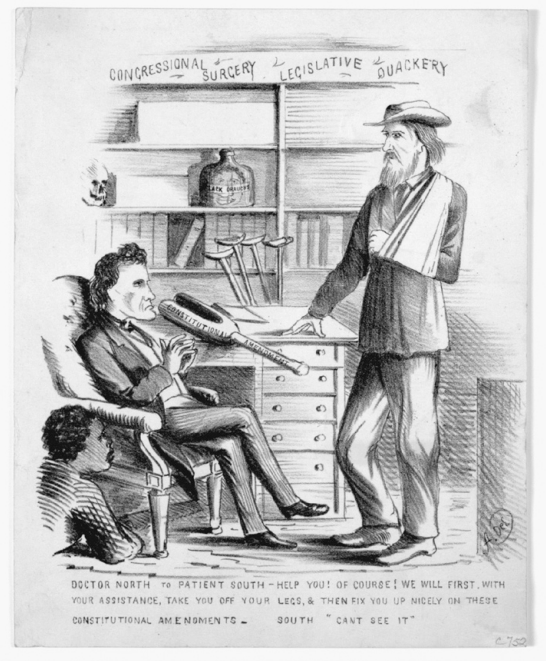

In the cartoon, the “Doctor North” who sits on a chair, prepares to amputate the leg of “Patient South. “A patient stands in front of the doctor with a broken hand in a sling, while another crawls on the ground next to the doctor. On a table beside the doctor, a crutch is labeled “Constitutional Amendments.” At the bottom, is the doctor’s claim, “Help you! Of course!” To this, a patient protests, saying “Can’t see it,” reflecting Southern resistance to reforms.

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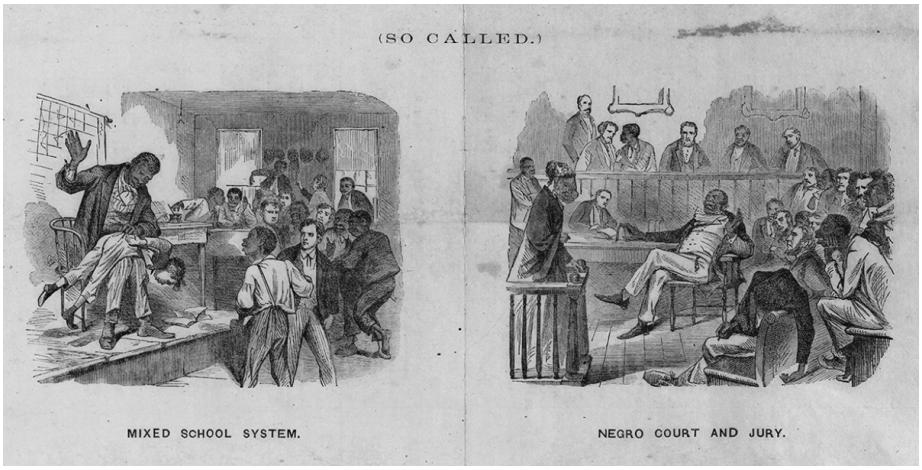

The left illustration is titled, “Mixed School system” and depicts a classroom setting with white and black children. One of the white children is getting beaten up severely by a black teacher. The right illustration is titled, “Negro Court and Jury” and depicts a courtroom filled with black and white attorneys and jury members, some of them laughing at a woman who stands with her head bent down on the stand.

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Extended image description for Figure

O J Dunn, the then lieutenant governor of the state of Louisiana, is surrounded by headshots of 29 African American delegates of the Louisiana constitutional convention.

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Extended image description for Figure

A CONVENTION OF SECESSIONISTS AFTER THE WAR.

The cartoon features five people seated at a table. The first one is bespectacled, with some documents in front of him, the second one sniffs a bottle titled salt, the third one holds his hands to his eyes as if crying, the fourth one sniffs a bottle, and the fifth one has his hands in his mouth. At the center in front of them is a chalice titled, “ “Yedust of Departed hopes.”

