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Ideological Origins of the New Republic

The new republic began in 1781 after the ratification of the Articles of Confederation and continued when the Americans replaced the Articles with the United States Constitution seven years later. In 1789, the people elected their first federal government. Over the next 15 years, the founding generation made substantive formal changes: in 1791, the states adopted the first 10 amendments, known collectively as the Bill of Rights, followed by two others in 1795 and 1804. The United States doubled its geographic size in 1803 when the Jefferson administration purchased the Louisiana territory from France.

The new republic endured slavery, even as some states began its gradual elimination in the 1780s. Most Americans focused on modifying their new government and its powers while declining to resolve the future of slavery. To avoid contention and disunion, the delegates to the constitutional convention did not address it. The words "slavery" or "slave" appear nowhere in the document. Some abolitionists like Benjamin Franklin – a former slave owner himself – John Adams, Alexander Hamilton, and Benjamin Rush attempted to raise the issue, but their efforts failed. Later leaders like William Lloyd Garrison, who founded the abolitionist paper, *The Liberator*, in 1831 and was co-founder of the Anti-Slavery Society, were active throughout the period. It was not until the end of the Civil War that slavery finally ended.

The period also saw the enhancement of the Supreme Court's authority when Chief Justice John Marshall issued his unanimous

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opinion in *Marbury* v. *Madison* in 1803. Marshall wrote into the Constitution that the judges' duty was to interpret the document and to overturn all laws that conflicted with that interpretation. New institutions were created, such as the Bank of the United States, and the Court unanimously approved Congress's authority to create it. George Washington was the first president to sign an executive order while James Monroe was the first to issue a signing statement, indicating his ideas of legislation and how he intended to enforce them.

The Articles of Confederation and the Constitutional Convention

Five years after the Continental Congress passed the Declaration of Independence, the states adopted the Articles of Confederation, though Congress had acted from 1776 as if this had already occurred. Because the new government lacked sufficient authority to create a uniform legal system, the states were supreme. The Articles placed all power, limited though it was, in a single-house Congress. There was no separate executive, but only a "president" who chaired a temporary congressional committee when Congress recessed. Nor did the Articles provide for a judiciary. Congress itself was the nation's highest tribunal.

The problems with the Articles lay embedded in one of the main themes outlined in the Declaration. Jefferson ended the document with the resounding words that "these United Colonies are, and of Right ought to be Free and Independent States … and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish commerce, and to do all other Acts and Things which Independent States may of right do." The use of the term "states" was significant. A state, as the founders understood it, signified a nation of people organized under one government in a defined territory. Many leaders of the new 13 states believed their states were independent, not only of Britain, but of each other, except for maintaining unity to combat Britain in the Revolutionary War. Accordingly, apart from Connecticut and Rhode Island, which simply adopted their existing colonial charters as their new constitutions, each state prepared new documents for internal governance. Because those two states were originally "corporate" colonies, they only had to revise their charters to eliminate British parliamentary supremacy and mandatory review of these laws by British officials in the Privy Council in London.

Other leaders, like Virginia's Patrick Henry, favored the Articles, because it preferred state supremacy over the new national government. The document amounted to a treaty between the states, an alliance of convenience undertaken due to the war with Britain. Unity was not, however, the goal beyond defeating Britain. "Each state retains its sovereignty, freedom and independence," the Articles announced, "and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." The United States Confederation seemed to have an existence only "in Congress assembled." Without the authority to raise revenue, Congress had to rely on the generosity of the states to send monetary "gifts" to keep the government in operation. Without a national leader, no executive enforced its laws. Without a national judiciary, the states resolved all civil and criminal actions.

