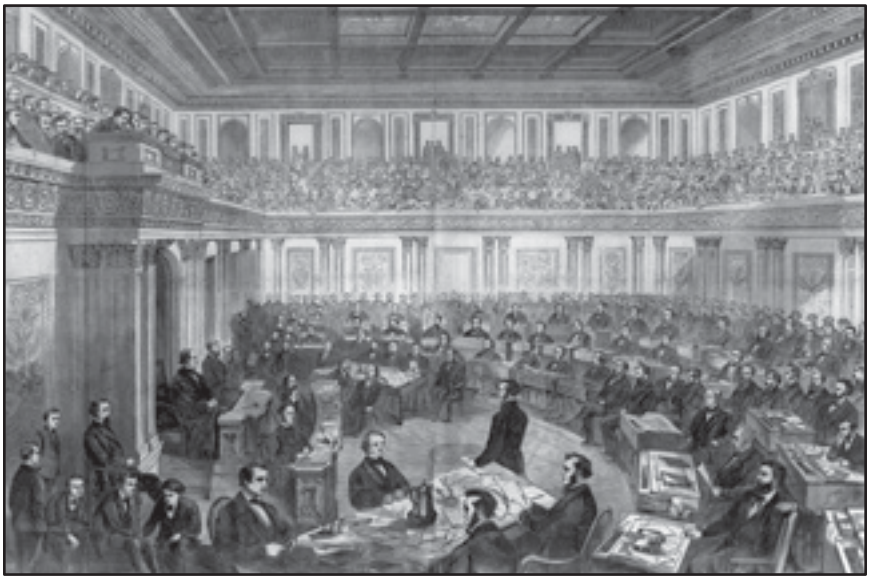
CHAPTER 1

READING BETWEEN THE LINES

America's Implicit Constitution



THE IMPEACHMENT TRIAL OF ANDREW JOHNSON (1868).

The United States Senate deciding the fate of President Andrew Johnson, in a trial presided over by Chief Justice Salmon P. Chase.

On the afternoon of March 5, 1868, as the nation's capital saw its first fair day in nearly a month, the Senate galleries filled to capacity. According to one press account, the ladies in the audience sparkled "with all the bright colors of brilliant toilettes." Sitting in the presiding officer's chair, Chief Justice Salmon P. Chase solemnly summoned each senator to step forward and take an oath to do "impartial justice."[1]

Usually, the chief justice does not chair Senate proceedings. Typically, senators take no special judicial oath. On many a day, elegant spectators do not throng the Capitol galleries. But this was no ordinary day. For the first time in history, the Senate was convening as a court of presidential impeachment. Andrew Johnson, the seventeenth president of the United States, stood formally accused of high crimes and misdemeanors warranting his ouster from office.[2]

No one knew who would prevail in the days ahead. An overwhelming majority of the House of Representatives had put forth eleven articles of impeachment, indicting Johnson for his wild anticongressional rhetoric and fierce defiance of congressional legislation—but conviction would require a two-thirds vote in the Senate. Johnson had many allies in the upper chamber. But did he have enough?

One by one, senators approached the chair and were sworn in. Rhode Island's Henry B. Anthony went first, followed by Delaware's James A. Bayard Jr. In 1801, Congressman James A. Bayard Sr. had brokered a deal making Thomas Jefferson president. Back then, Bayard Jr. had been an infant. Now he would have his own chance to shape a president's fate.

As Bayard Jr. took his oath, some in the chamber likely thought back to the legendary Bayard-Jefferson affair. They may have also recalled that Jefferson, as the vice president of the United States from 1797 to 1801, had himself presided over the Senate, thus occupying the very chair now filled by Chase. Johnson, too, had once sat in this seat, as Abraham Lincoln's vice president in early 1865. Did any of these stray thoughts cross Chase's mind as he sat in the Jefferson/Johnson chair? Did it further cross Chase's mind that, if he played his part well in the impeachment trial, he might himself

win the presidency in November, and thereafter fill an even more powerful chair once occupied by Jefferson and Johnson?

Chase continued to go down the alphabet. Several dozen senators—including Thomas Hendricks, Reverdy Johnson (no relation to Andrew), John Sherman, William Sprague (Chase's own son-in-law), Charles Sumner, and Peter Van Winkle—stepped forward and took their judicial oaths. Then came the moment many had been waiting for: The secretary called the name of Ohio's senior senator, Benjamin Franklin Wade, the official Senate president pro tempore. As Wade approached the chair, Hendricks—the senior senator from Indiana and a supporter of President Johnson—rose to his feet to object. The crowd hushed.

It took Hendricks less than two minutes to explain why Wade could not properly take the requisite oath. Under the presidential-succession statute then on the books, the Senate president pro tempore stood next in line after Johnson. (No vice president existed in 1868. When Lincoln was killed at war's end, Vice President Johnson had become President Johnson, and his old seat had thereafter remained empty.) Thus, were the Senate to convict Johnson, Wade would move into the White House. With so much to gain from a guilty verdict, Wade should not sit in judgment over Johnson. "I submit," intoned Hendricks, that "he [Wade] is not competent to sit as a member of the court."

Sherman immediately leaped to Wade's defense. As unflinching in debate as his famous older brother, General William Tecumseh Sherman, was in warfare, Ohio's junior senator gave no quarter: "This question… is answered by the Constitution of the United States, which declares that each State shall be entitled to two senators on this floor, and that the court or tribunal for the trial of all impeachments shall be the Senate of the United States. My colleague [Wade] is one of the senators from the State of Ohio; he is a member of this Senate, and is therefore made one of the tribunal to try all cases of impeachment." Sherman bluntly added that no one had objected moments earlier to the swearing-in of President Johnson's son-in-law, Tennessee Senator David Patterson.[3]

The constitutional game was now afoot. For the rest of that day and well into the next, senators did what they did best—speechify—on the nice constitutional questions before them: Should Wade sit in judgment

when he obviously had an enormous personal stake in the outcome? But wouldn't his recusal effectively deprive Ohio of its equal share in the Senate on the most momentous issue then facing America?