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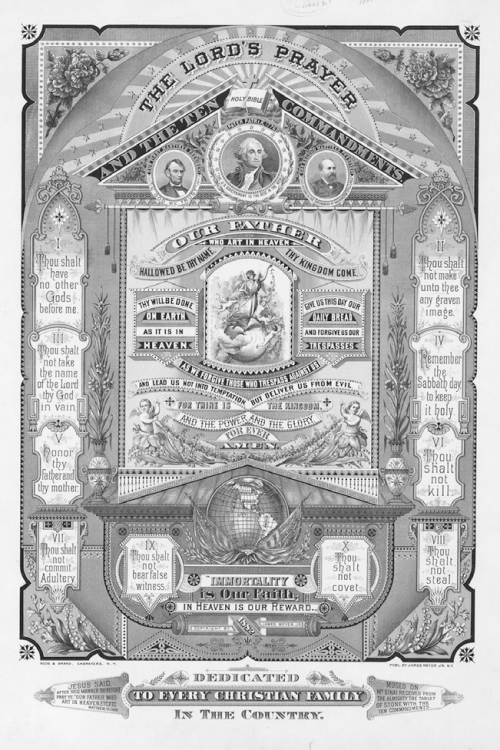

At the top are portraits of George Washington, Abraham Lincoln and Thomas Jefferson. At the bottom is the text, “Dedicate do every Christian family in the country.”

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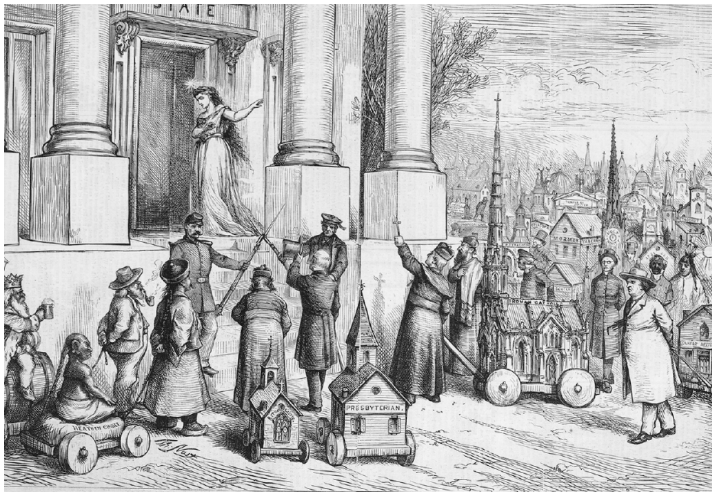
Extended image description for Figure



A feminine figure stands at the elevated platform of a church with her arms swung backward. Several people stand on the ground below with miniature churches and architectural models on pull carts, some of them pointing at her on top.

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Extended image description for Figure

Head of Suffragette Parade Passing Treasury

A large placard at the center of the crowd reads, “We Demand an Amendment to the United States Constitution Enfranchising Women,”

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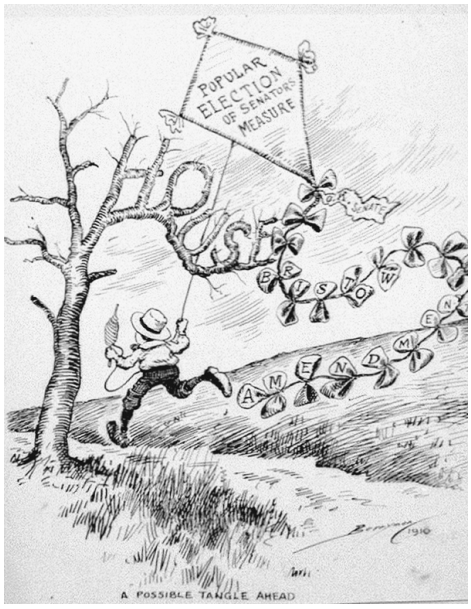
Extended image description for Figure



The kite’s tail spells “Amendments”

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Extended image description for Figure

The cartoon features a big woman holding a large sieve named “Federal Suffrage Amendment” with a layer of men holding placards with a variety of slogans in opposition of the Amendment. The ones in support of it fall through the sieve, to the ground below. Text at the bottom reads, “All the little Antis fall through.”

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Extended image description for Figure

The dog named Supreme Court is on a leash held back tightly by the man who holds out a verdict that reads, “The vital need is not an alteration of our fundamental law, but an increasingly enlightened view with reference to it. President Roosevelt.” The people reading the verdict are labeled as follows: White Collar worker, Farmer, Congress, Coal Miner, Union Labor.