Meantime, the states were subject to fierce interstate competition, even potential warfare, over water and mineral rights and boundaries. James Madison, Alexander Hamilton, and George Washington thought that a weak United States made it especially vulnerable to outside influence, attack, and even conquest. They strove to strengthen the new government when a group of entrepreneurs wanted to open the Potomac River to navigation. To begin the process, as a private citizen, Washington invited some Virginia and Maryland citizens to meet at his home at Mount Vernon to find ways to establish better communication between the two states. A representative from Pennsylvania later attended. Madison saw this as an opportunity to discuss the future of the Confederation and persuaded the Virginia legislature to appoint commissioners to meet with their counterparts in Annapolis in September 1786 to address improvements to the United States government.

The attendance at the Annapolis meeting shows how divided the states were. Only five sent representatives: New York, New Jersey, Pennsylvania, Delaware, and Virginia. Four others appointed commissioners, but none attended. Apparently, Maryland, Connecticut, South Carolina, and Georgia were uninterested. After the meeting, Hamilton, who represented New York, drafted a report to the Confederation Congress. He wrote that the commissioners unanimously championed a future meeting of delegates from all the states to strengthen the republic by amending the Articles. Although the Annapolis commissioners were mainly concerned with the breakdown in commercial relationships among the states, Hamilton carefully noted that other problems might also surface. He closed the report with a request to

Congress to authorize the states to send delegates to Philadelphia the following May to discuss the matter.

The constitutional convention met eight months later and throughout the summer of 1787. Congress charged the delegates with reporting all proposed amendments to it. Under the Articles, Congress's acceptance of an amendment required the unanimous consent of the states. Convention delegates in Philadelphia elected George Washington, the most popular man in America, to preside over the proceedings. Not only was he the hero of the victory over Britain, but he was also regarded as America's savior, "the father of his country." Madison took notes every day and rewrote them every night. Franklin served as a delegate from Pennsylvania. Jefferson did not attend. He was serving in France as the American representative or minister. John Adams also was not present: he was the American minister to Britain.

Unlike the Annapolis convention, every state – except for Rhode Island – sent representatives to Philadelphia. As it turned out, Rhode Island became the last state to ratify the Constitution, and then only after the first federal government was already operating. Its ratifying convention adopted the Constitution by a narrow vote of 34 to 32. Some delegates who did attend occasionally left because they were either uninterested or had to attend to their businesses or professional duties. This was true especially of the New York delegation. Two of the three delegates immediately became disillusioned and left. The third, Alexander Hamilton, returned to his law practice in New York City for much of the summer. Once the process began, the delegates decided against proposing amendments to the Articles and instead crafted an entirely new document. Although Congress could have simply rejected it because the delegates had disregarded their charge to recommend amendments, congressional members decided to forward the new document to the states for consideration and ratification (Box 1.1).

The new Constitution was founded on a series of compromises, especially the longest, Article I, regarding Congress. Two key issues involved the legislative branch. First, the question of how to divide power in a democratic way when the more populous states like Virginia, New York, and Pennsylvania dominated. Delegates from these large states thought representation should be based on population: Madison's Virginia Plan. Smaller states like Maryland, Delaware, and New Jersey, however, possessed far less voting power in terms of population. The New Jersey Resolutions essentially kept the same scheme created by the

Articles of Confederation when each state could elect between two and seven delegates, but the states had only one vote. The second issue concerned slavery. Given the prevalence of large slave populations in mostly southern states, the question was whether slaves should be counted in apportioning the House of Representatives. If so, the South would numerically dominate the House and the election of the president, given that electoral voting is based on a combination of the number of senators, two from each state, plus the number of representatives in the House.

Box 1.1 The Constitution of the United States, the first three articles, excerpts

Preamble
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 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.

Section 9

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.

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.

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.

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…

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…

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.

