A "UNIFORM AND ENTIRE" CONSTITUTION; OR, WHAT IF MADISON HAD WON?

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James Madison is widely regarded as the father of both the Constitution and the Bill of Rights.[1] Yet the constitution-plus-bill-of-rights that we know today differs in significant ways from what Madison proposed to the First Congress in June of 1789. For example, he proposed an explicit recognition of popular sovereignty,[2] a protection of the rights of conscience, freedom of the press, and criminal jury trial against state infringement,[3] a requirement of "unanimity for conviction" and "the right of

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1. See, e.g., Irving Brant, *James Madison: Father of the Constitution, 1787-1800* (Bobbs-Merrill, 1950); Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* xvi (Johns Hopkins U. Press, 1991) ("*Documentary Record*") ("Madison has a greater claim to being known as the father of the Bill of Rights than of the Constitution"); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 330 (A.A. Knopf, 1996) ("were it not for Madison, a bill of rights might never have been added to the Constitution.").

2. Madison proposed that the following declaration of popular sovereignty be prefixed to the constitution:

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

Madison Resolution of June 8, 1789, reprinted in *Documentary Record* at 11 (cited in note 1). While this prefix did not make it through the House, the idea was reflected in the addition of the phrase "or to the people," to what ultimately became the Tenth Amendment. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 145 (describing link between popular sovereignty and the Tenth Amendment) (forthcoming Yale U. Press, 1998).

3. *Documentary Record* at 13 (cited in note 1) ("No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.").

challenge" in federal criminal jury trials,[4] and an express statement of separation of powers.[5] In all of these areas, Madison lost. While our constitutional history might have been quite different if Madison had won on these issues, this Article does not seek to revisit Madison's substantive losses. Instead, it explores what our Constitution might look like if Madison had won on another issue he lost in that first Congress: Madison argued that amendments should be interlineated into the body of the Constitution, but the House of Representatives decided instead to attach amendments as supplements to the Constitution.

This Article proceeds in three steps. First, it recounts the debate in the first Congress over the form that amendments to the Constitution would take and Madison's loss on that issue. Second, it analyzes each of the twenty-seven amendments to the Constitution to determine the form they would take in the Constitution if Madison had prevailed on the issue in the first Congress. Finally, it presents a complete text of what our Constitution would look like if Madison had prevailed.

I. THE DEBATE IN THE FIRST CONGRESS

When Madison proposed his amendments to the Constitution, he sought to integrate them into the body of the Constitution so as to preserve what he considered the "uniform and entire" system of the Constitution.[6] He proposed that the recognition of popular sovereignty be "prefixed to the constitution,"[7] and that a bar on changes in Congressional compensation from taking effect before an intervening election be "added to the end of the first sentence" in Article I, section 6, clause 1.[8] Similarly, he proposed that the bulk of what we now call the Bill of Rights "be inserted" in Article I, section 9, "between clauses 3 and 4,"[9] and that his suggested additional restrictions on the

4. Id. at 13 ("The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites.").

5. Id. at 14 ("The powers delegated by this constitution, and appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.").

6. The Congressional Register, Aug. 13, 1789, reprinted in *Documentary Record* at 118 (cited in note 1).

7. Madison Resolution, June 8, 1789, reprinted in *Documentary Record* at 11 (cited in note 1).

8. *Documentary Record* at 12 (cited in note 1).

9. Id.

states "be inserted" in Article I, section 10, "between clauses 1 and 2."[10] In addition, he proposed "the third clause" in Article III, section 2 "be struck out, and in its place be inserted" a new provision governing jury trials in criminal cases, grand jury indictments, and jury trials in civil cases.[11]

Madison's proposal was referred to a select committee consisting of one representative from each of the eleven states that had, at that point, ratified the Constitution.[12] Although the select committee report differed in some respects from Madison's original proposal, it followed his lead in proposing that the amendments be incorporated into the body of the Constitution.[13] On August 13, 1789, the House of Representatives, sitting as a committee of the whole, began to debate the report of the select committee. Roger Sherman, a "consistent opponent of a Bill of Rights,"[14] immediately objected that "this is not the proper mode of amending the constitution."[15] He argued:

> We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric. We might as well endeavor to mix brass, iron and clay, as to incorporate such heterogeneous articles; the one contradictory to the other.[16]

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10. Id. at 13. See also The Congressional Register, June 8, 1789, reprinted in *Documentary Record* at 85 (cited in note 1) ("I wish also, in revising the constitution, we may throw into that section, which interdicts the abuse of certain powers in the state legislatures, some other provisions of equal if not greater importance than those already made.") (statement of Madison).

11. *Documentary Record* at 13 (cited in note 1).

12. The Congressional Register, July 21, 1789, reprinted in *Documentary Record* at 102-03 (cited in note 1). North Carolina and Rhode Island had not yet ratified the constitution and "[o]ne of Madison's major objectives was to 'bring in' North Carolina." David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. L. & Pol. 1, 54 (1987). "[M]ost Federalists were indifferent" to the fate of Rhode Island. Rakove, *Original Meanings* at 125 (cited in note 1).

13. House Committee Report, July 28, 1789, reprinted in *Documentary Record* at 29-33 (cited in note 1).

14. Bernard Schwartz, *The Bill of Rights: A Documentary History* 1050 (Chelsea House, 1971). As a delegate to the Philadelphia Convention, Sherman opposed a motion to appoint a committee to draft a federal bill of rights. John P. Kaminski, *Restoring the Grand Security: The Debate Over a Federal Bill of Rights, 1787-1792*, 33 Santa Clara L. Rev. 887, 890 (1993).

This was not, of course, the first time that Sherman and Madison had disagreed about the making of the Constitution. To the contrary, "it was the rivalry between their competing goals and political styles that jointly gave the Great Convention much of its drama and fascination—and also permitted its achievement." Rakove, *Original Meanings* at 92 (cited in note 1).

15. The Congressional Register, Aug. 13, 1789, reprinted in *Documentary Record* at 117 (cited in note 1).

16. Id.; see also Letter from Roger Sherman to Henry Gibbs, Aug. 4, 1789, reprinted in *Documentary Record* at 271 (cited in note 1) ("I don't like the form in which

Sherman contended that the "absurdity" of amending Madison's way was demonstrated by comparing it to statutory amendments, asking whether "any Legislature [would] endeavor to introduce into a former act, a subsequent amendment, and let them stand so connected."[17] Sherman questioned the legitimacy of Madison's approach, arguing that the constitution is the "act of the people" while the amendments "will be the act of the state governments," and suggesting that Madison's approach would be the equivalent of "destroy[ing] the whole and establish[ing] a new constitution," thereby "remov[ing] the basis on which we mean to build."[18] He therefore moved that amendments be added as supplements to the Constitution.[19]

Supporters of Sherman's motion expressed fear that submitting amendments to the states in the way proposed by Madison would be an attempt to repeal the Constitution, risking "the destruction of the whole,"[20] and argued that Sherman's supplemental approach would permit "the world [to] discover the perfection of the original, and the superfluity of the amendments."[21] Moving from weak arguments to fanciful ones, they even argued that "[i]f the amendments are incorporated in the body of the work, it will appear, unless we refer to the archives of congress, that George Washington, and the other worthy characters who composed the convention, signed an instrument which they never had in contemplation."[22]

Madison responded:

> Form, sir, is always of less importance than the substance; but on this occasion, I admit that form is of some consequence .... Now it appears to me, that there is a neatness and propriety in incorporating the amendments into the constitution itself; in that case the system will remain uniform and entire; it will certainly be more simple, when the amendments are interwoven into those parts to which they naturally belong ... we shall then be able to determine its meaning without references or comparison; whereas, if they are supplemen-

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they are reported to be incorporated in the Constitution, that Instrument being the Act of the people, ought to be kept intire [sic.]—and amendments made by the Legislatures Should be in addition by way of Supplement.").

17. The Congressional Register, Aug. 13, 1789 reprinted in *Documentary Record* at 117 (cited in note 1).

18. Id.

19. Id. at 117-18; see also id. at 125 ("I contend that amendments made in the way proposed by the committee are void") (statement of Sherman).

20. Id. at 119 (statement of Livermore).

21. Id. at 120 (statement of Clymer).

22. Id. (statement of Stone).

> tary, its meaning can only be ascertained by a comparison of the two instruments, which will be a very considerable embarrassment, it will be difficult to ascertain to what parts of the instrument the amendments particularly refer; they will create unfavorable comparisons, whereas if they are placed upon the footing here proposed, they will stand upon as good foundation as the original work.[23]

John Vining ridiculed Sherman's proposal, noting he had once seen an "act entitled an act to amend a supplement to an act entitled an act for altering part of act entitled an act for certain purposes therein mentioned" and that if Sherman's mode were adopted, "the system would be distorted, and like a careless written letter, have more matter attached to it in a postscript than was contained in the original composition."[24] Elbridge Gerry confronted directly the suggestion that amendments ratified by state legislatures would not "have the same authority as the original instrument," and challenged Sherman: "if this is his meaning, let him avow it, and if it is well founded, we may save ourselves the trouble of proceeding in the business" of amendments at all.[25] Egbert Benson, supporting Madison's approach, correctly noted that the state conventions that ratified the Constitution "had proposed amendments in this very form."[26] Madison, who had struggled to have the House

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23. Id. at 118.