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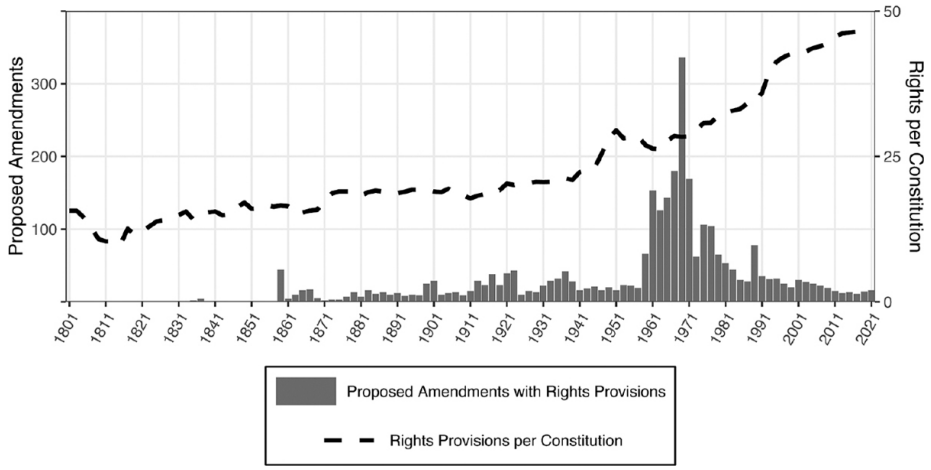
Extended image description for Figure



Data: The horizontal axis represents the years from 1801 to 2021 in increments of 10 years. The vertical axis on the left representing the Proposed Amendments has values from 0 to 400 in increments of 100. The vertical axis on the right representing the Rights per constitution has values from 0 to 50 in increments of 25. A legend at the bottom depicts a dotted line as the trend for Rights Provisions per Constitution, and Dark bars to represent the Proposed Amendments with Rights Provisions. The dotted line trend representing the Rights Provisions per Constitution begins at about 120 in 1801, then moves on as follows: 90 in 1811, 100 in 1821, 110 in 1831, 120 in 1841, 125 in 1851, 125 in 1861, 120 in 1871, 150 from 1881 to 1921, 190 in 1931, 200 in 1941, 220 in 1951, 200 in 1961, 220 in 1971, 250 in 1981, 300 in 1991, 350 from 2001 to 2011, 380 in 2021. The bar representing the Proposed Amendments with Rights Provisions are as follows: nil from 1801 to 1851. 1861: 50, 1871 to 1951: less than 50, 1961 to 1971: between 100 to 200, 1971: highest peak of 350, 1971 to 1981: 100, 1991: 70, 2001 to 2021: less than 50. All values given are approximate.

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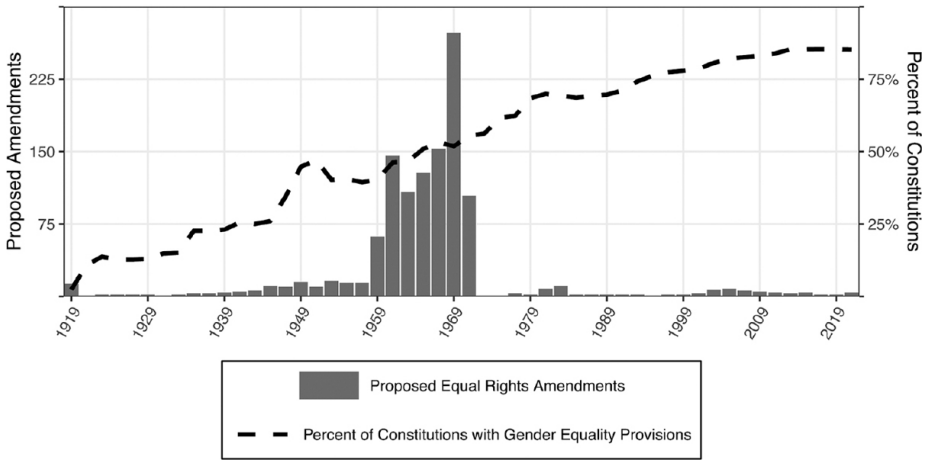
Extended image description for Figure