Article I-III / U.S. Constitution / Public domain

To resolve these two main issues, the delegates agreed to major compromises to ensure that the Convention stayed together. If the delegates failed to deal successfully with either one, the Convention could have dissolved. The first compromise concerned the structure of Congress's bicameral legislature. The House, elected every two years, represented the people. Each state possessed congressional districts of approximately equal numbers of people. Article I, Section 2, suggests that all the people in the district should be counted, not only registered voters: "Representatives … shall be apportioned among the several states … according to their respective numbers." To emphasize this point, when the Fourteenth Amendment was ratified in 1868, Section 2 stated that "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." These ideas reflected the classical republican ideal that electoral districts should be more or less equal in population or voters and that elections should be frequent. The Senate, meantime, represented the states, not the people or its voters. Each state was to have two senators no matter its geographic location or population size. Senators sat for six years, a long term, but the delegates agreed that the length was necessary for a body theoretically more deliberative than the House. Senate elections were undemocratic, because state assemblies, not the people, elected them, a procedure that lasted until 1913 when the Seventeenth

Amendment was ratified. Indirect election of senators reflected most delegates' view of human nature. As Madison famously wrote in Federalist 55, human passions and emotions always trump human reason: "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob," he wrote.

The second compromise involved slavery. Southern delegates thought that the census should include all slaves while northern delegates, many of whom were abolitionists, opposed including slaves. Northerners argued that slaves were neither free nor voters but mere property. The delegates finally agreed that for census purposes slaves would count as three-fifths of a person. This compromise not only held the convention together but also greatly influenced Congress and presidential elections during the nation's first half century. Virginia, which had fewer white voters than Massachusetts, maintained a larger congressional delegation than Massachusetts by counting three-fifths of the slaves there. After Jefferson won the presidency in 1800, he was often called "the negro president," because his enemies thought that the three-fifths compromise guaranteed his election. Of the first seven presidents, five were from the South, four of whom were Virginians. A third compromise also involved slavery. The Constitution empowered Congress to pass laws concerning the return of fugitive slaves, which it did in 1793, and to refrain from ending the slave trade until 1808.

Articles II and III also reflect the delegates' negative view of human nature. The people indirectly elected the president, just as they did senators. The Constitution provides that Electors, specially chosen to meet approximately one month after the popular vote, shall make the final choice. The Constitution does not mention an "Electoral College." That term came about in the early nineteenth century. Congress codified it into law in 1845. Because of its placement and brevity, Article III concerning the judiciary appears almost as an afterthought. The shortest of the articles, it lays out only one Supreme Court and all other courts that Congress decides to create. The Court's original and appellate jurisdictions indicated that most of its work was to hear appeals, except when foreign ambassadors, public ministers, or a state were litigants. For these, it possessed original jurisdiction, meaning that litigants could file actions directly in the Supreme Court. The people did not elect the federal judges, including Supreme Court justices. The president nominated a candidate and then the Senate alone confirmed or rejected the nomination by a simple majority.

Article IV addresses the states and what they may and may not do regarding the federal government. Section 4 demands that every state must guarantee that it has "a republican form of government." The article does not specify the structure of that government. It does not even demand that state governments had to be modeled on the US government. A state may have a unicameral legislature as, for example, Nebraska currently does, or, if it had two legislative houses, the makeup of both may reflect the size of the population. Article IV also includes a privileges and immunities clause, which states that a citizen from one state traveling in another state shall enjoy the same privileges and immunities of those residing in the state the citizen is visiting, but the Constitution does not define these "privileges and immunities." Finally, a provision requires each state to recognize the laws of the other states, the so-called full faith and credit clause: "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

Article V sets out amendment procedures. Congress may propose an amendment when two-thirds of both houses agree and then three-quarters of the states ratify it. Alternatively, the states themselves may call a constitutional convention, though it would once again take a two-thirds vote in both houses of Congress. Ratification would follow, requiring, again, three-quarters of the states to ratify it. Article VI contains a provision forbidding religious tests for federal officeholders.

Unlike the Articles, which require the unanimous vote of the states to ratify an amendment, the Constitution provides for the people in each state to elect special ratifying conventions to vote on the new document. The people in conventions, not their representatives in state legislatures, decided the document's fate. On September 17, 1787, 39 of the original 55 delegates signed the Constitution. Those who declined to sign believed that the powers vested in the three branches of government were too strong and centralized. They thought that the document excessively diminished the power of the states, the true representatives of American democracy and its people. Such concentrated power, they argued, led to tyranny. This argument opened the struggle over ratification that pitted the Constitution's supporters, the Federalists, against their opponents, the Anti-Federalists.