24. Id. at 120 (statement of Vining); see also id. at 122 ("If we proceed in the way proposed by [Sherman], I presume the title of our first amendment will be, a supplement to the constitution of the United States; the next a supplement to the supplement, and so on, until we have supplements annexed five times in five years, wrapping up the constitution in a maze of perplexity; and as great an[d] adept as that honorable gentlemen is at finding out the truth, it will take him, I apprehend, a week or a fortnight's study to ascertain the true meaning of the constitution."). Vining's fear that the postscript would be longer than the letter has not come to pass, but we are well on our way: "The roughly 3,100 words in [the] amendments come fairly close to the 4,300 of the original instrument." David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* at x (U. Press of Kansas, 1996).

25. The Congressional Register, Aug. 13, 1789 reprinted in *Documentary Record* at 127 (cited in note 1) (statement of Gerry). Five days before the adjournment of the constitutional convention, Elbridge Gerry proposed that a committee be appointed to draft a bill of rights. Rakove, *Original Meanings* at 288 (cited in note 1). He later refused to sign the Constitution. Id. at 106. Gerry also attended the early sessions of the Massachusetts ratifying convention, but "was too eccentric to give Anti-Federalists the leadership they conspicuously lacked." Id. at 119.

26. The Congressional Register, Aug. 13, 1789 reprinted in *Documentary Record* at 123 (cited in note 1) (statement of Benson). See, e.g., Amendments Proposed by the South Carolina Convention, May 23, 1788, reprinted in *Documentary Record* at 16 (cited in note 1) ("the third section of the Sixth Article ought to be amended by inserting the word '*other*' between the words '*no*' and '*religious.*'"); Amendments Proposed by the New York Convention, July 26, 1788, reprinted in *Documentary Record* at 28 (cited in note 1) ("the words *without the Consent of Congress* in the seventh Clause of the ninth

consider the subject of amendments at all, despaired that if Sherman's motion were adopted, "we shall so far unhinge the business as to occasion alterations in every article and clause of the report."[27]

Madison certainly seems to have had the better of the argument, and Sherman's motion was defeated.[28]

Less than a week later, on August 19, Sherman renewed his motion to add the amendments to the Constitution by way of supplement rather than by incorporating them into the body.[29] The extant record reports only that a debate occurred "similar to what took place" on August 13; no details of that debate are provided.[30] This time, however, Sherman's motion carried, with a two-thirds vote in favor.[31] What explains the change?

During the intervening week, the House of Representatives was a rather unpleasant place to be. On August 15, the House, again sitting as a committee of the whole, discussed a proposed constitutional amendment that neither Madison nor the select committee supported, an amendment providing for instruction of representatives. During this discussion, Thomas Sumter complained of what he considered undue haste in pressing the constitutional amendments proposed by the select committee. He stated that he was "obliged to notice" this "somewhat improper" conduct.[32] In this same debate, Aedanus Burke described the amendments proposed by Madison and the select committee as "little better than whip-syllabub, frothy and full of wind, formed only to please the palate," and compared them to

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Section of the first Article of the Constitution, be expunged."); *Amendments Proposed by the Anti-Federalist Minority of the Pennsylvania Convention*, reprinted in Randy E. Barnett, ed., *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* 373 (George Mason U. Press, 1989) ("That a proviso be added at the end of the second clause of the second section of the third article, to the following effect, viz.: Provided that such appellate jurisdiction, in all cases of common-law cognizance, be by a writ of error, and confined to matters of law only; and that no such writ of/error shall be admitted, except in revenue cases, unless the matter in controversy exceed the value of three thousand dollars."); *Amendments Proposed by the North Carolina Convention*, reprinted in Barnett, *Rights Retained by the People* at 369 ("the latter part of the 5th paragraph of the 9th section of the 1st article be altered to read thus: 'Nor shall vessels bound to a particular state be obliged to enter or pay duties in any other; nor, when bound from any one of the states, be obliged to clear in another.'").

27. *Documentary Record* at 123 (cited in note 1).

28. Id. at 128.

29. The Congressional Register, Aug. 19, 1789, reprinted in *Documentary Record* at 197 (cited in note 1).

30. Id. at 198.

31. Id.

32. The Congressional Register, Aug. 15, 1789, reprinted in *Documentary Record* at 174 (cited in note 1).

a "tub thrown out to a whale, to secure the freight of the ship and its peaceable voyage,"[33] a common metaphor at the time for a diversionary tactic.[34]

Madison "was not willing to be silent after the charges that had been brought," noting that Sumter and Burke had "insinuate[d] that we are not acting with candor."[35] He stated, "If I was inclined to make no alteration in the constitution I would bring forward such amendments as were of a dubious cast, in order to have the whole rejected,"[36] thereby insinuating that his opponents were deliberately proposing amendments that had little prospect of being enacted in order to undermine the constitution.[37]

Writing on August 15, William Smith stated, "there has been more ill-humour & rudeness displayed today than has existed since the meeting of Congress," and "to make it worse, the weather is intensely hot."[38] Later that week, tempers grew so hot that the House saw "the first known instance of congressmen challenging each other to duels."[39]

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33. Id. at 175.

34. See *Documentary Record* at 175 n.26 (cited in note 1); Kenneth R. Bowling, *"A Tub to the Whale,": The Adoption of the Bill of Rights*, in Patrick T. Conley and John P. Kaminski, eds., *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* 47 (Madison House, 1992) ("In 1704 Jonathan Swift had written in *Tale of a Tub* that 'seamen have a custom, when they meet a whale, to fling him out an empty tub by way of amusement, to divert him from laying violent hands upon the ship.'").

35. *Documentary Record* at 176 (cited in note 1).

36. Id.

37. See also Letter from James Madison to Richard Peters, Aug. 19, 1789, reprinted in *Documentary Record* at 281-82 (cited in note 1) (antifederalists would "blow the Trumpet for a second Convention" if the amendments were not enacted); Letter from James Madison to Edmund Pendleton, Aug. 21, 1789, reprinted in *Documentary Record* at 284 (cited in note 1) ("dilatory artifices of which some of the antifederal members are suspected"); Letter from Frederick A. Muhlenberg to Benjamin Rush, Aug. 18, 1789, reprinted in *Documentary Record* at 280-81 (cited in note 1) ("It is a strange yet certain Fact, that those who have heretofore been & still profess to be the greatest Sticklers for Amendments . . . have hitherto thrown every Obstacle they could in their way . . . but it is obvious their Design was to favour their darling Question for calling a Convention").

38. Letter from William L. Smith to Edward Rutledge, Aug. 15, 1789, reprinted in *Documentary Record* at 278 (cited in note 1). See also Letter from Thomas Hartley to Jasper Yeates, Aug. 16, 1789, reprinted in *Documentary Record* at 279 (cited in note 1) ("We had Yesterday warm debates about amendments."); Letter from George Leonard to Sylvanus Bourne, Aug. 16, 1789, reprinted in *Documentary Record* at 279 (cited in note 1) ("For three days past the proposed amendments have been under Consideration, the Political Thermometer high Each day.").

39. *Documentary Record* at xv (cited in note 1); see also Letter from William Smith to Ortho H. Williams, Aug. 22, 1789, reprinted in *Documentary Record* at 285 (cited in note 1) (observing that "the greatest objections arose from those opposed to the constitution, very high words passed in the house on this occasion, & what nearly

In the midst of this discord, Madison concluded that it was "absolutely necessary in order to effect any thing to abbreviate debate, and exclude every proposition of a doubtful & unimportant nature."[40] One of the things that Madison gave up was his favored form of amendment.[41] He explained:

> It became an unavoidable sacrifice to *a few* who knew their concurrence to be necessary, to the despatch if not the success of the business, to give up the form by which the amendts. when ratified would have fallen into the body of the Constitution, in favor of the project of adding them by way of appendix to it.[42]

While Madison sacrificed on this issue, he was not happy with the result, noting that "it is already apparent . . . that some ambiguities will be produced by this change, as the question will often arise and sometimes be not easily solved, how far the original text is or is not necessarily superceded, by the supplemental act."[43] But suppose Madison had not found it necessary to make this sacrifice to "a few" in the overheated environment of August 1789. What would our Constitution look like?

II. A MADISONIAN APPROACH TO THE TWENTY-SEVEN AMENDMENTS

THE FIRST TEN AMENDMENTS: AVOIDING AMBIGUITY AND PRODUCING A BETTER BILL OF RIGHTS

Integrating the first ten amendments into the body of the Constitution is relatively easy because Madison already did most of the work. The First, Second, Third, Fourth, Eighth, and

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amount to direct challenges, the weather was excessive hot, & the blood warm," but that once there was a "change in the Air," tempers calmed).

40. Letter from James Madison to Edmund Randolph, Aug. 21, 1789, reprinted in *Documentary Record* at 284 (cited in note 1). Sherman had noted that those who opposed his motion thought it a matter of form, while he contended that it was a matter of substance, and argued that if the supporters of the amendments were "so desirous of having the business compleated, they had better sacrifice what they consider but a matter of indifference to get gentlemen to go more unanimously along with them in altering the constitution." *Documentary Record* at 128 (cited in note 1).

41. Bowling, *"A Tub to the Whale,": The Adoption of the Bill of Rights* at 53 (cited in note 34) ("In securing Federalist votes to obtain the necessary two-thirds majority, Madison paid a two-part price: the House voted out the little that remained of his preamble, and it agreed to Sherman's motion that the amendments be placed at the end of the Constitution.").

42. Letter from James Madison to Alexander White, Aug. 24, 1789, reprinted in *Documentary Record* at 287 (cited in note 1) (emphasis in original).

