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ARTICLE: The Bill of Rights as a Constitution.

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**SUMMARY:**

... To many Americans, the Bill of Rights stands as the centerpiece of our constitutional order -- and yet constitutional scholars lack an adequate account of it. ... The Virginia ratifying convention's declaration of rights followed a similar pattern, invoking "the people's" rights to assembly, instruction, speech, press, and arms-bearing -- political rights all -- but using "every freeman" and "man" language in connection with a variety of civil rights involving due process and criminal procedure safeguards. ... Finally, let us consider how the Tenth Amendment elegantly integrates popular sovereignty with federalism. ... It misses the many linkages between the original Constitution and the Bill -- the importance of earlier invocations of "the people" in the Preamble and Article I; the connection between the free speech clause and the speech and debate clause; the relevance of the enumerated power philosophy of Article I for First Amendment absolutism; the subtle interplay between the militia and army clauses of Article I and the Second and Third Amendments; the implications of the Article III jury trial command for the Sixth Amendment; the nonexclusivity of Article V signalled by the First, Ninth, and Tenth Amendments; and so on. ...

**TEXT-1:**

To many Americans, the Bill of Rights stands as the centerpiece of our constitutional order -- and yet constitutional scholars lack an adequate account of it. Instead of being **studied holistically**, the Bill has been chopped up into discrete chunks of text, with each bit examined in isolation. In a typical law school curriculum, for example, the First, Ninth, and Tenth Amendments are integrated into an introductory survey course on "Constitutional Law"; the Sixth, Eighth, and much of the Fifth are taught in "Criminal Procedure"; the Seventh is covered in "Civil Procedure"; the takings clause is featured in "Property"; the Fourth becomes a course unto itself, or is perhaps folded into

"Criminal Procedure" or "Evidence" (because of the judicially-created exclusionary rule); and the Second and Third are ignored. <sup>1</sup>

When we turn from law school classrooms to legal scholarship, a similar pattern emerges. Each clause is typically considered separately, and some amendments -- again, the Second and Third -- are generally ignored by mainstream constitutional theorists. <sup>2</sup> To my knowledge no legal academic in the twentieth century has attempted to write in any comprehensive way about the Bill of Rights as a whole. <sup>3</sup> So too, today's scholars rarely consider the rich interplay between the original Constitution and the Bill of Rights. Leading constitutional casebooks treat "the structure of government" and "individual rights" as separate blocks <sup>4</sup> (facilitating curricular bifurcation of these subjects into different semesters), and the conventional wisdom seems to be that the original Constitution was concerned with the former; the Bill of Rights, the latter.

In this essay I seek to challenge the prevailing practice by offering an integrated overview of the Bill of Rights as originally conceived, an overview that illustrates how its myriad provisions related to each other and to those of the original Constitution. In the process I hope to refute the prevailing notion that the Bill of Rights and the original Constitution represented two very different types of regulatory strategies.

Conventional wisdom acknowledges that the original Constitution proposed by the Philadelphia convention focused primarily on issues of organizational structure and democratic self-governance: federalism, separation of powers, bicameralism, representation, and constitutional amendment. By contrast, the Bill of Rights proposed by the first Congress is generally read to have little to say about such issues. Its dominant approach, according to conventional wisdom, was rather different: to vest individuals and minorities with substantive rights against popular majorities. I disagree.

Of course, individual and minority rights did constitute a motif of the Bill of Rights -- but not the sole, or even the dominant, motif. A close look at the Bill reveals structural ideas tightly interconnected with language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations -- church, militia, and jury -- designed to create an educated and virtuous electorate. The main thrust of the Bill was not to downplay organizational structure, but to deploy it; not to impede popular majorities, but to empower them.

Consider, in this regard, Madison's famous assertion in *The Federalist* No. 51 that "[i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part." The conventional understanding of the Bill seems to focus almost exclusively on the second issue (protection of minority against majority) while ignoring the first (protection of the people against self-interested government). Yet as I shall show, this first issue was indeed first in the minds of those who framed the Bill of Rights. To borrow from the language of economics, the Bill of Rights was centrally concerned with controlling the "agency costs" created by the specialization of labor inherent in a republican government. In such a government the people (the "principals") delegate power to run day-to-day affairs to a small set of specialized government

officials (the "agents"), who may try to rule in their own self-interest, contrary to the interests and expressed wishes of the people. To minimize such self-dealing ("agency costs"), the Bill of Rights protected the ability of local governments to monitor and deter federal abuse, ensured that ordinary citizens would participate in the federal administration of justice through various jury-trial provisions, and preserved the transcendent sovereign right of a majority of the people themselves to alter or abolish government and thereby pronounce the last word on constitutional questions. The essence of the Bill of Rights was more structural than not, and more majoritarian than counter.

## I. MODERN BLINDERS

Before we fix our gaze on the eighteenth-century Bill of Rights, let us briefly consider how nineteenth- and twentieth-century events and ideas have organized our legal thinking, predisposing us to see certain features of the constitutional decalogue and to overlook others.

### A. *The Ideology of Nationalism*

We inhabit a world whose constitutional terrain is dominated by landmark Supreme Court cases invalidating state laws and administrative practices in the name of individual constitutional rights. Living in the shadow of *Brown v. Board of Education*<sup>6</sup> and the second Reconstruction of the 1960's, many lawyers embrace a tradition that views state governments as the quintessential threat to individual and minority rights, and federal officials -- especially federal courts -- as the special guardians of those rights.<sup>7</sup>

This nationalist tradition has deep roots. Over the course of two centuries, the Supreme Court has struck down state action with far more regularity than it has invalidated acts of coordinate national branches.<sup>8</sup> Early in this century, Justice Holmes declared, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."<sup>9</sup> Professor Thayer's famous 1893 essay on judicial review also embraced an expansive role for federal courts in reviewing state legislation, even as Thayer preached judicial deference to congressional acts of doubtful constitutionality.<sup>10</sup> Holmes and Thayer had reached maturity during the Civil War era, and they understood from firsthand experience that the constitutional amendments adopted following the war -- particularly the Fourteenth Amendment -- evinced a similar suspicion of state governments.

In fact, the nationalist tradition is far older than Reconstruction; its deepest roots lie in Philadelphia, not Appomattox. One of the Federalists' most important goals was to forge a strong set of federally enforceable rights against abusive state governments, a goal dramatized by the catalogue of rights in Article I, section 10 -- the Federalist forebear of the Fourteenth Amendment.<sup>11</sup> Indeed, the very effort to create a strong central government drew much of its life from the Federalists' dissatisfaction with small-scale politics and their belief that an "enlargement" of the government's geographic "sphere" would improve the caliber of public decisionmaking.<sup>12</sup> The classic statement of this view, of course, is Madison's *Federalist* No. 10.

Alongside this nationalist tradition, however, lay a states' rights tradition -- also championed by Madison -- extolling the ability of local governments to protect citizens against abuses by central authorities. Classic statements of this view include Madison's *Federalist* No. 46, his *Virginia Resolutions of 1798*, and his *Report of 1800*. Heavy traces of these ideas appear even in the work of the strong centralizer Alexander Hamilton. <sup>13</sup>

The foundations of this states' rights tradition are even older than those of the nationalist tradition -- indeed, older than the Union itself. During the fateful years between the end of the French-Indian War and the beginning of the Revolutionary one, it was colonial governments that took the lead in protecting Americans from perceived parliamentary abuses. Colonial legislatures kept a close eye on the central government; sounded public alarms whenever they saw oppression in the works; and organized political, economic, and (ultimately) military opposition to perceived British abuses. <sup>14</sup> The rallying cry of the Revolution nicely illustrates how states' rights and citizens' rights were seen as complementary, rather than conflicting: "No taxation without representation" sounds in terms of both federalism and the rights of Englishmen. <sup>15</sup>

The complementary character of states' rights and personal rights was dramatized yet again by the Virginia and Kentucky Resolutions of 1798-1800. Self-consciously echoing their colonial forebears, legislators in these two states sounded the alarm when they saw the central government taking actions that they deemed dangerous and unconstitutional. <sup>16</sup> Like its predecessor, the "Revolution of 1800" fused rhetoric of federalism and freedom: the Alien and Sedition Acts were seen as violating both the First and the Tenth Amendments. <sup>17</sup> Although many other state legislatures rejected Kentucky's open-ended claims that a state could nullify a federal law, state legislatures as a whole played a central role in the denouement of the new nation's first constitutional crisis. Through their power to select Senators and presidential electors, state lawmakers helped sweep the high-Federalist friends of the Alien and Sedition Acts out of national office in the election of 1800, replacing them with Jeffersonians who allowed the repressive Acts to expire.

Madison was quite careful to identify the limits, as well as the affirmative scope, of states' rights. State governments could monitor the federal one, and mobilize political opposition to federal laws seen as oppressive, but no state entity could unilaterally nullify those laws or secede from the Union. <sup>18</sup> Moreover, Madison's scheme gave the federal government a crucial role in protecting citizens from abusive state governments. Later spokesmen for the states' rights position, such as John C. Calhoun, Jefferson Davis, and Alexander Stephens, disregarded these vital limits to states' rights. Not only did their arguments on behalf of nullification and secession misread the Constitution's federal structure, <sup>19</sup> but these arguments were deployed on behalf of slavery, the ultimate violation of human dignity. Once again, a war was fought on American soil over intertwined issues of states' rights and human rights, but with a critical difference. In sharp contrast to the Revolutionaries' rhetoric of the 1770's, the Rebels' rhetoric of federalism in the 1860's came to be seen as conflicting with, rather than supportive of, true freedom.

Twentieth-century Americans are still living with the legacy of the Civil War, with modern rhetorical battle lines tracking those laid down a century ago.

Thus, in the tradition of Thaddeus Stevens, twentieth-century nationalists recognize the need for a strong national government to protect individuals against abusive state governments, but often miss the threat posed by a monstrous central regime unchecked by competing power centers. Conversely, in the tradition of Jefferson Davis, twentieth-century states' rightists wax eloquent about the dangers of a national government run rampant, but regularly deploy the rhetoric of states' rights to defend states' wrongs. Sadly, "states' rights" and "federalism" have often served as code words for racial injustice and disregard for the rights of local minorities <sup>20</sup> -- code words for a world view far closer to Jefferson Davis' than James Madison's.

What has been lost in this twentieth-century debate is the crucial Madisonian insight that localism and liberty can sometimes work together, rather than at cross-purposes. This is one of the themes that I hope will emerge from a fresh look at Madison's Bill of Rights.

### B. *The Logistics of Incorporation*

Through the Fourteenth Amendment, almost all the provisions of the Bill of Rights have come to be "incorporated" against the states. <sup>21</sup> Although generally sound, <sup>22</sup> the process of incorporation has had the unfortunate effect of blinding us to the ways in which the Bill has thereby been transformed. Originally a set of largely structural guarantees applying only against the federal government, the Bill has become a body of rights against all government conduct. Originally centered on protecting a majority of the people from a possibly unrepresentative government, the Bill has been pressed into the service of protecting vulnerable minorities from dominant social majorities. Given the core concerns of the Fourteenth Amendment, all this is fitting, but because of the peculiar logistics of incorporation, the Fourteenth Amendment itself often seems to drop out of the analysis. We *appear* to be applying the Bill of Rights directly; the Civil War Amendment is mentioned only in passing or not at all. <sup>23</sup> Like people with spectacles who often forget they are wearing them, most lawyers read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.

It is time, then, to take off these spectacles, and try to see how the Bill of Rights looked *before* Reconstruction. Only then can we fully appreciate some of its most important features, as originally conceived. And only after we understand this original vision can we begin to assess, in a self-conscious and systematic way, how much -- if any -- of this vision has survived subsequent constitutional developments. <sup>24</sup>

## II. THE ORIGINAL BILL OF RIGHTS

Let us begin by considering two provisions that are not part of our Bill of Rights, but were part of Madison's.

### A. *Lost Causes and Forgotten Clauses*

#### 1. *Size and Representation: First Things First*

The first Congress proposed a Bill of Rights containing twelve amendments, but only the last ten were ratified by the requisite three-fourths of state

legislatures, thereby becoming "valid to all Intents and Purposes, as Part of [the] Constitution." <sup>25</sup> Thus, the words that we refer to as the "First" Amendment really weren't "First" in the minds of the first Congress. Hear, then, the words that began *their* Bill of Rights:

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 more than one Representative for every fifty thousand persons. <sup>26</sup>

This would-be First Amendment obviously sounds primarily in structure; it is an explicit modification of the structural rule set out in Article I, section 2, mandating that the "Number of Representatives shall not exceed one for every thirty Thousand" constituents. <sup>27</sup> Had this original First Amendment been adopted instead of narrowly defeated during the ratification period -- it fell one state short of the requisite three-fourths -- it would no doubt be much harder for twentieth-century citizens and scholars to ignore the Bill of Rights' emphasis on structure, for the Bill would begin and end with obviously structural provisions. As it stands instead, the fact that the most evident structural provision (our Tenth, their Twelfth, Amendment) sits at the end of the decalogue may mislead us into viewing it as an afterthought, discontinuous with the perceived individual rights theme of the earlier provisions. The original First Amendment suggests otherwise. It is not surprising that *this* Amendment was first, for it responded to perhaps the single most important concern of the Anti-Federalists.

Part of this concern focused on demography and geography -- on the numerical size of the polity and the spatial size of the nation. Classical political theory had suggested that republics could thrive only in geographically and demographically small societies, where citizens would be shaped by a common climate and culture, would have homogeneous world views, would know each other, and could meet face-to-face to deliberate on public issues. Models of such republics included the Greek city-states and pre-imperial Rome. <sup>28</sup>

#### a. *The Federalists' Contribution*

The Federalists stood this orthodoxy on its head by claiming that a large and modestly heterogeneous society could actually produce a more stable republic than could a small city or state. Madison's *Federalist* No. 10 is today recognized as the most elegant and incisive presentation of this revolutionary idea, but in fact the entire introductory section of *The Federalist Papers* is devoted to confronting the Anti-Federalist concern about size. In *The Federalist* No. 2, Jay notes the many ways in which (white) Americans shared a basic homogeneity that constituted them as one people, ethnically, culturally, linguistically, historically, commercially, and geographically. Over the next seven papers, Jay and Hamilton sketch the inability of small republics to defend themselves against external threats while maintaining internal democracy. This is primarily a geopolitical and military argument for an

extended nation. Finally, Madison takes the stage in Numbers 10 and 14, stressing the purely domestic reasons for preferring a large state.<sup>29</sup>

Madison's first two *Federalist Papers* demonstrate the rich interplay among the issues of national size, legislative size, and representation. (The last issue, of course, had played a central role in the debates leading up to and growing out of the American Revolution; anyone claiming that the new Constitution vindicated rather than betrayed that Revolution had to address the subject of representation head on.) Direct democracy, Madison argued, was impossible in any society more expansive than a small city-state.<sup>30</sup> Even in tiny Rhode Island, the mass of citizens could not assemble regularly to decide matters of state; instead, citizens had to rely on a smaller body of government agents to represent them.<sup>31</sup> Rather than cause for alarm, representation was a great blessing in Madison's eyes. A small, select group of representatives could "refine"<sup>32</sup> public opinion and produce more virtuous, wise, and stable decisions. The image here is akin to skimming a small amount of cream (the representatives) off the top of a bucket of milk (the polity).<sup>33</sup> Just as representative systems were better (creamier) than direct democracies, so a large society was preferable to a small one. In order to get the same absolute amount of cream, we need skim an even thinner (and thus richer) layer off the top of a bigger bucket. This last argument, of course, presupposes an absolute numerical limit on the size of the legislature: no matter how large the polity, the legislature could not expand beyond a certain number (just as direct democracy could not expand beyond a certain size), after which deliberation and discussion would be impossible.<sup>34</sup>

Yet even Madison noted that the skimming principle should not be carried to extremes: "By enlarging too much the number of electors [per representative], you render the representative too little acquainted with all their local circumstances and lesser interests. . . ." <sup>35</sup>

#### b. *The Anti-Federalists' Critique*

Probably the deepest Anti-Federalist objection to the Constitution was that the document took the skimming principle too far: Congress was too small, too "refined." Indeed, this *structural* concern underlay most of the Anti-Federalists' other arguments. Because the legislature was so small, the Anti-Federalists feared that only "great" men with reputations over wide geographic areas could secure election.<sup>36</sup> Thus, for Anti-Federalists, the Constitution was at heart an "aristocratic" document, notwithstanding its ringing populist proclamations ("We the People . . .") and the process of ratification itself, which was far more democratic than the process by which the Articles of Confederation and most state constitutions had been adopted.<sup>37</sup> Anti-Federalists feared that the aristocrats who would control Congress would have an insufficient sense of sympathy with, and connectedness to, ordinary people. Unlike state legislators, "lordly" men in Congress would disdain their lowly constituents, who would in turn lose confidence in the national government. In the end, the new government would be obliged to rule through corruption, force, and fear -- with monopolies and standing armies -- rather than through mutual confidence.<sup>38</sup> Thus, Anti-Federalists rejected the novel logic of *The Federalist* No. 10 in favor of more orthodox political science: because of the attenuated chain of representation, Congress would be far *less* trustworthy than state legislatures.

The Anti-Federalists' lack of confidence in the federal legislature's ability to truly represent the people made them all the more insistent on popular representation in the judicial branch. Precisely because ordinary citizens could not aspire to serve as national legislators, there was a vital need to guarantee their role as jurors. This was especially true because national laws, adopted by persons unfamiliar with local circumstances, would need to be modified in their application by representatives better acquainted with local needs and customs.<sup>39</sup>

The Anti-Federalists were not simply concerned that Congress was too small *relatively* -- too small to be truly representative of the great diversity of the nation. Congress was also too small *absolutely* -- too small to be immune from cabal and intrigue. As Gilbert Livingston pointed out during the New York ratifying convention, the extraordinary powers of the Senate were vested in twenty-six men, fourteen of whom would constitute a quorum, of which eight would make up a majority.<sup>40</sup> Although the House of Representatives looked much better, with its initial allocation of sixty-five members, it could conceivably end up even worse, as Patrick Henry noted in the Virginia ratifying convention:

In the clause under consideration, there is the strangest language that I can conceive. . . . "The number shall not exceed one for every thirty thousand." This may be satisfied by one representative from each state. Let our numbers be ever so great, this immense continent may, by this artful expression, be reduced to have but thirteen representatives.<sup>41</sup>

And of course, by logic similar to Livingston's, seven Representatives could conceivably form a quorum, four of whom would constitute a majority!

Friends of the Constitution were not oblivious to these concerns, as Madison's own language in *The Federalist Papers* shows.<sup>42</sup> Indeed, the "thirty thousand" clause set the scene for a dramatic finale to the Philadelphia convention in which George Washington, for the first and last time, took center stage to address his fellow delegates on a substantive issue.

The date was September 17, 1787 -- the final day of the convention. Two days earlier the convention had unanimously agreed to a final text and had authorized the engrossment of the parchment for signing.<sup>43</sup> This final version provided that the number of Representatives not exceed "one for every *forty* thousand." Moments before the copy was finally voted upon and signed, Nathaniel Gorham of Massachusetts "said if it was not too late he could wish, for the purpose of lessening objections to the Constitution, that the clause . . . might be yet reconsidered, in order to strike out 40,000 & insert 'thirty thousand.'"<sup>44</sup> The irregularity of this eleventh hour motion only underscored the importance of the issue. Equally irregular was the response of presiding officer Washington, who had until then officially maintained a scrupulous silence on all substantive issues:

When the President rose, for the purpose of putting the question, he said that although his situation had hitherto restrained him from offering his sentiments on questions depending in the House, and it might be thought, ought now to impose silence on him, yet he could not forbear expressing his wish that the

alteration proposed might take place. It was much to be desired that the objections to the plan recommended might be made as few as possible -- The smallness of the proportion of Representatives had been considered by many members of the Convention, an insufficient security for the rights & interests of the people. He acknowledged that it had always appeared to himself among the exceptionable parts of the plan; and late as the present moment was for admitting amendments, he thought this of so much consequence that it would give much satisfaction to see it adopted. <sup>45</sup>

With the weight of its President behind the measure, the convention unanimously adopted the amendment. An erasure was made in the parchment, the word "thirty" was inserted where "forty" had been, and the document was then finally approved and signed. Thus, even before the ratification struggle, Federalist supporters of the Constitution were sensitive to the structural issue of congressional size.

During the ratification debates Anti-Federalists seized upon the issue, taking up Publius' challenge to frame their opposition in *structural* terms:

And the adversaries of the plan promulgated by the convention would have given a better impression of their candor if they had confined themselves to showing that the internal structure of the proposed government was such as to render it unworthy of the confidence of the people. <sup>46</sup>

[A]ll observations founded upon the danger of usurpation ought to be referred to the composition and structure of the government, not to the nature or extent of its powers. <sup>47</sup>

Nowhere was the concern with size more evident than in the ratification conventions themselves. Of the six states where conventions endorsed various amendments prior to the meeting of the first Congress -- Massachusetts, New Hampshire, New York, North Carolina, South Carolina, and Virginia -- all but one (South Carolina) proposed a secure minimum size for the House of Representatives. <sup>48</sup> This proposal was never placed lower than second on a typically long list of desired amendments. Only one principle ever ranked higher -- the idea of limited federal power that eventually made its way into our Tenth (their Twelfth) Amendment. <sup>49</sup> In the words of leading Anti-Federalist Melancton Smith at the New York ratifying convention, "We certainly ought to fix, in the Constitution, those things which are essential to liberty. *If any thing falls under this description, it is the number of the legislature.*" <sup>50</sup>

### c. *The First Amendment Compromise*

Given all this, it is not surprising that the first Congress' *First* Amendment attempted further fine tuning of the structure of representation in the lower house. Nor is it surprising that Virginia, the home state of both Madison and Henry, ratified this Amendment separately, weeks before approving the rest of the Bill of Rights. <sup>51</sup> What remains to be explained is why the Amendment failed, even by a single vote. <sup>52</sup> Although the legislative history on this point is sparse, a close analysis of the text itself yields a couple of possible explanations.

First, the Amendment's intricate mathematical formula made little sense. If the

population rose from eight to nine million in a decade, the requirement that there be at least 200 Representatives would be inconsistent with the requirement that there be not more than one Representative for every fifty thousand people. In effect, the Amendment required the population to jump from eight to at least ten million in a single decade! The mathematical oddness of the text is confirmed by the lean legislative history that does exist. When initially passed by the House of Representatives, the Amendment was worded identically to its final version with one exception: its last clause provided for "not . . . less than one Representative for every fifty thousand persons."<sup>53</sup> So worded, the proposal was sent to the Senate, along with all the other amendments proposed by the House. When the Senate adopted a Bill of Rights whose wording and substance diverged from the House version, the two chambers convened a joint committee to harmonize the proposed Bills.<sup>54</sup> At this conference, the word "more" was inexplicably substituted for "less," and the conference paste-job was hurriedly adopted by both houses under the shadow of imminent adjournment, apparently without deep deliberation about the substitution's (poor) fit with the rest of the clause.<sup>55</sup> Thus it is quite possible that the technical glitches in the First Amendment's formula became evident only during the later process of ratifying Congress' proposed amendments.

Second, and related, what the First Amendment promised in the short term -- increased congressional size -- it took back in the long run. Its final clauses established a maximum, not a minimum, on congressional size. Even worse, this maximum was more stringent than that in the existing Constitution. In effect, the Amendment dangled the bait of more "democracy" now in exchange for more "aristocracy" in the future. Some committed democrats may have been wary of snatching that bait. Tellingly, not a single state ratifying convention had proposed a stricter constitutional maximum on the size of the House.<sup>56</sup>

Why, then, did the joint House-Senate committee insert a maximum? The lack of extant records of the committee's deliberations requires us to speculate, but the most plausible culprit is James Madison, one of three Representatives (the other two being John Vining and Roger Sherman) appointed by the House. As we have seen,<sup>57</sup> Madison's *Federalist Papers* presupposed an absolute maximum on the size of the legislature:

Sixty or seventy men may be more properly trusted with a given degree of power than six or seven. But it does not follow that six or seven hundred would be proportionably a better depository. And if we carry on the supposition to six or seven thousand, the whole reasoning ought to be reversed. . . . In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.<sup>58</sup>

Unsurprisingly, when Madison initially offered up to the first Congress his proposed amendments to the Constitution, he integrated both minimum and maximum: "the number shall never be less than , nor more than ." <sup>59</sup> Although the full House eventually rejected the idea of a maximum,<sup>60</sup> Madison may well have seen his appointment to the joint committee as a chance to slip his pet provision back in -- especially given the previously expressed views of fellow committee member Sherman in support of his earlier provision.<sup>61</sup>

A final, more obvious explanation for the failure of the First Amendment focuses on Delaware, the only state that ratified the last ten amendments while rejecting the first.<sup>62</sup> Since each state was guaranteed at least one seat in the House of Representatives, Delaware, with its small population and limited room for growth, had selfish reasons to favor as small a House as possible -- indeed to endorse the hypothetical congressional bill that Patrick Henry had conjured up in the Virginia ratifying debates *decreasing* the size of the House from sixty-five members to thirteen.<sup>63</sup> Under Henry's nightmare bill, Delaware could achieve equality of representation in both branches, as its delegates had strenuously urged in the Philadelphia convention during the summer of 1787.<sup>64</sup> Prior to the convention, the Delaware legislature had gone so far as to issue binding instructions to its delegates to oppose all attempts to modify the one state, one vote rule of the Articles of Confederation.<sup>65</sup> This political explanation for Delaware's vote against the original First Amendment gains added support from the conduct of Delaware Representative Vining. When an early version of Madison's First Amendment initially came up for debate on the floor of the House of Representatives, Vining unsuccessfully sought to amend it in a way that would assure small states more than proportional representation in an expanded House.<sup>66</sup>

Whatever Delaware's reasons for ultimately rejecting Madison's First Amendment, we do well to remember that only a single state -- and a tiny one at that -- stood between the ten "success stories" of Amendments III-XII, and the "failure" of Amendment I.

## 2. *Economic Self-Dealing*

The Second Amendment proposed by the first Congress also went down to defeat in the ratification period, but by a wider margin -- only six state legislatures<sup>67</sup> ratified its words: "Article the second. . . . No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."<sup>68</sup>

As with the First Amendment, the Second obviously dealt centrally with an issue of governmental structure rather than substantive individual right. The original First Amendment tried to reduce the general danger that federal lawmakers would lack knowledge of and sympathy with their constituents, whereas the concern of the Second was more specific: economic self-interest among Senators and Representatives, a concern also evident in the emolument clause of the original Constitution's Article I, section 6. Despite this difference, both Amendments shared a fundamentally similar outlook. At base, both addressed the "agency cost" problem of government -- possible self-dealing among government "servants" who may be tempted to plunder their "masters," the people -- rather than the analytically distinct problem of protecting minorities of ordinary citizens from tyrannical majorities. If anything, both Amendments were attempts to strengthen majoritarianism rather than check it since both tried to tighten the link between representatives and their constituents.