Data: The horizontal axis represents the years from 1919 to 2019 in increments of 10 years. The vertical axis on the left represents the Proposed Amendments and has values from 0 to 300 in increments of 75. The vertical axis on the right represents Percent of Constitutions and has values from 0 to 75 in increments of 25 per cent. A legend below denotes a dotted line trend as the Percent of Constitutions with Gender Equality Provisions and Dark bars as the Proposed Equal Rights Amendments. The trend of the dotted line representing the Percent of Constitutions with Equality Provisions is as follows: 1919: 0 percent, 1929: 20 percent, 1939: 25 percent, 1949: 50 percent, 1959: 50 percent, 1969: 51 percent, 1979: 74 percent, 1989: 73 percent, 1999: 76 percent, 2009: 78 percent, 2019: 78 percent. the bars representing the Proposed Equal Rights Amendments are as follows: from 1919 to 1949: less than 10, 1959:73, 1969: 275, 1979: 0, 1989: 0, 1999: 5, 2009: 3, 2019: 0. All values given are approximate.

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Extended image description for Figure

The placards read as follows: “Race mixing is communism”, “Stop Race mixing.” Some of the protestors also hold the U S flag.

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Extended image description for Figure

The posters read: “Now hear this Scotus! Trump is not above the law. Women’s wave rising. Feminists versus Fascists. Trump is not immune.”

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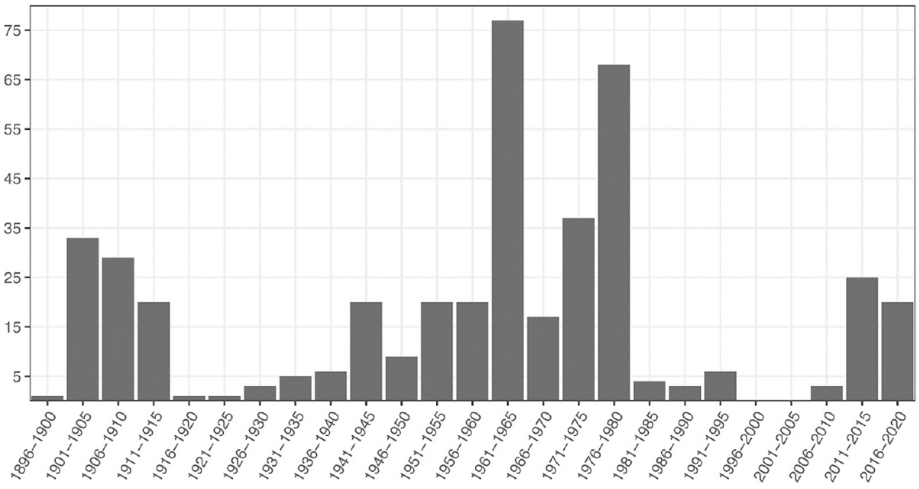
Extended image description for Figure



Data: The horizontal axis represents the years from 1896 to 2020 in ranges of 4 years. The vertical axis represents the number of Applications of the Fifth Article Convention in values from 5 to 75 in increments of 10. The data of the bars representing the Applications are as follows: From 1896 to 1900: 1, from 1901 to 1905: 33, from 1906 to 1910: 30, 1911 to 1915: 20, 1916 to 1925: 1, 1926 to 1930: 3, 1931 to 1935: 5, 1936 to 1940: 6, 1941 to 1945: 20, 1946 to 1950: 8, 1951 to 1960: 20, 1961 to 1965: 73, 1966 to 1970: 17, 1971 to 1975: 36, 1876 to 1980: 67, 1981 to 1985: 4, 1986 to 1990: 3, 1991 to 1995: 6, 1996 to 2005: 0, 2006 to 2010: 3, 2011 to 2015: 25, 2016 to 2020: 20. All values given are approximate.

