

## Introduction

In the more than 200 years since the ratification of the U.S. Constitution, it has become conventional wisdom that the Supreme Court has the last word on the meaning of that document. At the same time, the American people widely take for granted that the Constitution is a charter of democracy, liberty, and equality. Those who wrote and adopted the Constitution, however, actually took a dim view of democracy, and their notions of liberty and equality embraced overt racial and gender discrimination. Moreover, few of them anticipated that their new Supreme Court would assume the role of final arbiter of the Constitution's meaning. They did believe that the courts were essential to the preservation of law and justice, as against the lawless whims of popular majorities. But they doubted that the courts could preserve or give meaning to the Constitution independent of other political institutions.

The most farsighted among the founding generation, particularly James Madison, expected the meaning of the Constitution to develop through a political process that included the Supreme Court but would typically be led by the political branches of the federal government, the state governments, and the electorate. At its core, this political process was to be republican, not democratic. Madison and the Framers designed the Constitution deliberately to limit the operational influence of the people – “the democracy” – and instead sought to empower a national, political elite to give force and energy to a new central government. They created new governmental structures that would modify and refine the raw democratic will of the people, inhibit democratic control of officeholders, and prevent the emergence of durable political parties, perhaps

the most essential institutions of American democracy as it later developed but anathema to the republican founders.

The founding generation's republican vision – that is, the vision of the propertied white males who monopolized political power and promulgated the Constitution – can be reduced without too much distortion to a handful of fundamental ideas. The founders meant to create a republic, not a democracy. That is, the people would be recognized as formally sovereign, but real governing power would lie in the hands of the educated, the affluent, those of wide reputation – in short, a “virtuous” elite who might be expected to put justice, law, and the good of their country ahead of their own interests, forbearing the temptations of faction and party. The founders further meant to preserve a well-regulated liberty, not only by relying on the virtue of officeholders, but also by balancing enhanced power at the center against a substantial measure of reserved power for the states. Moreover, the preservation of liberty in a confederated republic depended on limiting full political participation and legal personhood to propertied white men. The majority of the population – women, black Americans, the indigenous nations, the poor – would take positions decisively subordinate to that of propertied white men in the new constitutional structure.

No part of this vision, however, went uncontested. Subsequent decades brought challenges to the Framers' vision, especially in the name of democracy and states' rights. Proponents of democracy never accepted the Framers' republican vision, before or after ratification. Rather, democrats gradually reimagined party organization as an essential feature of the now-democratic Constitution, notwithstanding the antiparty intentions of the Framers. Indeed, the triumphant radicals of the Jackson era deemed democratic party organization superior to courts and the elitist traditions of the law in determining constitutional meaning. Champions of states' rights also launched a persistent struggle over the meaning of federalism, the balance of power between the federal government and the states. Advocates of consolidated, national power and of radical state autonomy defined the ends of a continuum, along which battles raged constantly in the name of establishing the true route to liberty. Finally, proponents of the rights of women, black Americans, and the so-called Indian<sup>1</sup> nations challenged aspects of the Framers' plan but especially the

<sup>1</sup> Although “Indian” is an obviously problematic label for the diverse nations that inhabited the land that was to become the United States, it was the common label used by Euro-Americans in this period and remains a widely used label today, even among many of the

*Introduction*

3

stark racism and chauvinism of the later democrats and states'-rights men. Periodically, they turned to the Constitution itself to advance their causes and principles, but the established authorities consistently found in that Constitution a charter of freedom for the white man alone.

Struggles along all of these dimensions played out over decades. Indeed, the story of what the Constitution became after ratification has no endpoint, although our narrative must: By the late 1830s, the republican vision of the founders had, in important ways, been turned on its head. The new Democratic Party had gained ascendancy by reading the Constitution as a fundamentally democratic, not republican, document, which belonged to the people rather than the courts. Joined with the party's notion of democracy was a commitment to strict construction of federal powers and fierce defense of states' rights. Yet this party of "the democracy" – so understood because its avowed purpose was to defend a populist constitutional order against a reinvented "aristocracy" of special interests – explicitly excluded all but white men from civic participation. If the white males of the founding generation had varied and fluid views of exactly how women, blacks, and Indians might fit into a republican hierarchy, the white male "democrats" of the 1830s starkly excluded all of these groups from their otherwise antihierarchical Constitution.