Interestingly, of the three states whose ratifying conventions had suggested a congressional salary amendment in 1787-88 -- Virginia, New York, and North Carolina<sup>69</sup> -- only the two southern states voted to ratify the idea when it

formally came before their legislatures. Perhaps this was an issue about which New York state legislators felt more natural sympathy with future Congressmen than had the specially called, ad hoc convention of the people of New York in 1788. Because the first Congress' First Amendment had focused on a key difference between an "aristocratic" Congress and more "democratic" state legislatures, the latter bodies could cheerfully support that Amendment without calling into question their own legitimacy. But the issue of legislative salaries hit closer to home -- close to *their own* pocketbooks. How could state legislators vote for Congress' Second Amendment without also triggering public demand for similar amendments to their respective state constitutions regulating their own salaries? Thus, the lukewarm reaction of state legislatures to the original Second Amendment is itself mildly suggestive of a possible "agency cost" gap between the interests of constituents and legislators.

The events of 1816 are also suggestive. When Congress enacted the first increase in congressional pay since 1789, and refused to defer the increase until after the next election, an enraged electorate responded by voting congressional incumbents out of office in record numbers. Opposition to the act found voice not simply in newspapers, but in grand jury presentments, petitions, and local resolutions -- all adopted by ordinary citizens. <sup>70</sup>

## B. Our *First Amendment*

### 1. *Political Rights*

The first Congress' first two proposed amendments offer an illuminating perspective on their Third (our First) Amendment. From this perspective, we can see features of that Amendment that tend to be obscured by conventional wisdom. Let us begin by considering the second half of the Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

#### a. *Speech and Press*

Like its two predecessors, this declaration obviously sounds in structure, and focuses (at least in part) on the representational linkage between Congress and its constituents. Notwithstanding conventional wisdom, several leading scholars have noted the structural role of free speech and a free press in a working democracy. <sup>71</sup> Yet many others tend to view these rights as fundamentally minority rights -- rights of paradigmatically unpopular individuals or groups to speak out against a hostile and repressive majority. <sup>72</sup> To be sure, even here, there is often a weak brand of majoritarianism at work. Political action by today's minority may eventually persuade some members of today's majority or members of the next generation, thus enabling a new majority to emerge in the future. Fittingly, the classic First Amendment dissents of Holmes and Brandeis <sup>73</sup> were themselves exercises of free speech by a minority inspired by the hope of persuading a future majority (of the Court, of course).

However, the perspective furnished by the first two proposed amendments suggests that an even stronger kind of majoritarianism underlies our First Amendment. The body that is restrained is not a hostile majority of the people,

but Congress; and the earlier two amendments remind us that congressional majorities may in fact have "aristocratical" and self-interested views in *opposition* to views held by a majority of the people. Thus, while the Amendment's text is broad enough to protect the rights of unpopular minorities (such as Jehovah's Witnesses and Communists), <sup>74</sup> the Amendment's historical and structural core was to safeguard the rights of popular majorities (such as the Republicans of the late 1790's) against a possibly unrepresentative and self-interested Congress.

Consider once again Madison's distinction in *The Federalist* No. 51 between the two main problems of republican government -- first, protecting citizens generally from government officials pursuing their own self-interested agendas at the expense of their constituents; and second, protecting individuals and minorities from tyrannical majority factions of fellow citizens. <sup>75</sup> As did the first Congress' first two amendments, their Third (our First) Amendment betrayed more concern about the first issue than the second. To begin to see this, we need only reflect on the Amendment's first word. "Congress" was restrained but not state legislatures. Yet, as Madison's *Federalist* No. 10 reminds us, the danger of majority oppression of minorities (the second issue) was far greater at the state than at the national level. Of course, this was largely because *state legislative representation was so much less attenuated than congressional representation*, making state legislative majorities far more likely to reflect the unrefined sentiments of popular majorities. *Thus, the fact that our First Amendment restrained only Congress suggests that its primary target was attenuated representation, not overweening majoritarianism.* <sup>76</sup> *Congress was singled out precisely because it was less likely to reflect majority will.*

Madison himself had a rather different goal. As part of his initial proposed Bill of Rights, he included an amendment proscribing states from violating "freedom of the press," <sup>77</sup> and went on to declare:

But I confess that I do conceive, that in a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the executive or the legislative departments of Government, but in the body of the people, operating by the majority against the minority. <sup>78</sup>

Madison's proposed amendment also obliged state governments to protect "equal rights of conscience" and "trial by jury in criminal cases," and was soon reworded to protect "speech" as well as "press" from state interference. <sup>79</sup> When the package came up for discussion on the floor of the House, Madison described it as "the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments." <sup>80</sup>

Madison's proposal passed the House of Representatives (as the original Fourteenth Amendment!) <sup>81</sup> but died in the Senate. <sup>82</sup> Of course, to the extent that principles of free speech and a free press were implicit in the republican structure of the original Constitution, <sup>83</sup> state legislatures were already bound to observe those principles -- especially where citizens sought to speak out

about issues of national concern. (Any state effort to stifle this debate would seem vulnerable on supremacy clause grounds.)<sup>84</sup> However, full vindication of the Madisonian vision did not occur until the adoption of *our* Fourteenth Amendment after the Civil War. The equal protection clause of that Amendment, directed at state governments, obviously **focuses more on overweening majoritarianism than attenuated representation.** And strong arguments support a reading of the "privileges or immunities" clause as incorporating most of the provisions of the Bill of Rights, including the speech and press clauses, against the states.<sup>85</sup>

Although many modern speech theorists echo Madison's 1789 fear of popular majorities, we must remember that the First Amendment tradition of " uninhibited, robust, and wide-open" criticism of government celebrated by *New York Times v. Sullivan*<sup>86</sup> was born when Madison and Jefferson successfully appealed to a popular majority during 1798-1800. No court invalidated the Alien and Sedition Acts (unless one cheats by counting the *Sullivan* court itself, 150 odd years later, or the "court of history"<sup>87</sup> it invoked). Rather, a popular majority adjudicated the First Amendment question in the election of 1800, by throwing out the haughty and aristocratic rascals who had tried to shield themselves from popular criticism. **(The Sedition Act itself was a textbook example of attempted self-dealing among the people's agents; it criminalized libel of incumbents, but not challengers. Yet another dead giveaway: the Act conveniently provided for its own expiration after the next election.)**<sup>88</sup> If we see the First Amendment as primarily about minority rights, Jefferson's strategy of appealing to a popular majority seems odd indeed. But once we see the Amendment's populist roots, its vindication by the election of 1800 borders on the poetic. The election of 1816 was less dramatic, but it too highlighted the core role of the press in alerting popular majorities to the dangers of congressional self-dealing.<sup>89</sup>

It becomes even more clear that popular speech was the paradigm of our First Amendment when we recall its historic connection **to jury trial; popular bodies outside regular government would protect popular speech criticizing government.** The historic common law rule against **"prior restraint"**<sup>90</sup> -- courts could not enjoin a publisher from printing offensive material, but could entertain civil and criminal prosecutions for libel and sedition afterwards -- had bite largely because of the structural differences between the two proceedings. **The former could occur in equity courts, presided at by permanent government officials on the government payroll (chancellors),<sup>91</sup> but the latter would require the intervention of ordinary citizens (jurors) who could vote for the publisher without reprisal. In the colonies, the celebrated 1730's trial of the New York publisher John Peter Zenger had placed the issue of the jury's role at center stage in libel cases -- and it continued to remain there even after the Revolution and Constitution.<sup>92</sup> As we shall see in more detail below,<sup>93</sup> publishers prosecuted under the Alien and Sedition Acts in the late 1790's tried to plead their First Amendment defense to jurors. The judges, after all, had been appointed by the very same (increasingly unpopular) Adams administration that the defendants had attacked in the press.**

This episode contrasts sharply with today's practice, where friends of the First Amendment often seek to limit the power of juries on speech questions, such as obscenity *vel non*, by appealing to Article III judges. Since the First Amendment's center of gravity has (appropriately in light of the later

Fourteenth Amendment) shifted to protection of unpopular, minority speech, its natural institutional guardian has become an insulated judiciary rather than the popular jury.<sup>94</sup>

Similarly, today's First Amendment champions tend to see state and local "community standards" of discourse as the paradigmatic threat to free speech; but the Amendment's defenders in the 1790's turned to local juries and state legislatures for refuge. After congressional enactment of the Sedition Act, where could opponents vigorously voice their criticism of the Act without fear of prosecution under the Act itself? In state legislatures, of course. Even if, as the high Federalists claimed, freedom for partisan publishers was not absolute but limited to freedom from prior restraint, who would dare claim that absolute "freedom of speech" did not obtain within constitutionally recognized legislative bodies?<sup>95</sup> Indeed, the very notion of free speech for citizens had grown out of an older tradition establishing *legislative* "speech and debate" immunity from prosecution.<sup>96</sup> The Articles of Confederation had explicitly used the phrase "freedom of speech" to immunize members of the federal Congress from state libel law,<sup>97</sup> and the Virginia and Kentucky legislatures in 1798 were simply returning the compliment. Thus, even as the Virginia and Kentucky legislators themselves invoked both First and Tenth Amendment protections in arguing that the Alien and Sedition Acts were unconstitutional,<sup>98</sup> their own speech was specially protected by a states' rights gloss on the free speech clause.

In the end, the individual rights vision of the speech and press clauses powerfully illuminates a vital part of our constitutional tradition, but only by obscuring other parts. The special structural role of freedom of speech in a representative democracy; the localist and majoritarian accent of the First Amendment circa 1800; the massive transformation brought about by the Fourteenth Amendment; the competing claims of judge, jury, and electorate to define the boundaries of "free speech"; the obvious "agency" problem of incumbent self-dealing at the heart of the Sedition Act; the special role of free speech in state legislatures -- all this and much more are simply bleached out of the standard sketch drawn from the individual rights perspective.

#### b. *Assembly and Petition*

When we turn our attention to the assembly and petition clauses, a similar pattern emerges. Both clauses obviously protect individuals and minority groups, but the clauses contain a majoritarian core that contemporary scholarship has virtually ignored. The right of the people to assemble does not simply protect the ability of self-selected clusters of individuals to meet together; it is also an express reservation of the *collective* right of We the People to assemble in a future convention and exercise our sovereign right to alter or abolish our government by a simple majority vote. In the words of Rousseau's 1762 treatise on the social contract, "the sovereign can act only when the people are assembled."<sup>99</sup>

Listen carefully to the remarks of President Edmund Pendleton of the Virginia ratifying convention of 1788:

*We, the people, possessing all power, form a government, such as we think will secure happiness: and suppose, in adopting this plan, we should be mistaken in the end; where is the cause of alarm on that quarter? In the same*

plan we point out an easy and quiet method of reforming what may be found amiss. No, but, say gentlemen, we have put the introduction of that method in the hands of our servants, who will interrupt it from motives of self-interest. What then? . . . Who shall dare to resist *the people*? No, we will assemble in *Convention*; wholly recall our delegated powers, or reform them so as to prevent such abuse. <sup>104</sup>

This rich paragraph has it all: primary attention to the "agency" problem of government self-dealing, dogged unwillingness to equate Congress with a majority of the people, and keen appreciation of the collective right of the people to bring wayward government to heel by *assembling* in convention. Pendleton saw that the "agency" problem of government meant that future amendments might be necessary to bring government under control.

Obviously, ordinary government officials -- Congress, state legislatures, and so on -- could not be given a monopoly over the amendment process, for that would enable them to thwart desperately needed change by self-interested inaction. Hence the need to keep open the special channel of the popular convention acting outside of all ordinary government, convenable, if necessary, by popular petition. <sup>105</sup> (Indeed, it was the very threat of a second constitutional convention that induced many Federalists in the first Congress to support a Bill of Rights limiting their own powers, lest a new convention propose even more stringent amendments.) <sup>106</sup>

Pendleton's language reveals the obvious bridge between the Preamble's invocation of "the People" and the reemergence of that phrase in our First Amendment. The Preamble's dramatic opening words, quoted by Pendleton, trumpeted the Constitution's underlying theory of popular sovereignty. <sup>107</sup>

Those words and that theory implied a right of "the People" (acting by majority vote in special conventions) to alter or abolish their government whenever they deemed proper: what "the People" had "Ordain[ed] and establish[ed]" (by majority vote in special conventions), they or their "posterity" could dis-establish at will (by a similar mode). <sup>108</sup> To good lawyers of the late 1780's, Pendleton was merely restating first principles. Madison's very first proposed amendment was a prefix to the Preamble that similarly declared: "[T]he people have an indubitable, unalienable, and indefeasible right to reform or change their Government. . . ." <sup>109</sup> Not a single Representative quarreled with Madison on the substance of this claim, although some considered any prefix superfluous. <sup>110</sup> When Congress eventually decided to add amendments to the end of the document rather than interweave them into the original text, the prefix was abandoned; but the underlying idea survived, repackaged as a guarantee of the right of "*the people* to assemble." Members of the first Congress shared Pendleton's understanding that constitutional conventions were paradigmatic exercises of this right. <sup>111</sup> As Gordon Wood has observed, "conventions . . . of the people . . . were closely allied in English thought with the people's right to assemble. . . ." <sup>112</sup> Thus, our First Amendment's language of "the right of the people to assemble" simply made explicit at the end of the Constitution what Pendleton and others already saw as implicit in its opening. (Many other provisions of the Bill of Rights were also understood as declaratory, inserted simply out of an abundance of caution to clarify preexisting constitutional understandings.) <sup>113</sup>

Pendleton's language about the people's right to assemble was echoed by the Declaration of Rights adopted by the Virginia convention, which included the

following language: "That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives."<sup>119</sup> This was neither the first nor the last time that the people's asserted rights of assembly and instruction were yoked together. The same pairing had appeared in the Pennsylvania and North Carolina state Constitutions of 1776, the Vermont Constitutions of 1777 and 1786, the Massachusetts Constitution of 1780, and the New Hampshire Constitution of 1784; and would later appear in the Declaration of Rights of the New York, North Carolina, and Rhode Island ratifying conventions.<sup>120</sup> When Madison proposed the assembly clause to the first Congress, Thomas Tucker of South Carolina quickly moved to add to it an express right of the people "to instruct their Representatives."<sup>121</sup>

The juxtaposition of assembly and instruction is illuminating. Both clauses have strong majoritarian components, and reflect the Anti-Federalist concern with attenuated representation in Congress. Yet there is a vital difference between the two rights -- a difference that led Madison and his fellow Federalists to embrace the former while successfully opposing the latter. Instruction would have completely undermined the Madisonian system of deliberation among refined representatives. All the advantages of "skimming" would be lost if each representative could be bound by his relatively uninformed and parochial constituents rather than his conscience, enlightened by full discussions with his fellow representatives bringing information and ideas from other parts of the country.<sup>122</sup> As Garry Wills has pointed out, all of Madison's central arguments in *The Federalist* No. 10 are premised on a repudiation of the idea of instruction.<sup>124</sup>

By contrast, Madison and his fellow Federalists could embrace the idea of a popular right to assemble in convention. Unlike instruction, such a right would not continually undermine ordinary congressional deliberation on day-to-day affairs, but would simply reserve to the people the right to meet in future conventions to consider amending the Constitution -- just as the people had assembled in convention in the previous months to ratify the Constitution proposed by Madison and his fellow Federalists. Under the Federalists' "two track" scheme, ordinary legislation during moments of "normal politics" should be reserved to the legislature, but We the People could take center stage during "constitutional moments."<sup>125</sup> Thus, like the rights of *the people* explicitly reserved in the Ninth and Tenth Amendments, discussed below, the assembly clause has important implications for the structural process of constitutional amendment.

So too with the petition clause. I have argued elsewhere that whenever a majority of voters so petitioned, Congress would be obliged to convene a constitutional convention, just as it would be when presented with "Application of the Legislatures of two thirds of the several States" under Article V.<sup>126</sup> The key textual point here is that the Amendment explicitly guarantees "the right of *the people*" to petition -- a formulation that decisively signals its connection to popular sovereignty theory and underscores Gordon Wood's observation that the ideas of petition, assembly, and convention were tightly intertwined in eighteenth-century America.<sup>127</sup> The precursors of the petition clause suggested by state ratifying conventions had obscured these connections. Each of the four conventions spoke of the "people's" right to "assemble" or to alter or abolish government (and as we have seen, these two rights were closely linked); yet each convention described the right of petition in purely

individualistic language -- a right of "every freeman," "every person," or "every man."<sup>118</sup> Under these formulations, petition appeared less a political than a civil right, akin to the right to sue in court and receive due process.<sup>119</sup> The language and structure of our First Amendment suggest otherwise. As with assembly, the core petition right is collective and popular.

To be sure, like its companion assembly clause, the petition clause also protects individuals and minority groups. Stephen Higginson has persuasively shown that the clause was originally understood as giving extraordinary power to even a single individual, for the right to petition implied a corresponding congressional duty to respond, at least with some kind of hearing.<sup>120</sup>

But to focus only on minority invocations of the right to petition is to miss at least half of the clause's meaning, even if we put to one side its momentous implications for constitutional amendment. Like the other provisions of the First Amendment, the clause is not primarily concerned with the problem of overweening majoritarianism; it is at least equally concerned with the danger of attenuated representation. Higginson shows that part of the purpose and effect of the petitions was to help inform representatives about local conditions.<sup>121</sup> In eighteenth-century Virginia, for example, more than half of the statutes ultimately enacted by the state legislature originated in the form of popular petitions.<sup>122</sup> And as we have seen, Congress' small size gave rise to special concern about whether representatives would have adequate knowledge of their constituents' wants and needs. If we seek historical examples illustrating this point, we need look no further than the 1816 election, when citizens used petitions to Congress as one of several devices to educate their "agents" and each other.<sup>123</sup>

Indeed, the populist possibilities implicit in the petition clause should be evident from a simple side-by-side comparison of the First Amendment's language with English precedent. According to Blackstone's *Commentaries*, in England

*no petition to the king, or either house of parliament, for any alterations in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace or the major part of the grand jury, in the country; and in London by the lord mayor, alderman, and common council; nor shall any petition be presented by more than ten persons at a time.*<sup>124</sup>

In his American edition of Blackstone, St. George Tucker took obvious satisfaction in reminding his readers that, "In America, there is no such restraint."<sup>125</sup>

Like their speech and press clause counterparts, the rights of petition and assembly became applicable against state governments only after the adoption of the Fourteenth Amendment. As suggested above, incorporation of these guarantees against state governments makes a good deal of sense in light of the text of the Amendment's privileges or immunities clause, its historical purpose of safeguarding vulnerable minorities against majority oppression, and the overall structure of federalism implied by that amendment -- namely, that those citizen rights formerly protected against the national government should also be protected against state governments. Nor should we forget the central

role the right of petition played in abolitionist thought and practice in the antebellum era. <sup>126</sup> What makes less sense, however, is the Supreme Court's attempt to fully "incorporate" the First Amendment's establishment clause against states. To that clause, and its free exercise counterpart, we now turn.

## 2. Religion Clauses

### a. Religion and Federalism

The establishment clause did more than prohibit Congress from establishing a national church. Its mandate that Congress shall make no law "*respecting* an establishment of religion" also prohibited the national legislature from interfering with, or trying to dis-establish, churches established by state and local governments. <sup>127</sup> The key point is not simply that, as with the rest of the First Amendment, the establishment clause limited only Congress and not the states. As we have seen, that point is obvious on the face of the Amendment, and is confirmed by its legislative history. (It also, of course, has the imprimatur of Chief Justice Marshall's opinion in *Barron v. Baltimore*.) <sup>128</sup> Nor is the main point exhausted once we recognize that state governments are in part the special beneficiaries of, and rights-holders under, the clause. As we have also seen, the same thing could be said, to some degree, about the free speech clause. <sup>129</sup> The special prick of the point is this: the nature of the states' establishment clause right against federal dis-establishment makes it quite awkward to "incorporate" the clause against the states via the Fourteenth Amendment. Incorporation of the free speech clause against states does not negate state legislators' own First Amendment rights to freedom of speech in the legislative assembly. But incorporation of the establishment clause has precisely this kind of effect; to apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion -- a right explicitly confirmed by the establishment clause itself!

To put the point a slightly different way, the structural reasons that counsel caution in attempting to incorporate the Tenth Amendment against the states seem equally valid here. What's more, one of the strongest historical arguments for incorporation is that (contrary to *Barron*) various key drafters of the Fourteenth Amendment thought the Bill of Rights, properly interpreted, generally applied to state governments as well. <sup>130</sup> Yet this argument is equally unavailing for the establishment clause and the Tenth Amendment. There is little evidence that any of the architects of Reconstruction thought that either provision was originally designed to limit state governments. <sup>131</sup> Indeed, the incorporationists' historical exhibit A -- Senator Howard's famous catalogue of "personal rights" that should always have applied, and henceforth would apply, against the states -- meticulously mentioned each of the four "political" rights under the First Amendment (speech, press, assembly and petition) but omitted nonestablishment. <sup>132</sup> It of course also omitted the Tenth Amendment.

To my knowledge no scholar or judge has argued for incorporating the Tenth Amendment, but few seem critical of, or even concerned about, the blithe manner in which the establishment clause has come to apply against the states. The apparent reason for this lack of concern, and for the Supreme Court's initial decision to incorporate the clause, is our old friend, conventional wisdom. If we assume that virtually all the provisions of the Bill of Rights, except the Tenth Amendment, were essentially designed to protect individual

rights, total incorporation of the first nine <sup>133</sup> amendments seems eminently sensible, and wonderfully clean to boot. Unfortunately, that assumption is false.

There is, however, another clean solution to the problem that may well do more justice to history and structure. The Fourteenth Amendment might best be read as incorporating free exercise, but not establishment, principles against state governments. Like the "political rights" clauses we have already considered, the free exercise clause was paradigmatically about citizen rights, not state rights; it thus invites incorporation. Indeed, this clause was specially concerned with the plight of minority religions, and thus meshes especially well with the minority-rights thrust of the Fourteenth Amendment. Yet unlike incorporation of the establishment clause, application of free exercise principles does not wholly negate states' rights under the original establishment clause. A state would be free to establish one or several churches, but would be obliged to respect the free exercise rights of dissenters to opt out. Official establishment is of course not necessarily incompatible with freedom of worship and religious toleration, as England today attests. The American experience confirms this. Although Massachusetts had state-supported churches until 1833, her constitution of 1780 explicitly guaranteed freedom of conscience for religious dissenters -- in a provision that immediately preceded language authorizing government-supported churches. <sup>134</sup>

Fittingly, the substitute synthesis of First and Fourteenth Amendment principles I am suggesting here closely tracks James Madison's initial proposals in 1789. As we have already seen, Madison was ahead of his time in his concern for minority rights and his desire for federally enforceable constitutional rights against state governments. Thus he sponsored a quite modern-looking (but unsuccessful) amendment that would have limited state governments' ability to abridge their citizens' freedom of speech, press, and conscience, but that would have allowed state establishment of religion -- precisely the same result as my suggested synthesis. <sup>135</sup>

Jefferson, too, understood the states' rights aspects of the original establishment clause. While he argued for an absolutist interpretation of the First Amendment -- the federal government should have *nothing* to do with religion, control of which was beyond its limited delegated powers -- he was more willing to flirt with governmental endorsements of religion at the state level, especially where no state coercion would impinge on the freedom of conscience of dissenters. The two ideas were logically connected; it was especially easy to be an absolutist about the federal government's involvement in religion if one understood that the respective states had broad authority over their citizens' education and morals. Thus, while *President* Jefferson in 1802 refused to proclaim a day of religious Thanksgiving, he had done just that as *Governor* Jefferson some 20 years before. <sup>136</sup> Interestingly, a virtually identical view was voiced in the first Congress on September 25, 1789 -- the very day the Bill of Rights cleared both houses. When New Jersey Representative Elias Boudinot introduced a bill recommending "a day of public thanksgiving and prayer," South Carolina's Thomas Tucker rose up in opposition: "[I]t is a religious matter, and as such, is proscribed to us. If a day of thanksgiving must take place, let it be done by the authority of the several States." <sup>137</sup>

*Everson v. Board of Education*, the first Supreme Court case to apply the establishment clause against the states, invoked the views of Madison and Jefferson on religious freedom without so much as noting their views on the interconnected issue of federalism. <sup>138</sup> It is hardly surprising that the author of the Court opinion, Justice Black, sought to gloss over the special difficulties in applying the establishment clause against the states, given his longstanding commitment to "total incorporation" of the Bill of Rights. <sup>139</sup> More surprising, however, is the failure of any other member of the Court, then or since, to raise a serious challenge. <sup>140</sup>

#### b. *Religion and Education*

It is apt that the incorporation of the establishment clause first arose in a school case, and has had its most visible -- if problematic -- impact in public schools. From one perspective, the twentieth-century state school is designed to serve a function very similar to that of the eighteenth-century state church: imparting community values and promoting moral conduct among ordinary citizens, upon whose virtue republican government ultimately rests. <sup>141</sup> For example, the Pennsylvania Constitution of 1776 dealt with public schools and religious organizations in back-to-back sections, and treated "religious societies" as entities designed for the "encouragement of virtue" and "for the advancement of religion *or learning*." <sup>142</sup> The Massachusetts Constitution of 1780 likewise spoke of "public instructions" and "public teachers" in its provisions for establishing churches, and declared that "the happiness of a people, and the good order" of society "depend upon piety, religion, and morality." <sup>143</sup> Consider also its language concerning Harvard College:

[O]ur wise and pious ancestors . . . laid the foundation of Harvard College. . . . [E]ncouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America. . . . <sup>144</sup>

Harvard, of course, was hardly unique; most of the leading centers of learning in eighteenth-century America had religious roots. <sup>145</sup> Perhaps it is not coincidental that Massachusetts phased out its formal church establishments in the 1830's -- precisely the same time that state lawmakers such as Horace Mann began to reinvigorate the complementary institution of public schools.

But to see the analogy between today's public schools and yesterday's state churches is to see once again the federalism dimension of the original establishment clause. The possibility of national control over a powerful intermediate association self-consciously trying to influence citizens' world-views, shape their behavior, and cultivate their habits obviously struck fear in the hearts of Anti-Federalists. Yet local control over such intermediate organizations seemed far less threatening, less distant, less aristocratic, less monopolistic -- just as local banks were far less threatening than a national one, and local militias less dangerous than a national standing army. On a more positive note, allowing state and local establishments to exist would encourage participation and community spirit among ordinary citizens at the grass roots -- a vision not too different from that underlying parent-teacher associations or local school boards of our own era. (The Massachusetts Constitution of 1780, it should be noted, devolved the designation of established churches upon "the several towns, parishes, precincts, and other

bodies politic" within the state.) <sup>146</sup>

The educational importance of religious intermediate associations resurfaces in the free exercise clause. For if state-established churches in the eighteenth century were in some ways like today's public schools, other churches also played the role of educators, as Tocqueville stressed: "Almost all education is entrusted to the clergy." <sup>147</sup> Thus, the free exercise clause protected not simply the "private" worship of an individual, but also the nongovernmental yet "public" (Tocqueville's word) <sup>148</sup> education of citizens -- the very foundation of democracy.

### C. *The Military Amendments*

#### 1. *The Militia Amendment*

The Second Amendment reads as follows: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." As with our First Amendment, the text of the Second is broad enough to protect rights of discrete individuals or minorities; but the Amendment's core concerns are populism and federalism.