Anti-Federalists, like Patrick Henry, feared the very wording of the first three articles, which comprised bundles of power.

- Article I: "All legislative powers granted herein shall be vested in a Congress."
- Article II: "The executive power shall be vested in a President."
- Article III: "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."

Each article used the imperative form of the verb "to be," *shall*. The Constitution commands that all legislative powers or the executive power or the judicial power shall, not may or might, be vested in these branches of government. The state governments seemed to be left only with residual power when compared with what they possessed under the Articles of Confederation. Anti-Federalists were concerned that the states seemed to be only political appendages to the new national government. Moreover, they feared that the lack of a bill of rights might lead to a future despotism.

Article I also includes several provisions concerning what it authorizes Congress to do (Section 8), as well as limitations on that power; that is, what the document prohibits Congress from doing (Section 9). Congress could tax and spend, regulate commerce among the states, and declare war. It could also create a military force and devise the rules of war. It could suspend habeas corpus in the event of an invasion or rebellion. Article II, concerning presidential power, is vague in terms of what presidents may or may not do. As Section 2 states, presidents "execute" or enforce the law and serve as the commander in chief of the armed forces, though the Constitution notes only "the army and navy." Presidents negotiate treaties, while two-thirds of the Senate must consent before they are ratified. Presidents also appoint executive branch personnel and nominate judges, but only with Senate approval by a simple majority. They receive ambassadors and inform Congress of the state of the union.

The Constitution does not specify term limits for any office. The president, senators, and representatives must stand for re-election when their terms are ending, but they need not step down until they decide to do so or when they are defeated. The House of Representatives, by a simple majority, may impeach presidents if they have committed "high crimes and misdemeanors," which the Constitution does not define. The Senate then, by a two-thirds vote, may remove the president from office. Although Hamilton thought that presidents and senators should

be elected for life, re-election indirectly promised possible life terms for elected federal officials. Jefferson, for one, despised Hamilton's views, calling him "a monocrat." Like Jefferson, Anti-Federalists thought that presidents could possibly be elected and re-elected for life, making them little more than elected monarchs. The Twenty-Second Amendment (1951) limited the president to two terms in office.

Anti-Federalists also feared the new federal judiciary. Article III announces that the Supreme Court and presumably whatever lower courts Congress creates would have authority to rule on all cases and controversies that come before the United States. It created an independent judiciary that was neither related nor beholden to the legislative or executive branches. First, all federal judges serve "during good behavior," which meant life terms: service until they died, retired, or resigned, though Congress could remove them through impeachment. Second, Congress could never lower their salaries nor could Congress use its taxing and spending power to control judicial outcomes. There would be no threats to force judges to rule the way Congress wanted. The main oversight that Congress had over the Supreme Court was its authority to make exceptions to its jurisdiction, a power rarely used, the impeachment of individual justices, or the passage of constitutional amendments.

Article VI contains the supremacy clause, which states that the Constitution and the laws and treaties of the United States shall be the "supreme law of the land." The Anti-Federalists believed this clause totally undermined state sovereignty. Moreover, they disliked the provision that demanded that the states be bound by the Constitution no matter what their state legislatures may say to the contrary. They also opposed the ratification process set out in Article VII. Only nine of the 13 states were needed to bring it into effect, not the unanimous vote of all states, which the original Articles required. With that, the battle over ratification began.