HOW SHOULD THE SENATE HAVE decided the deep questions raised on March 5, 1868? It is tempting to say that senators should simply have followed the plain meaning of the written Constitution. But constitutional quicksand awaits all who insist on reading every clause of the document literally. Seemingly firm textual ground at times simply dissolves underfoot. For example, Article I, section 3, declares that "the Vice President of the United States shall be the President of the Senate" and that the Senate enjoys the "sole Power to try all Impeachments." There are only two textual exceptions. First, "when the President of the United States is tried, the Chief Justice shall preside" over the Senate impeachment trial. Second, when the vice president is "Absen[t]" from the Senate or acting as America's chief executive (because, say, of a temporary presidential disability), a Senate-chosen officer—a "Senate…President pro tempore"—may substitute. Read literally, all this seems to say that whenever the *vice president* is impeached, he *himself* may chair this Senate trial. But can it really be true that a man may sit in judgment of his own case?[4]

Clause-bound literalism cannot provide the infallible constitutional compass we crave. Yet surely faithful interpreters should not simply toss the written Constitution aside or treat it as an infinitely malleable plaything. How, then, should we proceed?

For starters, we must learn to read between the lines—to discern America's implicit Constitution nestled behind the explicit clauses. In short, we must come to understand the difference between reading the Constitution *literally* and reading the document *faithfully*.

The best way for us to get a feel for this difference is through a series of detailed historical case studies and hypotheticals. Later in this chapter, we shall return to the events of March 5, 1868, but before we do, let's tweak the actual facts of this episode so that we may better understand the underlying constitutional issues.

"President of the Senate"

SUPPOSE THAT ANDREW JOHNSON had been impeached exactly three years earlier. On March 5, 1865, Johnson was the newly installed vice president and thus the Senate's ordinary presiding officer. Abraham Lincoln still lived. Could Vice President Johnson have properly insisted in 1865, as Senator Wade would insist in 1868, that the Constitution explicitly authorized him to wield power in impeachment proceedings? How should the Senate have responded if Johnson, stubbornly standing on the literal language of the Constitution, had proclaimed that as the nation's vice president (and thus the "President of the Senate" according to Article I, section 3), he was entitled to chair his own impeachment trial?

The key that unlocks the door is the simple idea that no clause of the Constitution exists in textual isolation. We must read the document as a whole. Doing so will enable us to detect larger structures of meaning—rules and principles residing between the lines. Often, these implicit rules and principles supplement the meaning of individual clauses. For example, although no single clause explicitly affirms a "separation of powers," or a system of "checks and balances," or "federalism," the document writ large does reflect these constitutional concepts. This much is old hat. But as we shall now see, there are times when the document, read holistically and with attention to what it implies alongside what it expresses, means almost the *opposite* of what a specific clause, read in autistic isolation, at first seems to say.

IN CLOSE PROXIMITY TO THE declaration in Article I, section 3, that "the Vice President of the United States shall be President of the Senate," we find the following language in Article I, section 5: "Each House may determine the Rules of its Proceedings." These two clauses should be harmonized in a way that does justice to the central purpose of each. For instance, were the Senate to pass a rule that "no vice president may ever preside over the Senate," then the Senate-proceedings clause would simply swallow up the Senate-president clause. We should not allow this to happen. But neither should we allow the reverse: We should not permit the Senate-president clause to swallow up the Senate-proceedings clause.

Here, then, is a sensible synthesis: The Senate should adopt a rule pro-

hibiting the vice president from chairing *any vice-presidential impeachment proceeding*. This rule would not categorically bar all vice presidents from ever presiding over the Senate. This rule would not even bar vice presidents from ordinarily presiding over the Senate. The rule would merely say that in certain unusual situations, the chamber's usual presiding officer must absent himself from the chair as a matter of ethics and first principles.[5]

The long-standing practice of federal courts—which, like the practices of other branches can inform our understanding of first principles—confirms the soundness of this proposed reconciliation of the two clauses. The Constitution explicitly envisions a chief justice and implicitly authorizes this figure to preside over the Supreme Court, as a rule. However, in a case directly involving his own financial interests, the chief justice should step aside. In the landmark 1816 case of *Martin v. Hunter's Lessee*, involving competing claimants to a tract of valuable Virginia real estate, Chief Justice John Marshall properly absented himself from the bench because he had a stake in some of the land at issue. Had Marshall not stepped aside, his colleagues would have been justified in demanding his recusal—not across the board, but in the case at hand. Centuries before *Martin*, the celebrated English chief justice Sir Edward Coke had famously ruled, in a lawsuit known as *Bonham's Case*, that adjudicators must be free from financial self-interest. According to Coke, no man should be a judge in his own case.[6]

Exactly where, a skeptic might ask, does America's Constitution say that? Even if senators (or justices) are constitutionally permitted to follow the venerable legal maxim *nemo judex in causa sua*, are they constitutionally obliged to do so? If so, what is the source of this constitutional obligation?

To answer these questions, we will need to weave together several threads of law, history, and logic.

ONE THREAD MAY BE FOUND in Sir William Blackstone's Commentaries on the Laws of England, a canonical four-volume treatise first published in the late 1760s. Both before and after Independence, American lawyers and activists of all stripes relied heavily and preeminently on the Commentaries for instruction on basic English legal principles, many of which applied with full force in America. Sifting through nearly a thou-

sand American political tracts printed between 1760 and 1805, one scholar has found that no European authorities were cited more frequently than Montesquieu and Blackstone, each of whom was invoked almost three times as often as the next man on the list, John Locke.7

Near the outset of the *Commentaries*, Blackstone explained that even seemingly absolute legislative language sometimes contained implicit exceptions. Certain things simply went without saying. To be sure, Blackstone made clear that judges must never ignore the "main object" of a law, however misguided that object might appear to them. "[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it.…[W]here the main object of a statute is unreasonable the judges are [not] at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government." Blackstone then introduced a key qualification: Judges (and other interpreters) should construe laws so as to avoid absurdity or unreasonableness when dealing with exceptional situations that the legislature did not envision when it crafted general language. "Where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* [as to this collateral matter] disregard it."

Elsewhere in the opening section of the *Commentaries*, Blackstone elaborated this venerable canon of legal interpretation. "[T]he rule is, where words bear…a very absurd signification, if literally understood, we must a little deviate from the received sense of them.…[S]ince in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted."