##### a. *Populism*

We have already noted the populist and collective connotations of the rights of the people to petition and assemble in conventions, rights intimately bound up with the people's transcendent right to alter or abolish their government. Whenever self-interested government actors abused their powers or shirked their duties, "the people" could "assemble" in convention and reassert their sovereignty. "Who shall dare to resist the people?" asked Pendleton with obvious flourish. <sup>149</sup>

To many Anti-Federalists, the answer seemed both obvious and ominous. An aristocratic central government, lacking sympathy with and confidence from ordinary constituents, might dare to resist -- especially if that government were propped up by a standing army of lackeys and hirelings (mercenaries, vagrants, convicts, aliens, and the like). Only an armed populace could deter such an awful spectacle. Hence the need to bar Congress from disarming freemen.

Thus, the Second Amendment was closely linked to the First Amendment's guarantees of petition and assembly. One textual tip-off is the use of the loaded Preamble phrase "the people" in both contexts, thereby conjuring up the Constitution's bedrock principle of popular sovereignty and its concomitant popular right to alter or abolish the national government. More obvious, of course, is the preamble to the Amendment itself, and its structural concern with democratic self-government in a "free State." Compare this language with a proposed amendment favored by some Pennsylvania Anti-Federalists: "[T]he people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game. . . ." <sup>150</sup> Unlike our Second Amendment, this text puts individual and collective rights on equal footing.

History also connected the right to keep and bear arms with the idea of

popular sovereignty. In Locke's influential *Second Treatise of Government*, the people's right to alter or abolish tyrannous government invariably required a popular appeal to arms.<sup>151</sup> To Americans in 1789, this was not merely speculative theory. It was the lived experience of their age. In their lifetimes, they had seen the Lockean words of the Declaration made flesh (and blood) in a Revolution wrought by arms.

To see the connection between arms and populism from another angle, consider the key nineteenth-century distinction between political rights and civil rights. The former were rights of members of the polity -- call them Citizens -- whereas the latter belonged to all (free) members of the larger society. Alien men and single white women circa 1800 typically could enter into contracts, hold property in their own name, sue and be sued, and exercise sundry other civil rights, but typically could not vote, hold public office, or serve on juries. These last three were political rights, reserved for Citizens. So too, the right to bear arms had long been viewed as a political right, a right of Citizens.<sup>152</sup> Thus, the "people" at the core of the Second Amendment were Citizens -- the same "We the People" who in conventions had "ordain[ed] and establish[ed]" the Constitution and whose right to reassemble in convention was at the core of the First Amendment. Apart from the Preamble, the words "the People" appeared only once in the original Constitution, just a single sentence removed from the Preamble and in a context where "the People" unambiguously connoted *voters*: "The House of Representatives shall be . . . chosen every second Year by the People of the several States."

In emphasizing the structural and populist core of the Second Amendment, I do not deny that the phrase "the people" can be read broadly, beyond what I have called "the core." As with the language of petition and assembly, other concerns can be comfortably placed under the language's spacious canopy.<sup>153</sup> But to see the Amendment as primarily concerned with an individual right to hunt, or protect one's home, is like viewing the heart of the speech and assembly clauses as the right of persons to meet to play bridge, or to have sex.<sup>154</sup>

#### b. *Federalism*

Even if armed, unorganized citizens would face an uphill struggle when confronting a disciplined and professional standing army. In *The Federalist* No. 28, Alexander Hamilton described a typical nonfederal regime:

[I]f the persons intrusted with supreme power become usurpers, the different parcels, subdivisions, or districts of which [the nation] consists, having no distinct government in each, can take no regular measures for defense. The citizens must rush tumultuously to arms, without concert, without system, without resource. . . .<sup>155</sup>

In the federal system of America, however, Article I, section 8, clause 16 of the Constitution explicitly devolved upon state governments the power of "Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." In the event of central tyranny, state governments could do what colonial governments had done in 1776: organize and mobilize their Citizens into an effective fighting force capable of beating even a large standing army. Wrote Madison in *The Federalist* No. 46:

[T]he State governments with the people on their side would be able to repel the danger. . . . [A standing army] would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. <sup>156</sup>

Yet the "military check of federalism" <sup>157</sup> built into the original Constitution did not quiet Anti-Federalist fears. Many pointed a suspicious finger at earlier language in clause 16 empowering Congress "to provide for organizing, arming, and disciplining, the Militia." Might Congress try to use the power granted by these words, they asked darkly, to disarm the militia? <sup>158</sup> The Second Amendment was designed to make clear that any such congressional action was off limits.

The obvious importance of federalism to the Constitution's original allocation of military power prompts key questions about federalism's role in the Second Amendment's clarifying gloss. A good many modern scholars have read the Amendment as protecting only arms-bearing in organized "state militias," such as SWAT teams and National Guard units. <sup>159</sup> If this reading were accepted, the Second Amendment would be at base a right of state governments rather than Citizens. If so, the Amendment would be analogous to the establishment clause, and similarly resistant to incorporation against state governments via the Fourteenth Amendment. <sup>160</sup>

Though in some ways congenial to my overall thesis about the Bill of Rights, this reading doesn't quite work. The states' rights reading puts great weight on the word "militia," but this word appears only in the Amendment's subordinate clause. The ultimate right to keep and bear arms belongs to "the people," not the "states." As the language of the Tenth Amendment shows, these two are of course not identical and when the Constitution means "states," it says so. <sup>161</sup> Thus, as noted above, "the people" at the core of the Second Amendment are the same "people" at the heart of the Preamble and the First Amendment, namely Citizens. What's more, the "militia" as used in the Amendment, and in clause 16, had a very different meaning 200 years ago than in ordinary conversation today. Nowadays, it is quite common to speak loosely of the National Guard as "the state militia," but 200 years ago, any band of paid, semiprofessional, part-time volunteers, like today's Guard, would have been called "a *select corps*" or "*select militia*" -- and viewed in many quarters as little better than a standing army. <sup>162</sup> In 1789, when used without any qualifying adjective, "the militia" referred to all Citizens capable of bearing arms. <sup>163</sup> The seeming tension between the dependent and the main clauses of the Second Amendment thus evaporates on closer inspection -- the "militia" is identical to "the people" in the core sense described above. Indeed, the version of the Amendment that initially passed in the House, only to be stylistically shortened in the Senate, explicitly defined the "militia" as "composed of the body of the People." <sup>164</sup> This is clearly the sense in which "*the militia*" is used in clause 16 and throughout *The Federalist Papers*, <sup>165</sup> in keeping with standard usage <sup>166</sup> confirmed by contemporaneous dictionaries, legal and otherwise.

A more plausible bit of text to stress on behalf of a states' rights reading is "well regulated." <sup>167</sup> It might be asked, who, if not state governments, would regulate the militia and organize them into an effective fighting force capable

of deterring would-be tyrants in Washington? And does not the right to "regulate" subsume the right to prohibit, as the Supreme Court has explicitly recognized in commerce clause cases such as *Champion v. Ames*?<sup>168</sup> And if so, how can a provision designed to give state governments broad regulatory power over their Citizens' arms-bearing be incorporated against states to limit that very power?

Though much stronger than the standard states' rights reading, this chain of argument has some weak links of its own. First, it appears that the adjective "well regulated" did not imply broad state authority to disarm the general militia; indeed, its use in various state constitutional antecedents of the Second Amendment suggests just the opposite.<sup>169</sup> Second, and connected, the notion that congressional power in clause 16 to "organiz[e]" and "disciplin[e]" the general militia logically implied congressional power to *disarm* the militia entirely is the very heresy the Second Amendment was designed to deny. How, then, can we use the Amendment's language to embrace the same heresy vis-a-vis state regulation?<sup>170</sup> What's more, in dramatic contrast to the establishment clause and the Tenth Amendment, the right to keep and bear arms was viewed by key framers of the Fourteenth Amendment as a "privilege of national citizenship" that henceforth would apply, and perhaps should always have applied, against states.<sup>171</sup> Senator Howard, for example, explicitly invoked "the right to keep and bear arms" in his important speech cataloguing the "personal rights" to be protected by the Fourteenth Amendment.<sup>172</sup> Howard and others may have been influenced by the antebellum constitutional commentator William Rawle, who had argued in his 1825 treatise that the Second Amendment as written limited both state and federal government -- a view embraced by at least one (post-*Barron*) state supreme court in the 1840's.<sup>173</sup>

There is, however, another area in which the Second Amendment can be seen as analogous to the establishment clause, imposing limits on the federal government but not the states: the draft. Under this reading, the federal government cannot directly draft ordinary Americans into its army but state governments can conscript, organize, and train their respective Citizens -- the militia -- who can in times of emergency be called into national service. Consider first the key texts in Article I, section 8:

The Congress shall have Power . . .

To raise and support Armies . . .

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, . . . reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

By itself, the authority to "raise" armies no more naturally subsumed a power to conscript soldiers than the authority to "lay and collect Taxes [and] Duties" and to "constitute Tribunals inferior to the supreme Court" naturally subsumed power to draft tax collectors, customs officers, judges, and bailiffs.<sup>174</sup> (Similarly, more than mere implication from the naked text authorizing a navy

would seem necessary to allow the Congress to engage in the historically odious practice of impressment.)<sup>175</sup> In 1789, the word "army" -- in contradistinction to "militia" -- connoted a *mercenary* force, as even a casual glance at contemporaneous dictionaries reveals.<sup>176</sup> Of course, this was largely why an "army" was feared. It was *not* composed of a randomly conscripted cross-section of the general militia (all Citizens capable of bearing arms), but was instead filled with *hired* guns. These men, full-time soldiers who had sold themselves into virtual bondage to the government, were typically considered the dregs of society -- men without land, homes, families, or principles. Full-time service in the army further weakened their ties to civil(ized)/(ian) society, and harsh army "discipline" increased their servility to the government.

Small wonder, then, that many traditional republicans opposed standing armies, at least in peacetime. (Perhaps in war, with the very survival of the nation at stake, an army was the lesser of two evils -- "America's" army might be marginally less threatening to domestic liberty than the enemy's army.) Thus, mainstream republican thought in the late eighteenth century saw a "well regulated *Militia*" as the best "security of a free State." Article I clearly gave Congress authority in actual emergencies to federalize the militia instead of raising an army -- but only under a system of cooperative federalism designed to maintain the integrity of the militia. Clause 16 painstakingly prescribed the precise role that state governments had to play in training and organizing the militia and in appointing its officers. These carefully wrought limitations in clause 16 were widely seen in 1789 as indispensable bulwarks against any congressional attempt to misuse its power over Citizen militiamen. Yet these bulwarks would become trivial -- a constitutional Maginot Line -- if Congress could outflank them by relabeling militiamen as army "soldiers" conscriptable at will, in times of war and peace, under the plenary power of the army clause.<sup>177</sup> Seen from another angle, the Constitution's explicit invocation of "the Militia" in clause 16, in contradistinction to its use of "Armies" in clause 12, makes clear that each word is used in its ordinary language sense: "Arm[y]" means *enlisted* soldiers, and "Militia" means Citizen conscripts.<sup>178</sup>

Structure confirms this technical parsing of text. Wretches miserable enough to volunteer as hired guns might deserve whatever treatment that they got at the hands of army officers, but Citizens wrenched by conscription from their land, their homes, and their families deserved better. They were entitled to be placed in units with fellow Citizens from their own locality, and officered by local leaders -- men chosen by state governments closest to them and most representative of them, men who were likely to be persons of standing in their communities (indeed, likely to be elected civilian officials), men whom they were likely to know directly or indirectly from civilian society and who were likely to know them.<sup>179</sup> The ordinary harshness of military discipline would be tempered by the many social, economic, and political linkages that preexisted military service, and that would be reestablished thereafter. Officers would know that, in a variety of ways, they could be called to account back home after the fighting was over.

Nor should we forget the relationship among militiamen at the bottom ranks. Men serving alongside their families, friends, neighbors, classmates, and fellow parishioners -- in short, their community -- would be constantly reminded of civil(ian)/(ized) norms of conduct.<sup>180</sup> They were less likely to become uncivilized marauders or servile brutes. Thus, the transcendent constitutional

principle of civilian control over the military <sup>181</sup> would be beautifully internalized in the everyday mindset of each militiaman.

In the end, the militia system was carefully designed to protect liberty through localism. Here, as with the Virginia and Kentucky Resolutions, freedom and federalism pulled together. Just as the establishment clause saw a national establishment as far more likely to oppress than state and local establishments -- and in the worst case scenario, it was always easier to flee an oppressive locality or state than the nation as a whole -- so here, national conscription was far more dangerous than the state and local militia system. Like the jury of the vicinage, which we shall examine shortly, the militia was a local institution, bringing together representative Citizens to preserve popular values of their society.

Thus far my federalism argument has stressed the language and structure of Article I. Why have I advertised this as a *Second Amendment* argument? Because for me, it is the Second Amendment's gloss on Article I -- a synthesis of original Constitution and Bill of Rights, if you will -- that is decisive. For the stylized portrait of "army" and "militia" I have just presented was not universally subscribed to in 1789. Hamilton, for example, painted a less affectionate picture of the militia, <sup>182</sup> and might well have pointed to the expansive language of the "necessary and proper" clause to support a national army draft. In contrast, I have up to now omitted all reference to that clause and have read federal power strictly, emphasizing structural arguments that resonate best with Anti-Federalist and republican ideology. My warrant for this interpretive posture is the Second Amendment. I have read clause 16 jealously and have been especially vigilant about congressional circumvention of its terms, because, as we saw above, jealousy and vigilance are at the heart of the Amendment's gloss on clause 16. <sup>183</sup> I have emphasized republican ideology about militias and armies because that ideology was expressly written into the Amendment's preamble. <sup>184</sup> Truly, no other clause in the Constitution is so obviously, so self-consciously, didactic and ideological, save perhaps the (other) Preamble. If the Amendment is not about the critical difference between the vaunted "well regulated Militia" of "the people" and the despised standing army, it is about nothing. And to ask what *makes* this militia "well regulated" -- a protector of, rather than a threat to, civilian society -- is to confront the social and structural vision outlined above. To put the point yet another way, the Second Amendment takes the expansive word "necessary" -- originally a word on the congressional power side of the ledger, as Chief Justice Marshall stressed in *McCulloch v. Maryland* <sup>185</sup> -- and puts that word to work as a restriction on Congress. It is a well-regulated militia, and not an army of conscripts, that is "*necessary* to the security of a free State"; the Second Amendment estops Congress from claiming otherwise.

Post-constitutional history supports the foregoing analysis. During the war of 1812, various sorts of federal draft bills were introduced, setting the scene for an important congressional debate over the army and militia clauses of Article I and the gloss of the Second Amendment. Opposition to these bills in the House of Representatives was led by none other than Daniel Webster, who argued that any federal draft under the army clause impermissibly evaded the constitutional limitations on federal use of the militia. The plan was an illegitimate attempt to raise "a standing army out of the militia by draft." <sup>186</sup> Webster's vivid image of the evils of such an evasion of clause 16 should by

now be familiar:

Where is it written in the Constitution, . . . that you may take children from their parents, and parents from their children . . . [?]

But this father or this son . . . goes to the camp. With whom do you associate him? With those only who are sober and virtuous and respectable like himself? No, sir. But you propose to find him companions in the worst men of the worst sort. Another bill lies on your table offering a bounty to deserters from your enemy. Whatever is most infamous in his ranks you propose to make your own. . . . In the line of your army, with the true levelling of [Napoleonic] despotism, you propose a promiscuous mixture of the worthy and the worthless, the virtuous and the profligate; the husbandman, the merchant, the mechanic of your own country, with [the dregs of Europe] who possess neither interest, feeling, nor character in common with your own people, and who have no other recommendation . . . than their propensity to crimes. <sup>187</sup>

Webster closed with an invocation of the libertarian localism of the Virginia and Kentucky Resolutions, and a quotation of the "Right of Revolution" clause of the New Hampshire Constitution:

It will be the solemn duty of the State Governments to protect their own authority over their own militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State Governments exist; and their highest obligations bind them to the preservation of their own rights and the liberties of their people. . . . [My constituents and I] live under a constitution which teaches us that "the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind." <sup>188</sup>

In the tradition of the Virginia and Kentucky Resolves, representatives of various New England states met in the Hartford Convention of 1814-15 to denounce as unconstitutional any national "drafts, conscriptions, or impressments." <sup>189</sup> The eventual republican triumph on this issue -- none of the proposed draft bills passed <sup>190</sup> -- should be as central a precedent for our Second Amendment as the 1800 triumph over the Sedition Act is for our First.

Only in the twentieth century did the Supreme Court uphold a federal draft, in the *Selective Draft Law Cases* <sup>191</sup> decided during World War I. The arguments of the Court can be charitably described as unpersuasive. Less charitably, the Court's opinion is no more worthy of deference today than the Court's contemporaneous First Amendment jurisprudence, epitomized by now-malodorous cases such as *Debs* <sup>192</sup> and *Abrams*. <sup>193</sup> The "Revolution of 1800" had been all but forgotten until *New York Times v. Sullivan* <sup>194</sup> made it a pole star of the First Amendment; so today, the central lessons of 1812-14 lie dormant, waiting to be rediscovered and resurrected.

## 2. *The Quartering Amendment*

Consider next the Third Amendment: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

Like the Second, the Third is centrally focused on the structural issue of protecting civilian values against the threat of an overbearing military. No standing army in peacetime can be allowed to dominate civilian society, either openly or by subtle insinuation. The Second Amendment's militia could thwart any open military usurpation -- say, a siege -- but what about more insidious forms of military occupation, featuring federal soldiers cowing civilians by psychological guerrilla warfare, day by day and house by house? Bostonians who had lived under the hated British Quartering Act of 1774 knew that this was no wild hypothetical. Hence the Third Amendment was needed to deal with military threats too subtle and stealthy for the Second's "well regulated Militia."

Note also how the Third reinforces the federalism argument against the draft inspired by the Second. Since the Third flatly forbids Congress to conscript civilians as involuntary innkeepers and roommates of soldiers in peacetime, what sense does it make to read the army clause as giving Congress peacetime power to exercise even more drastic coercion by conscripting civilians into the army itself? It would be odd indeed to say that Congress has absolutely no peacetime power to force soldiers upon civilians, but virtually total peacetime power to force civilians into soldiers. I stress peacetime, because the army clause makes no distinction between war and peace. If its text allows a wartime draft, peacetime conscription must likewise be deemed necessary and proper. The militia clause, by contrast, limits Congress' conscription power to specified national emergencies <sup>195</sup> -- just as the Third Amendment limits Congress' quartering power to war time.

The strict limits in both places derive from the awesome nature of the conscription power. Like a criminal sanction, conscription can take over much of a person's life. This leads to my final structural point about the Third Amendment. Just as criminal law requires special legislative and judicial safeguards (as we shall see below) to protect against possible executive overreaching, so too the Third Amendment requires a special legislative finding before a civilian's house can be conscripted. Military use must be explicitly prescribed by national law, and as the *Youngstown* Court pointedly observed in an analogous context, only Congress can pass such a law. <sup>196</sup> Surprisingly, only one of the seven opinions in *Youngstown* even mentioned the Third Amendment; <sup>197</sup> as with federalism, the separation of powers implications of the Bill of Rights often go unnoticed because of our modern day fixation on individual rights.

To the extent modern lawyers think about the Third Amendment at all, they are likely to see it as an affirmation of the general right of individual privacy thought to pervade the penumbras and inhabit the interstices of the Bill of Rights. The most notable Supreme Court mention of the Amendment in the modern era, Justice Douglas' opinion of the Court in *Griswold v. Connecticut*, <sup>198</sup> epitomizes this perspective. But as we have seen, this is not the whole story -- indeed perhaps not even the headline. To be sure, there is an important connection between the Third and Fourth Amendments. Both explicitly protect "houses" from needless and dangerous intrusions by governmental officials. But the obvious connections between the Third Amendment and the one which immediately follows it -- to which we now turn -- must not be allowed to obscure the equally significant but typically unmentioned linkages between the Third Amendment and the words that immediately *precede* it in the Second Amendment. <sup>199</sup>

#### D. The Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

So reads our Fourth Amendment. We have already noted that the First and Second Amendments' references to "the people" implied a core *collective* right, echoing the Preamble's commitment to the ultimate sovereignty of "We the People of the United States." So too, as we shall see, with the Ninth and Tenth Amendments' use of that phrase. Indeed, the historian Lawrence Cress has argued that in constitutions in "state after state, [the phrases] 'the people' or 'the militia' [were used to connote] the sovereign citizenry, described collectively." In contrast, "the expression, 'man' or 'person' [was typically] used to describe individual rights such as freedom of conscience."<sup>200</sup> The Virginia ratifying convention's declaration of rights followed a similar pattern, invoking "the people's" rights to assembly, instruction, speech, press, and arms-bearing -- political rights all -- but using "every freeman" and "man" language in connection with a variety of civil rights involving due process and criminal procedure safeguards.<sup>201</sup> The Virginia prototype of the Fourth Amendment fell in the latter category -- "every *freeman* has a right to be secure from all unreasonable searches and siezures [sic] of his *person*. . . ." <sup>202</sup> This formulation followed the general outlines of the search and seizure clause of the highly influential Massachusetts Constitution of 1780 and its New Hampshire lookalike, and was in turn echoed by ratifying conventions in New York and North Carolina. <sup>203</sup> Madison was surely aware of these formulations, given his leading role in the Virginia convention, but his initial proposal instead invoked "the people" <sup>204</sup> -- language that survived all subsequent congressional modifications. In the search and seizure context, this formulation had appeared in only a single state constitution -- the rather atypical Pennsylvania Constitution of 1776, penned before the American reconceptualization of English popular sovereignty theory reached full flower. <sup>205</sup>

There is, even here, a way that we can -- if we try hard enough -- read "the people" as a collective noun. For the Fourth Amendment creates an explicit textual shield against any improper governmental interference with the proceedings of a constitutional convention -- quite literally, a *house of the people*. Seen from this angle, the Amendment resembles Article I's speech and debate and arrest clauses, <sup>206</sup> which immunize representatives in Congress from improper interference by executive or judicial agents. More broadly, the Amendment's language reminds us that we must be specially watchful of government efforts to use search and seizure powers to interfere with the people's political activities -- circulating petitions (literally *the people's papers*), attending political meetings (with their literal *persons*), etc.

Madison's choice of language here may well have been influenced by the celebrated 1763 English case of *Wilkes v. Wood*, <sup>207</sup> one of the two or three most important search and seizure cases on the books in 1789. <sup>208</sup> *Wood* involved a famous cast of characters -- both the target of the government search, John Wilkes, and the author of the opinion, Lord Chief Justice Pratt

(soon to become Lord Camden), were folk heroes in the colonies. (Pennsylvania residents named the town of Wilkes-Barre after the plaintiff; New Jersey and South Carolina each dedicated a city in Camden's honor.)<sup>209</sup> No less famous were the facts of the case. Wilkes, a champion of the people and a member of Commons (the people's house), had used the press to communicate with his constituents and criticize George III's ministry and majesty. When the government reacted by trying to use general warrants to suppress his political activity, Wilkes brought suit in *Wood* and successfully challenged the legality of those warrants. Wilkes also brought suit to challenge the "seizure" of his "person." (The government had imprisoned him in the Tower of London.) In a companion case to *Wood*, the Lord Chief Justice ordered Wilkes released on habeas corpus on the ground of his parliamentary privilege from arrest.<sup>210</sup>

In the Fourth Amendment, as elsewhere, we need not view the phrase "the people" as sounding solely in collective, political terms; once again, the language is broad enough to radiate beyond its core. Indeed, it is less than clear that populism *is* the core here. To begin with, the collective reading of "people" and "houses," though textually defensible and historically buttressed by the facts of *Wood*, seems strained -- a bit too cute, perhaps. Even more important, in the Fourth Amendment, as nowhere else in the Constitution, the collective-sounding phrase "the people" is immediately qualified by the use and subsequent repetition of the more individualistic language of "persons." The Amendment's text seems to move quickly from the public to the private, from the political to the personal, from "the people" out-of-doors (i.e., in conventions and suchlike) to "persons" very much in-doors, in their private homes.

Yet even here, in talking the familiar talk of individual rights, we must be wary of anachronism and must not automatically assume that the right was essentially counter-majoritarian. As with virtually every Bill of Rights provision thus far examined, the Fourth Amendment evinces more concern with the "agency" problem of protecting the people generally from self-interested government policy than with protecting minorities against majorities of fellow Citizens.

Reflect, for a moment, on the fact that the Amendment actually contains two different commands. First, all government *searches* and *seizures* must be *reasonable*. Second, no *warrants* shall issue without *probable cause*. The modern Supreme Court has intentionally collapsed the two requirements, treating all unwarranted searches and seizures -- with a few categorical exceptions, such as exigent circumstances -- as per se unreasonable.<sup>211</sup> Otherwise, the Court has reasoned, the requirement that a neutral magistrate verify probable cause *ex ante* would be obviously frustrated -- the special safeguards of the warrant requirement would be all but meaningless.

If we assume that the Amendment is primarily about protecting minority rights, and further assume that judges and magistrates are the best institutional guardians of those rights, this reading seems to make sense. Why should government officials be allowed greater latitude (general reasonableness rather than the stricter probable cause) when they intentionally avoid the courtroom and intrude on individuals in a judicially unwarranted manner? Hence the need, under these assumptions, to engraft a constructive

second sentence onto the amendment: "Absent special circumstances, no search or seizure shall occur without a warrant."

But the fact that the Amendment does *not* contain such a sentence should invite us to rethink our assumptions. (So too, should the combination of the silliness of the engrafted sentence without the "special circumstances" escape hatch, and the extraordinary difficulty of specifying the appropriate size and shape of the hatch.) To do this, consider the paradigmatic way in which Fourth Amendment rights would be enforced. Virtually any search or seizure by a federal officer would involve a physical trespass under common law principles. An aggrieved target could use the common law of trespass to bring suit for damages against the official -- just as Wilkes brought a trespass action in *Wood*. If the search or seizure were deemed lawful in court, defendant would prevail; but if, as in *Wood*, the search were found unlawful, defendant government officials would be held strictly liable. There was no such thing as "good faith" immunity. <sup>212</sup>

Given this, many officials would obviously prefer to litigate the lawfulness of a contemplated search or seizure before it occurred -- to seek a judicial warrant authorizing the intrusion. Such a warrant, if strictly complied with, would act as a sort of declaratory judgment whose preclusive effect could be subsequently pled in any later damage action. A lawful warrant, in effect, would compel a sort of directed verdict for the defendant government official in any subsequent lawsuit for damages. <sup>213</sup>

But note what has happened. A warrant issued by a judge or magistrate -- a permanent government official, on the government payroll -- has had the effect of taking a later trespass action away from a jury of ordinary Citizens. Because juries could be trusted far more than judges to protect against government overreaching (the "agency" problem), warrants were generally disfavored. Judges and warrants are the heavies, not the heroes, of our story.