43. Id. at 287-88.

Ninth Amendments belong in Article I, section 9, along with the other explicit limitations on Congressional power.[44] The Seventh and Tenth Amendments are also easy to integrate into the text in accordance with Madison's plan. Madison proposed that the right to a civil jury trial and the prohibition of reexamination of facts tried to a jury, except in accordance with the principles of common law, be included in Article III, section 2.[45] What became the Tenth Amendment, by contrast, was proposed as a separate article, a new Article VII, with the original Article VII renumbered as Article VIII.[46] Although these provisions emerged from Congress somewhat changed from Madison's original proposal, the language of these amendments as ultimately enacted can readily be inserted just where Madison wanted them.[47]

The Fifth and Sixth Amendments are somewhat more difficult to integrate because of the way they were altered in the legislative process. Indeed, it seems likely that these were the amendments Madison had in mind when he wrote that he already saw ambiguities in the relationship between the main body of the Constitution and the appended amendments.[48] Article III of the original Constitution guaranteed a jury trial of all crimes (except in cases of impeachment), and guaranteed that the trial be held in the state where the crime was committed, leaving to Congress to decide the place of trial for crimes not committed in any state.[49] In response to complaints that this did not adequately protect a right to a local jury, Madison proposed that this provision of the original Constitution be replaced by a new provision that guaranteed both a jury from the vicinage (except in cases of impeachment and cases in the military) and a grand jury indictment (except in certain extraordinary circum-

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44. See Madison Resolution of June 8, 1789, reprinted in *Documentary Record* at 12-13 (cited in note 1) (proposing bar on establishment of national religion; freedoms of religion, conscience, speech, assembly, petition, and bearing arms; limit on quartering of soldiers; bar on excessive bail, excessive fines, cruel and unusual punishment, and unreasonable searches and seizures; and that particular rights not be construed to diminish other retained rights).

45. Id. at 13.

46. Id. at 13-14.

47. It is possible, of course, that the changes in language could have led to changes in placement as well, but this does not undermine the reasonableness of Madison's placement.

48. See Letter from James Madison to Alexander White, Aug. 24, 1789, reprinted in *Documentary Record* at 287-88 (cited in note 1).

49. U.S. Const., Art. III, § 2, cl. 3.

stances), but which let crimes not committed within any county be tried where the laws prescribe.[50]

Madison's proposal also contained other provisions that ultimately found their way into the Fifth and Sixth Amendments. He proposed banning multiple punishments or trials for the same offense, compelled self-incrimination, deprivation of life, liberty, or property without due process, and relinquishment of property without just compensation.[51] He also proposed that the accused in criminal prosecutions have the right to a speedy and public trial, to be informed of the cause and nature of the accusation, and to be confronted with his accusers and witnesses, to have compulsory process, and to have the assistance of counsel.[52] All of these protections were to be inserted in Article I, section 9.

Thus, under Madison's approach, the provisions of both the Fifth and Sixth Amendments would be split up. The grand jury right of the Fifth Amendment and the criminal jury trial right of the Sixth Amendment would be placed in Article III, replacing the less detailed jury trial right originally protected in Article III. The other rights of the Fifth and Sixth Amendments would

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50. The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war, or public danger,) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury, shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorised in some other county of the same state, as near as may be to the seat of the offence.

In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law between man and man, the trial by jury as one of the best securities to the rights of the people, ought to remain inviolate.

Madison Resolution of June 8, 1789, reprinted in *Documentary Record* at 13 (cited in note 1).

51. No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself: nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

Madison Resolution of June 8, 1789, reprinted in *Documentary Record* at 12 (cited in note 1).

52. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

Madison Resolution of June 8, 1789, reprinted in *Documentary Record* at 13 (cited in note 1).

be placed in Article I, section 9, along with the First, Second, Third, Fourth, Eighth, and Ninth Amendments.

Madison's approach would have eliminated ambiguities in the relationship between Article III, the Fifth Amendment, and the Sixth Amendment. For example, Article III requires a jury trial for all crimes, except in cases of impeachment; the Sixth Amendment, by contrast, repeats the requirement of a jury trial in all criminal prosecutions, but has no impeachment exception. Article III requires that trial take place in the state where the crime was committed, unless the crime was not committed in any state, in which case Congress can direct the place of trial; the Sixth Amendment requires a jury of the state and district where the crime was committed, but makes no provision for crimes that do not occur in any state. The Fifth Amendment's grand jury requirement has an exception for military cases; the Sixth Amendment's jury trial requirement does not. Under our Shermanesque constitution, the courts have been left to puzzle out these problems.[53] If Madison's approach had prevailed, these problems would likely have been avoided by clear textual statements in Article III.

The received wisdom is that "Americans owe to Sherman, who was actually an opponent of amending the Constitution, the existence of a separate group of Amendments known as the Bill of Rights."[54] Herbert Storing, for example, wrote:

> Ironically, the result seems to have been exactly the opposite of what Sherman intended, and yet to have gone beyond what Madison wanted. Separate listing of the first ten amendments has elevated rather than weakened their status.[55]

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53. See, e.g., *Cook v. United States*, 138 U.S. 157, 181-82 (1891) (sixth amendment leaves in place the power of Congress to provide for the location of trial for crimes not committed within any state); *Ex parte Richard Quirin*, 317 U.S. 1, 40 (1942) (cases arising in the land or naval forces are "expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth."); *Ex parte Milligan*, 71 U.S. 2, 123 (1866) ("the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth."). Cf. Akhil Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1196-99 (1991) (arguing that Article III should be construed to require a non-waivable jury in criminal cases and that nothing in the sixth amendment should transform that mandatory structural requirement into a waivable right belonging to the accused).

54. *Documentary Record* at xv (cited in note 1).

55. Herbert J. Storing, *The Constitution and the Bill of Rights*, in M. Judd Harmon, ed., *Essays on the Constitution of the United States* 47 (Kennikat Press, 1978); cf. Amar, *Bill of Rights: Creation and Reconstruction* at 344 (cited in note 2) (noting irony that "Madison stressed the didactic role that a Bill of Rights could play, yet his original planned amendments would have scattered various provisions throughout the original

Similarly, Bernard Schwartz has argued that the change from Madison's approach to Sherman's approach "was of the greatest consequence, for it may be doubted that the Bill of Rights itself could have attained its position as the vital center of our constitutional law if its provisions were diluted throughout the Constitution," and that "[p]aradoxically, it is to Sherman (himself a consistent opponent of a Bill of Rights) that we owe the fact that we have a separate Bill of Rights."[56]

Madison's proposal, however, would not have produced less significant "scattered protections of individual rights."[57] It would have, instead, produced a better bill of rights.

Consider, first, that the bulk of what we now consider the bill of rights would have appeared immediately after the protection of the Great Writ of habeas corpus and immediately before the prohibition on bills of attainder and ex post facto laws.[58] These constitutional provisions surely belong on a bill of rights—and would have been a part of a Madisonian bill of rights—but are not on our Shermanesque bill of rights. Indeed, "'Federal Farmer,' the most influential Antifederal pamphleteer, asserted that the Constitution's ninth and tenth sections of Article I 'are no more nor less, than a partial bill of rights.'"[59]

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document.").

56. Schwartz, *The Bill of Rights: A Documentary History* at 1121 (cited in note 14); see also Bowling, *"A Tub to the Whale,": The Adoption of the Bill of Rights* at 53 (cited in note 34) (Sherman's approach broadened the role of amendments in constitutional law and "made it possible to point to a body of amendments known as the Bills of Rights"; "It is ironic that credit for this development belongs to a leading opponent of the Bill of Rights, Roger Sherman."); Richard B. Bernstein, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* 43 (Times, 1993) ("The House's decision, setting amendments aside from the rest of the Constitution, would lead to the placement of the Bill of Rights at the head of the post-1787 text of the document, thus ensuring its primacy in popular imagination."); Robert A. Goldwin, *Congressman Madison Proposes Amendments to the Constitution*, in Robert A. Licht, ed., *The Framers and Fundamental Rights* 62 (AEI Press, 1992) ("If the House of Representatives had gone along with Madison's proposal to insert the new articles in the body of the Constitution, it would have been difficult to think of them collectively as a body to be called the Bill of Rights, or any other collective name.").

57. Storing, *The Constitution and the Bill of Rights* at 47 (cited in note 55).

58. Cf. Amar, *Bill of Rights: Creation and Reconstruction* at 344 (cited in note 2) (suggesting that "each clause of the early Amendments gains by its proximity to the others.").

59. Kaminski, 33 Santa Clara L. Rev. at 896 (cited in note 14); see also Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 Chi.-Kent L. Rev. 239, 246 (1988) ("the prohibitions against ex post facto laws, bills of attainder and the suspension of habeas corpus are surely rights-bearing provisions."); Rakove, *Original Meanings* at 318 (cited in note 1) ("Some rights, then, *were* protected in the Constitution, but the list was clearly piecemeal in composition and partial in coverage. . . . The omission left the framers open to the charge that they had contrived to deprive the people of their fundamen-

Consider, too, what would *not* be contained in the Madisonian bill of rights in Article I, section 9, but instead would have been left to Article III: grand jury indictment and jury trial in civil cases. These rights have not been considered sufficiently fundamental to the American scheme of justice by the Supreme Court of the United States to be included in "due process of law."[60]

It is true that jury trial in criminal cases would not have been included in Madison's bill of rights in Article I, section 9. However, Madison thought this right so basic that he wanted to include it (along with "equal rights of conscience" and "freedom of the press") in Article I, section 10, as a right to be protected from state infringement as well as federal infringement.[61] On the other hand, while the Supreme Court has concluded that the right to jury trial in criminal cases is fundamental,[62] it is far from clear that this determination by the Court has strengthened rather than weakened the nature of that right.[63]

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tal rights."); id. at 320 (noting that after Federalist James Wilson launched the idea that inclusion of a bill of rights would be dangerous because it could be construed as implying additional powers in the national government, Anti-Federalists "gleefully" pointed out that the constitution already contained a "partial bill of rights").