To illustrate these basic ground rules of legislation and interpretation, Blackstone offered an elegant—and for our purposes, stunningly apt—example. "Thus if an act of parliament gives a man power to try all causes [cases], that arise within his manor of Dale; *yet, if a cause should arise in which he himself is party, the act is construed not to extend to that; because it is unreasonable that any man should determine his own quarrel*."[8]

A SECOND THREAD RELEVANT TO the proper rules of constitutional interpretation may be found in a fascinating verbal exchange that occurred in mid-August 1787 at the Philadelphia Convention that framed the U.S. Constitution. Delegates Elbridge Gerry and James McHenry proposed the insertion of an explicit clause forbidding Congress to enact ex-post-facto laws—laws, that is, seeking to retroactively criminalize actions that were wholly innocent when done. Two of the Convention's best lawyers, both of whom would eventually be named to the Supreme Court by George Washington, bristled at the proposal. An explicit constitutional prohibition, they argued, was unnecessary and would reflect poorly on the legal sophistication of the draftsmen. The impermissibility of punishing conduct that was innocent when done was a first principle of justice and the rule of law. As such, it went without saying, they claimed.

Oliver Ellsworth, who would later serve as America's third chief justice, "contended that there was no lawyer…who would not say that ex post facto laws were void of themselves. It cannot be necessary to prohibit them." Future associate justice James Wilson agreed. The insertion of such an artless reminder would invite negative "reflexions on the Constitution—and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so." Fellow lawyers Gouverneur Morris and William Samuel Johnson concurred that the insertion of an ex-post-facto clause would be an "unnecessary" precaution.

On the other side of the issue stood, among others, delegates Daniel Carroll, Hugh Williamson, and John Rutledge. (Rutledge was yet another lawyer and future Supreme Court justice.) Various state constitutions had included express prohibitions of ex-post-facto laws, and Williamson declared that an explicit clause in the federal document "may do good here, because the Judges can take hold of it." Ultimately the Philadelphia delegates voted with these men to include an express prohibition on ex-post-facto laws. If some future Congress ever tried to violate first principles, this explicit clause would give judges something hard and concrete—something textual and specific—to "take hold of."[9]

Yet no one at Philadelphia was recorded as challenging Ellsworth's and Wilson's emphatic legal claim, in the Blackstonian tradition, that even without the clause, the best reading of the Constitution would construe the document as *implicitly* prohibiting all congressional statutes seeking

to impose retroactive criminal punishment. As Blackstone had explained to his legions of readers on both sides of the Atlantic, unless the supreme legislature made crystal clear its specific intent to command an absurd or unjust result, the supreme law was to be interpreted so as to avoid patent absurdity or gross injustice.

Ellsworth and Wilson understood that this well-settled English rule of legal interpretation properly applied to America as well, but with a twist. In England, the supreme legislature was Parliament, and the supreme law was the corpus of parliamentary statutes. In America, the supreme lawmaker would be the American people themselves, who were being asked by the Philadelphia framers to ordain and enact the supreme law of the Constitution. Unless that supreme law—the Constitution—specifically and pointedly authorized Congress to pass ex-post-facto criminal laws, the proper presumption would be that the document withheld this authority from Congress. Such unjust congressional enactments would simply fall outside the ambit of proper "legislative Power" vested in Congress by the Constitution. Blackstone's own language on ex-post-facto laws harmonized perfectly with Ellsworth's and Wilson's remarks. In a chapter on "the Nature of Laws in General," Blackstone had suggested that ex-post-facto statutes were not even laws, "properly" speaking.[10]

As finally proposed by the Philadelphia framers and eventually enacted by the American people, the Constitution's opening sentence proclaimed that one of the document's paramount objects was "to establish Justice." Here was additional textual support in the written Constitution itself for the Ellsworth-Wilson position, following Blackstone, that all the document's clauses had to be construed against the backdrop of the first principles of justice. Such principles could only be contravened by pointed textual language or undeniably clear enacting intent.

LET'S NOW WEAVE TOGETHER THE threads on the table. Given the constitutional clauses and bits of historical evidence that we have considered thus far, the Constitution as a whole should not be construed to allow a vice president to preside over his own impeachment trial. The image shocks our widely shared sense of fairness and justice. No one should be a judge in his own case. The result seems absurd. The point is elementary and elemental. It goes without saying.

Had the Constitution specifically commanded such a result in pointed language—say, in a clause proclaiming that "the vice president shall preside over the Senate *even in cases of his own impeachment*"—then there would be conclusive textual evidence that America's sovereign, the people, had specifically focused on the matter and had decided that the result was neither unjust nor absurd. But Article I, section 3, does not speak with this kind of unmistakable specificity.

If it could be shown that the Constitution's framers and ratifiers generally understood its bland rule about the Senate's regular presiding officer to apply even when that regular presiding officer was himself being impeached, then deference to this widespread understanding might be warranted. However, there is no evidence that Americans envisioned and embraced this result while drafting and ratifying this clause. On the contrary, there is strong reason to presume that they thought that Blackstone's approach—summarizing and illustrating the background interpretive canons of Anglo-American law—would obviously apply here. There is no relevant difference between Blackstone's lord of the manor Dale and America's vice president. In neither case should nonspecific language be construed to authorize a grotesque perversion of fair procedure.

ONE MORE THREAD ADDS FURTHER strength and texture to our emerging argument against vice-presidential self-dealing. It turns out that Article I, section 3, contains yet another relevant passage: "When the President of the United States is tried [in the Senate, sitting as an impeachment court], the Chief Justice shall preside."