This book explains the Constitution's evolution from the putatively republican document of 1787 to a charter of democracy (of a sort) by the 1830s. It preserves courts and especially the Supreme Court as important shapers of that story, addressing the usual run of great cases in the constitutional history of the period. But it integrates judicial action into a much larger history of constitutional politics – in Congress, in presidential action, in the states, and in elections, political parties, newspapers, and the streets and fields. As the narrative seeks to demonstrate, this larger constitutional politics gave judicial action much of its meaning, as judicial action simultaneously informed that larger constitutional politics.

This book thus joins the important, traditional story of top-down constitutional development, centered on the Supreme Court, with a more modern, often bottom-up story. It draws on our own primary research and also synthesizes a generation of recent scholarship on the origins of judicial review, party formation, the plight of constitutional outsiders, and more. The result is a modern explanation of how diverse groups combined to supplant the founders' vision with a more "democratic"

descendants of those nations. So, while we often use "indigenous nations" or the like to describe these peoples, we also use "Indians."

understanding of the Constitution. This new democratic vision of constitutionalism, one bolstered by an expanded public sphere and an emerging practice and theory of party politics, was premised on an exclusionary understanding of citizenship that limited political access and legal personhood to white men. In short, this book suggests that a full understanding of early American constitutional development requires a narrative that places such figures as the Whiskey Rebels, the proto-feminist Judith Sargent Murray, the African-American activist James Forten, and the democratic party organizer Martin Van Buren in the same cast of characters as James Madison, Alexander Hamilton, and John Marshall.

The story's roots lie in the American Revolution and its challenge to monarchy, aristocracy, and the legal omnipotence of Parliament. The Revolution forced the American people to invent a government and constitutional order that could preserve the people's sovereignty and liberty without the familiar guideposts of hierarchical authority. Both the facts on the ground and certain widely shared convictions dictated that the new government would take the form of a confederation of states. Only a confederation, it seemed, could protect the constituent republics from aggression, foreign and domestic, while staying out of the internal affairs of each member state. Each state would preserve its citizens' liberties, as only modest-sized states could do, but would also be protected from the external threats that brought war, exaggerated military authority, oppressive taxation, and consequent threats to liberty.

The Revolution seemed to vindicate the claim that confederation would be an effective tool for the preservation of republican liberty. The newly confederated United States won its war of independence without a real national government but only an alliance among the states. The Articles of Confederation thus persisted into the 1780s as the nation's first constitution. But, as Chapter 1 of our story explains, its radically decentralized structure came to seem a failure to many in the nation's elite. These men bemoaned the excesses of democracy, the disregard for law, and the anxious localism that crippled the nation in both foreign and domestic affairs. The remedy was the new Constitution of 1787, which was designed to deliver substantial power to the center, where it would be wielded by an elite class putatively devoted to law rather than raw democratic will. Yet, the framers of the Constitution also sought to retain federalism and a limited sort of popular sovereignty. While trying to maintain this delicate balance, the new Constitution made clear that propertied white men were not yet prepared to grant civic equality to

women, black Americans, Indians, and the poor. These other Americans, constituting most of the population, would have distinctly subordinate roles, if any roles at all, in the constitutional hierarchy of the new federal republic. At the same time, the Founding and its immediate aftermath saw just enough agitation for the rights of each of these groups to suggest the possibility of a progressive expansion of rights under the Constitution over time.