Moreover, increased attention to Article I, § 9 might have given the rootless right to travel at least a colorable textual home. See U.S. Const., Art. I, § 9, cl. 6 ("nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another"); cf. *United States v. Guest*, 383 U.S. 745, 758 (1966) ("freedom to travel throughout the United States has long been recognized as a basic right under the Constitution," even though "that right finds no explicit mention in the Constitution.").

60. See *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) (due process clause "does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury."); *Hutardo v. California*, 110 U.S. 516 (1884) (fifth amendment right to grand jury indictment not applicable to states); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment."); *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916) (seventh amendment right to civil jury trial not applicable to states). But see Amar, *Bill of Rights: Creation and Reconstruction* at 101 (cited in note 2) ("Guaranteed in no less than three amendments, juries were at the heart of the Bill of Rights."); id. at 116 ("If we seek a paradigmatic image underlying the original Bill of Rights, we cannot go far wrong in picking the jury.").

61. See Madison Resolution, June 8, 1789, reprinted in *Documentary Record* at 13 (cited in note 1) ("No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."); The Congressional Register, Aug. 17, 1789, reprinted in *Documentary Record* at 188-89 (cited in note 1) (Madison "[c]onceived this to be the most valuable amendment on 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.").

62. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to criminal jury trial applicable to states).

63. See *Williams v. Florida*, 399 U.S. 78 (1970) (states may use juries smaller than twelve); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (states may use non-unanimous juries).

In addition, the Tenth Amendment would not have been in the Madisonian bill of rights in Article I, section 9, but instead would have stood on its own as a separate article. With the Ninth Amendment in the bill of rights and the Tenth Amendment as a separate article of the constitution, it would have been harder to forget that there are unenumerated rights and much harder to "treat the ninth amendment as a colossally bad first draft of the tenth."[64]

There is, concededly, one embarrassing drawback to a Madisonian bill of rights in Article I, section 9: Immediately prior to that bill of rights—or perhaps (sadly) the first such right—is the protection of the slave trade until 1808.[65] But as we shall see shortly, even this drawback can be turned to advantage. Madison's approach to constitutional amendment has the redeeming virtue of permitting the elimination of such noxious provisions.

THE ELEVENTH AMENDMENT: INCREASING CONGRESSIONAL FOCUS AND REDUCING THE OPPORTUNITIES FOR JUDICIAL MISCHIEF

When we turn to the Eleventh Amendment, we leave the comfort of Madison's own handiwork and must engage in a larger measure of speculation in attempting to integrate the amendment into the original text. Compounding the difficulty,

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64. Sager, 64 Chi.-Kent L. Rev. at 246 (cited in note 64); see also id. at 264 (answer to question of "what on earth can you do with the ninth amendment?" is "you can remember the ninth amendment"). See generally Bennett B. Patterson, *The Forgotten Ninth Amendment* (Bobbs-Merrill, 1955). My point is not that the ninth amendment is only about unenumerated individual rights; I agree that the preamble, ninth, and tenth amendments are "at their core about popular sovereignty." Amar, *Bill of Rights: Creation and Reconstruction* at 145 (cited in note 2). My point, rather, is that it would be easier to see the "triangular interrelation," id., among the three if two of the three were not placed right next to each other.

65. U.S. Const., Art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each person."). Madison himself wrote in 1785:

> The Constitution may expressly restrain [the legislature] from medling with religion—from abolishing Juries from taking away the Habeas corpus—from forcing a citizen to give evidence against himself, from controuling the press, from enacting retrospective laws at least in criminal cases, from abridging the right of suffrage, from seizing private property for public use without paying its full Valu[e,] from licensing the importation of Slaves, from infringing the Confederation, &c &c.

Rakove, *Original Meanings* at 313 (cited in note 1) (quoting Letter from Madison to Caleb Wallace (Aug. 23, 1785)).

of course, is the continuing controversy over the meaning of the Eleventh Amendment.

As appended to the Constitution, the eleventh amendment reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[66]

Beginning with its 1890 decision in *Hans v. Louisiana*,[67] however, the Supreme Court has held that the Eleventh Amendment embodies a concept of state sovereign immunity far beyond the amendment's text.[68] If this understanding of the Eleventh Amendment is correct, a likely place for insertion into the body of the constitution is Article IV, section 3, which deals with the integrity of the states. Moreover, if this understanding of the Eleventh Amendment were written into the text, the addition to Article IV, section 3 would read something like "Nor shall any State be subject to liability in any court of the United States without the consent of the Legislature of the State, except when sued by the United States or another State."

A more convincing interpretation of the Eleventh Amendment—one that is more respectful of its text and pre-1890 doctrine—is that it simply "eliminated party-based jurisdiction when the state was a party defendant, but did not alter the states' amenability to suit where jurisdiction was based on subject matter."[69] On this view, a Madisonian approach to constitutional amendment would have integrated the Eleventh Amendment into the text of Article III by altering its party-based clauses.[70] The resulting text of Article III, section 2 would likely read as follows:

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66. U.S. Const., Amend. XI.

67. *Hans v. Louisiana*, 134 U.S. 1 (1890).

68. *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997); *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). See also *Wisc. Dept. of Corrections v. Schacht*, 118 S. Ct. 2047, 2052 (1998) (Eleventh Amendment does "not automatically destroy original jurisdiction [but instead] grants the State a legal power to assert a sovereign immunity defense should it choose to do so."); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 Yale L.J. 1683 (1997) (exploring whether the immunity is from liability or merely from the jurisdiction of federal trial courts).

69. Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Sup. Ct. Rev. 1, 10; see also John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983).

70. See Meltzer, 1996 Sup. Ct. Rev. at 22 (cited in note 69) ("interlineation of the Eleventh Amendment into Article III might well have resulted in a rewriting of Article III's party-based clauses").

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State, *where the State is plaintiff*;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects, *except where a State is sued by a citizen or subject of any foreign state.*

Interestingly, there is one pre-*Hans* constitution that integrates the substance of the Eleventh Amendment into its Article III. The Constitution of the Confederate States of America provides:

> The judicial power shall extend to all cases arising under this Constitution, the laws of the Confederate States; and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the Confederate States shall be a party; to controversies between two or more States; between a State and citizens of another State, where the State is plaintiff; between citizens claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign states, citizens or subjects; but no State shall be sued by a citizen or subject of any foreign state.[71]

This is not the place to revisit the extensive literature concerning the proper interpretation of the Eleventh Amendment.[72] Yet apparently the framers of the Confederate Constitution—people obviously far more committed to "state's rights" than the Federalist drafters of the Eleventh Amendment—did not view the Eleventh Amendment as a statement of state sovereign immunity but as a modification to the party-based clauses of Arti-

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71. Constitution of the Confederate States of America, Art. III, § 2 (1861), reprinted in George Anastaplo, *The Amendments to the Constitution: A Commentary* 357-58 (Johns Hopkins U. Press, 1995).

72. For a "brief summary of a complex set of arguments," see Meltzer, 1996 Sup. Ct. Rev. at 12-13 (cited in note 69); for references to those arguments, see id. at 10 nn.44-45.

cle III.[73] This gives powerful support to the view that *Hans* was not the proper interpretation of the Eleventh Amendment but rather an inventive solution to a difficult problem facing the Supreme Court after the end of Reconstruction: how to gracefully avoid issuing judgments requiring southern states to make good on bonds issued by their Reconstruction governments when the Justices knew that such judgments would not be enforced.[74]

However one interprets the Eleventh Amendment, it seems unlikely that Madison's approach to constitutional amendment would have resulted in simply adding the words of what now appears in the Eleventh Amendment to the end of Article III, section 2. That is, a Madisonian would be unlikely to draft an amendment describing how Article III, section 2, should be construed.[75] Instead, under Madison's approach it would have been more likely that Congress would have focused explicitly on whether it was constitutionalizing state sovereign immunity or modifying the party-based heads of federal jurisdiction. Such an explicit focus would narrow the opportunities for mischievous judicial interpretation of constitutional language.

THE TWELFTH AMENDMENT: ELIMINATING CONFUSING SURPLUSAGE

The Twelfth Amendment is quite easy to integrate into the body of the Constitution. It changed the method of presidential election from that described in Article II, section 1—whereby the electors in each state voted for two persons, with the overall winner being president and the runner-up vice-president—to one in which the electors in each state vote separately for presi-

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73. See Akhil Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1482 n.232 (citing the Confederate Constitution and noting that "the Confederates chose language that simply limited two party-defined jurisdictional categories without in any way establishing the general 'sovereign immunity' of states, or ousting federal question and admiralty jurisdiction—exactly the same result as the Eleventh Amendment of the Federalist Constitution, properly read.").

74. See Gibbons, 83 Colum. L. Rev. at 1973-2004 (cited in note 69) (recounting the history of repudiation, the end of reconstruction, and the Court's capitulation); id. at 2004 (noting that *Hans* "can be viewed as a statesmanlike performance" in that the "Court's circuitous path through the sovereign immunity question left ample room for . . . remedial decisions, while avoiding a potentially disastrous confrontation with the states in which the Court could not count on support from the executive and legislative branches of the federal government.").