We can now see the Fourth Amendment with fresh eyes. Searches without warrants are not presumptively illegitimate. Rather, whenever such a search or seizure occurred, a jury could subsequently assess its reasonableness. If the jury deemed the search "unreasonable," the plain words of the Fourth Amendment would render the search unlawful. Defendant official could thus be held strictly liable in damages (though he might well in turn be indemnified by the government). Reasonableness vel non was a classic question of fact for the jury; <sup>214</sup> and the Seventh Amendment, in combination with the Fourth, would require the federal government to furnish a jury to any plaintiff-victim who demanded one, and protect that jury's finding of fact from being overturned by any judge or other government official. <sup>215</sup> Judicial warrants, however, were another matter. Precisely because they were granted by government officials and had the effect of taking the reasonableness issue away from the jury, they had to be strictly limited. <sup>216</sup> Such a warrant must meet stricter requirements (probable cause, etc.) than mere reasonableness. Thus, contrary to the modern Court's approach, the words of the Fourth Amendment mean what they say: the probable cause requirement applies only if and when a warrant issues. <sup>217</sup> Put another way, the Court has simply reversed the original linkage between the Fourth Amendment's two different commands. It is not that a search or seizure *without* a warrant was presumptively unreasonable, as the Court has assumed; rather, a search or seizure *with* a warrant was presumed

reasonable as a matter of law -- and thus immune from jury oversight. <sup>218</sup>

There is an obvious connection here to the common law rule against prior restraint, which we noted in the First Amendment context. <sup>219</sup> Just as judges were barred *ex ante* from restraining the press, but juries *ex post* could impose damages on publishers, so here judges and magistrates acting before a search were much more strictly limited than juries acting afterwards. This connection would hardly have been lost on the Fourth Amendment framers. In sixteenth- and seventeenth-century England, general warrants were the very devices by which various schemes of prior restraint and printer licensing were enforced. <sup>220</sup> Indeed, in *Wood* itself the Secretary of State, Lord Halifax, had issued a general warrant against Wilkes in an attempt to enforce the seditious libel laws, an area of law where the proper role of the jury was a hot topic.

As with the First Amendment, the central role of the jury in the Fourth Amendment should remind us that the core rights of "the people" were popular and populist rights -- rights which the popular body of the jury was well suited to vindicate. <sup>221</sup> To see the Amendment as centrally concerned with countermajoritarian rights is to miss the later transformation brought about by the Fourteenth Amendment, with its core concerns about minority rights and its heavy reliance on federal judges.

Nor should we ignore the Fourth Amendment's image of federalism. The reasonableness requirement limited all federal officers, and the warrant requirement imposed special restrictions on federal judges and magistrates, but vindication of these restrictions would largely come from state bodies. State statutes and state common law, after all, would typically define and protect ordinary individuals' property rights to their "persons, houses, papers, and effects." Thus, *state* law would initially create the cause of action that would enable ordinary men and women to challenge unconstitutional actions by *federal* officials. <sup>222</sup> And even if these actions were tried in federal court (because they raised federal questions arising under the Fourth Amendment), <sup>223</sup> a Seventh Amendment jury composed of local Citizens, rather than a judge appointed in Washington, D.C., would decide the general question of reasonableness. Here too, localism would protect liberty.

#### E. *The Judicial Process Amendments*

Let us now turn to the Fifth through Eighth Amendments, which we shall consider as a block. Each of the provisions in this block can be understood as regulating the structure and procedure of federal courts -- each, that is, except for the takings clause of the Fifth Amendment.

##### 1. *Takings Clause*

"[N]or shall private property be taken for public use, without just compensation."

This prohibition seems primarily to protect individuals and minority groups. After all, any government action imposing a financial burden on a majority of the populace would look more like a legitimate "tax" than an unconstitutional "taking." In this respect, the provision runs counter to the dominant majoritarian thrust of other Bill of Rights provisions we have seen thus far. The

clause also seems distinctly modern in proclaiming that limits should be imposed on government action, even when government agents are acting on behalf of their constituents, rather than pursuing their own self-interest. Thus, the clause requires private compensation even if property is taken for "public" use. <sup>224</sup>

The concerns underlying the takings clause were deeply felt by James Madison, who, we should recall, was ahead of his time in arguing that the dominant danger in America came from a possibly overweening majority rather than from self-interested government agents. But as we saw in considering Madison's original Fourteenth Amendment -- a prescient precursor of our own -- he was unsuccessful in bringing the needed majorities in Congress around to his way of thinking. <sup>225</sup> How, then, did he manage to slip the takings clause through?

In part by clever bundling, tying the clause to a variety of other provisions that commanded more enthusiasm (in large part because they rested on a somewhat different world view, as we shall see). One key bit of evidence in support of the clever bundling hypothesis has already been noted: the subject of the clause seems to have very little in common with the other clauses of the Fifth Amendment, each of which deals centrally with criminal procedure. Even more dramatic is the fact that unlike every other clause in the first Congress' proposed Bill, the just compensation restriction was not put forth in any form by any of the state ratifying conventions. <sup>226</sup> So too with Madison's original but unsuccessful Fourteenth Amendment, <sup>227</sup> which was more vulnerable to attack precisely because it was not as cleverly bundled as the takings clause. On these two provisions, then, Madison was putting forth his own somewhat prophetic ideas, rather than distilling the zeitgeist.

## 2. Jury Clauses

Unlike the takings clause, most other provisions of Amendments V-VII were centrally concerned with the "agency" problem of government officials' attempting to rule in their own self-interest at the expense of their constituents' sentiments and liberty. There was, for example, a special historical connection between the First and Eighth Amendments. The most gruesome punishments in England had typically been imposed on those who spoke out against the government. Justice Hugo Black noted one example in his James Madison Lecture on the Bill of Rights. For the crime of "writing books and pamphlets," the English lawyer William Prynne's "ears were first cut off by court order and . . . subsequently, by another court order, . . . his remaining ear stumps [were] gouged out while he was on a pillory." <sup>228</sup> Even more gruesome was the typical sentence in treason:

That you, and each of you, (here his Lordship named the prisoners severally,) be taken to the place from whence you came, and from thence you are to be drawn on hurdles to the place of execution, where you are to be hanged by the neck, but not until you are dead; for while you are still living, your bodies are to be taken down, your bowels torn out, and burnt before your faces; your heads are to be then cut off, and your bodies divided each into four quarters, and your heads and quarters to be then at the King's disposal; and may the Almighty God have mercy on your souls. <sup>229</sup>

Just as the awesome power of conscription, if not strictly regulated, could give runaway government officials near-despotic control over the general citizenry,<sup>230</sup> so criminal law inspired dread and jealousy. Thus, the deep concerns underlying the Second and Third Amendments are at work here too -- as should be evident from the specific aside on military justice in the opening clause of the Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . .

The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury.

#### a. *Jurors as Populist Protectors*

Guaranteed in no less than three amendments, juries were at the heart of the Bill of Rights. The Fifth safeguarded the role of the grand jury; the Sixth, the criminal petit jury; and the Seventh, the civil jury. In addition, Madison's unsuccessful Fourteenth Amendment would have explicitly guaranteed jury trial against state governments.<sup>231</sup> What's more, trial by jury in all criminal cases had earlier been mandated by the clear words of Article III: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." Indeed, the entire debate at the Philadelphia convention over whether to add a Bill of Rights was triggered when George Mason picked up on a casual comment from another delegate that "no provision was yet made for juries in civil cases."<sup>232</sup> Between the close of the Philadelphia convention and the opening of the first Congress, five of the six state ratifying conventions that proposed amendments put forth two or more jury-related proposals.<sup>233</sup> State constitutions further confirm the centrality of the jury. According to Leonard Levy's tally, the only right secured in all state constitutions penned between 1776 and 1787 was the right of jury trial in criminal cases.<sup>234</sup>

Spanning both civil and criminal proceedings, the key role of the jury was to protect ordinary individuals against governmental overreaching. Jurors would be drawn from the community; like the militia they were ordinary Citizens, not permanent government officials on the government payroll. Just as the militia could check a paid professional standing army, so too the jury could thwart overreaching by powerful and ambitious government officials.

The grand jury, for example, could thwart any prosecution it deemed unfounded or malicious -- especially if it suspected that the executive was trying to use the powers of incumbency illegitimately to entrench itself in power by prosecuting its political critics. Note how the Fifth Amendment differs from the Fourth. In contrast to the Fourth's warrant clause, the decision whether sufficient cause exists to prosecute a felony can never under the Fifth be made solely by permanent government officials. Perhaps because of this, the Fifth nowhere explicitly requires that the indictment be supported by a given level of "probable cause" or that the indictment or presentment "particularly describ[e]" the factual offenses charged. Because the decision was to be made by a popular body, perhaps more flexibility was allowed, as within the Fourth Amendment itself.

More broadly, the grand jury had sweeping proactive and inquisitorial powers to investigate suspected wrongdoing or coverups by government officials and make its findings known through the legal device of "presentment" -- a public document stating its accusations. Presentments were not limited to indictable criminal offenses. The grand jury had a roving commission to ferret out official malfeasance or self-dealing of any sort and bring it to the attention of the public at large. In the words of James Wilson:

The grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest publick improvements and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men, and publick bad measures. <sup>238</sup>

This vision of the grand jury was nicely illustrated by the events of 1816; the congressional pay increase noted earlier was the target of several grand jury proceedings that helped inform and mobilize the electorate about "public bad men and publick bad measures." <sup>239</sup>

In cases where an indictable criminal offense had occurred, the grand jury was unable to compel prosecution on its own initiative without the concurrence of the executive, but could nonetheless use presentments to publicize to the people at large any suspicious executive decisions to decline prosecution. <sup>240</sup> The image here is akin to that of modern-day blue ribbon commissions and special prosecutors called to investigate in areas where regular government officials may have conflicts of interest. By focusing public attention on otherwise low-visibility executive decisions, the grand jury could deter executive self-dealing and enhance executive accountability.

Though not as proactive as its "grand" counterpart, the criminal petit jury could interpose itself on behalf of "the people's" rights by refusing to convict when the executive sought to trump up charges against its political critics. Once again, more than a permanent government official -- even an independent Article III judge -- was required to safeguard liberty. In England, judges had too often acquiesced in government tyranny, as the cases of Prynne and Wilkes (tried in absentia for seditious libel) graphically illustrated. <sup>241</sup> Even in America, federal judges would be appointed by the central government, and might prove reluctant to rein in their former benefactors and current paymasters -- as illustrated by the brazenly partisan conduct of some Federalist judges during the Sedition Act controversy. <sup>242</sup> Thus in those aspects of a criminal case that might involve a judge acting without a jury -- issuing arrest warrants, setting bail, and sentencing -- additional *restrictions* came into play via the Fourth Amendment warrant clause and the Eighth Amendment.

The petit jury's power would be especially great if it could lawfully refuse to convict a defendant charged under any federal law *it* deemed unconstitutional. As we shall see below, this right of "jury review" was advocated by many constitutional theorists in the late eighteenth and early nineteenth centuries, and was invoked by publishers accused of violating the Sedition Act. <sup>240</sup>

A Sixth Amendment right of "jury review" gains added plausibility when we remember the central role of the Seventh Amendment civil jury in adjudicating the Fourth Amendment issue of "reasonableness." Here, the order of the parties was typically reversed -- the target of government harassment would be the plaintiff, and a government official the defendant -- but the basic idea was the same. Ordinary Citizens would check executive overreaching and monitor the professional judiciary.

As Tocqueville observed, the overall jury system was fundamentally populist and majoritarian:

The institution of the jury . . . places the real direction of society in the hands of the governed, . . . and not in that of the government. . . . [It] invests the people, or that class of citizens, with the direction of society. . . . The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority. <sup>241</sup>

b. *Jurors as Provincials*

The jury was not simply a popular body, but a local one as well. Indeed, the Sixth Amendment explicitly guaranteed a jury "of the State and district wherein the crime shall have been committed," going a step beyond the language of Article III, which required only that jury trials be held somewhere within *the state* where the crime occurred. Early in the Philadelphia convention, Madison captured an important truth in a telling analogy, arguing for the need to "preserve the State rights, as carefully as the trials by jury." <sup>242</sup> Just as state legislators could protect their constituents against central oppression, so too jurors could obviously "interpose" themselves against central tyranny through the devices of presentments, nonindictments, and general verdicts. As with the militia, the jury would be composed of Citizens from the same community and its actions were expected to be informed by community values.

c. *Jurors as Pupils*

The jury was also to be informed by judges -- most obviously in the judges' charges. As Ralph Lerner has shown in his essay on "Republican Schoolmasters," judges often seized the occasion to educate the jurors about legal and political values, ranging well beyond the narrow issues before them. <sup>243</sup> Like the church and the militia, the jury was in part an intermediate association designed to educate and socialize its members into virtuous thinking and conduct. Churches stressed religious and moral virtues; militias struck a proper balance between civilian and martial virtues; and juries instilled republican legal and political virtues.

No one understood all this better than Tocqueville, a keen student of American constitutional law and the leading theorist on the importance of intermediate associations:

The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes

with a respect for the thing judged and with the notion of right. . . . It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. . . .

. . . *It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties.* . . .

. . . I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ. <sup>244</sup>

Through the jury, Citizens would learn self-government by doing self-government. In Tocqueville's memorable phrase, "the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well." <sup>245</sup> In 1789, the Anti-Federalist "Maryland Farmer" noted that although ordinary folk were "much degraded in the powers of the mind," jury service would uplift them. "*Give them power and they will find understanding to use it.*" <sup>246</sup>

#### d. Jurors as Political Participants

Unable to harbor any realistic expectations about serving in the small House of Representatives or the even more aristocratic Senate, ordinary Citizens could nevertheless participate in the application of national law through their service on juries. <sup>247</sup> In the words of the "Federal Farmer," the leading Anti-Federalist essayist of the ratification period, through juries "frequently drawn from the body of the people . . . we secure to the people at large, their just and rightful controul in the judicial department." <sup>248</sup> Juries, wrote another republican in 1791, give the people "a share of Judicature which they have reserved for themselves." <sup>249</sup> As the most prominent historian of Anti-Federalist thought, Herbert J. Storing, has written, "*The question was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the administration of government.*" <sup>250</sup>

Analogies between legislatures and juries abounded. <sup>251</sup> Wrote the "Federal Farmer":

*It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department . . .*

The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature . . . have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other. <sup>252</sup>

So, too, Jefferson declared in 1789 that "it is necessary to introduce the people into every department of government. . . . Were I called upon to decide whether the people had best be omitted in the Legislative or Judicial department, I would say it is better to leave them out of the Legislative." <sup>253</sup> Tocqueville later made much the same point:

The jury is, above all, a political [and not a mere judicial] institution . . . .

. . . The jury is that portion of the nation to which the execution of the laws is entrusted, as the legislature is that part of the nation which makes the laws; and in order that society may be governed in a fixed and uniform manner, the list of citizens qualified to serve on juries must increase and diminish with the list of electors. <sup>254</sup>

Even more elaborate was the vision of the jury conjured up by John Taylor of Caroline, one of the early Republic's **leading constitutional theorists**. The jury, wrote Taylor, was the "lower judicial bench" in a bicameral judiciary. <sup>255</sup> The judicial structure mirrored that of the legislature, with an upper house of greater stability and experience, and a lower house to represent popular sentiment more directly. In a similar vein, the "Maryland Farmer" defined the jury as "*the democratic branch of the judiciary power -- more necessary than representatives in the legislature.*" <sup>256</sup>

Tocqueville explicitly defined the jury as "a certain number of citizens chosen by lot and invested with a temporary" commission <sup>257</sup> -- the analogy to militias suggests itself once again -- and the "Federal Farmer" also seemed to stress the *rotating* quality of jury service, as evidenced by his final reference, quoted above, to Citizens coming forward "in turn." The idea of mandatory rotation once again illustrates the connections between juries and legislators, for many Anti-Federalists wanted compulsory rotation in the legislature as well. <sup>258</sup> Indeed, Thomas Jefferson's two biggest objections to the original Constitution were its lack of a bill of rights and its abandonment of the republican principle of mandatory rotation. <sup>259</sup> At the New York ratifying convention Gilbert Livingston criticized the lack of mandatory rotation in the legislature, but his comments fit the jury context as well:

[Rotation] will afford opportunity to bring forward the genius and information of the states, and will be a stimulus to acquire political abilities. It will be the means of diffusing a more general knowledge of the measures and spirit of the administration. These things will confirm the people's confidence in government. <sup>260</sup>

Like so many other ideas we have seen, the mandatory rotation principle drew its strength from structural concerns about attenuated representation rather than elaborate ideas about minority rights.

#### e. *The Centrality of the Jury*

If we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury. Not only was it featured in three separate amendments (the Fifth, Sixth, and Seventh), but its *absence* strongly influenced the judge-restricting doctrines underlying three other amendments (the First, Fourth, and Eighth). So too, the double jeopardy clause, which

makes no explicit mention of juries, should be understood to safeguard not simply the individual defendant's interest in avoiding vexation, but also the integrity of the initial petit jury's judgment (much like the Seventh Amendment's rule against "re-examin[ation]" of the civil jury's verdict). <sup>261</sup> The due process clause also implicated the jury, for its core meaning was to require lawful indictment or presentment (thus triggering the Fifth Amendment grand jury clause). <sup>262</sup> Even those amendments that at first seem rather far afield appear on closer inspection to resonate with the values underlying the jury. We have seen important parallels between the jury and the Second Amendment's vaunted "well regulated Militia." The vision underlying the jury also harmonizes well with Congress' first two (unsuccessful) amendments, which reflected suspicion of government agents on the permanent payroll and too far removed from the people. The jury summed up -- indeed embodied -- the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.

If the foregoing picture of the jury seems somewhat unconventional, perhaps the reason is that the present day jury is only a shadow of its former self. First Amendment doctrine has evolved beyond the prohibition against prior restraint, while the judge-created and judge-enforced exclusionary rule has displaced the jury trial for damages as the central enforcement mechanism of the Fourth Amendment -- in part because of judge-created doctrines of government officials' immunity from damages. <sup>263</sup> As we shall now see, even the core role of the jury in criminal trials has been seriously eroded over the last two centuries.

#### (i) *Jury Review*

Consider first the issue of jury review. Let us begin by defining the question with precision. First, the issue is not the general one of jury nullification (can a jury disregard a law it thinks unjust?), but the narrower question of whether a jury can refuse to follow a law if and only if it deems that law *unconstitutional*. <sup>264</sup> The concept is exactly analogous to the idea of judicial review, as traditionally understood. Judges may not ignore a law simply because they think it wrong, or unjust, or silly; but they may -- indeed must -- do so if they deem it unconstitutional. Second, the question is not whether a jury has the raw *power* of review by entering a general verdict and "getting away with it" -- i.e., escaping sanctions that would affect the Holmesian "bad man." Rather, the question is whether a jury has the legal right -- perhaps even the duty -- to refuse to follow a law it deems unconstitutional. As a practical matter, the issue often boils down to whether an attorney should be allowed to argue unconstitutionality, typically as a defense, to a jury.

This is exactly how the issue arose in perhaps the most famous of all Sedition Act prosecutions, *United States v. Callender*, <sup>265</sup> tried in 1800 in a federal Circuit Court. When the publisher Callender's attorney, William Wirt, tried to argue the statute's unconstitutionality to the jury, he was cut off by presiding Circuit Justice Samuel Chase. Chase was later impeached for his overall handling of *Callender*, and for refusing to allow defense counsel in another criminal case to argue law to the jury. About half of the Senate voted to convict, several votes short of the two-thirds required by the Constitution. <sup>266</sup> Wirt, by contrast, went on to become "one of the greatest Supreme Court advocates of all time and the man who holds the record for years of service as

Attorney General." <sup>267</sup> Here is an edited transcript of the Chase-Wirt exchange:

Here CHASE, Circuit Justice -- Take your seat, sir, if you please. If I understand you rightly, you offer an argument to the petit jury, to convince them that the . . . Sedition Law[] is contrary to the constitution of the United States and, therefore, void. Now I tell you that this is irregular and inadmissible; it is not competent to the jury to decide on this point . . .

. . . [W]e all know that juries have the right to decide the law, as well as the fact -- and the constitution is the supreme law of the land, which controls all laws which are repugnant to it.

Mr. Wirt. -- Since, then, the jury have a right to consider the law, and since the constitution is law, the conclusion is certainly syllogistic, that the jury have a right to consider the constitution.

CHASE, Circuit Justice. -- A non sequitur, sir.

Here Mr. Wirt sat down. <sup>268</sup>

Chase went on to try to explain his ruling, but if anything, it is his arguments that border on non sequitur. At times he seemed to say that if the jury could consider constitutionality, it would necessarily follow that judges could not. But nothing in the idea of judicial review, or in the subsequent *Marbury* case, requires that *only* judges consider constitutionality. <sup>269</sup> Surely, for example, President Jefferson was within his constitutional rights -- perhaps duties -- when he pardoned those convicted under the Sedition Act because he deemed the Act unconstitutional, notwithstanding that Article III Circuit Courts had held to the contrary in cases involving the very convicts in question. Judges took oaths to uphold the Constitution, as *Marbury* emphasized, but so did Presidents and jurors. In his celebrated 1791 lectures on law, James Wilson, who had been second (if that) only to Madison in his contributions to the Constitution, declared: "[W]hoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature - . . . [W]hen a question, even of this delicate nature, occurs, every one who is called to act, has a right to judge." <sup>270</sup> Though Wilson did not single out juries by name, surely they were "called to act" when requested to send James Callender to jail. Theophilus Parsons, who would one day sit as Chief Justice of his state supreme court, was even more explicit in the Massachusetts ratifying convention:

But, sir, the people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his own fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation. <sup>271</sup>

Likewise, *Marbury's* sonorous claim that "it is emphatically the province and duty of the judicial department to say what the law is" <sup>272</sup> does not necessarily support Chase. As Taylor's bicameral image illustrates, juries can be seen as

part of the judicial department -- the lower (and if anything, presumptively more legitimate, because more popular) house. <sup>273</sup> Just as both House and Senate had to agree the Sedition Bill was constitutional before it became law, why shouldn't both judge and jury be required to agree on its constitutionality before Callender was sent to jail? Nor was today's strict law/fact distinction between the roles of upper and lower judicial houses so clear in 1800. On the contrary, it was widely believed in late eighteenth-century America that the jury, when rendering a general verdict, could take upon itself the right to decide both law and fact. <sup>274</sup> So said a unanimous Supreme Court in one of its earliest cases (decided before *Callender*), <sup>275</sup> in language that resonates with the writings of some of the most eminent American lawyers of the age -- Jefferson, Adams, and Wilson, to mention just three. <sup>276</sup> Indeed, Chase himself went out of his way to concede that juries were judges of law as well as of fact. <sup>277</sup> Perhaps, however, this concession had to do with the peculiarities of sedition law and its somewhat unusual procedures -- driven, it will be recalled, by the struggle between judge and jury. In any event, the line between constitutional law and constitutional fact is often hazy, as illustrated by the "reasonableness" issue in Fourth Amendment jurisprudence. <sup>278</sup>

Chase also suggested that decentralized jury review would undermine the idea of uniform national law -- one jury might acquit on constitutional grounds, another might not -- but the same thing can be said of Article III judicial review. <sup>279</sup> Through its power to make exceptions to the Supreme Court's appellate jurisdiction, Congress can vest the last word in constitutional cases in lower federal courts who, like juries, might disagree among themselves. <sup>280</sup> The *Callender* case was itself a remarkable example of this truth, for under the Judiciary Act of 1789 the Supreme Court lacked jurisdiction to hear this or any other criminal appeal from Circuit Courts. <sup>281</sup> (Thus, the most important constitutional issue of the Federalist era never reached the Supreme Court.) Truly, the situation under the Judiciary Act of 1789 was even more decentralized than this. Trials in Circuit Court, such as Callender's, were presided over by two or even three judges. In the event these judges disagreed among themselves, whose instructions must the jury follow? If anything, the very structure of the judges' hierarchy implied a radical decentralization and nonuniformity wholly consistent with jury review. <sup>282</sup>

But would not such a decentralized system lead to confusion and anarchy? Not in any single case, given the Constitution's rather clear procedural structure for aggregating substantive disagreement. In general, these rules work in a systematically anti-governmental, pro-populist way. In the event any major institutional actor at the federal level deems a federal law unconstitutional, that institution is typically able to make its constitutional objection stick -- at least in criminal law, where persons' lives, liberties, and property are most vulnerable. If either House or Senate deems a criminal bill unconstitutional, it cannot become law; and no person can be convicted in the absence of such a law, because there is no such thing as a "federal common law" of crimes. <sup>283</sup> If the President deems the bill unconstitutional, he may veto or pardon (even before indictment). So too, if judges deem the law unconstitutional, they may order the defendant released and make their decision stick through the Great Writ of habeas corpus. By symmetric logic, juries too should be allowed to use their power to issue a general verdict for defendant to achieve the same result.

Chase's final argument simply asserted the jury's lack of "competence" to

decide the Sedition Act's (un)constitutionality. Judges were learned in law, and juries were not. Though this may seem quite obvious today, perhaps the reason is that we have lost the powerful and prevailing sense of 200 years ago that the Constitution was *the people's* law. Even if juries generally lacked competence to adjudicate intricate and technical "lawyer's law," the Constitution was not supposed to be a prolix code. It had been made, and could be unmade at will, by We the People of the United States -- Citizens acting in special single-issue assemblies (ratifying conventions), asked to listen, deliberate, and then vote up or down. How, it might be asked, were juries different from conventions in this regard? If ordinary Citizens were competent to make constitutional judgments when signing petitions or assembling in conventions, why not in juries too? Is there not an important truth in Jefferson's exuberant 1789 definition of jury trials as "trials by the people themselves"? <sup>284</sup>

In setting forth the strong arguments for jury review, I do not mean to suggest that I am wholly persuaded. But the mere fact of their strong plausibility shows how strikingly powerful the jury might have become, had post-1800 history unfolded differently. As previously noted, the Supreme Court never heard *Callender* or any other Sedition Act case, and indeed, did not definitively address the issue of jury review until the 1895 case of *Sparf and Hansen v. United States*. <sup>285</sup> In upholding Chase's approach, the *Sparf* Court added no real arguments beyond those canvassed above. The strongest defense of its holding comes from provisions never cited by the Court, namely the Civil War Amendments. These amendments did not repeal the fundamentally populist philosophy of the original Constitution and Bill of Rights, but they did radically transform the nature of American federalism. As Jefferson and Taylor understood all too well, acceptance of Wirt's argument for jury review would have created in fundamentally local bodies a power that approached de facto nullification in a wide range of situations. Existence of such a power in local bodies to nullify Congress' Reconstruction statutes might have rendered the Civil War Amendments a virtual dead letter. Thus it is plausible to think that these Amendments implicitly qualified the (equally implicit) power of local juries to thwart national laws. This, however, was hardly an argument that lay in the mouth of the *Sparf* Court. In the previous two decades, the Supreme Court had *itself* systematically destroyed congressional Reconstruction with the scalpel of stingy statutory construction and the sledgehammer of judicial review. <sup>286</sup>

#### (ii) *Waivability of Jury Trial*

For whose benefit did the right to jury trial exist? For Tocqueville, the answer was easy -- the core interest was that of the Citizens, rather than the parties: "I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them . . ." <sup>287</sup> Similarly, Justice Blackmun has written that the public has interests, independent of a criminal defendant, in monitoring judges, police, and prosecutors -- and in being "educat[ed about] the manner in which criminal justice is administered." <sup>288</sup> Though speaking of the gallery's right to a "public" trial within the meaning of the Sixth Amendment, Justice Blackmun's insight would seem to apply a fortiori to the jury's right, for every trial in which a jury sits is to that extent a *public* trial, of and by the people, and not just for them.