The Constitution was ratified soon enough, but not without strong opposition from Anti-Federalists. There was little doubt that George Washington would be the nation's first president, but many Anti-Federalists stood ready to scrutinize the new administration's every step, even as they acquiesced in the new Constitution. Thus, Washington and his cabinet took the leading role in shaping the new government while facing criticism and skepticism at nearly every turn. As Chapter 2 explains, President Washington's ambitious Secretary of the Treasury, Alexander Hamilton, launched an energetic program for centralization of power in the national government. Although Hamilton believed that this Federalist program implemented the goals of the framers of the Constitution, opposition soon formed among elites and middling politicians, as well as democrats and populists. Representatives of marginalized groups also sought to carve out roles for themselves under the Constitution but with little success. Gradually the opposition to the Federalists coalesced under the Republican label and in 1800 delivered Jefferson to the presidency in the name of states' rights and popular sovereignty.

During the years of Federalist hegemony across the 1790s, the federal courts played an auxiliary role in legitimating the Federalist reading of the Constitution. After Thomas Jefferson's election in 1800, however, the cause of Federalist constitutionalism fell chiefly to the Supreme Court under Chief Justice John Marshall. Chapter 3 shows that Marshall's Court not only defended capacious federal power, but, as important, used the Court's opinions to promote a distinctively legalist understanding of the Constitution. That is, in the face of rising movements for states' rights and democratic control, the Court insisted that the judiciary was supreme over the other branches and even over the sovereign people in interpreting the Constitution. Moreover, according to Marshall, that document constitutionalized judge-made, common law principles of contract and property at the expense of the states' and the people's own understandings of the public good. At every step, Marshall's legalist campaign provoked

resistance from the more-radical Republicans, who believed that the people – not the judges and not the common law – held the final and sovereign word on the meaning of the Constitution.

The Republicans, however, were never fully united. Although Jefferson's election in 1800 stood as important precedent for future efforts to organize a democratic party, the Republicans remained a loose movement comprising everything from radical democrats to "moderates" who were sometimes indistinguishable from Federalists. Chapter 4 shows how the Republicans in power after 1800 struggled to establish an alternative to Federalist constitutionalism. Under pressure from international crises, the Federalist judiciary, and a Federalist remnant in Congress and the states, the Jefferson Administration and subsequent Republican administrations actually expanded federal power in important respects. In so doing, they exacerbated the frustrations of the democrats and the firmest states'-rights men.

Chapter 5 begins the story of the democrats' breakthrough. After the War of 1812, the ascent of democratic culture did not mean the advent of universal equality but, instead, triumphant claims to the hegemony of the white man. The constitutionalism of the radical democrats came to dominate the Republican movement, gradually converting the movement into the Democratic Party and purging its more legalist and centralizing elements. As it did so, the democrats made clear that they read the Constitution not only as democratic but as white and, of course, male. The possibilities that many had seen in the Constitution for some measure of rights for black Americans, for women, and for the Indian nations virtually disappeared in the "democratic" reinvention of the Constitution.

Chapter 6 tells the story of Indian status under the Constitution, an important test case of the Marshall Court's resistance in the 1820s to the democratic, states'-rights reading of the Constitution. The climactic defeat of the Marshall Court occurred in 1832 when the Court tried to defend the residue of rights claimed by the Cherokee Nation against the aggressions of Georgia's people and government. In the teeth of a holding of the Supreme Court, President Andrew Jackson and the State of Georgia made clear that the Constitution and the laws would mean what the (white, male) people, not the Court, said they meant.

The story concludes with the creation and entrenchment of the Democratic Party by Martin Van Buren and other leaders of the democratic movement. This party would have been anathema to the framers of the Constitution and to nearly all of the ratifiers, both because of the simple fact that it was a permanently organized party and because it stood for a

*Introduction*

7

kind of radical democratic control and devolved federalism that seemed dangerously similar to the structure that had failed so miserably in the 1780s. For some of the founding generation, but certainly not for all, the horror of Van Buren's Democratic Party would also have included the starkness of its racism and its comprehensive exclusion of women, blacks, and Indians from any meaningful place in the constitutional order.