75. But see James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 Corn. L. Rev. 1269 (1998) (arguing that the Eleventh Amendment was phrased as an explanation of Article III in order to secure its application to then-pending cases).

dent and vice-president.[76] Under Madison's approach to constitutional amendment, the provisions of Article II, section 1 describing the role of presidential electors would be eliminated and the text of the Twelfth Amendment substituted in its place.

Under our Shermanesque Constitution, a citizen interested in learning how the president is elected would begin by reading Article II, section 1. There she would read that the president "shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows."[77] If she read what "follows" carefully, she might wonder why the losing candidate for president does not routinely wind up as vice-president. If she thought some more and considered that the electors might cast their two votes for the president and vice-president running on a ticket together, she would then wonder why they do not routinely wind up with the same number of votes as each other, leaving it to the House of Representatives to decide which one of them would actually be president. If she were lucky, her copy of the Constitution would have some annotation indicating that she should check the Twelfth Amendment, where she would learn that she has wasted her time trying to interpret the Constitution.

Under a Madisonian constitution, a citizen would not have to wade through such confusing surplusage and follow an unofficial cross-reference, but instead could learn how the president is elected by reading what "follows" the part of the Constitution that says that the president shall be elected "as follows."

THE THIRTEENTH AMENDMENT: ELIMINATING EVIL PROVISIONS

The Thirteenth Amendment abolished slavery. If it were integrated into the body of the Constitution, it would fit comfortably in the Madisonian bill of rights in Article I, section 9. Indeed, since the Thirteenth Amendment renders irrelevant the limitation on Congressional power over the slave trade contained at the beginning of Article I, section 9, the language abolishing slavery can take the place of that evil provision. The result is that what earlier looked like an embarrassing way to begin a bill of rights would be eliminated, and the most basic

76. Under neither system does the full electoral college ever meet to deliberate. Cf. Geoffrey R. Stone, et al., *Constitutional Law* 14 (Little, Brown and Co., 3d ed. 1996) ("electoral college . . . was to be a deliberative body").

77. U.S. Const., Art. II § 1, cl. 1.

right—the right to be free from enslavement—would take its place, joining such rights as habeas corpus, free speech, free exercise of religion, protection against unreasonable searches and seizures, and the prohibition on bills of attainder. Under Madison's approach to amendments, the limitation on the amendment power to protect the slave trade, as well as the hated fugitive slave clause of Article IV, section 2, would likewise be removed from the Constitution.

Madison's approach to constitutional amendment would also have made it less likely that the framers of the Thirteenth Amendment would have overlooked that the abrogation of slavery, by permitting freed slaves to be counted for allocating seats in Congress and the Electoral College, increased the danger of southern dominance of the national government.[78] "This oversight vastly complicated the already difficult task of Reconstruction."[79]

Incorporating section 2 of the Thirteenth Amendment into the body of the constitution would require an addition to Article I, section 8, which gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[80] The addition would be a rather straightforward phrase at the end of the sentence: "and to enforce the limitations and obligations imposed by this Constitution." This addition would simply state explicitly what the Supreme Court had already held to be implicit in the constitution in *Prigg v. Pennsylvania*, where the Court held that if "the Constitution guarantees the right . . . the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it."[81] The delicious irony is

78. See William E. Nelson, *The Fourteenth Amendment* 46 (Harvard U. Press, 1988).

79. Id; see also Rakove, *Original Meanings* at 93 (cited in note 1) (noting that "the South had to be reconstructed—precisely because freed but disenfranchised slaves would be fully counted for purposes of apportionment in the House").

80. U.S. Const., Art. I, § 8, cl. 18. See Meltzer, 1996 Sup. Ct. Rev. at 22 (cited in note 69) ("Suppose that the Fourteenth Amendment had been interlineated in the original Constitution—with . . . Section 5's grant of legislative authority added to Article I, Section 8.").

81. 41 U.S. 539, 615 (1842). For a devastating critique of both *Prigg* and the attempt by Justice Story's son to recast it as an anti-slavery opinion, see Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 Sup. Ct. Rev. 247 (1995).

that the right involved in *Prigg* was the right of a slave owner to the return of his property under the fugitive slave clause.

THE FOURTEENTH AMENDMENT: CONSTITUTIONALIZING THE UNION'S VICTORY IN THE CIVIL WAR AND REMOVING OUTDATED TRANSITIONAL MATERIAL

The Fourteenth Amendment contains four substantive provisions which serve to embody in the Constitution the Union's victory in the Civil War. Section 1 defines both national and state citizenship and prohibits the states from infringing the privileges or immunities of citizens of the United States and ensures that states provide both due process and equal protection. Section 2 revises the method of apportioning seats in the House of Representatives to eliminate the advantage originally given to slave holding states. Section 3 disables public officers who joined the confederate insurrection from holding future office. Section 4 makes clear that the debts incurred to suppress the confederacy would be paid, but that the debts of the confederacy would not be paid and slave owners would not be compensated for emancipation.

It is possible that the Union's victory would have been embodied in the Constitution much differently if the framers of the Fourteenth Amendment followed Madison's method of amending the constitution. Such a method might well have forced them to confront directly the question of which rights already protected from federal infringement, if any, they intended to also be protected from state infringement. This is not the place to revisit the debate over the incorporation doctrine,[82] but rather simply to note that a Madisonian approach to constitutional amendment might have radically influenced that debate. For example, the Reconstruction Congress might have resolved the debate textually by moving elements of Article I, section 9 and Article I, section 10 into a new section that explicitly limited both the federal government and the states. More generally, it might have made it harder for the members of the Thirty-Ninth Congress to evade making clear just how substantially they intended to alter the federal system.[83]

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82. See generally Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5 (1949); William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. Chi. L. Rev. 1 (1954).

83. See Nelson, *The Fourteenth Amendment* at 52 (cited in note 77) (draftsmen of fourteenth amendment may have chosen "a phrasing that was sufficiently broad so that

In order to keep speculation to a minimum, however, I am willing to assume that the text of the four substantive provisions of the Fourteenth Amendment would have been enacted as they were, but located in the appropriate parts of the constitution.

The first section of the Fourteenth Amendment contains two distinct sentences, one defining citizenship and the other protecting privileges and immunities, due process, and equal protection. The latter plainly belongs at the beginning of Article I, section 10, the section of the constitution setting forth limits on state power that has been called "the Federalist forebear of the Fourteenth Amendment."[84] Indeed, Congressman Bingham—"the Madison of the first section of the Fourteenth Amendment,"[85]—explained that he used Article I, section 10 as a model for his drafting.[86]

The first sentence of the Fourteenth Amendment is more difficult to place, perhaps because it seems to have been somewhat of an afterthought in the amendment process. It was not a part of the proposed amendment as it emerged from the Joint Committee on Reconstruction or as it was passed by the House of Representatives.[87] Instead, it was added on the floor of the Senate pursuant to a motion of Senator Howard of Michigan.[88] Although many Republicans in Congress evidently believed that

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those who favored federal protection of political rights could construe it to provide such protection, and sufficiently innocuous so that those opposed giving such power to the federal government could be reassured that the amendment did no such thing.").

84. Amar, 100 Yale L.J. at 1134 (cited in note 53).

85. *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting). See also Amar, *Bill of Rights: Creation and Reconstruction* at 343 (cited in note 2) ("we might do well to study John Bingham more, and lift some of the load from James Madison's stooped shoulders.").

86. See Cong. Globe, 42d Cong., App. 1st Sess. 84 (1871) ("I did imitate the framers of the original Constitution. As they had said 'no State shall emit bills of credit, pass any bill of attainder, *ex post facto law*, or law impairing the obligation of contracts;' imitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment . . . .").

87. See Nelson, *The Fourteenth Amendment* at 57-58 (cited in note 78) (describing proposal by the joint committee and noting that it was passed by the House as proposed); Horace Edgar Flack, *The Adoption of the Fourteenth Amendment* 71 (AMS Press, 1965) ("at no time was the question of citizenship considered by the Committee, no proposition to define citizenship being submitted . . . . for the Committee evidently regarded the freedmen as citizens"); id. at 73 (noting that the report of the Joint Committee on Reconstruction said "not a word . . . about the necessity or desirability of defining citizenship," but nonetheless "specifically declared that negroes were citizens.").

88. Cong. Globe, 39th Cong., 1st Sess. 2869 (1866). Senator Fessenden, Chairman of the Joint Committee on Reconstruction, was too ill to present the joint resolution proposing the fourteenth amendment, and Senator Howard took his place. Flack, *The Adoption of the Fourteenth Amendment* at 84 (cited in note 86). This amendment was made after the Republicans had spent several days in caucus, "while the Senate held short sessions or was in adjournment." Fairman, 2 Stan. L. Rev. at 59 (cited in note 81).

the freedmen had already been made citizens by the Thirteenth Amendment and the Civil Rights Act of 1866, they feared that "Courts had thrown some doubt over the question," and might find the Civil Rights Act of 1866 unconstitutional.[89] Therefore they did not want to put "'reliance . . . upon judicial decisions' which might be 'against freedom.'"[90] The major judicial decision that had been against freedom, of course, was *Scott v. Sandford*.[91]

Dred Scott, like *Chisolm v. Georgia*,[92] involved an interpretation of one of Article III's diversity clauses: blacks were not "citizens" within the meaning of Article III and therefore could not invoke a federal court's diversity jurisdiction. Perhaps then, the first sentence of the Fourteenth Amendment, designed as it was to prevent another *Dred Scott*, belongs, like the Eleventh Amendment, in Article III.