Nevertheless, in 1930 the Supreme Court held that the jury trial right was defendant's alone, to waive if he pleased. The Court explicitly framed the question as whether jury trial was "only [a] guaranty to the accused" instead of a component of the structure of "a tribunal as a part of the frame of government."<sup>289</sup> If the latter, the Court seemed to concede, a judge acting without a jury was simply not a court capable of trying a defendant, just as the Senate acting without the House is not a legislature capable of passing laws.

But as we have seen, the bicameral analogy is historically apt; it is anachronistic to see jury trial as an issue of individual right rather than (also, and, more fundamentally) a question of government structure. None of the arguments in *Patton v. United States* survives close scrutiny. Predictably, the Court stressed the words of the Sixth Amendment guaranteeing to "the accused" the right of jury trial. But this ignores the clear words of Article III mandating that "the trial of *all* Crimes . . . shall be by Jury" -- a command no less mandatory and structural than its companion commands that the judicial power of the United States "shall be vested in" federal courts, whose judges "shall" have life tenure and undiminished salaries, and whose jurisdiction "shall extend to *all*" cases in certain categories.<sup>290</sup> The words in the Article III jury clause were plainly understood during the ratification period as words of obligation.<sup>291</sup> Nothing in the Sixth Amendment repeals those words -- as would have been the case, for example, had the Amendment explicitly conferred upon "the accused" a (waivable?) right to a *non*-jury trial. Before *Patton*, the Supreme Court was on record in *Callan v. Wilson* as affirming that the Amendment was not "intended to supplant" Article III's jury clause.<sup>292</sup> In *Callan*, decided in 1888, the Court held that the undiminished words of Article III required jury trials in the District of Columbia, even though the Sixth Amendment speaks only of "State[s]." Nor have any other parts of Article III's jury clause -- such as its impeachment exception -- been deemed repealed by implication. *Patton*'s reading is thus at odds with precedent as well as with the plain words of the Ninth Amendment that the expression of some rights (such as "the accused's" right to jury trial) must never "be construed" by sheer implication to "deny or disparage" other rights guaranteed by the preexisting Constitution (such as *the people's* right to jury trial).<sup>293</sup>

But why, then, was the jury trial language of the Amendment necessary? If Article III is as clear as I have suggested, and was so understood in 1789, why did the first Congress add the jury clause of the Sixth Amendment? The historical answer is unequivocal: to guarantee a right to a trial *within the district* of the crime. Article III had not specified jury trial of "the vicinage," as per the prevailing common law, and many Anti-Federalists wanted an explicit guarantee that juries would be organized around local rather than statewide communities.<sup>294</sup> (Once again, we see the local communitarian spirit of the Bill of Rights.) Thus, perhaps the special Sixth Amendment right to a jury from the "district" is solely the accused's, waivable at will -- but the underlying mandate of jury trial itself cannot be waived.

The Sixth Amendment's legislative history overwhelmingly confirms this. Until the mysterious House-Senate conference we earlier noted in conjunction with the first Congress' original First Amendment, the jury clause used language identical to that of Article III ("the trial of all crimes shall be . . .").<sup>295</sup> When House and Senate failed to agree about whether explicitly to introduce the "vicinage" formulation, the compromise language of "district" was chosen,<sup>296</sup>

and the clause was dropped into a catch-all criminal procedure amendment that used language of the right of "the accused" to various nonstructural benefits including speedy trial, assistance of counsel, confrontation, and compulsory process. To put the historical point in its strongest light, it would be perverse in the extreme to take a clause in the Bill of Rights designed to strengthen jury trial as evincing a desire to weaken it. Had this been the intended or even a plausible reading of the clause in 1789, there would have been howls of protest from Anti-Federalists like the "Federal Farmer." Instead, there is not a scrap of evidence that anyone thought that the Article III mandate could be slyly undone by the Sixth Amendment.

Ignorance is indeed a great law reformer, but surely there are limits. *Patton* claimed that no one at the Founding viewed jury trial as going beyond the protection of the accused -- a statement that ignores the writings of the "Federal Farmer," the "Maryland Farmer," Jefferson, and many others.<sup>297</sup> Thus, *Patton's* claim that no third-party rights were at stake simply begs the question of jurors' rights. Also question-begging is reliance on the fact that other Sixth Amendment rights are waivable, since these concededly do not go to the structure and status of the court as a properly constituted tribunal and do not implicate any Article III mandate. Nor can reliance be placed on the "greater" power of defendant to waive trial altogether by pleading guilty; for surely that would not allow the alleged "lesser" power of permitting a criminal defendant who pled not guilty to be tried by a federal "judge" who lacked Article III status -- say, the Speaker of the House, in clear violation of the bill of attainder clause. Equally unavailing is the argument that civil jury trial is waivable. Indeed, the clear language of the Supreme Court's earliest treatment of the waiver issue cuts exactly the opposite way. In 1819, the Court wrote:

Had the terms been, that "the *trial* by jury shall be preserved," it might have been contended, that they were imperative, and could not be dispensed with. But the words [of the Seventh Amendment] are, that the *right* of trial by jury shall be preserved, which places it on the foot of [waivable rights].<sup>298</sup>

As noted before, the language of Article III is imperative in just the way the Court appeared willing to acknowledge. Indeed, as late as 1898, the Supreme Court, per Justice Harlan, was squarely on record as declaring that a criminal defendant could not waive jury trial.<sup>299</sup> *Patton* breezily dismissed the 1898 discussion as "dictum" (it wasn't), and failed even to mention an 1874 Supreme Court case whose unambiguous language squarely addressed the precise issue in *Patton*: "In a criminal case, [defendant] cannot . . . be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men."<sup>300</sup>

Nevertheless, it would be a mistake to put all the blame for the vanishing significance of the jury on the shoulders of the *Patton* Court. The issue in *Patton* was a rather narrow one: could a defendant who pled not guilty be tried without a (twelve person) jury? Even had *Patton* said no, back door evasion of jury trial was possible through the device of the guilty plea. Historically, the petit jury had a role only at trial; a guilty plea occurred prior to, and precluded, any trial (although even a guilty plea could occur only after a different jury -- the grand jury -- had authorized the charge).<sup>301</sup> As a practical matter, the back door opened by guilty pleas was of little significance 200 years ago, for as Professor Alschuler has shown, such pleas were then highly atypical, and plea

bargaining was generally viewed with suspicion, if not hostility.<sup>302</sup> Today, by contrast, roughly ninety percent of criminal defendants convicted in American courts plead guilty, and plea bargaining has the explicit sanction of the Supreme Court.<sup>303</sup>

#### F. *The Popular Sovereignty Amendments*

In light of the strongly populist cast of the all preceding amendments, it is wholly fitting that the Bill of Rights ends with back-to-back invocations of "the people":

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The popular sovereignty motif of the Tenth Amendment could not be more obvious. We the People, acting collectively, have delegated some powers to the federal government, have allowed others to be exercised by state governments, and have withheld some things from all governments. The Preamble and the Tenth Amendment are perfect bookends, fittingly the alpha and omega of the founding and its gloss.

The obviously collective meaning of "the people" in the Tenth Amendment (and everywhere else) should alert us that its core meaning in the Ninth is similarly collective. As I have explained in detail elsewhere,<sup>304</sup> the most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government, through the distinctly American device of the constitutional convention. We have already seen that this clarifying gloss -- with antecedents in virtually every state constitution -- was initially proposed as a prefix to the Preamble, only to be dropped for stylistic reasons and resurrected in the First Amendment's explicit right of "the people" to assemble in convention.<sup>305</sup> So too, with both the Ninth and Tenth Amendments' use of that phrase. Indeed, Hamilton in *The Federalist No. 84* explicated the Preamble in language that perfectly foreshadowed the later amendments' wording:

[Our Constitution is] professedly founded on the power of *the people* . . . Here, in strictness, *the people* surrender nothing; and as they *retain* everything they have no need of particular *reservations*, "WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Here is a [clear] recognition of *popular rights*. . . .<sup>306</sup>

To see the Ninth as centrally about countermajoritarian individual rights -- such as privacy -- is to engage in anachronism.<sup>307</sup>

Finally, let us consider how the Tenth Amendment elegantly integrates popular sovereignty with federalism.<sup>308</sup> All government power derives from the people, but these grants are limited. The federal government has only powers "delegated" to it, expressly or by implication, and certain "prohibit[ions]" are

imposed on state governments. How are these government agents to be kept within these limits? In part by mutual jealousy and monitoring, as we have seen throughout. State legislatures could alert the people to any perceived usurpations by central agents (consider the "sirens" sounded by the Virginia and Kentucky legislatures in 1798, or the Hartford Convention in 1814-15); state militias could thwart and thus deter a tyrannical standing army; state common law of trespass could help vindicate persons' Fourth Amendment rights; and so on. Once again, **populism and federalism** -- **liberty and localism** - - work together.

### III. THE BILL OF RIGHTS AS A CONSTITUTION

It is now time to step back and see what larger lessons may be pieced together from the story thus far.

#### A. *The Bill of Rights* . . .

##### 1. *Reading Old Rights* **Holistically**

In this essay, I have tried to suggest how much is lost by the clause-bound approach that now dominates constitutional discourse. The clause-bound approach misses the ways in which structure and rights mutually reinforce. It misses interesting questions *within* amendments, like "why is the takings clause lumped together with the rest of the Fifth Amendment?" It misses the thematic continuities *across* different amendments -- such as the popular sovereignty motif sounded by repeated invocations of "the people," and the ways in which jury trial issues influenced the thinking behind the First, Fourth, and Eighth Amendments. It misses the many linkages between the original Constitution and the Bill -- the importance of earlier invocations of "the people" in the Preamble and Article I; the connection between the free speech clause and the speech and debate clause; the relevance of the enumerated power philosophy of Article I for First Amendment absolutism; the subtle interplay between the militia and army clauses of Article I and the Second and Third Amendments; the implications of the Article III jury trial command for the Sixth Amendment; the nonexclusivity of Article V signalled by the First, Ninth, and Tenth Amendments; and so on.

How could we forget that our Constitution is a *single* document, and not a jumble of disconnected clauses -- that it is *a* Constitution we are expounding?

##### 2. *Taking New Rights Seriously*

**The Bill of Rights as I have sketched it here differs dramatically from its conventional image in the minds of both lawyers and lay folk. If my account is persuasive, must we abandon current folk wisdom and case law?**

**Not necessarily.** As I have tried to emphasize at a number of strategic points, adoption of the Fourteenth Amendment appears to have transformed the nature of the Bill. The original Bill's strong emphasis on **popular sovereignty** theory makes it especially important to attend to the effect of subsequent constitutional amendments. For that theory requires interpreters to take "more modern [amendments] at least as seriously as more ancient ones."<sup>309</sup> In Bruce Ackerman's terminology, **interpreters must try to "synthesize" the meanings of**

chronologically separated "constitutional moments." <sup>310</sup>

This sort of synthesis -- holism across time -- is hardly mechanical. Indeed, to be done well, synthesis requires extraordinary legal and historical sensitivity. <sup>311</sup> But the first step is to recognize the problem: the world view underlying the Bill of Rights was not dominated by the idea of individualistic, countermajoritarian rights. In this essay, I have not gone much beyond this first step, nor attempted to consider in any comprehensive way how much of the Bill, as originally understood, survives the subsequent adoption of Amendments XI-XXVI. For the problem of synthesis, of course, is by no means limited to the Fourteenth Amendment.

To take one obvious example, consider the fact that, as originally conceived, militias and juries were all male. Of course, the exclusion of women reflects the strong connections between these two institutions and suffrage -- also all male 200 years ago. But once We the People adopted the Nineteenth Amendment, guaranteeing women the vote, how could judges continue to permit sex discrimination in juries and militias? Of course, the words "jury" and "militia" appear nowhere in the Nineteenth Amendment -- but by the same token, the word "male" appears nowhere in the earlier references to these institutions. What remains constant across time is the underlying understanding that jury and militia service are *political* rights and duties, closely linked to suffrage. <sup>312</sup> Once suffrage rights are extended, corresponding and coextensive changes must occur in juries and militias. To put the point another way, could any law making women ineligible to hold office be reconciled with the Nineteenth Amendment? I think the answer is no, even though the Amendment does not explicitly speak of holding office. <sup>313</sup> The same should hold true for other political rights. <sup>314</sup>

Yet things have not seemed so clear to the Supreme Court. Not until 1975, more than a half century after the Nineteenth Amendment became the supreme law of the land, did the Court strike down sex discrimination on juries, in an opinion that nowhere mentioned the suffrage amendment. <sup>315</sup> In 1981, the Court upheld sex discrimination in draft registration. Once again, the Nineteenth Amendment went unmentioned. <sup>316</sup>

Part of the problem, I suggest, is that judges tend to view the original Bill of Rights as more modern than it really was. Once judges see how deeply the Bill was rooted in certain eighteenth-century assumptions, courts are likely to spend more time carefully reflecting on the words and spirit of later amendments that *are* more modern in their underlying vision.

B. . . . *as a Constitution*

Today, the very phrase "Bill of Rights" is virtually synonymous with a compilation of countermajoritarian personal rights. Cause and effect are hard to disentangle; does the definition drive, or is it driven by, the standard reading of *our* Bill of Rights? Either way, we should recognize how different standard usage was 200 years ago. The virulent Anti-Federalist Luther Martin, for example, argued during 1788 for "a bill of rights" that would encompass "a stipulation in favour of the rights both of states and of men." <sup>317</sup> George Mason, the leading proponent of a Bill of Rights at the Philadelphia convention, also linked the project to an express reservation of states' rights. <sup>318</sup> Another leading

Anti-Federalist urged a "declaration in favour of the rights of states and of citizens." <sup>319</sup> In the New York ratifying convention, Thomas Tredwell lamented: "Here we find no security for the rights of individuals, no security for the existence of our state governments; here is no bill of rights. . . ." <sup>320</sup> In proposing provisions to be included in such a Bill, Tredwell emphasized populist provisions: "freedom of election, a sufficient and responsible representation, the freedom of the press, and the trial by jury both in civil and criminal cases." <sup>321</sup> In a similar populist spirit, Thomas Jefferson wrote that "a bill of rights is what *the people* are entitled to against every *government* on earth. . . ." <sup>322</sup>

Gordon Wood sums up this Anti-Federalist spirit well:

[T]he Antifederalists' lack of faith was not in the people themselves, but only in the [regular government] organizations and institutions that presumed to speak for the people. . . . [E]nhancing the people out-of-doors as it correspondingly disparaged their elected officials, [Antifederalist thought] can never be considered undemocratic. [Antifederalists] were "localists," fearful of distant governmental, even representational, authority for very significant political and social reasons that in the final analysis must be called democratic. <sup>323</sup>

The Federalists also understood that calls for a Bill of Rights were driven by populist and localist concerns. In 1788, Madison wrote Jefferson that proponents of a Bill of Rights sought "further guards to *public liberty* & individual rights." <sup>324</sup> In *The Federalist* No. 38, he noted that some critics "concur[red] in the absolute necessity of a bill of rights, but contend[ed] that it ought to be declaratory, not of the personal rights of individuals, but of the rights reserved to the States in their political capacity." <sup>325</sup> And in *The Federalist* No. 84, Hamilton stressed that "one object of a bill of rights [is] to declare and specify the *political* privileges of the citizens in the *structure* and *administration* of the government." <sup>326</sup>

Hamilton's answer to the drumbeat for a Bill of Rights was to stress the ways in which the original Constitution fit the bill, so to speak. For Hamilton and many others, the Philadelphia Constitution was "itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." <sup>327</sup> But this point can be flipped around. As I have tried to show throughout, the Bill of Rights can itself be seen as a *Constitution* of sorts -- that is, as a document attentive to structure, focused on the "agency" problem of government, and rooted in the sovereignty of We the People of the United States.

### 1. Seeing the Importance of Structure

Like the original Constitution, the original Bill of Rights was webbed with structural ideas. Federalism, separation of powers, bicameralism, representation, amendment -- these issues were understood as central to the preservation of liberty. My point is not that substantive "rights" are unimportant, but that these rights were intimately intertwined with structural considerations.

Consider, in this regard, Dean Choper's thesis that courts should treat "structural" issues such as federalism and separation of powers as nonjusticiable, and save their prestige for the protection of "individual rights."

<sup>328</sup> For Choper, the only items that fall within the second category are those things that no government -- state or federal -- may do. Issues of federalism, Choper assures us, lie beyond the judicial ken because true liberty is not involved -- the issue is simply *which* government can intrude. <sup>329</sup>

But 200 years ago, the issue of which government often made all the difference in the world. The original Constitution specified only three things that neither federal nor state government could do: pass bills of attainder, enforce ex post facto laws, and grant titles of nobility. To make matters even worse for Choper, the first two of these prohibitions obviously have structural overtones sounding in separation of powers. <sup>330</sup> When we look at the original Bill of Rights, an even starker pattern emerges: none of its provisions bound state governments. This regime, epitomized by *Barron v. Baltimore* <sup>331</sup> -- a case Choper never even mentions in over 400 pages of text -- was the de jure constitutional framework for almost a century. De facto, *Barron* survived well into this century, and was not decisively dethroned until the Warren Court. Only after the near-total incorporation of the Bill of Rights against states and the "reverse-incorporation" of equal protection principles against the federal government -- both of which occurred after World War II -- did it become natural to define "individual rights" as Choper does. Yet Choper nowhere signals his awareness of just how odd his ideas would have sounded to earlier generations. When Choper does purport to do history, his claims become even more outlandish: "[T]he assertion that federalism was meant to protect . . . individual constitutional freedoms . . . has no solid historical or logical basis." <sup>332</sup>

## 2. *Getting Beyond the Countermajoritarian Difficulty*

I have singled out Dean Choper for special criticism because his work is particularly clear in its effort to distill and defend widely held, but distinctly modern, ideas about the Constitution. The work of Alexander Bickel also epitomizes much modern thinking about the Constitution. "The root difficulty," Bickel wrote in one of his most quoted sentences, "is that judicial review is a counter-majoritarian force in our system." <sup>333</sup> By focusing so singlemindedly on one of the two main issues flagged by Madison in *The Federalist* No. 51 -- the problem of minority rights -- Bickel's work has unfortunately diverted our attention from Madison's other chief concern, namely, the "agency" problem of government. As we have seen, only by taking seriously the "agency" issue can we fully understand the original Bill of Rights. Elsewhere, I have tried to show how inattention to "agency" problems has led to profound misunderstandings about federalism, sovereign immunity, and the amendment process. <sup>334</sup> And this is only the beginning. Renewed scholarly attention to "agency" issues could shed new light on a vast number of other constitutional questions, just as renewed emphasis on "agency costs" has importantly energized the recent law and economics literature.

## 3. *Putting the People Back Into the Constitution*

Attention to the "agency" problem should remind us that all permanent government officials -- even Article III judges -- may at times pursue self-interested policies that fail to reflect the views and protect the liberties of ordinary Americans. As the Fourth Amendment warrant clause and the Eighth Amendment make clear, professional judges acting without Citizen juries can

sometimes be part of the problem, rather than the solution.

Today it is commonplace to stress judicial review as the most natural enforcement mechanism of the Bill of Rights. But consider again the two historical quotations typically invoked for this idea. First, there is Madison's speech before the first Congress: "If [rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive [branch]. . . ." <sup>335</sup>

Madison surely had Article III judicial review in mind here, but he may also have been thinking of juries. He speaks not of "judges" but "tribunals," which from one perspective can be seen as encompassing both the "upper" house of the judge and the "lower" house of the jury. If "independen[ce]" be the key to Madison's remarks, we must remember that juries were arguably even less dependent on executive and legislature, since jurors had never been appointed by these branches, and did not draw any permanent salary from them. Emphasis on the populist and localist jury would fit perfectly with other things Madison said in the above-quoted speech. For example, in the sentence immediately after his mention of "independent tribunals" he stressed federalism as an enforcement device:

Besides this security, there is a great probability that such a declaration in the federal system would be enforced; because the State Legislatures will jealously and closely watch the operations of this Government, and be able to resist with more effect every assumption of power, than any other power on earth can do; and the greatest opponents to a Federal Government admit the State Legislatures to be sure guardians of the people's liberties. <sup>336</sup>

Moments earlier, Madison had pointed to the importance of "public opinion" in making the Bill of Rights more than a mere "paper barrier." <sup>337</sup>

Now turn to Jefferson's comment that a bill of rights would put a "legal check . . . into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity." <sup>338</sup> Here too, Jefferson plainly has in mind judicial review by judges. But elsewhere, he made clear that he viewed juries as part of the "judiciary." Indeed, only three months after his approving comments about judges and judicial review, and a full decade before *Callender*, Jefferson argued that where they suspected self-dealing or other "agency" bias on the bench, ordinary Citizen jurors could constitute themselves as judges of both fact and law:

But we all know that permanent judges acquire an Esprit de corps, that being known they are liable to be tempted by bribery, that they are misled by favor, by relationship, by a spirit of party, by a devotion to the Executive or Legislative. . . . It is left therefore to the juries, if they think the permanent judges are under any bias whatever in any cause, to take upon themselves to judge the law as well as the fact. They never exercise this power but when they suspect partiality in the judges. . . . <sup>339</sup>

Beyond juries, both Madison and Jefferson emphasized public education as the

remedy for, and deterrent to, unconstitutional conduct. Wrote Jefferson, "written constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally and recall *the people*; they fix too for *the people* the principles of their political creed." <sup>340</sup> The words of the Bill of Rights would themselves educate Americans; hence the appropriateness of didactic, nonlegalistic phrases such as "a well regulated Militia [is] necessary to the security of a free State." <sup>341</sup> Such maxims were the heart and soul of early state constitutions. <sup>342</sup> Virginia's famous 1776 Declaration of Rights even featured a maxim about the need for maxims! "[N]o free government, or the blessings of liberty, can be preserved to any people, but by . . . virtue, and by frequent recurrence to fundamental principles." <sup>343</sup> A Bill of Rights would crystallize these principles so that they could be memorized and internalized -- much like scripture -- by ordinary Citizens. <sup>344</sup> In the words of one 1788 commentator, a Bill of Rights "will be the first lesson of the young citizens." <sup>345</sup> Patrick Henry and John Marshall agreed on very little in the Virginia ratifying convention, but when Henry declared that "[t]here are certain maxims by which every wise and enlightened people will regulate their conduct," Marshall went out of his way to agree that such maxims "are necessary in any government, but more essential to a democracy than to any other." <sup>346</sup>

Madison, too, stressed popular education and popular enforcement:

What use then it may be asked can a bill of rights serve in popular Governments? . . . 1. The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion. 2. [Whenever] usurped acts of the Government [occur], a bill of rights will be a good ground for an appeal to the sense of the community. <sup>347</sup>

In 1792, Madison -- the great champion of internal checks and balances -- noted that such checks "are neither the sole or the chief palladium of constitutional liberty. *The people* who are the authors of this blessing, must also be its guardians." <sup>348</sup>

The emphasis on popular enforcement would of course prove prescient. Less than a decade after the Bill of Rights became law, federal judges cheerfully sent men to jail for criticizing the government, but opponents of the Sedition Act -- led by Jefferson and Madison -- ultimately prevailed by "*appeal[ing]* to the sense of the community." <sup>349</sup> First, they attempted to "appeal" from judges to juries, who embodied this community sense. When blocked by judges, they used the media of state legislatures to transform the election of 1800 into a national public seminar on constitutional principles. Thus educated, ordinary Citizens on election day registered the "community sense" that the Act was a usurpation.

Though their personal labors in founding the University of Virginia signaled the special depth of their commitment, Madison and Jefferson were hardly unique in seeing the centrality of public education. In 1775, for example, Moses Mather declared that "[t]he strength and spring of every free government is the virtue of the people; virtue grows on knowledge, and knowledge on education." <sup>350</sup> After quoting Mather, Gordon Wood sums up the ethos of the

era in his own words: "And education, it was believed, was the responsibility and agency of a republican government. So the circle went." <sup>351</sup> "The most obvious republican instrument for . . . inculcating virtue in a people was education." <sup>352</sup> We should not be surprised, then, that each of the first six Presidents of the United States urged the formation of a national university. In the didactic language of the Massachusetts Constitution of 1780:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education . . . it shall be the duty of legislatures and magistrates . . . to encourage [these ends]. <sup>353</sup>

The idea of popular education resurfaces over and over in the Bill of Rights. As we have seen, each of the three intermediate associations it safeguards -- church, militia, and jury -- was understood as a device for educating ordinary Citizens about their rights and duties. The erosion of these institutions over the last 200 years has created a vacuum at the center of our Constitution. Thus, one of the main tasks for today's constitutional theorists should be to explore ways this vacuum might be filled. Revisiting the *Rodriguez* case <sup>354</sup> and establishing a constitutional right to public education might be one place to start. <sup>355</sup> An uneducated populace cannot be a truly sovereign populace.

Yet it is exactly such a truly sovereign people who constitute the rock on which our Constitution is built. The opening words of the Preamble, of course, dramatize this truth; but so do the words of the Bill of Rights. For I hope it has not escaped our notice that **no phrase appears in more of the first ten amendments than "the people."**

#### FOOTNOTES:

<sup>n1</sup> For a more detailed discussion of how law school teachers have carved up the Bill of Rights, see Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 328-31 (1981). Gutman closes his essay with a suggestion that legal discourse about rights be severed from analysis of constitutional structure, *id.* at 379-81. Although this plea stands directly opposed to my own approach, Gutman's little-known essay is the font of many important insights. It deserves a place on the "must read" list of all serious students of the Bill of Rights.

<sup>n2</sup> In a recent essay, Sanford Levinson has powerfully documented the general lack of interest in the Second Amendment among mainstream constitutional theorists. Levinson, *The Embarrassing Second Amendment*, 99 [YALE L.J. 637, 637-42 \(1989\)](#). Levinson criticizes this lack of interest, but even one so catholic as he is willing to allow the Third Amendment to languish in obscurity. See [id. at 641](#).

<sup>n3</sup> *Accord* Gutman, *supra* note 1, at 328 & n.146 ("No work since [the 1890's] has provided an integrated analysis of the Bill of Rights.").

The best modern account of the Bill is a book by a practitioner: E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* (1957). The book contains a wealth of historical material about the Bill and its antecedents, but offers little in the way of comprehensive constitutional theory.

<sup>n4</sup> See, e.g., G. GUNTHER, CONSTITUTIONAL LAW 70-402 (11th ed. 1985) ("Part II: The Structure of Government"); *id.* at 403-1633 ("Part III: Individual Rights"). Professor Gunther's casebook is far from unique in this respect. See Gutman, *supra* note 1, at 372 & n.424.

<sup>n5</sup> THE FEDERALIST No. 51, at 323 (J. Madison) (C. Rossiter ed. 1961) [hereinafter all citations to *The Federalist* are to this edition].

<sup>n6</sup> [347 U.S. 483 \(1954\)](#).

<sup>n7</sup> See, e.g., J. CHOPER, JUDICIAL REVIEW AND THE POLITICAL PROCESS 252-54 (1980). I too am guilty. See, e.g., Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, [65 B.U.L. REV. 205 \(1985\)](#) [hereinafter Amar, *A Neo-Federalist View*].

<sup>n8</sup> For an elegant discussion of the differences between judicial invalidations of congressional statutes and other forms of judicial review, see C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 67-93 (1969).

<sup>n9</sup> O. W. HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920).

<sup>n10</sup> Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

<sup>n11</sup> See, e.g., Amar, *Of Sovereignty and Federalism*, [96 YALE L.J. 1425, 1440-41 \(1987\)](#) [hereinafter Amar, *Sovereignty*], and sources cited therein.