True, these words say nothing explicit about the vice president. But if we give the matter even the slightest thought, it quickly dawns on us that the central purpose of this passage was to oust the vice president from the chair. In presidential impeachment trials, the chief justice should preside *precisely because the vice president should not*. This central purpose lay visible on the surface of the earliest version of this clause at Philadelphia, before the clause was rewritten for stylistic and organizational reasons: "The Vice President shall be ex officio President of the Senate, except when they sit to try the impeachment of the President, in which case the Chief Justice shall preside."[11]

The reason that the vice president should never preside in a presiden-

tial impeachment also springs to mind upon a moment's reflection: The vice president would have an intolerable conflict of interest. The problem would not be, as some modern observers might initially assume, that the vice president would be unduly inclined to favor his running mate, the president. Rather, the problem at the Founding was the exact opposite: The vice president was apt to be the leading *rival* of the president. Under the framers' version of the electoral college, presidential and vice-presidential candidates did not formally run as a partisan ticket. (That system emerged only after the ratification of the Twelfth Amendment in 1804.) Whoever came in second in the presidential election automatically became vice president—and would in turn automatically move into the top spot upon an impeachment court's conviction of the president. No man with so much to gain by a guilty verdict should preside over the trial.[12]

If the vice president may not sit in the chair when the president is on trial, surely it follows even more strongly—*a fortiori*, as lawyers would say—that the vice president may not properly preside over his own trial.[13]

Granted, a brazen legalistic counterargument might be made on behalf of this gross impropriety, as follows: The Constitution could have explicitly provided that the vice president would be ineligible to preside whenever *either* the president *or the vice president himself* was on trial, but the document did not so provide. The framers apparently did focus on the conflict-of-interest problem, and they decided that the problem existed only in cases of *presidential* impeachment.

Arguments like this give legal reasoning a bad name. There is simply no evidence that the framers or ratifiers clearly envisioned and specifically endorsed the ridiculous image of a vice president presiding over his own trial.

At Philadelphia, the impeachment debate centered almost entirely on issues of *presidential* impeachment. The very idea of creating the position of vice president did not emerge until the last days of the Convention, and what little attention this office did receive was often subsidiary to other issues of more pressing concern to the delegates. Even without access to then-secret Philadelphia records, a careful eighteenth-century reader could deduce from the final text itself that the vice presidency had received incomplete attention in the drafting process. While expressly providing for compensation of House and Senate members in Article I, for presidents in

Article II, and for Supreme Court (and other federal) judges in Article III, the document failed to even mention compensation for the vice president. Surely we should place no weight on this thoughtless omission; it would be silly to deny compensation to vice presidents on the theory that the document demands this odd result by negative implication. So, too, we should place no weight on the omission of an explicit recusal clause for vice presidential impeachments; it would be silly to read the chief-justice clause as authorizing, by mere negative implication, a vice president to sit in judgment of himself.[14]

In the year-long ratification process, there is no record of anyone saying that the vice president would be obliged to vacate the Senate chair *only* in cases of presidential impeachment. At no point did the Constitution's friends champion the odd idea that although a vice president should obviously not preside when he stood to gain an office, he nevertheless should preside when he stood to lose one.

Instead, leading Federalists explicitly invoked the *nemo judex in causa sua* principle in a variety of contexts and with a forcefulness that confirmed that this principle was a premise of the entire constitutional project. In *The Federalist* No. 10, James Madison, writing under the pen name "Publius," declared that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." In *The Federalist* No. 80, Alexander Hamilton (also writing as "Publius") reiterated and broadened the claim: "No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."[15]

Had the specific issue of vice-presidential impeachment procedure ever come into sharp focus in the ratification debates, an able lawyer such as Wilson or Ellsworth would have had at his disposal a decisive Blackstonian defense of the constitutional text as actually drafted—a defense running something like this: In the case of a man literally presiding over his own case, it obviously went without saying that such a thing was impermissible. *Nemo judex in causa sua* was a foundational feature of civilized legal systems—not merely in late eighteenth-century America and England, but across the planet and over the centuries. The very image of a man presiding at his own trial bordered on the ludicrous: No one could be in two places at

once—both in the chair and in the dock. Even if such eccentric geometry were physically possible, it would be legally absurd. To have explicitly prohibited such a thing would have been worse than a waste of ink. Had the draftsmen at Philadelphia dignified this scenario with an explicit textual prohibition, they would have invited public ridicule and needlessly cluttered the document. In the case of a *presidential* impeachment, however, the matter was not so self-evident. Strictly speaking, a vice president in the Senate chair would not be judging his own case, but someone else's. Here, the impropriety might be somewhat more debatable, and the application of the *nemo judex in causa sua* principle perhaps more contestable. So it made good sense for the Constitution to specifically resolve that issue in an explicit clause ousting the vice president from the chair and filling it instead with a more impartial officer, the chief justice.[16]

ON MARCH 5, 1868, WHEN AMERICANS FIRST WITNESSED Chief Justice Salmon P. Chase presiding over the Senate in a presidential impeachment trial, some may have wondered whether the framers had specified the best officer for such an occasion. As many of the politicians and spectators who packed the Senate chamber understood, Chase himself yearned to be president and had long bent his enormous energies toward that end. At the 1860 Republican Convention in Chicago, Chase had finished third in the presidential balloting. Early in 1861, Lincoln had tapped Chase to be his treasury secretary. But even while serving under Lincoln, Chase had dreamed of displacing him. The ubiquitous one-dollar greenbacks issued by the wartime Treasury Department had featured Chase's visage, not Lincoln's. In the opening months of 1864, Chase had angled, unsuccessfully, to position himself atop the November ticket.

Before naming Chase to the Court in late 1864, Lincoln had expressed "only one doubt" about Chase's fitness for the job. "He is a man of unbounded ambition, and has been working all his life to become President. That he can never be; and I fear that if I make him chief-justice he will simply become more restless and uneasy and neglect the place in his strife and intrigue to make himself President. If I were sure that he would go on the bench and give up his aspirations and do nothing but make himself a great judge, I would not hesitate a moment."[17]

Lincoln knew his man. Chase continued to hunger for the top executive post after he had secured the highest judicial job. Even as Johnson's trial was unfolding, its presiding officer was making plans to seek the upcoming Democratic nomination for the presidency—the very spot that the defendant was hoping to secure for himself.[18]

Was Chase, therefore, under an unwritten constitutional obligation to recuse himself at Johnson's impeachment trial? Should the Senate have tried to muscle him out when he did not stand down? Had we only an unwritten maxim, *nemo judex in causa sua*, to guide us, the answer might seem uncertain.