On the other hand, Professor Nelson has stated:

> In all, the existing archival material suggests that, during the winter and spring and even into the autumn of 1866, questions connected with the adoption of the Fourteenth Amendment were the central political concern of the American people. Section one itself was not seen as a trivial matter designed merely to remove doubts about the constitutionality of the Civil Rights Act, but rather as a declaration of fundamental principle . . . . As a declaration of fundamental principle—of the meaning of American citizenship and nationality—section one was in the center of public discourse.[93]

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89. Flack, *The Adoption of the Fourteenth Amendment* at 88 (cited in note 86) (citing Cong. Globe at 2560). See also Crosskey, 22 U. Chi. L. Rev. at 20-21 (cited in note 81) (arguing that Bingham "drew the first draft of what is now the first section of the Fourteenth Amendment, upon the assumption that all the Republican constitutional theories . . . were the standing law [and] failed to recognize that prudent draftsmanship required a negation of the still unoverruled doctrine of the *Dred Scott Case* that persons of African descent, whether slaves or not, were not, and could not possibly be, citizens of the United States under the Constitution."). Cf. *The Slaughterhouse Cases*, 83 U.S. 36, 73 (1873) ("But it had been held by this court, in the celebrated Dred Scott case . . . that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled.").

90. Nelson, *The Fourteenth Amendment* at 58 (cited in note 77) (quoting "Report of the Reconstruction Committee," *The Right Way* at 1 (May 12, 1866)).

91. 60 U.S. 393 (1857).

92. 2 U.S. 419 (1793) (holding that the Supreme Court had jurisdiction over the case as a controversy "between a State and Citizens of another State").

93. Nelson, *The Fourteenth Amendment* at 60 (cited in note 77).

As a declaration of fundamental principle of citizenship and nationality, the first sentence of the Fourteenth Amendment would be best placed in Article IV, section 2, with the original privileges and immunities clause. This is a particularly apt placement, considering that nearly all of the Civil War era Republicans believed that the original privileges and immunities clause, properly understood, already protected the privileges and immunities of national citizenship.[94]

Notice that if the privileges or immunities clause of the Fourteenth Amendment were placed in Article I, section 10, it would follow close on the heels of the Madisonian bill of rights in Article I, section 9, a placement that might have added credence to the argument that the privileges and immunities of national citizenship are those listed in the bill of rights,[95] particularly because such a bill of rights would not include civil jury trial or grand jury indictment.[96] Moreover, by separating the first and second sentence of the Fourteenth Amendment from

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94. Crosskey, 22 U. Chi. L. Rev. at 15-16 (cited in note 82); Amar, *Bill of Rights: Creation and Reconstruction* at 207-08 (cited in note 2) (noting the "widely held Republican view that these words in Article IV incorporated by reference the rights, freedoms, privileges, and immunities later specified in the Federal Bill."). Indeed, a Madisonian approach to the fourteenth amendment might have led Bingham to amend Article IV's privileges and immunities clause to fill what he saw as an ellipsis. See Crosskey, 22 U. Chi. L. Rev. at 13 (cited in note 82) ("There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is 'the privileges and immunities of citizens of the United States in the several States' that it guaranties.") (quoting Cong. Globe, 35th Cong., 2d Sess. 984 (1859) (statement of Bingham)).

95. But see *Slaughterhouse*, 83 U.S. at 74-75 (noting that the first sentence of the fourteenth amendment refers to both national and state citizenship, while the second sentence refers only to national citizenship, and holding that the fourteenth amendment only protects privileges and immunities of national citizenship, not privileges and immunities of state citizenship); id. at 79 (suggesting that privileges and immunities of national citizenship are limited to those that "own their existence to the Federal government, its National character, its Constitution, or its laws."); cf. *Adamson*, 332 U.S. at 71-72 (1947) (Black, J., dissenting) ("My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who . . . opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states."); Amar, *Bill of Rights: Creation and Reconstruction* at 260 (cited in note 2) (arguing that the right question under the privileges or immunities clause is "whether it is a personal *privilege*—that is, a private right—of individual citizens, rather than of states or the public at large.").

96. Cf. *Adamson*, 332 U.S. at 62-63 (Frankfurter, J., concurring) ("To suggest that it is inconsistent with a truly free society to begin prosecutions without an indictment, to try petty civil cases without the paraphernalia of a common law jury . . . is, in de Tocqueville's phrase, to confound the familiar with the necessary."). Perhaps Akhil Amar is correct that there are stronger arguments for applying the civil jury and grand jury requirements than generally acknowledged, see Amar, *Bill of Rights: Creation and Reconstruction* at 318-26 (cited in note 2); yet he acknowledges that "so much of the hostility to incorporation has been driven by doubts about the fundamentality of juries." Id. at 326.

each other—and by linking the definition of citizenship with the original privileges and immunities clause—it would reduce the force of the Court's reasoning in *Slaughterhouse* that the privileges and immunities of state and national citizenship must be different because the first sentence mentions both while the second sentence mentions only national citizenship.[97] In short, the incorporation debate might have been short-circuited—and the privileges or immunities clause of the Fourteenth Amendment saved from the virtual irrelevance to which *Slaughterhouse* consigned it—because the privileges or immunities clause in Article I, section 10 of a Madisonian constitution might have been read as a reference to the bill of rights in Article I, section 9 of a Madisonian constitution.

The second section of the Fourteenth Amendment, which addresses the allocation of seats in the House of Representatives, would replace the original method of allocation contained in the third paragraph of Article I, section 2. As a result, a provision that gave slave-holding states disproportionate power in the House and the Electoral College by adding three-fifths of the number of slaves to a state's free population would be replaced by a provision that reduces a state's representation in the House to the extent the state excludes adult black males from voting in elections. Moreover, it seems likely that the transitional material in that paragraph—requiring that the first census occur within three years after the first meeting of Congress and allocating representatives to the original states pending that census—would also be eliminated. If a paragraph is being substantially rewritten, a drafter following Madison's approach would probably delete old transitional provisions that had long since been implemented and rendered no longer relevant.[98]

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97. *Slaughterhouse*, 83 U.S. at 74-75.

98. The provision that direct taxes, like representation, be apportioned, would also likely have been eliminated from Article I, section 2, because its protection was repeated later in Article I, section 9. It is also possible that the provision in Article I, section 9 would itself have been deleted as well, considering that the requirement of apportioning direct taxes had been created solely as a device to legitimate the apportionment of representation. See Rakove, *Original Meanings* at 74 (cited in note 1) ("As Wilson noted, 'less umbrage would perhaps be taken agst. an admission of slaves into the Rule of representation' if it posed as an extension of a rule of taxation.") (citation omitted); id. at 179-80 (noting that "real purpose" of apportionment rule was "to legitimate the sectional compromise over representation."); id. at 396 n.44 (recounting that Gouverneur Morris suggested that the Convention strike out the provision proportioning taxation to population because it had been merely a bridge to get over the problem of how to count slaves and that once across, they could remove the bridge.). Interestingly, if this had been done, the sixteenth amendment would have been unnecessary.

For similar reasons, a Madisonian approach to the Fourteenth Amendment might well have resulted in the elimination of Article VII of the constitution, which provides that the ratification of the constitution by nine states would establish the constitution between those states. Certainly this provision was a transitional one that had been fulfilled. Moreover, there might have been some symbolic appeal to the idea of eliminating this transitional provision, having just fought a civil war that established the permanence of the Union.[99]

The third section of the Fourteenth Amendment provides that a public officer who once took an oath of office to support the Constitution, and then violated that oath by supporting the confederacy, could not hold either state or federal office unless Congress by a two-thirds vote removed the disability. The natural place for insertion of this provision is in Article VI, immediately after the requirement that state and federal officers take an oath to support the Constitution.

The fourth section of the Fourteenth Amendment provides that the debts incurred by the United States to suppress the confederacy would be paid, but that no compensation would be paid to slave owners for the loss or emancipation of any slave and that neither the United States nor any state could pay debts of the confederacy. It, too, has a natural insertion point in Article VI, immediately after the provision that the prior debts incurred by the United States would be as valid under the Constitution as under the Articles of Confederation.

But what of section 5 of the Fourteenth Amendment, giving Congress the power to enforce the substantive provisions of the Fourteenth Amendment? While section 5 has caused considerable controversy in the Supreme Court,[100] it would have been

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99. The legal theory of secession relied heavily on the idea that the constitution was "formed by the several States in their separate sovereign capacity." Mississippi Resolution on Secession (Nov. 30, 1860), reprinted in Henry Steele Comager, ed., *Documents of American History* 371 (Appleton-Century-Crofts, 8th ed. 1968). South Carolina, for example, purported to "repeal[]" its ratification, South Carolina Ordinance of Succession (Dec. 20, 1860), reprinted in *Documents of American History* at 372, explaining that the constitution was a "compact between the States." South Carolina Declaration of Causes of Secession (Dec. 24, 1860), reprinted in *Documents of American History* at 373. In the special session of the Confederate Congress in which President Jefferson Davis asked for and received authority to prosecute the war, he explained that "the Constitution of the United States was framed in 1787 and submitted to the *several states* for ratification, as shown by the seventh article," which he then proceeded to quote. Davis's Message to Congress (April 29, 1861), reprinted in *Documents of American History* at 389 (emphasis in original).