<sup>n12</sup> See generally G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 463-67 (1969) ("The Abandonment of the States").

<sup>n13</sup> See generally Amar, *Sovereignty*, *supra* note 11, at 1492-1520.

<sup>n14</sup> *Id.* at 1500-03.

<sup>n15</sup> See also McLaughlin, *The Background of American Federalism*, 12 AM. POL. SCI. REV. 215, 222 (1918) (noting overlap between "states rights" and "individual rights" rhetoric in colonial arguments against Parliament); A. PEKELIS, LAW AND SOCIAL ACTION 94-95 (1950) (similar).

<sup>n16</sup> Eight years earlier, the Virginia legislature had adopted resolutions denouncing as unconstitutional the federal government's assumption of state war debts. *Virginia Resolutions on the Assumption of State Debts*, in DOCUMENTS OF AMERICAN HISTORY 155-56 (H. Commager 9th ed. 1973) (describing state legislators as "guardians . . . of the rights and interests of their constituents" and "sentinels placed by them over the ministers of the federal government, to shield it from their encroachments, or at least to sound an alarm when it is threatened with invasion"). This 1790 declaration is an important link in the historical chain connecting the antiparliamentary activity of colonial legislatures before 1776 with the resolutions of 1798. Note especially the use of the revealing word "ministers" to describe federal officers.

<sup>n17</sup> See, e.g., 5 THE FOUNDERS' CONSTITUTION 132 (P. Kurland & R. Lerner

eds. 1987) (Kentucky Resolution No. 3) (intertwining First and Tenth Amendment arguments).

<sup>n18</sup> See Amar, *Sovereignty*, *supra* note 11, at 1451-66, 1492-1520.

<sup>n19</sup> See *id.* at 1451-66.

<sup>n20</sup> See, e.g., *id.* at 1425-29, 1488 n.252; A. PEKELIS, *supra* note 15, at 127.

<sup>n21</sup> See G. GUNTHER, *supra* note 4, at 422-40.

<sup>n22</sup> *But see infra* text accompanying notes 127-40 (questioning incorporation of establishment clause).

<sup>n23</sup> See, e.g., *infra* note 94.

<sup>n24</sup> As shall become clear, this essay only sets the stage for, but does not undertake, this systematic assessment. See *supra* text accompanying notes 310-15.

<sup>n25</sup> U.S. CONST. art. V.

<sup>n26</sup> 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 321-22 (1894) [hereinafter DOCUMENTARY HISTORY OF THE CONSTITUTION] (ellipsis in original).

<sup>n27</sup> Under this formula, each slave was counted as three-fifths of a free person. U.S. CONST. art. I, § 2, cl. 3.

<sup>n28</sup> The best known exponent of this view, of course, was Montesquieu. This view resounds throughout Anti-Federalist speeches and writings. For a smattering, see THE ANTIFEDERALISTS 24, 39, 101-02, 132-33, 208, 302, 324 (C. Kenyon ed. 1966) (reprinting work of "Centinel," "The Pennsylvania Minority," "John De Witt," "Agrippa," "The Federal Farmer," "Cato," and "Brutus") [hereinafter C. KENYON].

<sup>n29</sup> For more discussion, see Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, [56 U. CHI. L. REV. 443, 469-78 \(1989\)](#) [hereinafter Amar, *Original Jurisdiction*].

<sup>n30</sup> THE FEDERALIST No. 14, at 100 (J. Madison).

<sup>n31</sup> *Cf.* THE FEDERALIST No. 63, at 387 (J. Madison) ("true distinction . . . [of] the American governments lies *in the total exclusion of the people in their collective capacity*, from any share" in day-to-day governance).

<sup>n32</sup> THE FEDERALIST No. 10, at 82 (J. Madison).

<sup>n33</sup> For a more elaborate discussion of Madison's precise imagery of "refinement," see G. WILLS, *EXPLAINING AMERICA* 223-47 (1981).

<sup>n34</sup> See, e.g., THE FEDERALIST No. 10, at 82 (J. Madison); *id.* No. 55, at

342 (J. Madison); *id.* No. 58, at 360 (J. Madison); *id.* No. 62, at 379 (J. Madison). See also *infra* text accompanying notes 58-61.

<sup>n35</sup> THE FEDERALIST No. 10, at 83 (J. Madison).

<sup>n36</sup> This was, of course, part of the Federalists' design. See G. WOOD, *supra* note 12, at 471-518 ("The Worthy Against the Licentious"); G. WILLS, *supra* note 33, at 216-47.

<sup>n37</sup> See generally Amar, *Sovereignty*, *supra* note 11; Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, [55 U. CHI. L. REV. 1043 \(1988\)](#) [hereinafter Amar, *Philadelphia Revisited*].

<sup>n38</sup> See Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, [84 NW. U.L. REV. 74, 90-91 \(1989\)](#), and sources cited therein; C. KENYON, *supra* note 28, at xl; *Essays of Brutus* (IV), in 2 THE COMPLETE ANTI-FEDERALIST 382-84 (H. Storing ed. 1981); *Letters From The Federal Farmer* (II), in *id.* at 233-34; 2 B. SCHWARTZ, THE BILL OF RIGHTS 1187 (1971) (Letter from Richard Henry Lee and William Grayson to Virginia Speaker of the House of Representatives (Sept. 28, 1789)).

<sup>n39</sup> Rose, *supra* note 38, at 91; *Essays by a Farmer* (IV), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 38.

<sup>n40</sup> 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 287 (J. Elliot ed. 1888) [hereinafter ELLIOT'S DEBATES].

<sup>n41</sup> [3 \*Id.\* at 46.](#)

<sup>n42</sup> See *supra* text accompanying note 35.

<sup>n43</sup> On the details of engrossing and signing, see Amar, *Our Forgotten Constitution: A Bicentennial Comment*, [97 YALE L.J. 281, 282-83 \(1987\)](#) [hereinafter Amar, *Our Forgotten Constitution*].

<sup>n44</sup> 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 643-44 (M. Farrand rev. ed. 1937) [hereinafter M. FARRAND].

<sup>n45</sup> *Id.* at 644.

<sup>n46</sup> THE FEDERALIST No. 23, at 156 (A. Hamilton).

<sup>n47</sup> *Id.* No. 32, at 196 (A. Hamilton).

<sup>n48</sup> E. DUMBAULD, *supra* note 3, at 161, 175-76, 181, 185-86, 193, 202.

<sup>n49</sup> *Id.* at 163, 175, 180, 181, 185, 189, 201-02.

<sup>n50</sup> 2 ELLIOT'S DEBATES, *supra* note 40, at 249 (emphasis added). For a sample of similar concerns about congressional size voiced by other Anti-Federalists, see C. KENYON, *supra* note 28, at lii (Kenyon's introductory essay), 12 ("Centinel"), 37, 49 ("Pennsylvania Minority"), 79-80, 86

("Philadelphiensis"), 107-09 ("John De Witt"), 192 (George Mason), 209, 213, 216, 222-30 ("The Federal Farmer"), 242, 263 (Patrick Henry), 307, 310-11 ("Cato"), 361 ("Albany Manifesto"), 375-89 (Melancton Smith), 396 (Thomas Tredwell). On the size of state legislatures during the Revolution era, see G. WOOD, *supra* note 12, at 167.

n51 See 2 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 26, at 385-90.

n52 See *id.* at 321-90. The ratification tally in this official document corresponds with that in H. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 320 (1896), and suggests that the tallies in 2 B. SCHWARTZ, *supra* note 38, at 1203, and 1 ELLIOT'S DEBATES, *supra* note 40, at 339-40, reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 41, are in error. Elliot omits both Vermont's ratification of all twelve amendments, and Pennsylvania's eventual decision to ratify the (original) First Amendment on September 21, 1791. Elliot also erroneously states that Rhode Island ratified Congress' Second Amendment. Schwartz ignores Pennsylvania's ratification of the First Amendment, and mistakenly implies that both Rhode Island and Pennsylvania ratified the original Second Amendment. (Apparently they did not.) Compare B. SCHWARTZ at 1203 with *id.* at 1197, 1200, 1201. The Holmes Devise account of ratification is also faulty. See J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 456 (1971).

n53 E. DUMBAULD, *supra* note 3, at 213 (emphasis added); 1 ANNALS OF CONG. 802 (J. Gales ed. 1789) (1st ed. pagination) (Aug. 21, 1789).

n54 1 ANNALS OF CONG., *supra* note 53, at 939 (Sept. 21, 1789).

n55 *Id.* at 948 (Sept. 24, 1789).

n56 E. DUMBAULD, *supra* note 3, at 175-76, 181, 185-86, 193, 202.

n57 See *supra* text accompanying note 34.

n58 THE FEDERALIST No. 55, at 342 (J. Madison).

n59 1 ANNALS OF CONG., *supra* note 53, at 451 (June 8, 1789).

n60 *Id.* at 802 (Aug. 22, 1789).

n61 *Id.* at 753 (Aug. 14, 1789).

n62 See *supra* note 52.

n63 See *supra* text accompanying note 41.

n64 See, e.g., 1 M. FARRAND, *supra* note 44, at 37, 490-92, 500-02.

n65 *Id.* at 4, 37; 3 *id.* at 574-75 & n.6.

<sup>66</sup> 1 ANNALS OF CONG., *supra* note 53, at 747 (Aug. 14, 1789).

<sup>67</sup> Maryland, North Carolina, South Carolina, Delaware, Vermont, and Virginia. 2 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 26, at 321-90; H. AMES, *supra* note 52, at 317; *see also supra* note 52.

<sup>68</sup> 2 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 26, at 322 (ellipsis in original).

<sup>69</sup> E. DUMBAULD, *supra* note 3, at 161, 188, 195, 204-5.

<sup>70</sup> *See* 4 J. MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES 357-62 (1927). At least one state legislature also denounced the congressional act. *Id.* at 361.

<sup>71</sup> *See, e.g.*, A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); C. BLACK, *supra* note 8, at 33-50.

<sup>72</sup> *See, e.g.*, Collins & Skover, *The Future of Liberal Legal Scholarship*, [87 MICH. L. REV. 189, 214 \(1988\)](#). The authors' identification of the First Amendment with minority rights is especially revealing in light of their view, to which I subscribe, that the Bill of Rights is less centrally focused on minority rights than on protecting "the entire citizenry from governmental abuses of power." *Id.*; *see also* Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, [84 COLUM. L. REV. 91, 127 n.189 \(1984\)](#) (presenting First Amendment as in large part a federalism provision; but nevertheless implying that its core concern was to prevent majority tyranny). *But see infra* text accompanying notes 75-76.

<sup>73</sup> [Abrams v. United States, 250 U.S. 616, 624-31 \(1919\)](#) (Holmes, J., dissenting); [Gitlow v. New York, 268 U.S. 652, 672-73 \(1925\)](#) (Holmes and Brandeis, J.J., dissenting); *see also* [Whitney v. California, 274 U.S. 357, 372-80 \(1927\)](#) (Brandeis and Holmes, J.J., concurring).

<sup>74</sup> *See, e.g.*, [Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688-89 \(1959\)](#) (amendment's "guarantee is not confined to the expression of ideas that are conventional or shared by a majority").

<sup>75</sup> *See supra* text accompanying note 5.

<sup>76</sup> *Cf.* McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, [76 CALIF. L. REV. 267, 288-93 \(1988\)](#) (similar structural analysis of contracts and takings clauses based on framework of *Federalist* Nos. 10 & 51).

<sup>77</sup> 1 ANNALS OF CONG., *supra* note 53, at 452 (June 8, 1789); E. DUMBAULD, *supra* note 3, at 208.

<sup>78</sup> 1 ANNALS OF CONG., *supra* note 53, at 454-55 (June 8, 1789).

Madison had previously expressed the same view in a letter to Jefferson on the subject of a possible bill of rights:

In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* [sic] to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 298 (R. Rutland & C. Hobson eds. 1977). Yet Madison's views were atypical, as his next sentence reveals: "This is a truth of great importance, but not yet sufficiently attended to. . . ." Madison went on to say that a Bill of Rights would probably be most effective where unpopular and unrepresentative government action was at issue. "[T]here may be occasions on which the evil may spring from **government self-interest**, and on such, a bill of rights will be a good ground for an appeal to the sense of the community." *Id.* at 299.

<sup>n79</sup> E. DUMBAULD, *supra* note 3, at 208, 211.

<sup>n80</sup> 1 ANNALS OF CONG., *supra* note 53, at 784 (Aug. 17, 1789).

<sup>n81</sup> E. DUMBAULD, *supra* note 3, at 215.

<sup>n82</sup> *Id.* at 217-19.

<sup>n83</sup> See, e.g., U.S. CONST. art. IV, § 4 (guaranteeing republican government at state level).

<sup>n84</sup> See generally C. BLACK, *supra* note 8, at 33-50. Interestingly, when abolitionist Congressmen sought to codify this rule in the 36th Congress, they were voted down 36-20 by a straight party-line vote. Their bill was worded as follows:

But the free discussion of the morality and expediency of slavery shall never be interfered with by the laws of any State or of the United States; and the freedom of speech and of the press, on this and every other subject of domestic and national policy, should be maintained inviolate in all the States.

A. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 40 (1978) (emphasis added).

<sup>n85</sup> See generally M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); [Adamson v. California, 332 U.S. 46, 92-123 \(1947\)](#) (Black, J., dissenting). Indeed, incorporation of free speech and free press principles makes especially strong sense in light of the free speech crusade that the (often unpopular) abolitionists had waged from the 1830's on, fighting discriminatory gag rules on abolitionist petitions in Congress, and censorship of abolitionist literature by both southern state governments and a Democrat-controlled federal postal service. See Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, [96 YALE L.J. 142, 158-66 \(1986\)](#) (authored by Stephen Higginson); C. EATON, THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH (1964); R. NYE, FETTERED FREEDOM (1963); W. SAVAGE, THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE, 1830-

1860 (1938). To recast the historical argument into a textual one, at the heart of the Fourteenth Amendment is the idea that no state shall "abridge" the freedoms of free(d)men; it would be odd indeed to refuse to apply the one pair of clauses of the Bill of Rights whose explicit battle cry is "freedom" and whose language prohibiting "abridging" explicitly tracks the "abridg[ment]" language of the privileges or immunities clause. *Accord* A. MEIKLEJOHN, *supra* note 71, at 53.

<sup>n86</sup> [376 U.S. 254, 270 \(1964\)](#).

<sup>n87</sup> [376 U.S. at 276](#).

<sup>n88</sup> Contemporary critics of the Act highlighted its self-dealing features. See, e.g., Madison, *Report on the Virginia Resolutions* (Jan. 1800), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 141, 144-45; see also 8 ANNALS OF CONG. 2153 (July 1798) (remarks of Edward Livingston stressing "majorit[arian]" thrust of speech and press clauses).

<sup>n89</sup> See *supra* text accompanying note 70.

<sup>n90</sup> See 4 W. BLACKSTONE, COMMENTARIES \*150-53; 2 ELLIOT'S DEBATES, *supra* note 40, at 449-50 (remarks of James Wilson at Pennsylvania ratifying convention); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1879 (1833).

<sup>n91</sup> Prior to [Bloom v. Illinois, 391 U.S. 194 \(1968\)](#), it appears that American judges, following English authorities, claimed a right to enforce injunctions through contempt proceedings from which juries were excluded, even in cases resulting in serious punishment of the contemner. See Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 23, 44-45 (1981).

<sup>n92</sup> See, e.g., *Letters of Centinel* (I), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 136 ("[I]f I use my pen with the boldness of a freeman, it is because I know that *the liberty of the press yet remains unviolated, and juries yet are judges.*") (emphasis in original).

<sup>n93</sup> See *infra* text accompanying notes 265-84.

<sup>n94</sup> Professors Monaghan and Schauer have both noted this shift, but neither points to the Fourteenth Amendment to justify or explain it -- yet another illustration, perhaps, of the invisibility of the incorporation doctrine. See Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 526-32 (1970); Schauer, *The Role of the People in First Amendment Theory*, [74 CALIF. L. REV. 761, 765 \(1986\)](#).

<sup>n95</sup> Cf. A. MEIKLEJOHN, *supra* note 71, at 34-35 (discussing absolute right of free political speech and debate in Congress).

<sup>n96</sup> See, e.g., MD. CONST. of 1776 (Declaration of Rights), art. VIII; MASS CONST. of 1780, pt. I, art. XXI; N.H. CONST. of 1784, pt. I, art I, § XXX; see also an act for declaring the rights and liberties of the subject and settling the succession of the crown (Bill of Rights), 1689, 1 W. & M. ch. 2, § 9; L. LEVY,

EMERGENCE OF A FREE PRESS 102-03 (1985). Indeed, of the original 13 colonies, only Pennsylvania's 1776 constitution extended "freedom of speech" beyond the legislature, *id.* at 5. And as Gordon Wood has shown, the unusual unicameral legislative system in Pennsylvania can be understood as constituting the citizens themselves as the implicit lower house. See G. WOOD, *supra* note 12, at 231-32, 249-51.

<sup>n97</sup> Articles of Confederation, 1781, art. V, cl. 5.

<sup>n98</sup> See *supra* text accompanying notes 16-17.

<sup>n99</sup> 3 J. ROUSSEAU, *DU CONTRAT SOCIAL* ch. XII (1762) (emphasis added) (my translation; in original, "le Souverain ne sauroit agir que quand le peuple est assemble").

<sup>n100</sup> 3 ELLIOT'S DEBATES, *supra* note 40, at 37 (emphasis added).

<sup>n101</sup> See *infra* text accompanying notes 116-19.

<sup>n102</sup> See, e.g., 1 ANNALS OF CONG., *supra* note 53, at 446 (remarks of John Page) (June 8, 1789); J. GOEBEL, *supra* note 52, at 413-30.

<sup>n103</sup> See Amar, *Sovereignty*, *supra* note 11, at 1439.

<sup>n104</sup> I have elsewhere attempted to develop this argument in much greater detail; my seemingly counterintuitive but increasingly confident view is that Article V does not specify the exclusive mode of lawful constitutional alteration. See Amar, *Philadelphia Revisited*, *supra* note 37.

<sup>n105</sup> 1 ANNALS OF CONG., *supra* note 53, at 451 (June 8, 1789) (emphasis added).

<sup>n106</sup> See, e.g., *id.* at 741, 746 (remarks of James Jackson, John Page, and James Madison) (Aug. 13-14, 1789).

<sup>N107</sup> See, e.g., *id.* at 446 (reference to "assembling of a convention") (remarks of John Page) (June 8, 1789); see also Amar, *Philadelphia Revisited*, *supra* note 37, at 1058 and sources cited therein (linking ideas of convention and assembly); Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, [139 U. PA. L. REV. 287 \(1990\)](#) (connecting people's right to assemble to conventions and other forms of popular sovereignty and mass mobilization).

<sup>n108</sup> G. WOOD, *supra* note 12, at 312.

<sup>n109</sup> Indeed, the congressional resolution accompanying the Bill explicitly described it as containing "declaratory" as well as "restrictive" provisions. 2 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 26, at 321. Our Tenth Amendment is of course an obvious example, and was so understood from the outset. See 1 ANNALS OF CONG., *supra* note 53, at 458-59 (remarks of James Madison admitting that his proto-Tenth Amendment "may be considered as superfluous") (June 8, 1789).

<sup>n</sup>110 3 ELLIOT'S DEBATES, *supra* note 40, at 658-59.

<sup>n</sup>111 PA. CONST. of 1776 (Declaration of Rights), art. XVI; N.C. CONST. of 1776 (Declaration of Rights), art. XVIII; VT. CONST. of 1777, ch. 1, § XVIII; MASS. CONST. of 1780, pt. I, art. XIX; N.H. CONST. OF 1784, pt. I, art. I, § XXXII; VT. CONST. of 1786, ch.1, § XXII; 1 ELLIOT'S DEBATES, *supra* note 40, at 328 (New York); [id. at 335](#) (Rhode Island); 4 *id.* at 244 (North Carolina).

<sup>n</sup>112 1 ANNALS OF CONG., *supra* note 53, at 761 (Aug. 15, 1789).

<sup>n</sup>113 See, e.g., *id.* at 767 (remarks of Michael Jenifer Stone) (instruction "would change the Government entirely" from one "founded upon representation" into a "democracy of singular properties") (Aug. 15, 1789). Stone's formulation precisely tracks Madison's *Federalist* No. 10 distinction between representative republics and direct democracies.

<sup>n</sup>114 G. WILLS, *supra* note 33, at 216-30; see also THE FEDERALIST No. 63, at 387 (J. Madison), *quoted supra* note 31.

Only after the instruction debate in the first Congress did state constitutions begin to sever the rights of instruction and assembly. See, e.g., KY. CONST. of 1792, art. XII, § 22.

<sup>n</sup>115 I borrow here the phrasing of my colleague Bruce Ackerman. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, [93 YALE L.J. 1013 \(1984\)](#). Elsewhere I have explained more precisely the extent of my agreements and disagreements with his theory of constitutional amendment. Amar, *Philadelphia Revisited*, *supra* note 37.

<sup>n</sup>116 Amar, *Philadelphia Revisited*, *supra* note 37, at 1065-66.

<sup>n</sup>117 G. WOOD, *supra* note 12, at 312. See also E. DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY 103-05 (1950) (linking assembly, petition, conventions, and rights "of the people"); Smith, "Shall Make No Law Abridging . . .": *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, [54 U. CIN. L. REV. 1153, 1153, 1179 \(1986\)](#) (petition right "inextricably linked to the emergence of popular sovereignty").

<sup>n</sup>118 1 ELLIOT'S DEBATES, *supra* note 40, at 328 (New York); 2 *id.* at 553 (proposals of Maryland convention committee minority); 3 *id.* at 658-59 (Virginia); 4 *id.* at 244 (North Carolina).

<sup>n</sup>119 On the political rights/civil rights distinction, see *infra* text accompanying note 152.

<sup>n</sup>120 Note, *supra* note 85, at 155-58. So too, a single individual can, merely by drafting and filing a complaint, compel both a defendant to answer upon pain of default, and a judge to provide a judicial opinion applying the law to a set of facts. Less dramatically, a mere fifth of a single house may compel the recording of any vote in the house journal. U.S. CONST. art. I, § 5, cl. 3.

<sup>n</sup>121 Note, *supra* note 85, at 153-55; accord Smith, *supra* note 117, at 1178-79.

<sup>n122</sup> R. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 64 (1979).

<sup>n123</sup> See *supra* text accompanying note 70.

<sup>n124</sup> 1 W. BLACKSTONE, *supra* note 90, at \*139 (emphasis added). One scholar has questioned whether these restrictions were rigorously enforced after the Glorious Revolution. Smith, *supra* note 117, at 1162. *But see id.* at 1166 (noting 1781 ruling by Lord Mansfield that restrictions were still in effect).

<sup>n125</sup> 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 299-300 app. (Tucker ed. 1803) [hereinafter TUCKER'S BLACKSTONE].

<sup>n126</sup> See sources cited *supra* note 85.

<sup>n127</sup> For much more support and elaboration than is possible here, see E. DUMBAULD, *supra* note 3, at 104 & n.5; Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371; Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65, 84-85, 127-30 (1962); Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, [61 NOTRE DAME L. REV. 311, 321-23 \(1986\)](#); Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DE PAUL L. REV. 1191 (1990).

<sup>n128</sup> [32 U.S. \(7 Pet.\) 243 \(1833\)](#).

<sup>n129</sup> See *supra* text accompanying notes 95-98.

<sup>n130</sup> See M. CURTIS, *supra* note 85.

<sup>n131</sup> On the other hand, because states had dissolved their formal establishments well before the Civil War, and at least one state had adopted a state establishment clause with "respecting" language tracking that of the federal First Amendment, the original federalism dimension of the federal clause was probably less obvious in the 1860's than in the early 1800's. See IOWA CONST. of 1857, art. I, § 3.

<sup>n132</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866). Howard omitted mention of the free exercise clause as well, but as we shall see below, there are stronger structural reasons for incorporating that clause. See *infra* text accompanying notes 134-35. What's more, other architects of Reconstruction *did* mention "free exercise" or "conscience" while omitting all mention of establishment. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 475-76 (1871) (remarks of Henry Dawes); *id.* at 84-85 app. (remarks of John Bingham). Early judicial opinions also mentioned free exercise while ignoring nonestablishment. See, e.g., [The Slaughter-House Cases](#), [83 U.S. \(16 Wall.\) 36, 118-19 \(1872\)](#) (Bradley, J., dissenting); [United States v. Hall](#), [26 F. Cas. 79, 81 \(C.C.S.D. Ala. 1871\)](#) (No. 15,282) (Woods, J.).

n133 On the issue of incorporating the Ninth Amendment, see *infra* note 139.

n134 MASS. CONST. of 1780, pt. I, arts. II-III.

n135 See *supra* text accompanying notes 77-80.

n136 Compare Proclamation Appointing a Day of Thanksgiving and Prayer (Nov. 11, 1779), reprinted in 3 THE PAPERS OF THOMAS JEFFERSON 177 (J. Boyd ed. 1951) [hereinafter J. Boyd] with Letter from Thomas Jefferson to Attorney General Levi Lincoln (Jan. 1, 1802), reprinted in 8 THE WRITINGS OF THOMAS JEFFERSON 129 (P. Ford ed. 1897) [hereinafter P. Ford]; see also Second Inaugural Address (Mar. 4, 1805), reprinted in 8 P. Ford at 341, 344 (suggesting that states have power over religion where federal government has none).

n137 1 ANNALS OF CONG., *supra* note 53, at 949-50.

n138 [330 U.S. 1, 11-16 \(1947\)](#). *Everson's* incorporation drew support from dicta in earlier cases in which the Court held that free exercise principles applied against states, [330 U.S. at 15 & n.22](#).

n139 See [Adamson v. California, 332 U.S. 46, 68-123 \(1947\)](#) (Black, J., dissenting). Black appeared to define the "Bill of Rights" as encompassing only the first eight amendments, [332 U.S. at 72 n.5, 98, 110](#). The federalism-based awkwardness of incorporating the Tenth Amendment has already been noted; and Black's disinclination to incorporate the Ninth is supported by some of the historical evidence he cites, but is inconsistent with other portions of that evidence. Compare [332 U.S. at 105, 106, 113-15](#) (quoting speeches referring to "first eight" amendments) with *id.* at 121-22 (quoting material referring to "ten amendments . . . so far as they recognize rights of persons"). Justice Black, of course, read the Ninth Amendment quite narrowly. See [Griswold v. Connecticut, 381 U.S. 479, 518-20 \(1965\)](#) (Black, J., dissenting). His strongest structural argument against incorporating that amendment -- that it's tough to transmogrify a provision "enacted to protect state powers against federal invasion" into "a weapon of federal [judicial] power to prevent state legislatures from passing laws they consider appropriate to govern local affairs," [381 U.S. at 520](#) -- relies on a plausible yet debatable reading of the Ninth Amendment. See *infra* note 307, and sources cited therein. It's a structural argument, however, that applies in spades against Black's own commitment to incorporating the establishment clause.

n140 Abandoning *Everson* would not necessarily destabilize existing understandings. Although a detailed discussion of the possible applications of my substitute synthesis of First and Fourteenth Amendment principles is beyond the scope of my remarks here, consider the example of voluntary school prayer. In the absence of establishment clause constraints, state-supported prayer might not be deemed per se unconstitutional. Yet under the well established principles of [Board of Education v. Barnette, 319 U.S. 624 \(1943\)](#) (school pledge case), and [Wooley v. Maynard, 430 U.S. 705 \(1977\)](#) ("live free or die" case) -- free speech cases with heavy free exercise overtones -- the First and Fourteenth Amendments would nevertheless require the state to allow any student who objected to opt out without penalty. In some

situations -- for example, involving children of tender age, or specially strong social pressure from the dominant religious community -- even the existence of a formal "no hassle pass" might not be deemed sufficient to render the state-led prayer "voluntary," and thus permissible. Yet if a court were to make this claim about prayer, why treat the Pledge of Allegiance any differently? Once we disregard the ill-fitting establishment clause, the issues implicated by pledges and prayers in public schools tend to converge. If we insist on keeping the ban on school-sponsored prayer in all its strictness by emphasizing the inherently coercive atmosphere of elementary school classrooms, *Barnette* must be expanded to prohibit the Pledge altogether, rather than simply requiring an opt-out. This seems even clearer in light of the post-*Barnette* insertion of the words "under God" into the Pledge.