Ratification and the Bill of Rights

Supporters of the new document, the Federalists, advocated ratification, because they thought that the Constitution provided needed order and stability. It centralized power in a strong national government with Congress as the key lawmaker. One of the biggest states, New York, was a stronghold of Anti-Federalism. Alexander Hamilton, a

Federalist, feared that if his state of New York failed to adopt the new document, others might well follow suit. Should that transpire, proponents would be unable to attract affirmative votes from the necessary nine states to secure ratification. To sway the New York state convention, Hamilton recruited fellow New Yorker John Jay and Virginian James Madison to address these and other issues to persuade the New York convention to ratify the new document. All three men were prominent statesmen. Madison, known by historians as the "father of the Constitution" because of his work during the constitutional convention, was later elected the fourth president of the United States. Hamilton served as the nation's first and youngest-ever secretary of the treasury. Jay, an eminent lawyer and diplomat, became the first chief justice of the United States and later governor of New York.

Publius, the collective pseudonym Hamilton chose for the series, signed all the essays. The name referred to Publius Valerius Publicola, the renowned sixth-century BCE Roman statesman and republican leader. Of the 85 essays, known collectively as The Federalist Papers, Jay wrote five, with the remaining 80 split between Hamilton (51) and Madison (29). The essays soon appeared periodically in several New York newspapers, analyzing the virtues of the Constitution, and were later collected in book form. Madison's fellow Virginian, Thomas Jefferson, called the Papers "the best commentary on the principles of government which ever was written."

Anti-Federalists, in the meantime, undertook their own propaganda campaign, hoping to keep the Articles in place. Led by the powerful New York governor, George Clinton, and others, they fought ratification. Their camp included some at the convention who declined to sign the Constitution, prominent leaders like Virginia's George Mason and Edmund Randolph, a future attorney general of the United States. Both were Virginians. Mason is known in history as "the father of the Bill of Rights" for his advocacy of a list of rights protected by the Constitution. Luther Martin, an able though often drunk Maryland lawyer, also refused to sign. He later argued cases before the Supreme Court. Elbridge Gerry of Massachusetts, whose name is forever linked to the practice of gerrymandering election districts for political party gain, became a vocal Anti-Federalist.

Still, the Constitution became effective on June 21, 1788, when the ninth state ratified it. Two important states failed to do so until after that date: New York by a close vote of 30 to 27 and Virginia with a slightly better majority of 89 to 79. With a great deal of perseverance,

the founding generation formed a "more perfect Union," as the Constitution's Preamble promised. The Constitution overcame its predecessor's economic and political deficiencies. The framers designed it to balance the authority of the state and federal governments and to allow the federal government to raise revenue and enforce its laws. One of the most important national laws passed under the Articles of Confederation but recognized as part of federal law under the new document, was the Northwest Ordinance of 1787. This measure imposed common-law principles on the new nation's frontier, namely that voters in the territories were equal with one person having one vote. A second important law was the Judiciary Act of 1789, which created the lower federal courts and laid out the Supreme Court's jurisdiction, notably to hear appeals from state appellate courts involving federal or constitutional issues. The third law, a collection of several acts known as the Decision of 1789, specified the first three executive departments: state, treasury, and war.

Meantime, Anti-Federalists, later known as Republicans, were still disgruntled. They argued that the document did not guarantee rights and liberties. Hamilton argued, notably in Federalist 84, that the Constitution itself was a bill of rights (Box 1.2). Many state conventions, however, rejected this view and demanded that the first Federal Congress adopt amendments to guarantee rights and liberties. One of the most vocal supporters of a bill of rights along with George Mason was Thomas Jefferson, who advocated his position while serving as the American minister in France. Jefferson eventually persuaded his friend and Virginia colleague, James Madison, who led the battle in the House of Representatives to pass 12 amendments. The states ratified only 10 of them on December 15, 1791. The two that failed addressed the size of the House and the pay for its members. Those that were ratified added guarantees of free speech, a free press, freedom of religion, and other rights and liberties. The proposal concerning congressional pay eventually became the Twenty-Seventh Amendment in 1992 after it was revived in the 1980s.

Box 1.2 Federalist 84, 1788, excerpt of Alexander Hamilton

The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful

purpose, A BILL OF RIGHTS. The … constitution of each State is its bill of rights. And the proposed Constitution, if adopted, will be the bill of rights of the Union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention; comprehending various precautions for the public security, which are not to be found in any of the State constitutions. Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan.