100. Compare *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997) (exercise of Congressional power under section 5 requires "congruence and proportionality between

completely unnecessary if Madison's approach to constitutional amendments had been adopted. For as we have already seen,[101] the ratification of the Thirteenth Amendment would already have resulted in the revision of the necessary and proper clause to explicitly give Congress the power to "enforce the limitations and obligations imposed by this Constitution." Although there might still have been battles over the scope of Congressional enforcement power, they would be fought on the familiar terrain of the necessary and proper clause,[102] rather than on some unique and exotic constitutional island.

THE FIFTEENTH, NINETEENTH, TWENTY-FOURTH, AND TWENTY-SIXTH AMENDMENTS: GIVING SHAPE TO THE GUARANTY OF A REPUBLICAN GOVERNMENT

The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments each expand the franchise by eliminating a traditional basis for denying people the ability to participate in political life: race, sex, poverty, and youth. They belong together, and a Madisonian approach to the process of constitutional amendment would put them together. Moreover, by setting limits on exclusion from political participation, they help to define what a truly representative government entails. Thus all four should be placed at the end of Article IV, section 4, which guarantees to every state a "republican form of government."

It is also possible that a Madisonian approach to constitutional amendment might have led Congress to consider, when proposing the Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, whether to provide for reduction in a state's representation in the House if the state does not permit women or the poor or eighteen year olds to vote. Alternatively, Congress might have considered deleting the existing provision calling for reduction in representation as unnecessary after the Fifteenth Amendment.[103] As our constitution now stands, discrimination

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the injury to be prevented or remedied and the means adopted to that end") with *Katzenbach v. Morgan*, 384 U.S. 641, 651-52 n.10 (1966) (suggesting that under section 5 Congress can expand, but not contract, individual rights recognized by the Supreme Court).

101. See text accompanying notes 77-80.

102. See *McCulloch v. Maryland*, 17 U.S. 316, 413 (1819) (holding that "necessary" in the "necessary and proper" clause means "convenient" or "useful"); cf. Eugene Gressman and Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 125 (1996) (describing section 5 of the Fourteenth Amendment as a "little necessary and proper clause").

103. Such a deletion would have removed a textual obstacle to redressing sex discrimination under the equal protection clause. See Stone, et al., *Constitutional Law* at

in voting against all these groups is illegal, but only discrimination against males over twenty-one triggers a reduction in representation in the House.

THE SIXTEENTH AMENDMENT: LOOSENING A RESTRAINT ON CONGRESS

Article I, section 9 prohibited Congress from imposing a direct tax, except in proportion to the population of each state, creating serious impediments to a national income tax.[104] Moreover, Article V prohibited an amendment of this provision prior to 1808. As noted earlier, these provisions were included in the original constitution to provide cover for the three-fifths rule of representation, and might have been eliminated by the Reconstruction Congress under a Madisonian approach to constitutional amendment.[105] Under our Shermanesque constitution, however, this did not occur. In order to permit a national income tax, the Sixteenth Amendment was enacted in 1913.

Even if these provisions had survived Reconstruction, a Madisonian would not put pages of text between a provision placing a restraint on Congress and another provision loosening that restraint. Instead, the Sixteenth Amendment would be placed in Article I, section 9, as a modification of the restraint on Congressional powers that was being loosened. In addition, under Madison's approach to constitutional amendment, the expired restriction on amending this provision would have been deleted.

THE SEVENTEENTH AMENDMENT: ELIMINATING MORE CONFUSING SURPLUSAGE

The Seventeenth Amendment is much like the twelfth. Just as the twelfth changed the method of presidential election from that described in Article II, section 1, the Seventeenth Amendment changed the method of electing Senators from that described in Article I, section 3. Under the original Constitution, Senators were chosen by state legislatures and the governor could fill temporary vacancies until the legislature met. Under the Seventeenth Amendment, Senators are elected by the peo-

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709 (cited in note 75) ("Ironically the second section of the Fourteenth Amendment for the first time introduced explicit gender discrimination into the Constitution."); *Minor v. Happerset*, 88 U.S. 162 (1874) (relying on section two of the Fourteenth Amendment to uphold the denial of female suffrage).

104. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

105. See note 107.

ple of each state and the governor can be empowered to fill temporary vacancies until an election can be held. Following Madison's approach to the amending the Constitution, just as the Twelfth Amendment would replace the parts of Article II, section 1 that it superseded, so too the Seventeenth Amendment would replace the parts of Article I, section 3 that it superseded. Moreover, the provision of Article I, section 4 that prohibited Congress from setting the place for choosing Senators would be eliminated.

In addition, as with the Fourteenth Amendment, outdated transitional material might well have been eliminated, in this case the provision of Article I, section 3 that the first Senate divide itself into three classes so that only one-third of the Senate stands for reelection every two years. Finally, the transitional material contained in the Seventeenth Amendment itself—i.e., that it would not affect Senators already chosen prior to its ratification—could simply have been a part of the resolution of amendment. Under a Madisonian approach, such a provision need not be contained in the Constitution itself, any more than the resolution of the Constitutional Convention calling on Congress, as soon as nine states ratified, to set dates for the selection of electors, the voting by electors, and the "Time and Place for commencing the Proceedings under this Constitution," was contained in the Constitution.[106]

THE EIGHTEENTH AND TWENTY-FIRST AMENDMENTS: AVOIDING THE CLUTTER OF ENACTMENT AND REPEAL

The Eighteenth Amendment prohibited intoxicating liquor; the Twenty-First Amendment repealed the Eighteenth Amendment. While thankfully this is the only such event in our history, it could have happened more frequently, and might still. Madison's approach to constitutional amendment would avoid cluttering the Constitution with amendments and their repeals. Instead, upon repeal, the earlier amendment would simply be stricken out.

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106. Resolution of the Constitutional Convention, Sept. 17, 1787, reprinted in Bernstein, *Amending America* at 291 (cited in note 56). Similarly, the Congressional resolution transmitting the proposed constitution to the state legislatures "in Order to be submitted to a convention of Delegates chosen in each State by the people thereof" is not treated as part of the constitution. Resolution of the Congress of the United States to Transmit the Proposed Constitution to the Legislatures of the States, Sept. 28, 1787, reprinted in 2 *Documentary History of the Constitution of the United States of America 1786-1870* at 22 (Dept. of State, 1894).

The Twenty-First Amendment, however, did one thing in addition to repealing the Eighteenth Amendment. It prohibited bringing intoxicating liquor into a state for delivery or use in violation of the laws of that state. This short provision is the only part of these two amendments that would appear in a Madisonian constitution.

As Laurence Tribe has pointed out, the Twenty-First Amendment "actually forbids the private conduct it identifies, rather than conferring power on the States as such" to forbid that conduct.[107] This feature makes placement of the provision in a Madisonian constitution a bit unclear, because our Constitution does not have a section devoted to imposing restrictions on individuals. The only other such constitutional provision is the Thirteenth Amendment's ban on slavery, but a ban on bringing alcohol into a state hardly seems to belong alongside the abolition of slavery.[108] The better place for this short provision from

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107. Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 Const. Comm. 217, 219 (1995) ("This has the singular effect of putting the Twenty-First Amendment on a pedestal most observers have always assumed was reserved for the rather more august Thirteenth Amendment, which is typically described as the *only* exception to the principle that our Constitution's provisions . . . limit only some appropriate level of *government*.") (emphasis in original).

108. Id. at 220 ("The upshot is that there are two ways, and only two ways, in which an ordinary private citizen . . . can violate the United States Constitution. One is to enslave someone, a suitably hellish act. The other is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws—an act that might have been thought juvenile, and perhaps even lawless, but *unconstitutional*?") (emphasis in original).

The eighteenth amendment itself directly controlled private behavior. U.S. Const., Amend. XVIII § 1 ("the manufacture, sale, or transportation of intoxicating liquors . . . is hereby prohibited."); *National Prohibition Cases*, 253 U.S. 350, 386 (1920) (noting that the amendment "binds all legislative bodies, courts, public officers *and individuals*") (emphasis added). Indeed, Elihu Root argued that such an amendment was beyond the scope of the Article V amendment power, see *National Prohibition Cases*, 253 U.S. at 362-64 (argument of Senator Root). He distinguished the thirteenth amendment by noting that slavery is a creature of positive law, "always unauthorized unless some exercise of government permitted it." Id. at 363. The Supreme Court held otherwise, but announced only its conclusions, not its reasons. Id. at 384-86 ("Mr. Justice Van Devanter announced the conclusions of the court."); see also David E. Kyvig, *Repealing National Prohibition* 17-18 (U. of Chicago Press, 1979). A related argument, that an amendment such as prohibition could only be enacted by convention, was accepted by a district judge in Newark, N.J., but not by the Supreme Court. *United States v. Sprague*, 44 F.2d 967 (D.N.J. 1930), rev'd 282 U.S. 716 (1931); see Kyvig, *Repealing National Prohibition* at 139. While the twenty-first amendment does not belong alongside the abolition of slavery, it is at least possible that the advocates of the eighteenth amendment—led by "evangelical Protestant churches" that believed that sobriety was "the foundation of economic success and political liberty," id. at 6—would have sought to place the eighteenth amendment precisely there.

The twenty-first amendment was ratified by conventions, thus belying the statement in our Shermanesque Constitution that describes all of the amendments as ratified by

the Twenty-First Amendment is in Article IV, section 2, along with the other constitutional provisions dealing with those who cross from the border from one state to another.[109]

THE TWENTIETH, TWENTY-SECOND, TWENTY-THIRD, AND TWENTY-FIFTH AMENDMENTS: PUTTING THE PRESIDENT AND CONGRESS IN THEIR PLACES

The Twentieth Amendment, designed to eliminated lame duck sessions of Congress, sets January 3 as the date for the transition of power from one Congress to the next and January 20 as the date for the transition of power from one president to the next. It also provides for situations in which the president-elect dies prior to taking office. The Twenty-Second Amendment imposes a limit of two terms on the president. The Twenty-Third Amendment provides for the District of Columbia to participate in the election of the president through the electoral college. The Twenty-Fifth Amendment provides for filling a vacancy in the vice presidency and for handling presidential disability.