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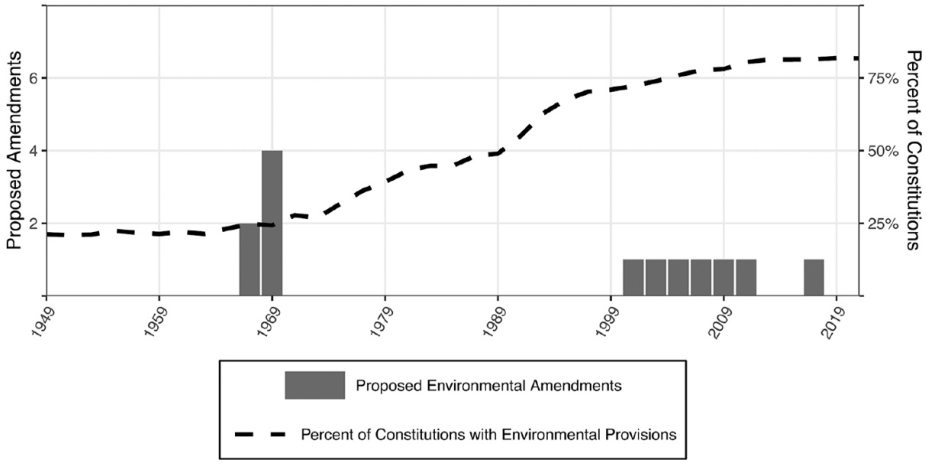
Extended image description for Figure



Data: The horizontal axis represents the years from 1949 to 2019 in increments of 10 years. The vertical axis on the left represents the Proposed Amendments in values from 2 to 8 in increments of 2. The vertical axis on the right represents the Percent of Constitutions in values from 25 to 75 in increments of 25 percent. A legend below denotes the Percent of Constitutions with Environmental Provisions as a dotted trend and proposed Environmental Amendments as dark bars. The dotted trend representing the Percent of Constitutions with environmental provisions is as follows: 1949: 24 percent, 1959: 24 percent, 1969: 25 percent, 1979: 45 percent, 1989: 50 percent, 1999: 74 percent, 2009: 76 percent, 2019: 77 percent. The bars representing the Proposed Environmental Amendments are as follows: 1949 to 1959: 0, 1968: 2, 1969: 4, 1979 to 1999: 0, 2000 to 2010: 1, 2019: 1. All values given are approximate.

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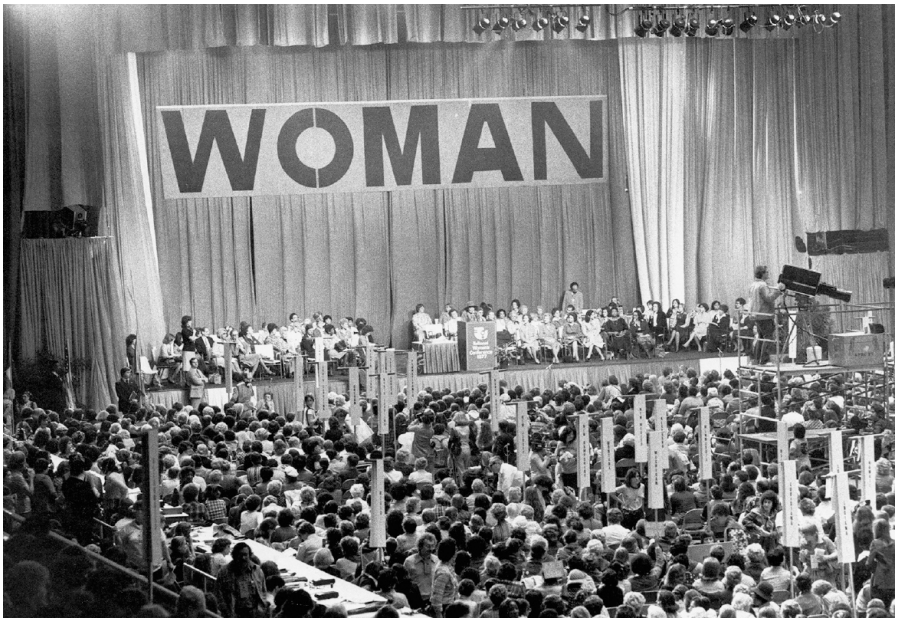
Extended image description for Figure



The backdrop of the stage bears the word, “Woman.”