Alexander Hamilton 1788 / Federalist 84 / Public domain

The First Amendment, originally the third submitted to Congress, sets out five important individual rights. These include two religion clauses: the right of religious liberty and the prohibition of the national government to establish a religion. It also provides for free speech, a free press, freedom of assembly, and the freedom to file grievances with the government. The common-law tradition allowed for a free press and free speech, but not without limits. Seditious libel, for example, was excluded: this meant that criticism of the government and its officials may be punishable by a fine and/or imprisonment. Madison hoped to forestall the implementation of this common-law idea in what became the First Amendment by proposing more wide-ranging language: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." Instead, the common law was preserved in the vagueness of the final language: "Congress shall make no law respecting the 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 to peaceably to assemble."

Seven years after the ratification of the Bill of Rights, in 1798, Congress under Federalist control passed the Alien and Sedition Acts that President John Adams, a Federalist, signed into law. The Alien Act

empowered the president to deport any non-American citizen whom he believed was dangerous to American national security. The more far-reaching Sedition Act was based on the common-law principle of seditious libel. Under the act, the government arrested and tried many critics of the Adams administration who claimed that Adams sought to transform the United States into a British-style government. The administration feared that France was planning to invade the United States and turn it into a French republic, as it had with Holland and Switzerland, and thought limits on speech and the press would protect the nation.

Some public officials believed that many Americans like Thomas Jefferson sympathized with France and its 1789 revolution. In fact, he did. Adams thought that they ignored the horrors of the French Revolution, which had resulted in the Reign of Terror from 1793 to 1794 and the executions of thousands of innocent people. Because the nation was in imminent danger of a French invasion, Adams and Congress agreed to the deportation of dangerous aliens and incarceration and fines for those found guilty of seditious libel. The Sedition Act provided for imprisonment for up to two years, a fine of up to $2000, or both, after speaking and publishing words that a court found to be seditious libel.

Several editors faced prosecution. One was Benjamin Franklin Bache, Franklin's grandson, who edited a Philadelphia paper highly critical of the Adams administration. After his indictment, Bache died in a yellow fever epidemic before trial. James Thomson Callender, an editor and pamphleteer in Richmond, who was a spokesman for Jefferson, claimed that Adams's "reign" was "one continued tempest of malignant passions." Supreme Court Justice Samuel Chase presided over his trial when justices acted as federal trial judges. He sentenced Callender to nine months in jail and a $200 fine. Thomas Cooper, born in London and educated at Oxford, emigrated to America and became a follower of the Jeffersonian Republicans. He attacked the Adams administration and spent two years in jail with a fine of $400. He later served as president of what is now the University of South Carolina.

Not all trials involved editors. US Representative Matthew Lyon was imprisoned for publishing a letter in the *Vermont Journal* that attacked Adams for having "an ungrounded thirst for ridiculous pomp, foolish adulation, and selfish avarice." Justice William Paterson sent him to jail for four months and fined him $1000. Lyon was re-elected to the

House of Representatives from his jail cell. In all, 25 people were arrested, 15 indicted, and 10 convicted under the law. Madison and Jefferson opposed the Alien and Sedition Acts. Unlike Hamilton, who believed in the supremacy of the new national government over the states, the two Virginians argued that the Constitution created a union of sovereign states. They saw the acts as a mechanism to silence Jeffersonian critics of the Adams administration's pro-British, anti-French policies.

Jefferson attacked the Sedition Act anonymously in his Kentucky Resolutions, published in November 1798. A month later, Madison's Virginia Resolutions appeared in print, also anonymously. They argued that the power to control sedition remained with the states, not the federal government. The states possessed the authority to judge, Jefferson wrote, "how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom." The states thus possessed the authority to reject federal laws if the Constitution did not specifically empower Congress to pass it in the first place. These resolutions were a late eighteenth-century version of later debates over the doctrine of nullification. Jefferson's original draft of the Kentucky Resolutions included the states right of "nullification" of all federal laws. His editors deleted it. Congress later repaid the fines that the courts had imposed on those convicted under the Sedition Act, which expired in 1801.