But the letter and spirit of the written Constitution made plain that Chase did not need to step aside. Merely harboring presidential ambitions—even intense and plausible presidential ambitions—was not a constitutionally disqualifying conflict of interest. Rather, this abstract sort of conflict of interest was obviously built into the very structure of the impeachment machinery designed by the framers. *This* kind of conflict of interest *was* something that America's supreme legislature, the people, *had* doubtless envisioned and embraced as a *necessary* part of the *main object* of Article I's impeachment clauses.

While the Constitution structured presidential impeachment as a judicialized proceeding—rife with the language of "Trial," "Case," "Judgment," and "convict[ion]," and to be presided over by the nation's highest judicial officer—the document also placed power to administer this judicialized system in the hands of regular politicians in the House and Senate. In the impeachment process, the president's trial bench and jury would consist not of professional judges or common citizens, but of uncommon political leaders, many of whom would likely harbor strong political ambitions—including, in some cases, presidential aspirations. From the outset, the Senate was expected to function as a nursery for future presidents and presidential aspirants. As the Founders' system predictably played out, most of the early presidents (including Johnson himself) had previously served as senators.[19]

Nor were chief justices expected to be men wholly uncontaminated by presidential hopes and dreams. At the Founding, presidents were widely seen as executive magistrates akin to judicial magistrates. Before the Philadelphia framers finally hit upon the idea of creating a standing office of

vice president, delegate Gouverneur Morris had proposed that in case of presidential death or disability, presidential powers should devolve upon the chief justice. The men who eventually became America's first two chief justices, John Jay and John Rutledge, had both received substantial support in the presidential election of 1789, finishing third and fourth, respectively—directly behind George Washington and John Adams. America's fourth chief justice, John Marshall, was probably the Federalists' most eligible presidential prospect at the time of his nomination and confirmation. Recent scholarship suggests that, only days before his nomination to the Court in early 1801, Marshall, who was then secretary of state, had schemed to secure the presidency for himself in the constitutional confusion created by the tangled Adams-Jefferson-Burr election of 1800. If we consider more recent history, it is worth remembering that Chief Justice William Howard Taft was an ex-president, that Chief Justice Charles Evans Hughes had been the Republican Party nominee for the presidency, and that Chief Justice Earl Warren had been the Republican Party nominee for the vice presidency.[20]

Thus, in constituting senators and the chief justice as the president's impeachment court, the Founders surely envisioned presidential aspirants as proper judges of sitting presidents. The decisive difference between such figures and the vice president was that a senator or a chief justice would become chief executive only through a standard presidential election, whereas the vice president would *automatically* ascend upon the president's conviction—he would gain power *solely* because of the judicial verdict of the impeachment court. Giving the gavel to the vice president would therefore create an intolerable conflict of interest; giving the gavel to the chief justice would not.

GAVELS ASIDE, WHAT ABOUT THE role that Ohio Senator Benjamin Wade, the Senate president pro tempore, sought play as an impeachment judge and juror at Johnson's trial? In the event of Johnson's conviction, who would automatically ascend to the powers of the presidency solely because of that verdict? Benjamin Wade.

Recall that, from the moment President Lincoln died and Vice President Johnson moved up to replace him, the vice presidency stood vacant,

and could not be refilled until the next presidential election. (This would change only with the Twenty-fifth Amendment, adopted after President John F. Kennedy's assassination a century later.) Thus, were the Senate to oust Johnson, someone other than the vice president would need to take over as chief executive. Anticipating scenarios of this sort, the Philadelphia framers had drafted a specific succession clause authorizing Congress to create a statutory line of succession. In 1792, Congress enacted a law placing the Senate president pro tempore first in the statutory line of succession and the House speaker second.[21]

Initially, we might wonder how America's written Constitution, which so carefully provided that the vice president should never preside over a president's impeachment trial, could have allowed almost the same thing—arguably, something even worse—by giving the Senate president pro tempore an actual vote in a presidential impeachment trial, when he, too, could hardly be an impartial judge. In fact, the written Constitution did no such thing. The Constitution's succession clause required Congress to designate an "officer"—presumably an executive-branch *cabinet* officer—to fill whatever succession gap might open up. The Congress in 1792 simply misunderstood the Constitution's command and instead specified legislative figures—who were not, properly speaking, "officers" within the meaning of the succession clause.* Stressing the letter and spirit of the key word, "officer," Congressman James Madison and others opposed the 1792 act on constitutional grounds, but neither Madison nor anyone else at the time explained in detail how the act, in addition to all its other flaws, would pervert the Constitution's carefully designed impeachment structure. In 1792 lawmakers were not focusing intently on the unusual situation of a double vacancy created by the impeachment and conviction of a vice-president-turned-president, as distinct from many of the other possible scenarios—of death, mental disability, physical disability, kidnapping, resignation, and so on—that might leave the nation simultaneously bereft of both president and vice president.[22]

* The political backstory here is that Treasury Secretary Alexander Hamilton's congressional allies in 1792 did not wish to boost Hamilton's cabinet rival, Secretary of State Thomas Jefferson. So Congress did what came naturally—excluding both cabinet officers from the line of succession and instead privileging its own chieftains.

With this old law on the books, however, Senator Wade found himself in an awkward position at the outset of Johnson's trial. Senators sympathetic to Johnson demanded that Wade recuse himself in obedience to the venerable *nemo judex* principle. As they saw it, Wade's status as Johnson's legal successor made it impossible for Wade to take the requisite impeachment oath to do "impartial justice" and thereafter to sit as a proper judge and juror in what the Constitution itself labeled a "Trial."[23]

Wade's defenders countered that his recusal would deprive the state of Ohio of its constitutional entitlement to two votes in the Senate chamber at a particularly important moment. Counterbalancing the venerable principle of *nemo judex in causa sua* was a common-law doctrine called "the rule of necessity." This rule allowed a judge with an otherwise disqualifying self-interest to hear a case if his participation were truly necessary or if all other judges would likely have a comparable conflict of interest. For example, the Constitution says that federal judicial salaries may not be decreased. Were Congress nevertheless to try to cut these salaries, would every federal judge be barred from hearing a judicial challenge to the cut? Judges over the centuries have answered this question differently; but the modern Supreme Court has proclaimed itself competent to hear such cases under the necessity exception to the *nemo judex in causa sua* principle. Similarly, Wade's senatorial allies explicitly argued that necessity required his participation, lest his state lose its constitutionally guaranteed equality in the Senate.[24]

In theory, Wade could have kept his Senate seat and his full constitutional voting privileges, and also avoided a personal conflict of interest, simply by renouncing his statutory right to succeed Johnson. Yet renunciation would not really have cured the self-interest problem; rather, it would have made House Speaker Schuyler Colfax the constitutional heir apparent, even though Colfax himself had played a prominent role earlier in the impeachment process, when the House in effect had acted as a grand jury, indicting Johnson for alleged high crimes and misdemeanors. A self-interested grand-jury foreman hardly seems much better than a self-interested trial judge or juror. Had *both* Wade and Colfax renounced their succession claims, there would have been no one left to replace Johnson, creating a vacuum that would have only widened the constitutional crisis.