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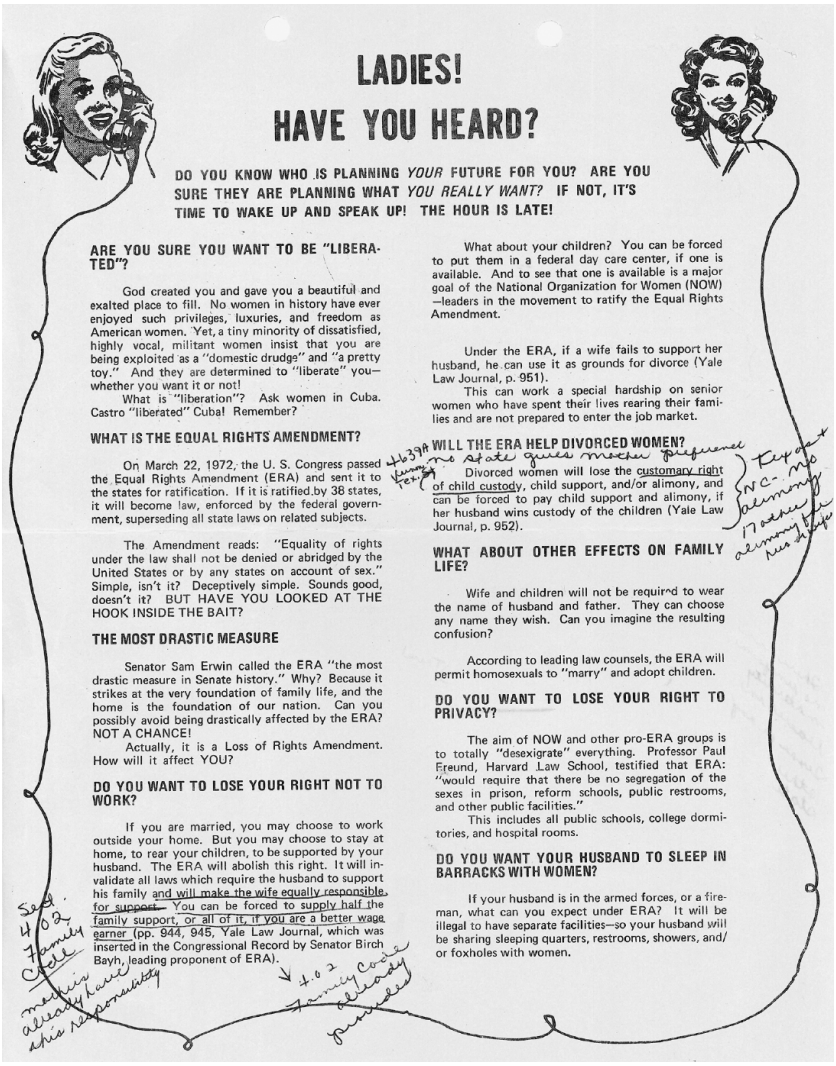
Extended image description for Figure



LADIES!

HAVE YOU HEARD?

DO YOU KNOW WHO IS PLANNING *YOUR* FUTURE FOR YOU? ARE YOU SURE THEY ARE PLANNING WHAT *YOU REALLY WANT?* IF NOT, IT'S TIME TO WAKE UP AND SPEAK UP! THE HOUR IS LATE!

ARE YOU SURE YOU WANT TO BE "LIBERATED"?

God created you and gave you a beautiful and exalted place to fill. No women in history have ever enjoyed such privileges, luxuries, and freedom as American women. Yet, a tiny minority of dissatisfied, highly vocal, militant women insist that you are being exploited as a "domestic drudge" and "a pretty toy." And they are determined to "liberate" you—whether you want it or not!

What is "liberation"? Ask women in Cuba. Castro "liberated" Cuba! Remember?

WHAT IS THE EQUAL RIGHTS AMENDMENT?

On March 22, 1972, the U. S. Congress passed the Equal Rights Amendment (ERA) and sent it to the states for ratification. If it is ratified by 38 states, it will become law, enforced by the federal government, superseding all state laws on related subjects.

The Amendment reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any states on account of sex." Simple, isn't it? Deceptively simple. Sounds good, doesn't it? BUT HAVE YOU LOOKED AT THE HOOK INSIDE THE BAIT?

THE MOST DRASTIC MEASURE

Senator Sam Erwin called the ERA "the most drastic measure in Senate history." Why? Because it strikes at the very foundation of family life, and the home is the foundation of our nation. Can you possibly avoid being drastically affected by the ERA? NOT A CHANCE!