Seditious libel remained a federal offense under common law until 1812 when the Supreme Court held that the common law did not make it a crime. Some states continued to try those engaged in seditious libel. Ironically, as president, Jefferson encouraged the prosecution of those who criticized him and his administration. Perhaps the most famous case took place in 1804 in New York when Jeffersonians prosecuted a Federalist editor, Harry Croswell, for seditious libel. Though convicted, despite the eloquent defense of his counsel, Alexander Hamilton, he received no sentence. A year later, he won a new trial, but by then Hamilton was dead of the gunshot wound inflicted by Vice President Aaron Burr in their famous duel in Weehawken, New Jersey.

The remaining nine amendments protected the individual against the national government. The ambiguously written Second Amendment led to a long debate over whether gun ownership was an individual or collective right: that is, whether it protected gun owners' right to

purchase, carry, and own a firearm (the individual right) or whether the right was linked to the raising of a militia to protect the community (the collective right). The Third Amendment addressed the problem of British soldiers who seized the homes of American colonists without their express permission. To forestall the US government from imitating this practice, the amendment simply prohibited it in peacetime and required Congress to act in a time of war.

The next three amendments addressed those suspected of committing a crime. The search and seizure provisions of the Fourth Amendment overcame the issuances of general warrants. This was a remnant of a British legal practice, which had ended in Britain in 1763 but the British government maintained in its colonies. A general warrant allowed law enforcement officers to search places, often print shops, and make arrests of those suspected of crimes without specifying a particular person or place. The amendment required a judge or magistrate to first issue a search warrant, but only based on "probable cause," and to specify the place to be searched and the objects or persons to be seized.

The Fifth, like the First Amendment, comprised several provisions. It required a grand jury to issue an indictment before the accused went to trial: the exception was during wartime. It prohibited double jeopardy, meaning that the United States may not try a person twice for the same crime. It contained the first of two due process clauses (the second one binds the states in the Fourteenth Amendment), which forbid the United States from depriving any person of life, liberty, or property without "due process of law." The phrase "due process of law" has its roots in the Magna Carta of 1215. That thirteenth-century document suggested that due process rights encompass a long history of English legal conventions. It required "a process" in a criminal proceeding involving many of the guarantees in the Fourth, Fifth, and Sixth Amendments. The Fifth also included the takings clause, which prohibited the federal government from seizing private property except for public use and paid for with "just compensation," a phrase left undefined.

The Sixth Amendment included five provisions: juries for criminal trials, which must be speedy (a term not defined) and in a public place; trials must take place where the alleged crime took place; prisoners have a right to know the charges against them; they have the right to confront the witnesses who testify against them and to call witnesses in

their defense; and they enjoy the right to have an attorney or legal "counsel" represent them in a court of law. The Seventh guaranteed a jury in civil trials if the monetary value of the suit is over $20, a figure Congress has raised to $75,000, according to the current Rules of Federal Procedure. The Eighth Amendment prohibited the federal government from making criminal suspects pay "excessive" bail to obtain their release. The term "excessive" was undefined. Nor can the United States inflict "cruel and unusual" punishments on persons convicted of a federal crime. This last provision has stimulated a storm of controversy over whether capital punishment is "cruel."

As Hamilton noted in Federalist 84, the framers found it impossible to identify every possible civil right or liberty. The Ninth Amendment opened the door to the addition of rights not included: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." For some commentators and historians, the language is so broad it means nothing. Finally, the Tenth, or states' rights, Amendment emphasized the federal nature of the new governing structure: "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." This provision, along with the foundation established by Madison and Jefferson in their Virginia and Kentucky Resolutions, inexorably led to the states' rights battles of later years.