So too, at some point, equal protection principles -- which undeniably apply to state governments -- might limit the ability of a state to privilege one religion over another. Even without the establishment clause, a court could plausibly hold that a statute declaring that "this is a Christian state" denies equal concern and respect to discrete social minority groups -- but only if the court were willing to think in a similar way about a statute declaring English to be the state's "official" language.

Thus, the main reason for abandoning *Everson* is not that it necessarily leads to the wrong results, but simply that it rests on faulty history and shaky structural analysis. Emphasizing free exercise, free speech and equal protection instead of nonestablishment, my substitute synthesis focuses on the key issues of *equality* and *freedom* from coercion. These are obviously the issues at the heart of Reconstruction, and should be central to any application of the Fourteenth Amendment, yet as noted earlier, the Fourteenth Amendment itself too often drops out of the analysis altogether. Ironically, its core themes of equality and freedom are often obscured and even violated by the byzantine edifice of establishment clause doctrine in which the modern Court has imprisoned itself.

The ideas in this footnote have been importantly influenced by Michael Paulsen. See *generally* Paulsen, *supra* note 127.

<sup>n141</sup> See G. WOOD, *supra* note 12, at 427 ("Religion was the strongest promoter of virtue, the most important ally of a well-constituted republic.").

<sup>n142</sup> PA. CONST. of 1776, §§ 44-45 (emphasis added).

<sup>n143</sup> MASS. CONST. of 1780, pt. I, art. III.

<sup>n144</sup> *Id.* pt. II, ch. V, art. I.

<sup>n145</sup> The linkage between education and religion was so obvious that when Madison proposed giving Congress explicit textual authority to establish a national university, he felt compelled to explicitly deny power to make that university sectarian. The proposal failed. 2 M. FARRAND, *supra* note 44, at 616.

<sup>n146</sup> MASS. CONST. of 1780, pt. I, art. III.

<sup>n</sup>147 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 320 n.4 (Vintage ed. 1945).

<sup>n</sup>148 *Id.* at 320.

<sup>n</sup>149 See *supra* text accompanying note 100.

<sup>n</sup>150 E. DUMBAULD, *supra* note 3, at 174 (emphasis added).

<sup>n</sup>151 Apparently, the violent nature of revolution induced Locke to strictly limit the legitimate occasions for the exercise of the people's right to revolt. The people, said Locke, could reclaim their sovereignty only when government action approached true and systematic tyranny. J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* §§ 221-43 (T. Peardon ed. 1952). Between 1776 and 1789, Americans domesticated and defused the idea of violent revolution by channeling it into the newly renovated legal instrument of the peaceful convention. Through the idea of conventions, Americans *legalized* revolution, substituting ballots for bullets. As a result, by 1789 Americans could expand the Lockean right to "revolt" -- to alter or abolish government -- into a right the people could invoke (by convention) at any time and for any reason. See, e.g., G. WOOD, *supra* note 12, at 342-43; 1 *WORKS OF JAMES WILSON* 77-79 (R. McCloskey ed. 1967); 2 *ELLIOT'S DEBATES*, *supra* note 40, at 432-33 (remarks of James Wilson at Pennsylvania ratifying convention). Yet as the Second Amendment reminds us, even the new legal institutions ultimately rested on force -- force that ideally would never need to be invoked, yet whose latent existence would nevertheless deter.

<sup>n</sup>152 There is some fuzziness at the edges, but arms-bearing and suffrage were intimately linked 200 years ago and have remained so for two centuries. Thus, Lincoln's initial decision to propose the Thirteenth Amendment, and the Republicans' eventual decision to endorse the Black franchise in the Fifteenth Amendment, were importantly influenced by the fact that Black soldiers had served the Union during the Civil War. Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 *NOTRE DAME LAW.* 5, 9-11 (1976). Indeed, section 2 of the Fourteenth Amendment defined a state's presumptive electorate as all males over 21. This was virtually identical to the definition of the general militia, which encompassed all adult males capable of bearing arms. In our own century, Woodrow Wilson and other national politicians explicitly endorsed women's suffrage in recognition of women's roles as "partners" in the war effort against Germany. 1 *W. WILSON, WAR AND PEACE* 263, 265 (R. Baker & W. Dodd eds. 1927); A. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890-1920*, at 166 (1971); A. GRIMES, *supra* note 84, at 92. Even more recently, the Twenty-Sixth Amendment extending the franchise to eighteen-year-olds grew out of the perceived unfairness of any gap between the Vietnam draft age and the voting age. *Id.* at 141-47. For an extraordinarily rich discussion of the *political* connotations of arms-bearing, see Scarry, *War and the Social Contract: The Right to Bear Arms*, 139 *U. PA. L. REV.* (forthcoming 1991).

<sup>n</sup>153 For arguments supporting a broad reading of the Amendment as protecting arms-bearing outside of military service, see Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to Bear Arms*, *LAW & CONTEMP. PROBS.*, Winter 1986, at 151. *But see*, e.g., [Aymette v. The State](#),

[21 Tenn. \(2 Hum.\) 154, 161 \(1840\)](#) ("The phrase '*bear arms*,' . . . has a military sense, and no other. . . . A man in the pursuit of deer, elk and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms*. . . ."); accord Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, [82 MICH. L. REV. 204, 219-20, 267 \(1983\)](#) [hereinafter Kates, *Original Meaning*]. Kates has subsequently modified his position in response to Halbrook's evidence. Kates, *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS., Winter 1986, at 143, 149.

<sup>n154</sup> See Scarry, *supra* note 152.

<sup>n155</sup> THE FEDERALIST No. 28, at 180 (A. Hamilton).

<sup>n156</sup> *Id.* No. 46, at 299 (J. Madison).

<sup>n157</sup> See generally Amar, *Sovereignty*, *supra* note 11, at 1494-1500.

<sup>n158</sup> See, e.g., 3 ELLIOT'S DEBATES, *supra* note 40, at 48, 52 (remarks of Patrick Henry at Virginia ratifying convention).

<sup>n159</sup> See, e.g., J. ELY, DEMOCRACY AND DISTRUST 94-95, 227 n.76 (1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-2, at 299 n.6 (2d ed. 1988). For a more detailed catalogue of Second Amendment scholarship, see Kates, *Original Meaning*, *supra* note 153, at 206-07.

<sup>n160</sup> L. TRIBE, *supra* note 159, at 299 n.6.

<sup>n161</sup> See U.S. CONST. amend. X (distinguishing between "States respectively" and "the people").

<sup>n162</sup> See, e.g., Kates, *Original Meaning*, *supra* note 153, at 214-18; Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J. L. & PUB. POL'Y 559, 623-28 (1986); *Letters From The Federal Farmer* (III, XVIII), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 242, 341-42.

<sup>n163</sup> In addition to sources cited *supra* note 162, see S. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 920 (1978).

<sup>n164</sup> E. DUMBAULD, *supra* note 3, at 214.

<sup>n165</sup> See, e.g., THE FEDERALIST No. 25, at 166 (A. Hamilton); *id.* No. 29, at 184 (A. Hamilton); *id.* No. 46, at 299 (J. Madison).

<sup>n166</sup> See, e.g., 3 ELLIOT'S DEBATES, *supra* note 40, at 425 (remarks of George Mason at Virginia ratifying convention) ("Who are the Militia? They consist now of the whole people. . . ."); *Letters From The Federal Farmer* (XVIII), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 341 ("A militia, when properly formed, are in fact the people themselves . . . and include . . . all men capable of bearing arms. . . .").

<sup>n167</sup> See, e.g., J. ELY, *supra* note 159, at 227 n.76; L. TRIBE, *supra* note 159, at 299 n.6.

<sup>n168</sup> [188 U.S. 321 \(1903\)](#).

<sup>n169</sup> See, e.g., VA. DECLARATION OF RIGHTS of 1776, § 13; DEL. DECLARATION OF RIGHTS of 1776, § 18; MD. CONST. of 1776 (Declaration of Rights), art. XXV; N.H. CONST. of 1784, pt. I, art. I, § XXIV; see also Hardy, *supra* note 162, at 626 n.328.

<sup>n170</sup> Cf. [State v. Reid, 1 Ala. 612, 616-17 \(1840\)](#) (distinguishing between arms regulation and arms prohibition).

<sup>n171</sup> See generally S. HALBROOK, *supra* note 163, at 107-53; Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, [4 GEO. MASON L. REV. 1 \(1981\)](#).

<sup>n172</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).

<sup>n173</sup> W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 120-30 (1825); accord [Nunn v. State, 1 Ga. 243 \(1846\)](#); see also [State v. Chandler, 5 La. Ann. 489 \(1850\)](#) (state regulation of arms case with dictum, "This is the right guaranteed by the Constitution of the United States.").

<sup>n174</sup> U.S. CONST. art. I, § 8, cls. 1, 9. See 4 ELLIOT'S DEBATES, *supra* note 40, at 210 (remarks of Richard Spaight in North Carolina ratifying convention: "Men are to be *raised* by bounty.") (emphasis added).

<sup>n175</sup> British impressment in the 1770's was one of the major grievances triggering the American Revolution and was explicitly denounced by the Declaration of Independence. In the later impressment debate leading to the War of 1812, Secretary of State Monroe declared that impressment "is not an American practice, but is utterly repugnant to our Constitution. . . ." 28 ANNALS OF CONG. 81 (1814) (remarks of Senator Jeremiah Mason). Yet even if naval impressment were deemed permissible, army conscription power would not necessarily follow. Historically the two were distinct issues -- the British government before the Revolution "did attempt to exercise in this country the supposed right of impressment for the Navy, which it never did for the Army." *Id.* As explained below, the word "army," in contradistinction to "militia," connoted a volunteer force. The word "navy" was more ambiguous, as illustrated by the British-American tussles over impressment. These textual and historical points can be recast into a structural argument: impressing "private" sailors who had already voluntarily agreed to abandon ordinary civilian life and submit to the harsh discipline and command on a merchant ship involved a smaller marginal deprivation of liberty than wrenching Citizen farmers from their families and lands through an army draft.

<sup>n176</sup> See, e.g., THE FEDERALIST No. 24, at 161 (A. Hamilton) (defining "army" as "permanent corps in the pay of government"); WEBSTER'S AMERICAN DICTIONARY (1828). In addition to the sources cited *supra* notes 162-63, see J. GRAHAM, A CONSTITUTIONAL HISTORY OF THE MILITARY

DRAFT (1971); Freeman, *The Constitutionality of Direct Federal Military Conscription*, 46 IND. L.J. 333, 337 n.14 (1971); Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493 (1969); Hirsch, *The Militia Clauses of the Constitution and the National Guard*, [56 U. CIN. L. REV. 919, 958-59 \(1988\)](#); 3 J. STORY, *supra* note 90, at § 1179.

✚n177 *But see* Malbin, *Conscription, The Constitution and the Framers: An Historical Analysis*, 40 FORDHAM L. REV. 805, 824 (1972). Malbin claims that although Congress can conscript under the army clause, the militia clause is not thereby rendered trivial. According to him, had Congress not been able to rely on the militia as a back-up military force, Congress would have been tempted to keep a large (and thus dangerous) *standing* army at all times. The militia clause removes this temptation, and thus adds something valuable, he claims. Malbin's argument fails miserably. If Congress did have army conscription power, as he claims, surely it would have the lesser power under the *army* clause to draft back-up army "reserves" obviating the need for large standing armies -- but once again, this contingent draft violates the cooperative federalism safeguards imposed by the militia clause.

✚n178 The idea of a national army based on a national draft is a distinctly modern one, born in Napoleonic France in 1798 -- a decade *after* ratification of our Constitution. Freeman, *The Constitutionality of Peacetime Conscription*, 31 VA. L. REV. 40, 68 (1944); Friedman, *supra* note 176, at 1498-99 & n.20; Malbin, *supra* note 177, at 811. Tellingly, although many leading Anti-Federalists voiced loud fears about the federal government's power to mistreat conscripted militiamen, virtually nothing was said about possible mistreatment of conscripted army soldiers -- the very idea bordered on oxymoron. Put another way, even the most suspicious Anti-Federalists generally seemed to assume that the federal government could not use the army clause to justify conscription, and no Federalists, of course, ever supported such a reading. Friedman, *supra* note 176, at 1525-33; *see also Essay by Deliberator*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 178-79. *But see Essays of Brutus* (VIII), in 2 *id.* at 406 (questioning whether Congress might have impressment power under the army clause, but referring to this as a draft "from the militia"). Elsewhere, Brutus took the extreme position that the Article I enumeration of powers imposed no meaningful or sincere limits on congressional authority.

✚n179 Friedman, *supra* note 176, at 1508. States' rights advocates viewed the state appointment of officers as vital. When Madison proposed to limit states to appointments "under the rank of General," the Philadelphia convention voted overwhelming against him. Roger Sherman called the modification "absolutely inadmissible" and Elbridge Gerry sarcastically suggested that the convention might as well abolish state governments altogether, create a king, and be done with it. 2 M. FARRAND, *supra* note 44, at 388.

✚n180 The social aspects of militias are nicely captured in the following account of a typical militia muster in late seventeenth-century Massachusetts:

On the training days, a town's militia company generally assembled on public grounds, held roll call and prayer, practiced the manual of arms and close order drill, and passed under review and inspection by the militia officers and other public officials. There might also be target practice and sham battles

followed in the afternoon -- when times were not too perilous -- by refreshments, games, and socializing.

R. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 6 (1967). Note how the reference to prayer fits well with the role of local religious establishments in Massachusetts, see *supra* text accompanying notes 143-46.

<sup>n</sup>181 At least seven Revolution-era constitutions or bills of rights echoed -- almost *in haec verba* -- the language of the Virginia Bill of Rights of 1776, § 13: "[I]n all cases the military should be under strict subordination to, and governed by, the civil power." These provisions were invariably placed alongside paeans to "the militia" and/or guarantees of the right of "the people" to keep and bear arms. See PA. CONST. of 1776 (Declaration of Rights), art. XIII; DEL. DECLARATION OF RIGHTS of 1776, § 20 MD. CONST. OF 1776 (Declaration of Rights), art. XXVII; N.C. CONST. of 1776 (Declaration of Rights), art. XVIII; VT. CONST. of 1777, ch. 1, § XV; MASS. CONST. of 1780, pt. I, art. XVII; N.H. CONST. of 1784, pt. I, art. I, § XXVI. See generally 2 A. DE TOCQUEVILLE, *supra* note 147, at 279-302. Although not explicitly analyzing the allocation of military power under the U.S. Constitution, Tocqueville's account of civilian versus professional armies strongly supports my analysis.

<sup>n</sup>182 See, e.g., THE FEDERALIST Nos. 25, 29 (A. Hamilton).

<sup>n</sup>183 See *supra* text accompanying notes 157-58; see also *supra* note 179.

<sup>n</sup>184 See 1 ANNALS OF CONG., *supra* note 53, at 777 (remarks of Elbridge Gerry) ("What, sir, is the use of the militia? It is to prevent the establishment of a standing army, the bane of liberty."); cf. Malbin, *supra* note 177, at 824 n.69 (criticizing overreliance on republican ideology in interpreting militia and army clauses of Article I). Interestingly, at the Philadelphia convention George Mason proposed an anti-standing-army preamble to the Article I militia clause, but the proposal failed. 2 M. FARRAND, *supra* note 44, at 617.

<sup>n</sup>185 [17 U.S. \(4 Wheat.\) 316, 419-21 \(1819\)](#).

<sup>n</sup>186 1 PAPERS OF DANIEL WEBSTER: SPEECHES AND FORMAL WRITINGS 21 (C. Wiltse ed. 1986).

<sup>n</sup>187 *Id.* at 25-29.

<sup>n</sup>188 *Id.* at 30.

<sup>n</sup>189 *Report and Resolutions of the Hartford Convention, reprinted in* 1 GREAT ISSUES IN AMERICAN HISTORY 237, 240 (R. Hofstadter ed. 1958).

<sup>n</sup>190 The precise degree to which constitutional scruples contributed to the bills' defeat is the subject of some dispute. Compare Malbin, *supra* note 177, at 820-21 & n.56 with Friedman, *supra* note 176, at 1541-44 and Freeman, *supra* note 176, at 341-42. See generally J. LEACH, CONSCRIPTION IN THE UNITED STATES: HISTORICAL BACKGROUND 30-126 (1952).

<sup>n</sup>191 [245 U.S. 366 \(1918\)](#).

During the Civil War, the federal government adopted a draft bill of sorts, although many of its supporters conceded that the army clause might not allow direct conscription. These supporters tried to characterize the bill as akin to a tax and denied that it established illegitimate conscription, pointing to its provisions allowing money payment in lieu of personal military service, 1 F. SHANNON, *THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY, 1861-1865*, at 308 (1928). In the end, less than one-fifth of the men "drafted" personally served, see Freeman, *supra* note 178, at 72 n.102. In an unpublished sketch in preparation for a proper judicial case that never materialized, Chief Justice Taney nevertheless declared the act unconstitutional as an impermissible circumvention of the militia clause. R. Taney, *Thoughts on the Conscription Law of the United States*, reprinted in *THE MILITARY DRAFT 207-18* (M. Anderson ed. 1982).

<sup>n192</sup> [Debs v. United States, 249 U.S. 211 \(1919\).](#)

<sup>n193</sup> [Abrams v. United States, 250 U.S. 616 \(1919\).](#)

<sup>n194</sup> [376 U.S. 254, 273-76 \(1964\).](#)

<sup>n195</sup> The national government may call out the militia only to "execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 8, cl. 15.

<sup>n196</sup> [Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 \(1952\).](#)

<sup>n197</sup> [343 U.S. at 644](#) (Jackson, J., concurring).

<sup>n198</sup> [381 U.S. 479, 484 \(1965\).](#)

<sup>n199</sup> A LEXIS search of Supreme Court citations to the Third Amendment since *Youngstown* reveals seven attempts to associate the amendment with privacy, and only one (dissenting) invocation of the amendment in a context involving alleged military overreaching. See [Laird v. Tatum, 408 U.S. 1, 22 \(1972\)](#) (Douglas, J., dissenting) (Army surveillance case). By contrast, the precursors of the Third Amendment proposed by state ratifying conventions invariably linked the quartering amendment with its militia counterpart. E. DUMBAULD, *supra* note 3, at 182, 185, 201.

<sup>n200</sup> Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 31 (1984).

<sup>n201</sup> E. DUMBAULD, *supra* note 3, at 182-85.

<sup>n202</sup> *Id.* at 184 (emphasis added).

<sup>n203</sup> MASS. CONST. of 1780, pt. I, art. XIV; N.H. CONST. of 1784, pt. I, art. I, § XIX; E. DUMBAULD, *supra* note 3, at 191 (New York); *id.* at 200 (North Carolina).

<sup>n204</sup> E. DUMBAULD, *supra* note 3, at 207.

<sup>n</sup>205 PA. CONST. of 1776 (Declaration of Rights), art. X. Vermonters copied Pennsylvania's language, VT. CONST. of 1777, ch. 1, § XI; VT. CONST. of 1786, ch. 1, § XII, but the legal status of Vermont's statehood had not been definitively resolved in 1789.

<sup>n</sup>206 U.S. CONST. art. I, § 6, cl. 1.

<sup>n</sup>207 98 Eng. Rep. 489 (C.P. 1763), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 230.

<sup>n</sup>208 The other leading case here was *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 233. The Boston writs of assistance case appears to have played very little role in the discussion leading up to the Fourth Amendment. The leading historical account of that Amendment uncovered only one reference to the writs of assistance, N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION* 89 n.40 (1937). Lasson attributed the pseudonymous pamphlet containing this reference to Elbridge Gerry. In fact, Charles Warren has shown that this pamphlet was written by Mercy Otis Warren, the sister of the colonial lawyer James Otis, who argued the writs of assistance case. Warren, *Elbridge Gerry, James Otis and Mercy Warren and the Ratification of the Constitution*, in 64 MASSACHUSETTS HISTORICAL SOCIETY PROCEEDINGS (1932).

<sup>n</sup>209 On *Wilkes*, see R. POSTGATE, *THAT DEVIL WILKES* (1929); G. RUDE, *WILKES AND LIBERTY* (1962); P. MAIER, *FROM RESISTANCE TO REVOLUTION* 162-69 (1972); [Powell v. McCormack, 395 U.S. 486, 527-31 \(1969\)](#). On Camden, see T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 184 n.35 (1969). On *Wood* and its companion cases, see *id.* at 29-35 and accompanying endnotes; N. LASSON, *supra* note 208, at 43-49.

<sup>n</sup>210 *Rex v. Wilkes*, 95 Eng. Rep. 737 (C.P. 1763), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 231.

<sup>n</sup>211 See, e.g., [Johnson v. United States, 333 U.S. 10 \(1943\)](#).

<sup>n</sup>212 See generally Amar, *Sovereignty*, *supra* note 11, at 1486-87, 1506-07, and sources cited therein; W. NELSON, *AMERICANIZATION OF THE COMMON LAW* 17 (1975); see also *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765).

<sup>n</sup>213 See, e.g., W. NELSON, *supra* note 212, at 190 n.57 (citing Massachusetts case with jury verdict that officer not guilty "If this Warrant be Lawfull in This Case," but guilty otherwise); *id.* at 92 ("due issuance of a [judicial] warrant was an absolute defense to an officer who was sued for an unlawful search or arrest"). In *Wood* and *Entick*, had the warrants been lawful, each surely would have been a good defense. 4 W. BLACKSTONE, *supra* note 90, at \*286-90 (general warrant "is therefore in fact no warrant at all: for it will not justify the officer who acts under it; whereas a lawful warrant will at all events indemnify the officer, who executes the same ministerially").

<sup>n</sup>214 Cf. Scalia, *The Rule of Law as a Law of Rules*, [56 U. CHI. L. REV. 1175, 1180-86 \(1989\)](#).

<sup>n</sup>215 Cf. 2 ELLIOT'S DEBATES, *supra* note 40, at 550 (amendment proposed by committee at Maryland ratifying convention requiring jury trial in "all cases of trespasses" and prohibiting appellate relitigation of jury's factual findings).

<sup>n</sup>216 See *id.* at 551-52 (general warrants should be "forbidden to those *magistrates* who are to administer the general government") (emphasis added).

<sup>n</sup>217 Accord T. TAYLOR, *supra* note 209, at 21-50. Professor Taylor offers a wealth of historical evidence against collapsing the Fourth Amendment's distinct requirements, but nowhere suggests the possible relevance of jury trial issues. Although Professor Nelson suggests that arrests and searches always required warrants in colonial Massachusetts, W. NELSON, *supra* note 212, at 17-18, he elsewhere cites two early nineteenth-century cases holding that no arrest warrant was needed "in cases of treason and felony, and . . . to preserve the peace and to prevent outrage." *Id.* at 226 n.126. The later cases accord with Professor Taylor's extensive evidence, and with Blackstone. 4 W. BLACKSTONE, *supra* note 90, at \*286-90.

<sup>n</sup>218 I owe this alternative formulation to a conversation with Mike Paulsen.

<sup>n</sup>219 See *supra* text accompanying notes 90-93.

<sup>n</sup>220 S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 47 (2d. ed. 1984); N. LASSON, *supra* note 208, at 24-50; 3 J. STORY, *supra* note 90, at § 1895; see also 2 ELLIOT'S DEBATES, *supra* note 40, at 551 (Maryland convention recognition that general warrants were "the great engine by which power may destroy those individuals who resist usurpation").

<sup>n</sup>221 The linkage between juries and Fourth Amendment interests was most vividly articulated in the following passage from an Anti-Federalist essayist:

[If a federal constable searching] for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift . . . a trial by jury would be our safest resource, heavy damages would at once punish the offender and deter others from committing the same; but what satisfaction can we expect from a lordly [judge] always ready to protect the officers of government against the weak and helpless citizens. . . . PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 154 (J. McMaster & F. Stone eds. 1888); see also *id.* at 781-82 (remarks of Robert Whitehill at Pennsylvania ratifying convention). Immediately after criticizing the Constitution's inadequate provisions for jury trial, Whitehill invoked "The Case of Mr. Wilkes" -- a trespass action that had been tried to a jury -- and argued that "the Doctrine of general Warrants show[s] that *Judges* may be corrupted." *Id.* (emphasis added).

<sup>n</sup>222 See Amar, *Sovereignty*, *supra* note 11, at 1504-10.

<sup>n</sup>223 See *id.* at 1510-12.

<sup>n</sup>224 But see McConnell, *supra* note 76, at 288-93 (using *Federalist* No. 51 framework and federalism analysis to argue that takings clause was primarily motivated by agency cost concerns about remote and self-interested federal

officials, especially military officers). Professor McConnell's analysis helps to explain why the takings clause applied only against the federal government. To the extent his explanation works, the takings clause is that much smaller an exception to my overall thesis about the Bill of Rights.

<sup>n225</sup> See *supra* text accompanying notes 77-82.

<sup>n226</sup> See E. DUMBAULD, *supra* note 3, at 53, 162 (item 14).

<sup>n227</sup> *Id.* at 162 (item 23).

<sup>n228</sup> Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 870 (1960); see also [Adamson v. California, 332 U.S. 46, 70-71 \(1947\)](#) (Black, J., dissenting) (noting connection between First Amendment and limitations on "arbitrary court action" imposed by Fifth, Sixth, and Eighth Amendments).

<sup>n229</sup> Trials for High Treason of Lieut. Col. Edward Marcus Despard et al. 46 (Birmingham 1803) *quoted in* T. TAYLOR, *supra* note 209, at 180 n.41.

<sup>n230</sup> See *supra* text accompanying notes 196-97.

<sup>n231</sup> See *supra* text accompanying note 79.

<sup>n232</sup> See 2 M. FARRAND, *supra* note 44, at 587-588.

<sup>n233</sup> See E. DUMBAULD, *supra* note 3, at 176, 181-82, 183-84, 188, 190-91, 200, 204.

<sup>n234</sup> L. LEVY, *supra* note 96, at 227.

<sup>n235</sup> 2 WORKS OF JAMES WILSON, *supra* note 151, at 537.

<sup>n236</sup> See *supra* text accompanying note 70.

<sup>n237</sup> See [United States v. Cox, 342 F. 2d 167, 185-96 \(1965\)](#) (Wisdom, J., concurring).