Actually, it is a Loss of Rights Amendment. How will it affect YOU?

DO YOU WANT TO LOSE YOUR RIGHT NOT TO WORK?

If you are married, you may choose to work outside your home. But you may choose to stay at home, to rear your children, to be supported by your husband. The ERA will abolish this right. It will invalidate all laws which require the husband to support his family and will make the wife equally responsible for support. You can be forced to supply half the family support, or all of it, if you are a better wage earner (pp. 944, 945, Yale Law Journal, which was inserted in the Congressional Record by Senator Birch Bayh, leading proponent of ERA).

What about your children? You can be forced to put them in a federal day care center, if one is available. And to see that one is available is a major goal of the National Organization for Women (NOW) —leaders in the movement to ratify the Equal Rights Amendment.

Under the ERA, if a wife fails to support her husband, he can use it as grounds for divorce (Yale Law Journal, p. 951).

This can work a special hardship on senior women who have spent their lives rearing their families and are not prepared to enter the job market.

WILL THE ERA HELP DIVORCED WOMEN?

Divorced women will lose the customary right of child custody, child support, and/or alimony, and can be forced to pay child support and alimony, if her husband wins custody of the children (Yale Law Journal, p. 952).

WHAT ABOUT OTHER EFFECTS ON FAMILY LIFE?

Wife and children will not be required to wear the name of husband and father. They can choose any name they wish. Can you imagine the resulting confusion?

According to leading law counsels, the ERA will permit homosexuals to "marry" and adopt children.

DO YOU WANT TO LOSE YOUR RIGHT TO PRIVACY?

The aim of NOW and other pro-ERA groups is to totally "desexigrate" everything. Professor Paul Freund, Harvard Law School, testified that ERA: "would require that there be no segregation of the sexes in prison, reform schools, public restrooms, and other public facilities."

This includes all public schools, college dormitories, and hospital rooms.

DO YOU WANT YOUR HUSBAND TO SLEEP IN BARRACKS WITH WOMEN?

If your husband is in the armed forces, or a fireman, what can you expect under ERA? It will be illegal to have separate facilities—so your husband will be sharing sleeping quarters, restrooms, showers, and/or foxholes with women.

The page bears the following elements: Sub heading: Do you know who is planning your future for you? Are you sure they are planning what you really want? If not, its time to wake up and speak up! The hour is late!" Two illustrations of a woman speaking on a telephone adorn the left and right edges of the page. The text is divided into 8 paragraphs titled with questions based on the Equal rights amendment.

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Extended image description for Figure

THE DECISION TO HAVE A BABY COULD SOON BE BETWEEN YOU, YOUR HUSBAND AND YOUR SENATOR.

For everyone who thought something like this could never happen. It has.

This week, the United States Senate will vote on two bills which could deprive you of your most fundamental personal rights: the right to have the number of children you want. When you want them. Or to have none at all.

These bills ultimately seek to outlaw all abortion. For all women. Even if the pregnancy is the result of rape. Or incest.

Sponsoring the bills are Jesse Helms, Orrin Hatch and other right-wing U.S. Senators who will stop at nothing to impose their particular religious and personal beliefs on you. Your family. Your friends. Everyone.

And what's even more frightening, they are acting with the encouragement of President Reagan.

Don't stand by silently. Telephone and telegraph your senators today. Their address is: The United States Senate, Washington, D.C. 20510.

And fill out the Planned Parenthood coupon. Give generously of your time and money.

The fate of safe and legal abortion hangs in the balance.

JOIN PLANNED PARENTHOOD

Planned Parenthood of Metropolitan Washington D.C.
1108 16th Street, N.W.
Washington, D.C. 20036

☐ I believe abortion is something personal, not political. Please keep me informed and add me to your mailing list.

☐ I want to make a tax-deductible contribution to Planned Parenthood of Metropolitan Washington D.C. to further its general purposes.

NAME _____

ADDRESS _____

CITY/STATE/ZIP _____

TELEPHONE (DAY) _____ (EVE) _____

The ad is titled, “If you have a baby, it would be between you, your husband and your senator.” The ad bears a short article and a form at the bottom.

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Extended image description for Figure

A figure stands in front of the building, holding a child.

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