Although Congress was formally free to repeal and replace the 1792 act in 1868, any replacement law would have come about with Johnson's impending removal in mind. Thus the new law would have lacked the virtues of a succession statute enacted impersonally and impartially, behind a suitably thick veil of ignorance obliging lawmakers to focus on long-term succession principles rather than short-term politics.

In short, no constitutionally perfect option existed in early March 1868. Both Wade's supporters and his critics made good points, and the real problem was that an old law made no sense, but could not be fixed in time for the trial.

After hours of public debate, the Senate eventually decided to seat Wade on March 6. Wade thereafter sat in judgment over Johnson and at the trial's end voted in a self-serving way—to convict. Rumor had it that by then Wade had already selected his would-be cabinet. But his self-interested vote did not tip the balance. Johnson ultimately had enough votes to remain in power. The final vote to convict was 35 to 19—just shy of the two-thirds needed to oust Johnson and crown Wade.

Looking back on the Wade affair, late nineteenth-century Americans found little to commend in the flawed 1792 statute that had created the conflict of interest. In 1886, Congress repealed the 1792 act, replacing it with a proper system of cabinet succession that excluded House and Senate members from the line of presidential succession and thereby freed the impeachment process from the specter of self-interested adjudication.

This might seem a happy ending to our saga, but history does not always yield happy endings. In 1947 Congress changed the succession rules yet again, inserting the House speaker and Senate president pro tempore (in that order) ahead of various cabinet officers in the line of succession.[25]

THE TAKE-HOME LESSON OF OUR story thus far is that sound constitutional interpretation involves a dialogue between America's written Constitution and America's unwritten Constitution. The latter, at a minimum, encompasses various principles implicit in the written document as a whole and/or present in the historical background, forming part of the context against which we must construe the entire text. The constitutional analysis in the preceding pages has not flowed from a literalistic and clause-bound

reading of the written Constitution, which of course contains no clause that explicitly prohibits the vice president from presiding over his own impeachment trial. But neither has our argument strayed far from the written Constitution. Rather, we have been exploring a variety of unwritten sources that intertwine with the written text—sources such as Blackstone's canonical Commentaries summarizing late eighteenth-century rules of interpretation; Founding-era speeches and essays; preconstitutional and postconstitutional practices and precedents; principles and purposes implicit in various patches of constitutional text; and, above all, structural deductions from the constitutional system viewed holistically.

Standing alone, the written Constitution would appear to be inadequate. Were it read in a literal and flatfooted way, some of its clauses would seem indeterminate or even perverse when measured against the larger purposes of the document itself.

Standing alone, an unwritten Constitution would appear to be illegitimate. Were it to degenerate into an assortment of "constitutional rules" conjured up out of thin air, it would do violence to the fundamental choice of the American people over the centuries to ordain and amend a single written text that sets forth the nation's supreme law.

Neither America's written Constitution nor America's unwritten Constitution stands alone. Rather, the two stand together and support each other. The unwritten Constitution, properly understood, helps make sense of the written text. In turn, the written text presupposes and invites certain forms of interpretation that go beyond clause-bound literalism.[26]

If anyone thinks that all the interpretive puzzles we have been pondering would have happily disappeared had the framers simply been more textually explicit by inserting into the written Constitution a clause declaring that "no man may be a judge in his own case," think again. A clause along these lines would hardly have been self-defining. Would such a clause have (implicitly) recognized a countervailing principle of necessity? When would such a counterprinciple, whether implicit or explicit, come into play? (Recall that some judges have hesitated to sit in cases involving issues of judicial compensation, while other judges have sat without compunction; and that senators in 1868 sharply disagreed about whether Wade's participation in the Johnson impeachment could be justified by

"necessity.") How broadly or narrowly should we define the judge's "own case"? For instance, what about a lawsuit where a judge's brother was the lawyer for one of the parties? (In *Dred Scott v. Sanford*, Justice Benjamin Curtis sat in judgment and famously dissented, voting to support the legal claims of plaintiff Dred Scott, whose lawyer was the justice's brother, George Ticknor Curtis. Today, this decision to sit would probably set off an avalanche of criticism by legal ethicists.) How broadly should we define being a "judge"? (While Chief Justice Marshall did not sit in judgment in the 1816 Virginia land case of *Martin v. Hunter's Lessee*, he did draft the legal petition to his colleagues in his own quite recognizable handwriting, and he may have discussed the relevant legal issues with his brethren in their common boardinghouse. Here, too, modern legal ethicists would probably insist on stricter standards.) Thus, even an explicit textual affirmation of the *nemo judex in causa sua* principle in the Constitution itself would have left open a range of questions whose answers could not simply be deduced from the words themselves.[27]

To see the limits of clause-bound textualism from another angle, recall that the Constitution does contain an explicit ex-post-facto clause. Even so, the clause has given rise to many questions on which the text is hardly decisive. What if a law does not change the substantive rules of criminal conduct but does retroactively modify evidentiary rules of proving criminality—say, by allowing certain kinds of evidence that were inadmissible at the time the crime was committed? What if a law retroactively authorizes a harsher punishment for conduct that was universally understood to be a heinous crime at the moment of its commission? What if a law merely creates a new set of courts that did not exist at the time of the crime? At the Philadelphia Convention, James Wilson overstated his case when he proclaimed that an explicit ex-post-facto clause would be "useless." If nothing else, the clause has usefully eliminated whatever small uncertainty might have existed about certain core cases involving retroactive criminalization of actions that were wholly innocent when done. But Wilson was right to say that, even with the inclusion of an explicit clause, the written text would not suffice to answer all hard constitutional questions: "Both sides will agree to the principle & will differ as to its application."[28]

At these junctures, where isolated clauses shade off into indeterminacy or perversity, we must raise our sights and see the big picture: the Constitution as a whole.