<sup>n238</sup> See [Adamson v. California, 332 U.S. 46, 70-71 \(1947\)](#) (Black J., dissenting); [Green v. United States, 356 U.S. 165, 209 \(1957\)](#) (Black J., dissenting); *cf. Essays by a Farmer* (IV), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 39 ("Whenever therefore the trial by juries has been abolished, . . . [t]he judiciary power is immediately absorbed, or placed under the direction of the executive. . . ."). On Wilkes, see I. BRANT, THE BILL OF RIGHTS, at 189-91 (1965).

<sup>n239</sup> See 2 G. HASKINS & H. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATION OF POWER: JOHN MARSHALL 1801-15, at 140, 159 (1981); J. SMITH, FREEDOM'S FETTERS 139-417 (1956).

<sup>n240</sup> See *infra* text accompanying notes 265-84.

<sup>n241</sup> 1 A. DE TOCQUEVILLE, *supra* note 147, at 293-94.

<sup>n</sup>242 1 M. FARRAND, *supra* note 44, at 490.

<sup>n</sup>243 See Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127.

<sup>n</sup>244 1 A. DE TOCQUEVILLE, *supra* note 147, at 295-96 (emphasis added). Francis Lieber, one of the leading constitutional commentators of the mid-nineteenth century, shared Tocqueville's assessment. See F. LIEBER, CIVIL LIBERTY AND SELF-GOVERNMENT 250 (1853).

<sup>n</sup>245 1 A. DE TOCQUEVILLE, *supra* note 147, at 297.

<sup>n</sup>246 *Essays by a Farmer* (IV), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 39.

<sup>n</sup>247 *Letters From The Federal Farmer* (IV), in 2 *id.* at 249; *cf.* *Letters of Cato* (V), in *id.* at 119 ("the opportunity you will have to participate in government [is] one of the principal securities of a free people").

<sup>n</sup>248 *Letters From The Federal Farmer* (XV), in *id.* at 320.

<sup>n</sup>249 Quoted in Holt, "The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793, 36 BUFFALO L. REV. 301, 325 (1987).

<sup>n</sup>250 H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 19 (1981) (footnote omitted). Storing's language here closely tracks that of the Anti-Federalist essayist Centinel, see *Letters of Centinel* (II), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 149 (jury trial "preserves in the hands of the people, that share which they ought to have in the administration of justice"); *accord* 2 B. SCHWARTZ, *supra* note 38, at 1174 (quoting speech of Governor John Hancock to Massachusetts legislature) (jury trial provisions "appear to me to be of great consequence. In all free governments, a share in the administration of the laws ought to be vested in, or reserved to the people. . . ."). The centrality of the jury is nowhere more evident than in Hancock's speech on Congress' proposed Bill of Rights. No clauses are mentioned other than the three dealing with juries.

<sup>n</sup>251 H. STORING, *supra* note 250, at 19.

<sup>n</sup>252 *Letters From The Federal Farmer* (IV), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 249-50.

<sup>n</sup>253 Letter from Thomas Jefferson to L'Abbe Arnoux (July 19, 1789), *reprinted in* 15 J. Boyd, *supra* note 136, at 282, 283 (1958); *see also* 2 THE WORKS OF JOHN ADAMS 253 (C. Adams ed. 1850) (diary entry, Feb. 12, 1771) ("the common people should have as complete a control" over judiciary as over legislature).

<sup>n</sup>254 1 A. DE TOCQUEVILLE, *supra* note 147, at 293-94. Professor Nelson writes that jurors were typically selected "by lot from a list of freeholders, elected by the voters of a jurisdiction, or summoned by the sheriff from among

the bystanders at court." Nelson, *supra* note 163, at 918 n.140. Thomas Jefferson was harshly critical of this last method, which he believed vested too much discretion in permanent executive officials. Petition on Election of Jurors (Oct. 1798), *reprinted in* 7 P. Ford, *supra* note 136, at 284, 285 (1896); First Annual Message (Dec. 8, 1801), *reprinted in* 8 P. Ford, *supra* note 136, at 108, 123-24 (1897); Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *reprinted in* 10 P. Ford, *supra* note 136, at 37, 39 (1899).

✚n255 J. TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (Stark ed. 1950).

✚n256 *Essays by a Farmer* (IV), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 38.

✚n257 1 A. DE TOCQUEVILLE, *supra* note 147, at 293.

✚n258 See, e.g., G. WOOD, *supra* note 12, at 521-22; *Essays of Brutus* (XVI), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 444-45; 2 ELLIOT'S DEBATES, *supra* note 40, at 309-11 (remarks of Melancton Smith at New York ratifying convention). On the possible use of lotteries to achieve *legislative* rotation, see my Note, *Choosing Representatives by Lottery Voting*, [93 YALE L.J. 1283 \(1984\)](#).

✚n259 Letter from Thomas Jefferson to George Washington (May 2, 1788), *reprinted in* 13 J. Boyd, *supra* note 136, at 124, 128 (1956); Letter from Thomas Jefferson to James Madison (July 31, 1788), *reprinted in* 13 J. Boyd, *supra* note 136, at 440, 442-43 (1956); Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 12 J. Boyd, *supra* note 136, at 438, 440-41 (1955); Letter from Thomas Jefferson to Francis Hopkinson (Mar. 13, 1789), *reprinted in* 14 J. Boyd, *supra* note 136, at 649, 650 (1958).

✚n260 2 ELLIOT'S DEBATES, *supra* note 40, at 288.

✚n261 The only state constitutional precursor of the double jeopardy clause conjoined this provision to its criminal jury trial guarantee. N.H. CONST. of 1784, pt. I, art. I, § XVI. The Maryland state ratifying convention -- one of only two that raised the double jeopardy issue -- made this linkage even more explicit: "That there shall be a trial by jury in all criminal cases . . . and that there be no appeal from matter of fact, or second trial after acquittal." This clause was immediately followed by a proto-Seventh Amendment bar on appellate relitigation of facts found by a *civil* jury. 2 ELLIOT'S DEBATES, *supra* note 40, at 550; see also 3 J. STORY, *supra* note 90, at § 1781 (double jeopardy clause prohibits second trial after defendant "has once been convicted, or acquitted of the offence charged, by the verdict of a jury. . . . But it does not mean, that he shall not be tried for the offence a second time, if the jury have been discharged without giving any verdict; or, if, having given a verdict, judgment has been arrested upon it, or a new trial has been granted in his favor . . ."). Story's position is in some tension with current double jeopardy doctrine in America, but appears well supported by British practice, both then and now. J. SIGLER, DOUBLE JEOPARDY 15-16, 32 n.138, 126-28 (1969). It also may well make more sense than current doctrine, *id.* at 42, 127, 223.

<sup>n262</sup> See, e.g., 3 PAPERS OF ALEXANDER HAMILTON 485 (H. Syrett & J. Cooke eds. 1962) (1784 "Letter of Phocion" defining "due process of law" as "*indictment or presentment of good and lawful men* and trial and conviction in consequence") (quoting Coke in italicized language); 2 J. KENT, COMMENTARIES ON AMERICAN LAW 13 (2d ed. 1832) (parroting Coke's definition of due process of law, quoted *supra*); 3 J. STORY, *supra* note 90, at § 1783 (similar). Here, as elsewhere, I do not argue that the clause cannot be applied beyond what I have called its "core" meaning. Indeed, refusal to do so here would render the provision wholly redundant, as the Supreme Court has noted. [Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. \(18 How.\) 272, 276 \(1856\).](#)

<sup>n263</sup> Most current immunity doctrines are of a distinctly modern vintage. See Amar, *Sovereignty*, *supra* note 11, at 1487 and sources cited therein.

<sup>n264</sup> These issues are unhelpfully conflated in Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972). See, e.g., *id.* at 169 n.2 (equating jury decision that statute is "unconstitutional" with judgment that statute is "wrong"). *But* see 2 WORKS OF JAMES WILSON, *supra* note 151, at 542 (jury, in deciding legal questions, is bound by rules of legal reasoning).

<sup>n265</sup> [25 F. Cas. 239 \(C.C.D. Va. 1800\)](#) (No. 14,709).

<sup>n266</sup> See materials in S. PRESSER & J. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 228-47 (2d ed. 1989).

<sup>n267</sup> [Commemoration of the 200th Anniversary of the Supreme Court's First Sitting, 110 S.Ct. 738, 741 \(1990\)](#) (remarks of Rex Lee).

<sup>n268</sup> [25 F. Cas. at 253.](#)

<sup>n269</sup> See [Marbury v. Madison, 5 U.S. \(1 Cranch\) 137 \(1803\)](#). See generally Amar, *Original Jurisdiction*, *supra* note 29, at 445-46 and sources cited therein.

<sup>n270</sup> 1 WORKS OF JAMES WILSON, *supra* note 151, at 186.

<sup>n271</sup> 2 ELLIOT'S DEBATES, *supra* note 40, at 94.

<sup>n272</sup> [5 U.S. \(1 Cranch\) at 177.](#)

<sup>n273</sup> J. TAYLOR, *supra* note 255, at 200-01.

<sup>n274</sup> Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Nelson, *supra* note 163, at 904-17; Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964);.

<sup>n275</sup> [Georgia v. Brailsford, 3 U.S. \(3 Dall.\) 1, 4 \(1794\).](#)

<sup>n276</sup> See, e.g., Letter from Thomas Jefferson to L'Abbe Arnoux (July 19, 1789), *reprinted in* 15 J. Boyd, *supra* note 136, at 282-83 (1958); Petition on Election of Jurors (Oct. 1798), *reprinted in* 7 P. Ford, *supra* note 136, at 284 (1896); Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *reprinted in* 10 P. Ford, *supra* note 136, at 37, 39 (1899); 2 WORKS OF JOHN

ADAMS, *supra* note 253, at 254-55 (diary entry, Feb. 12, 1771); 2 WORKS OF JAMES WILSON, *supra* note 151, at 540. This view of the power of American juries was articulated as early as 1692. L. LEVY, *supra* note 96, at 24-25. Even Alexander Hamilton seems to have believed that juries in criminal cases could decide both law and fact, and disregard the bench's instructions on law -- or so he argued as defense counsel in 1803. See [Sparf and Hansen v. United States, 156 U.S. 51, 147-48 \(1895\)](#) (Gray and Shiras, J.J., dissenting). *But cf.* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966) (distinguishing between civil and criminal juries, and dismissing *Georgia v. Brailsford* as anomalous).

<sup>n277</sup> See *supra* text accompanying note 268.

<sup>n278</sup> See Scalia, *supra* note 214.

<sup>n279</sup> Professor Schefflin apparently fails to understand this. See Schefflin, *supra* note 264, at 169 n.2; Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 56.

<sup>n280</sup> See generally Amar, *A Neo-Federalist View*, *supra* note 7.

<sup>n281</sup> See Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, [138 U. PA. L. REV. 1499 \(1990\)](#) [hereinafter Amar, *Judiciary Act*].

<sup>n282</sup> See W. NELSON, *supra* note 212, at 19, 26, 28, 166; Note, *supra* note 274, at 174 n.27.

<sup>n283</sup> See [United States v. Hudson & Goodwin, 11 U.S. \(7 Cranch\) 32 \(1812\)](#). The *Hudson* case raises many complications, but I would distill its central insight as follows: In the absence of express congressional authorization, federal courts may not fashion general criminal rules -- especially where Congress' constitutional authority to enact identical rules is in question. I would defend this insight by invoking the structure of the original Constitution (i.e., separation of powers, federalism, and their intersection through "the political safeguards of federalism"), the Constitution's own heightened procedural rules governing criminal sanctions, and general rules requiring strict construction where penal policy is involved. Thus, various earlier federal judicial decisions in tension with *Hudson* were dubious precedents indeed, defensible only if Congress in the First Judiciary Act meant to delegate its own (limited) criminal authority to federal courts, and such a sweeping statutory grant somehow did not violate constitutional norms of nondelegation. See Judiciary Act of 1789, ch. 20, § 11 (giving Circuit Courts "exclusive cognizance of all crimes and offences cognizable under the authority of the United States" subject to certain exceptions).

<sup>n284</sup> Letter to David Humphreys (Mar. 18, 1789).

<sup>n285</sup> [156 U.S. 51 \(1895\)](#).

<sup>n286</sup> See, e.g., [United States v. Cruikshank, 92 U.S. 542 \(1876\)](#); [The Civil Rights Cases, 109 U.S. 3 \(1883\)](#).

<sup>n</sup>287 1 A. DE TOCQUEVILLE, *supra* note 147, at 296.

<sup>n</sup>288 [Gannett Co. v. De Pasquale, 443 U.S. 368, 428-29 \(1979\)](#) (Blackmun, J., dissenting in part).

<sup>n</sup>289 [Patton v. United States, 281 U.S. 276, 293 \(1930\)](#).

<sup>n</sup>290 On the mandatory character of these words of Article III, see Amar, *A Neo-Federalist View*, *supra* note 7; Amar, *Judiciary Act*, *supra* note 281. Joseph Story, whose opinion of the Court in [Martin v. Hunter's Lessee, 14 U.S. \(1 Wheat.\) 304 \(1816\)](#), emphasized the plain meaning of "shall" and "all" in Article III's jurisdictional and tenure provisions, also deemed these words mandatory in the criminal jury context. [United States v. Gibert, 25 F. Cas. 1287, 1305 \(C.C.D. Mass. 1834\)](#) (No. 15,204).

<sup>n</sup>291 See, e.g., THE FEDERALIST No. 83, at 496 (A. Hamilton); 3 ELLIOT'S DEBATES, *supra* note 40, at 520-21 (remarks of Edmund Pendleton at Virginia ratifying convention); 4 *id.* at 145, 171 (remarks of James Iredell in North Carolina ratifying convention); *id.* at 290 (remarks of Rawlins Lowndes at South Carolina ratifying convention); C. KENYON, *supra* note 28, at 51 (report of Pennsylvania convention minority).

<sup>n</sup>292 [127 U.S. 540, 549 \(1888\)](#) (Harlan, J.).

<sup>n</sup>293 One of the core purposes of the Ninth Amendment was to prevent this sort of misconstruction. See McAfee, *The Original Meaning of the Ninth Amendment*, [90 COLUM. L. REV. 1215 \(1990\)](#). For other applications, see *infra* text accompanying notes 304-07.

<sup>n</sup>294 See, e.g., *Letters From The Federal Farmer* (II-IV), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 230-31, 244, 245, 249; C. KENYON, *supra* note 28, at 36, 51 (report of Pennsylvania convention minority); 3 ELLIOT'S DEBATES, *supra* note 40, at 578-79 (remarks of Patrick Henry in Virginia ratification debates); 4 *id.* at 154 (remarks of Samuel Spencer in North Carolina ratifying convention); 2 *id.* at 400 (remarks of Thomas Tredwell in New York ratifying convention); E. DUMBAULD, *supra* note 3, at 183, 190, 200 (declarations of rights of Virginia, New York, and North Carolina ratifying conventions).

<sup>n</sup>295 E. DUMBAULD, *supra* note 3, at 208, 212, 215.

<sup>n</sup>296 *Id.* at 49 & n.22, 54; J. GOEBEL, *supra* note 52, at 449, 454-55.

<sup>n</sup>297 Compare [Patton, 281 U.S. at 296-97](#) with material quoted *supra* text accompanying notes 247-60. *Patton* suggested that the colonies allowed bench trials in criminal cases, [281 U.S. at 306](#), but more recent historical studies have called into question the evidence underlying *Patton's* claims. See Towne, *The Historical Origins of Bench Trial for Serious Crime*, 26 AM. J. LEGAL HIST. 123 (1982). In any event, this history is of only tangential relevance to the meaning of Article III and the Sixth Amendment, whose wording differed considerably from various colonial and state constitutional antecedents.

<sup>n</sup>298 [Bank of Columbia v. Okely, 17 U.S. \(4 Wheat.\) 235, 244 \(1819\)](#). In

dramatic contrast to the universal view during the ratification debates that Article III did mandate jury trial in all criminal cases -- and properly so -- various proposals for civil jury were expressly limited to situations where "the parties, or either of them request it." E. DUMBAULD, *supra* note 3, at 176, 182 (proposed amendments of Massachusetts and New Hampshire ratifying conventions).

<sup>n299</sup> [Thompson v. Utah, 170 U.S. 343, 353-54 \(1898\)](#). Unanimity on this point is evident as late as 1904, even as the Court split on the analytically distinct issue of the degree to which petty crimes fell within the scope of the Article III mandate. [Schick v. United States, 195 U.S. 65 \(1904\)](#).

<sup>n300</sup> [Insurance Co. v. Morse, 87 U.S. \(20 Wall.\) 445, 451 \(1874\)](#) (dictum).

<sup>n301</sup> See, e.g., [United States v. Gibert, 25 F.Cas. 1287, 1304 \(C.C.D. Mass. 1834\)](#) (No. 15,204) (Story, Circuit J.); [Schick, 195 U.S. at 81-82](#) (Harlan, J., dissenting); J. HELLER, *THE SIXTH AMENDMENT* 71 (1951).

<sup>n302</sup> Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 1-24 (1979); see also W. NELSON, *supra* note 212, at 100 (noting judicial discouragement of guilty pleas in capital cases).

<sup>n303</sup> Alschuler, *supra* note 302, at 1, 40 (citing statistics and Supreme Court cases).

<sup>n304</sup> Amar, *Philadelphia Revisited*, *supra* note 37, at 1044-60.

<sup>n305</sup> See *supra* text accompanying notes 103-09.

<sup>n306</sup> THE FEDERALIST No. 84, at 513 (A. Hamilton) (emphasis altered).

<sup>n307</sup> Accord McAfee, *supra* note 293. Although a source of many insights, Professor McAfee's essay seems to move a bit too quickly past the phrase "retained by the people" and the popular sovereignty theory underlying that phrase. For an equally insightful corrective, see Note, *Was the Flag Burning Amendment Unconstitutional?*, [100 YALE L.J. 1073 \(1991\)](#). See generally Amar, *Philadelphia Revisited*, *supra* note 37, at 1043-76.

<sup>n308</sup> For further elaboration, see Amar, *Sovereignty*, *supra* note 11, at 1492-1519.

<sup>n309</sup> See Amar, *Our Forgotten Constitution*, *supra* note 43, at 293.

<sup>n310</sup> Ackerman, *Constitutional Politics/Constitutional Law*, [99 YALE L.J. 453, 515-47 \(1989\)](#); see also *supra* note 115.

<sup>n311</sup> For example, although the Fourteenth Amendment is aimed only at state governments, its attempt to bring citizen rights against both state and federal governments into sync may have interesting feedback effects on the character of rights against *federal* officials. Given that the original texts of many provisions are broad enough to encompass minority rights against the federal government, the gloss placed on these provisions by the Fourteenth Amendment may have inverted the "core" and the "peripheral" applications --

even against the federal government.

<sup>n312</sup> Indeed, President Wilson and many other lawmakers ultimately endorsed the proposed Nineteenth Amendment as a war measure, in recognition of the role of women as economic soldiers in the war effort. See *supra* note 152.

<sup>n313</sup> During debates preceding the Fifteenth Amendment, various leading Congressmen took the sensible position that the right to hold office need not be explicitly mentioned, since, absent a clear statement to the contrary, the right to be voted for was implicit in the right to vote. See A. GRIMES, *supra* note 84, at 57.

<sup>n314</sup> See, e.g., *supra* text accompanying note 254 (Tocqueville's linkage of electorate and jury pool); Note, *supra* note 258, at 1290 n.38 (discussing various modern statutes that "use voter registration rolls as a first approximation of" the pool of eligible jurors); see also [Palmer v. State, 150 N.E. 917, 918 \(Ind. 1926\)](#) (post-Nineteenth Amendment case requiring that women be eligible to sit on state juries: "Where, by statute, jurors are to be selected from qualified electors, the adoption of a constitutional amendment making women electors qualifies them for jury duty." (citing cases)). Feminists in the early twentieth century appear to have clearly understood that women's capacity to serve on juries was intimately linked to the larger issue of women's suffrage. See, e.g., Susan Glaspell's *A Jury of her Peers*, reprinted in THE BEST SHORT STORIES OF 1917, at 256-82 (E. O'Brien ed. 1918).

<sup>n315</sup> [Taylor v. Louisiana, 419 U.S. 522 \(1975\)](#). Interestingly, the Nineteenth Amendment did get fleeting mention in one of the first postsuffrage Supreme Court cases involving sex discrimination on juries. See [Fay v. New York, 332 U.S. 261, 290 \(1947\)](#).

<sup>n316</sup> [Rostker v. Goldberg, 453 U.S. 57 \(1981\)](#). Compare the views of the National Organization for Women: "Omission from the registration and draft ultimately robs women of the right to first-class citizenship," *quoted* in Scarry, *supra* note 152.

<sup>n317</sup> 3 M. FARRAND, *supra* note 44, at 290 (Luther Martin's Reply to the Landholder).

<sup>n318</sup> 2 *id.* at 640 (George Mason's objections to Constitution); 3 ELLIOT'S DEBATES, *supra* note 40, at 444 (remarks of Mason in Virginia ratifying convention).

<sup>n319</sup> *Letters of Agrippa* (XVI), in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 111.

<sup>n320</sup> 2 ELLIOT'S DEBATES, *supra* note 40, at 401; see also 3 *id.* at 445-46 (similar remarks of Patrick Henry at Virginia ratifying convention); McAfee, *supra* note 293, at 1241-44 (discussing and quoting other Anti-Federalists linking Bill of Rights with states' rights).

<sup>n321</sup> 2 ELLIOT'S DEBATES, *supra* note 40, at 399.

<sup>n</sup>322 Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 12 J. Boyd, *supra* note 136, at 438, 440 (1955) (emphasis added).

<sup>n</sup>323 G. WOOD, *supra* note 12, at 520; *see also id.* at 516 (describing Anti-Federalists as populists emphasizing widespread participation in government). *But see Letters of Agrippa* (XVI), in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 111 (explicit argument for protections of "the minority against the usurpation and tyranny of the majority").

<sup>n</sup>324 11 THE PAPERS OF JAMES MADISON, *supra* note 78, at 297 (letter of Oct. 17, 1788) (emphasis added).

<sup>n</sup>325 THE FEDERALIST No. 38, at 235 (J. Madison).

<sup>n</sup>326 *Id.* No. 84, at 515 (A. Hamilton) (emphasis added).

<sup>n</sup>327 *Id.*; *see also* PENNSYLVANIA AND THE FEDERAL CONSTITUTION, *supra* note 221, at 252 (remarks of Thomas McKean in Pennsylvania ratifying convention) ("[T]he whole plan of government is nothing more than a bill of rights -- a declaration of the people in what manner they choose to be governed.").

<sup>n</sup>328 J. CHOPER, *supra* note 7.

<sup>n</sup>329 *Id.* at 174-75.

<sup>n</sup>330 *See* J. ELY, *supra* note 159, at 90. (Both "[c]lauses prove on analysis to be separation of powers provisions, enjoining the legislature to act prospectively and by general rule (just as the judiciary is implicitly enjoined by Article III to act retrospectively and by specific decree).").

<sup>n</sup>331 [32 U.S. \(7 Pet.\) 243 \(1833\)](#).

<sup>n</sup>332 J. CHOPER, *supra* note 7, at 244.

<sup>n</sup>333 A. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

<sup>n</sup>334 *See* Amar, *Sovereignty*, *supra* note 11; Amar, *Philadelphia Revisited*, *supra* note 37.

<sup>n</sup>335 1 ANNALS OF CONG., *supra* note 53, at 457 (June 8, 1789).

<sup>n</sup>336 *Id.*

<sup>n</sup>337 *Id.* at 455.

<sup>n</sup>338 Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in* 14 J. Boyd, *supra* note 136, at 659, 659 (1958).

<sup>n</sup>339 Letter from Thomas Jefferson to L'Abbe Arnoux (July 19, 1789), *reprinted in* 15 J. Boyd, *supra* note 136, at 282 (1958) (citing book "Jurors judges both of law and fact by Jones"); for further evidence of Jefferson's views, *see* sources cited *supra* note 276.

n340 Letter from Thomas Jefferson to Joseph Priestley (June 19, 1802), *reprinted in* 8 P. Ford, *supra* note 136, at 158, 159-60 (1897).

n341 See, e.g., 3 J. STORY, *supra* note 90, at § 1859 (Bill of Rights "serves to guide, and enlighten public opinion"); *Letters From The Federal Farmer* (XVI), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 38, at 324-25 ("If a nation means its systems, religious or political, shall have duration, it ought to recognize the leading principles of them in the front page of every family book. What is the usefulness of a truth in theory, unless it exists constantly in the minds of the people and has their assent. . . . [E]ducation [consists of] a series of notions impressed upon the minds of the people by examples, precepts and declarations."); 1 TUCKER'S BLACKSTONE, *supra* note 125, at 308 app. ("A bill of rights may be considered, not only as intended to give law, and to assign limits to a government, . . . but as giving *information to the people* [so that] every man of the meanest capacity and understanding may *learn* his own rights.") (emphasis added).

n342 See Palmer, *Liberties*, in CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55 (W. Nelson & R. Palmer eds. 1987); I. BRANT, *supra* note 238, at 37-42. Recall Daniel Webster's language, noted earlier: "[My constituents and I] live under a [state] constitution which *teaches us*" certain maxims of democratic self-governance. See *supra* text accompanying note 188 (emphasis added). Also recall the obviously didactic language of the Massachusetts constitutional provisions concerning Harvard, and of virtually all state constitutions regarding civilian supremacy over the military, *supra* notes 144, 181.

n343 VA. DECLARATION OF RIGHTS of 1776, § 15.

n344 Madison well understood the mnemonic benefits of maxims for ordinary Citizens. See THE FEDERALIST No. 53, at 330-32 (J. Madison). Hamilton, less of a true populist, was more critical. *Id.* No. 84, at 513 (didactic "aphorisms which make the principal figure in several of our State bills of rights . . . would sound much better in a treatise of ethics than in a constitution of government"). Hamilton was of course also less enthusiastic about militias and juries. See *id.* Nos. 26, 29, 83 (A. Hamilton).

n345 Quoted in Storing, *The Constitution and the Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 31 (R. Goldwin & H. Schambra eds. 1985).

n346 3 ELLIOT'S DEBATES, *supra* note 40, at 137, 223.

n347 11 THE PAPERS OF JAMES MADISON, *supra* note 78, at 298-99. (Letter of James Madison to Thomas Jefferson Oct. 17, 1788). Madison here closely tracked the remarks of Edmund Randolph concerning the Virginia Bill of Rights, quoted in 1 B. SCHWARTZ, *supra* note 38, at 249.

n348 14 THE PAPERS OF JAMES MADISON, *supra* note 78, at 218 (*National Gazette* essay on U.S. Government, Feb. 4, 1792); accord G. WOOD, *supra* note 12, at 33-35 (Constitution "ultimately sustained" by "the very spirit of the people"); *id.* at 377 ("genius" and "habits" of people prevail over "paper . . .

form[s]" in constitutions and bills of rights) (quoting Noah Webster).

n349 See *supra* text accompanying note 347.

n350 Quoted in G. WOOD, *supra* note 12, at 120.

n351 *Id.*

n352 *Id.* at 426.

n353 MASS. CONST. of 1780, pt. II, ch. V, § II.

n354 [San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 \(1973\).](#)

n355 For some tentative thoughts, see Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990).

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