If Madison's approach to amending the constitution had prevailed, the provisions of the Twentieth Amendment would have been placed in Article I, section 4, replacing the second paragraph of that article which required Congress to assemble (typically some thirteen months after they were elected[110]) on the first Monday in December. The remaining substantive provisions of the Twentieth Amendment, as well as the substantive provisions of the Twenty-Second, Twenty-Third, and Twenty-Fifth Amendments, would all be placed in Article II, section 1, along with all of the other provisions governing the election of the president.

A Madisonian approach to constitutional amendments, however, might well have been more valuable: The drafters of the Twentieth Amendment wanted to ensure that if any future presidential election had to be resolved by the House, it would be done by the new House taking office on January 3, not the

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the state legislatures.

109. The privileges and immunities clause of Article IV, section 2 protects a citizen of one state that travels into another while its extradition clause prevents a person who travels from one state into another to avoid prosecution from obtaining sanctuary. See U.S. Const., Art. IV, § 2.

110. See John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. Rev. 470, 485 (1997).

old House before January 3.[111] However, they did nothing to set a date on which the president of the Senate is required by Article II, section 1 and the Twelfth Amendment to open the votes submitted by the electors in the several states. Nor did they alter the requirement of those provisions that, if no one receives a majority of electoral votes, the House of Representatives shall choose a president "immediately." There is a ticking time bomb in our Constitution, one that could produce a crisis of legitimacy if an outgoing Congress claimed the power—perhaps even the constitutional duty—to meet prior to January 3 in order to select the new president.[112] If Madison's approach to constitutional amendment had prevailed, the drafters of the Twentieth Amendment might well have focused more closely on how they intended to affect the prior language of the Constitution, and perhaps have avoided this danger.

THE TWENTY-SEVENTH AMENDMENT: FULL CIRCLE TO MADISON

The Twenty-Seventh Amendment, which prevents Congress from taking advantage of a raise that it gives itself without standing before the people in an intervening election, brings us full circle back to James Madison. For this amendment was one of the original amendments proposed by Madison, approved by Congress, but not ratified by the requisite number of states until 1992. It is easy to decide where it would be inserted into the constitution under Madison's approach, because Madison himself proposed that it be inserted at "the end of the first sentence" in "Article I[], section 6, clause 1."[113]

III. A UNIFORM AND ENTIRE CONSTITUTION

What follows is what our Constitution would look like if Madison's approach to constitutional amendments had prevailed in the first Congress. For ease in finding additions to the original text, the additions are highlighted; for ease in reading, the deletions are not indicated. The result, I believe, is as Madi-

111. Id. at 481 & n.54.

112. Cf. Akhil Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 Ark. L. Rev. 215 , 222 (1994) (unresolved questions of what happens if death occurs at any time prior to counting of electoral votes create "a time bomb ticking away in our Constitution").

113. Madison Resolution of June 8, 1789, reprinted in *Documentary Record* at 12 (cited in note 1).

son predicted, "uniform and entire," and "certainly . . . more simple."[114]

It is true that such a uniform and entire Constitution lacks the "archeological feel," caused by "different historical layers of text."[115] As a result, the scars of history are less immediately visible. But a constitution is not written for historians or archeologists. It is written as a frame of government for the people of today. As Judge Gibbons has explained:

> But who elected the Founders? The answer to that question is plain: we did, if anyone did, and each prior generation has before us, and if the Constitution is to remain a form of higher law, each succeeding generation must do so again—for no one else can.[116]

Because "the status of the Constitution as law depends upon the political will of a present political community,"[117] it should be understandable, not only by the priestly class of lawyers and judges, but by the people—today's people—in whose name it is made.[118] The Constitution "was not supposed to be a

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114. The Congressional Register, Aug. 13, 1789, reprinted in *Documentary Record* at 118 (cited in note 1).

115. Amar, *Bill of Rights: Creation and Reconstruction* at 344 (cited in note 2).

116. John J. Gibbons, *Intentionalism, History, and Legitimacy*, 140 U. Pa. L. Rev. 613, 624 (1991). See also William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1986) (arguing that "Justices read the Constitution in the only way we can: as twentieth-century Americans.").

117. Gibbons, 140 U. Pa. L. Rev. at 622 (cited in note 116).

118. See, e.g., Rakove, *Original Meanings* at 344 (cited in note 1) ("Had the Constitution . . . been expressed in the scientific language of law, or those terms of art which we often find in political compositions, . . . it might have appeared more definite and less ambiguous; but to the great body of the people altogether obscure, and to accept it they must leap in the dark.") (quoting Oliver Ellsworth). Cf. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* at 102 (cited in note 24) ("The decision to make amendments supplementary increased the need for an arbiter of disputes over constitutional interpretation. The role of the judiciary in American constitutionalism would therefore grow larger."); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 Alb. L. Rev. 671, 674-75 (1995) ("the words of the Constitution, our fundamental charter of rights and of government, have become the exclusive province of an elite cabal of high priests. . . . The Constitution has become a relic to be worshiped, rather than a document of the People, intended to be read, understood, and applied by the People, in order to produce government for the People. We don't bury the document in a treasure chest, but we do the next best thing: we place it under glass at the National Archives so that tourists can walk past and gaze at old parchment for twenty seconds apiece."). Interestingly, the veneration for the original parchment of the constitution is a relatively recent phenomenon. As late as 1882, it was "kept folded up in a little tin box in the lower part of a closet" at the library of the State Department. Charles Warren, *The Making of the Constitution* at v (Fred B. Rothman & Co., 1993 reprint) (internal citation omitted).

Joseph Goldstein has made a similar point about Supreme Court opinions:

prolix code. It had been made, and could be unmade at will, by We the People of the United States."[119] Indeed, if Madison had prevailed, perhaps we would have been less likely to have "lost the powerful and prevailing sense of 200 years ago that the Constitution was *the people's* law."[120] Such popular understanding is particularly important for a bill of rights, considering that for Madison, "The true benefits of a bill of rights were to be found in the realm of public opinion.... As greater popular respect for individual and minority rights developed over time... the greater benefit would occur if acceptance of the principles encoded in rights acted to restrain political behavior, tempering improper popular desires *before* they took the form of unjust legislation."[121]

There is, finally, an elegant symmetry to such a Madisonian constitution: It begins with a statement that it is made by "we the people," and ends with a recognition of the reserved powers of "the people."[122]

> If Ours is to be an "intelligent democracy," if Our revolutions are to be peaceful, We the People... must be able to learn, from Our own reading of the Constitution and the Supreme Court's constructions of it, what rights We have and do not have,... and what limits are and are not imposed on those who govern on Our behalf. For then We can meet Our responsibility as informed citizens to respond to what the Court did and why it did it.

Joseph Goldstein, *The Intelligible Constitution: The Supreme Court's Obligation to Maintain the Constitution as Something We the People Can Understand* 6 (Oxford U. Press, 1992).

119. Amar, *Bill of Rights: Creation and Reconstruction* at 123 (cited in note 2).

120. Amar, 100 Yale L.J. at 1195 (cited in note 53) (emphasis in original).

121. Rakove, *Original Meanings* at 335-36 (cited in note 1). Anti-Federalists agreed that "[b]ills of rights were educational documents," but emphasized that "they provided the standards of certainty that enabled citizens to assess doubtful acts of government" and "worked best by inculcating the values they espoused among the people *and* their rulers." Id. at 324 (emphasis in original). See also Amar, *Bill of Rights: Creation and Reconstruction* at 157 (cited in note 2) ("The words of the Bill of Rights would themselves educate Americans; hence the appropriateness of didactic, nonlegalistic phrases...."); id at 349 (noting that both James Madison and John Bingham understood "that a Bill that did not dwell in the hearts and minds of ordinary Americans would probably, in the long run, fail.").

122. *Cf.* Amar, 100 Yale L.J. at 1200 (cited in note 53) (preamble and tenth amendments are "perfect bookends, fittingly the alpha and omega").

MADISON'S "UNIFORM AND ENTIRE" CONSTITUTION

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

Article I

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

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

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

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. The actual Enumeration shall be made within every Term of ten Years, in such Manner as Congress shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative. ***But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.***

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

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

Section 3. ***The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.***

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

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

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

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

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

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

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

The terms of Senators and Representatives shall end at noon on the 3d day of January and the terms of their successors shall then begin. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

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

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

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

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

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. ***But no law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened. The members*** shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during

such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

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

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power

To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

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, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the

United States, or in any Department or Officer thereof, ***and to enforce the limitations and obligations imposed by this Constitution.***

Section 9. ***Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.***

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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 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.

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.

No person shall be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken, but ***the Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.***

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. ***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.***

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Im-

ports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct a number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District to perform their duties.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as

Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. —The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of their successors shall then begin. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress

may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors,

other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State, ***where***

the State is plaintiff;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects, ***except where a State is sued by a citizen or subject of any foreign state.***

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

The trial of all crimes, except in cases of impeachments, and cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, shall be by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and 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; provided that when ***the crime is*** not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. ***All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.*** The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for

electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation. ***The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.***

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every

State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Article VII

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.