"Congress shall have Power"

TO BETTER UNDERSTAND THE KIND of interpretive approach needed when we seek to find the implicit Constitution hiding behind the document's explicit words, let's now undertake a completely different case study. Having just worked through various unusual constitutional issues that arose at a unique hour of American history—the opening moments of the first-ever presidential impeachment trial—some readers might wonder whether the tool of holistic reading is of help in handling the more mundane matters that routinely arise in ordinary courtrooms. In fact, this tool did much of the work in perhaps the most canonical Supreme Court case ever decided. Precisely because this great case had nothing to do with presidential impeachment, and involved a wholly different set of issues—issues concerning the breadth of congressional lawmaking power and the reserved powers of states, issues that continue to arise in routine litigation in twenty-first-century courts—a close look at the Court's landmark decision will make clear that the technique of reading between the lines has widespread application.

WERE SOME FUTURE GENERATION EVER to erect a monument to America's greatest judicial decisions—a case-law version of Mount Rushmore—*McCulloch v. Maryland* would surely make the final cut. So would *Marbury v. Madison* and *Brown v. Board of Education*, but unlike most other landmark cases, *McCulloch* deserves its place in the pantheon for its style as well as its substance. To read *McCulloch* is to behold the art of constitutional interpretation at its acme.

The *McCulloch* case arose when Maryland tried to impose a targeted tax on the Bank of the United States—a bank that Congress had initially set up in 1791 and had revived in the wake of the War of 1812. In an opinion by Chief Justice Marshall writing for a unanimous bench in 1819, the *McCull-*

och Court decided two important issues. First, the Court held that Congress had acted within its constitutional powers in creating and renewing the national bank. Second, the justices ruled that no state could, in the absence of congressional consent, impose a tax on that bank.

This much is well understood by both modern civics textbooks and modern Court opinions. But the actual chain of constitutional argumentation that Marshall forged to reach these results has become twisted in the modern retelling. Prominent modern citations to *McCulloch* are miscitations, treating the opinion as if it rested on certain explicit constitutional clauses. In fact, Marshall repeatedly relied not on explicit clauses but on the implicit meaning of the Constitution as a whole.

Begin with the first issue decided by *McCulloch*—the question of congressional power to create a national bank. Ask a lawyer or a knowledgeable layperson to name the basis for Marshall's decision, and he will probably point you unhesitatingly to the necessary-and-proper clause. This clause—the concluding language of Article I, section 8, of the Constitution—declares that "Congress shall have Power …To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."

According to conventional wisdom, *McCulloch* read this specific clause as giving the federal government important additional powers—powers above and beyond those conferred on the central government by the preceding ("foregoing") clauses of Article I, section 8, such as the powers to regulate interstate commerce and to raise armies. In a notable 2005 case, *Gonazales v. Raich*, Justice Antonin Scalia cited *McCulloch* for exactly this point. (The issue in *Raich* was whether Congress had power to criminalize medicinal marijuana use in a situation where a state had legalized medicinal use. By a vote of six to three, the Court sided with Congress.) All told, the various justices who wrote opinions in *Raich* cited *McCulloch* ten times, and while they disagreed about many things, no one took issue with Justice Scalia's claims that *McCulloch* had relied on the necessary-and-proper clause and had read that clause as adding to the other powers enjoyed by the central government.[29]

In fact, *McCulloch* did no such thing. *McCulloch* said something closer to the opposite—that perhaps the necessary-and-proper clause conferred no additional power on the federal government.[30]

Before Marshall in *McCulloch* said a single word about this clause, he declared that the Constitution as a whole seemed to empower Congress to create a national bank and that anyone who thought otherwise must shoulder the burden of proof. According to Marshall, even "in the absence" of a necessary-and-proper clause, congressional power should be read in a generous and commonsensical way so as to achieve the basic purposes for which the American people had established the Constitution. Marshall believed that, had the Constitution not contained a necessary-and-proper clause, Congress would nonetheless enjoy considerable flexibility in exercising its "great powers," including the powers to regulate interstate commerce and to raise armies. Such flexibility, wrote Marshall, surely encompassed the power to create a national bank.

True, Marshall did devote several pages to the necessary-and-proper clause. Marshall claimed that Maryland (which was attacking the bank) had invoked the clause to *limit* what would otherwise be the broad natural sweep of the earlier enumerated powers of Congress. It was enough for Marshall to show—and it was all he purported to show—that the necessary-and-proper clause did not subtract anything from the earlier enumerations of federal power. Whether the clause added power, Marshall pointedly declined to say. Perhaps, he suggested, the clause did expand power. "Its terms purport to enlarge, not to diminish." Or perhaps, he mused, the clause simply was meant to "remove all doubts" that all the other congressional powers should be read with suitable breadth. Either way—whether the clause was a plus or merely a zero so far as federal power was concerned—it was not a minus, said Marshall. The clause "cannot be construed to restrain" the earlier enumerated powers.

There is a reason why *McCulloch* has been so widely misread. The necessary-and-proper clause is a concrete and seemingly specific text. Like the ex-post-facto clause, it is something, we instinctively feel, that judges and other faithful interpreters may properly "take hold of." By contrast, we may worry that once a judge goes beyond a specific clause, he might simply make things up, faithless to his constitutional oath. The thought that Marshall may have been faithless in perhaps the most canonical Court decision of all time unnerves us. So Marshall is depicted as a narrow textualist, building his constitutional church on the solid rock of an explicit clause.[31]

Marshall in *McCulloch* was indeed a faithful interpreter, but he was not a clause-bound textualist. Rather, he elegantly blended a close reading of the written Constitution with a sensitive understanding of America's unwritten Constitution.

He began by stressing that not everything in the Constitution was, or could sensibly be, explicit. Some things were merely implied. "Among the enumerated powers, we do not find that of establishing a bank.…*But there is no phrase in the instrument which…excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely expressed*" (emphasis added). Later in this section, he reiterated that he read the Constitution as generally giving Congress an "*implied*" authority "of selecting means for executing the enumerated powers" (emphasis added).

The need for such implications was not due to poor draftsmanship at Philadelphia. Rather, Marshall insisted, this need derived from the very essence of the Constitution as an embodiment of American popular sovereignty. If every aspect of constitutional law—every constitutional power, every constitutional limit on power, every minor constitutional exception and niggling qualification to a general constitutional rule, every constitutional principle entitled to weight in constitutional interpretation—had to be expressly and minutely included in the text of the Constitution itself, the document would, said Marshall, "partake of the prolixity of a legal code." (He had in mind here something like today's tax code.) Such a detailed and labyrinthine text "would probably never be understood by the public." At that point, the essence of America's Constitution as the people's law—as a terse, accessible text that had been understood, debated, and ratified by the people, and that could thereafter be understood, interpreted, and, if necessary, amended by the people—would have been fatally compromised.

If not the necessary-and-proper clause, then which enumerated powers authorized Congress to create a national bank? The chief justice did almost all the heavy lifting in a single paragraph that did little more than gesture toward a cluster of clauses. None of these clauses did Marshall closely parse. Several he only paraphrased:

> Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers

> to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government.…A government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution.

Viewed one by one, virtually every clause that Marshall invoked can be dismissed if read in a narrow, literalistic, autistic way—the way Congressman James Madison read them in 1791, when he (unsuccessfully) argued in the House of Representatives against the constitutionality of the first national bank. Strictly speaking, the law creating the bank did not *itself* lay taxes or borrow money. As a matter of strict logic, one can imagine an army without a bank, and a bank without an army. And so on.[32]

Marshall's constitutional genius was to grasp that Americans had not ratified the Constitution clause by clause, enumerated power by enumerated power. The people had ratified the Constitution as a whole, and thus the federal government's powers needed to be read as a whole rather than as a jumble of discrete clauses. In Marshall's words, the question of federal power should "depend on a fair construction of the *whole instrument*" (emphasis added), read through the prism of the general purposes that the American people had in mind when they framed and ratified the document.

In one of *McCulloch*'s most quotable—if least understood—lines, Marshall stressed (with italics) that "we must never forget, that it is *a constitution* we are expounding." Three intertwined ideas lay close to the surface of this reminder. First, the Constitution could not remain true to its nature as a document from and for the people were it to become overly long and intricate. Here, the distinction was between "a constitution" and a code. Second, the Constitution warranted rules of interpretation that were different from those of the earlier Articles of Confederation, which, Marshall reminded his readers, had openly purported to "exclude[] incidental or implied powers." Here, the distinction was between "a constitution" and

a pure confederation based entirely on state sovereignty. Third, the Constitution was a "whole instrument." Here, the distinction was between "a constitution" and an assortment of clauses read in disjointed fashion.

McCulloch's pivotal paragraph exemplified Marshall's trademark brand of holistic analysis. The great chief proceeded in three steps. Step One: The central purpose of the Constitution was to safeguard national security across a vast continent. This was apparent when one pulled back from specific clauses and saw the big picture—in Marshall's words, "[t]he sword and the purse." (Though Marshall did not mention it, this purpose was also evident in the words "common defence" and "general Welfare," which appeared both in the Constitution's Preamble and at the outset of Congress's enumerated powers.) Step Two: Creating a national bank fit sensibly within that central purpose, given all the ways that a continental bank might facilitate continental defense. In particular, Marshall underscored that a national bank with branches across the land could ensure that American soldiers—who might need to march from "the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific"—would be paid on site and on time. (As a veteran of Valley Forge, Marshall knew deep in his bones how all could be lost if men at a decisive time and place deserted or deteriorated for want of funds or supplies.) Step Three: This kind of sensible fit with the Constitution's broad purposes, as opposed to a mathematically perfect nexus between a statute and a specific empowering clause, was all that was required. Had the Constitution's words "imperiously require[d]" a tighter fit, judges would "have only to obey." Absent an explicit constitutional command to this effect, the commonsensical connection between a national bank and national defense (not to mention national fiscal operations more generally) would easily suffice.

WITH THIS ANALYSIS OF ENUMERATED powers in mind, let's now return to Marshall's discussion of the necessary-and-proper clause. Why, we might wonder, didn't Marshall try to expand federal authority still further by arguing that the necessary-and-proper clause added something extra to the previous enumerations? Given that the clause, as Marshall read it, did not subtract from the earlier enumerations, what was its purpose if it did not add some extra power?

Marshall suggested that perhaps the clause was merely *declaratory* of what would have been the best reading of the Constitution even had this clause not existed. Viewed this way, the clause aimed neither to increase nor decrease federal power but rather to add clarity and remove doubt. With this clause in place, it would be plain to all that, in sharp contrast to the old Confederation's Congress, the new Constitution's Congress would have some latitude in implementing its enumerated powers.

This was how the clause had been presented to the American people by leading Federalists during the ratification period. In the first major battleground state to hold a ratifying convention, Pennsylvania, James Wilson explained that the clause "say[s] no more than that the powers we have already particularly given, shall be effectually carried into execution." Writing as "Publius," Alexander Hamilton in *The Federalist* No. 33 admitted that the clause "might be chargeable with tautology or redundancy" because it was added merely for clarity and "greater caution" to guard against a stingy reading of the other enumerated powers. Madison/Publius echoed the point in *The Federalist* No. 44. Even without this explicit clause, "there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government *by unavoidable implication*" (emphasis added).[33]

Seen this way, the clause calls to mind the ex-post-facto clause, which was also understood by leading Federalists as simply making explicit what would otherwise have been merely (but clearly) implicit. Indeed, the link between the two clauses was even tighter, for the necessary-and-proper clause included an important textual reminder that congressional laws should be "proper." Marshall understood *propriety* in this context to mean that congressional laws had to fit with the "spirit of the constitution" and not merely its "letter." A law that was merely a "pretext" should not be upheld under the necessary-and-proper clause, Marshall insisted.

Note what this means. As Marshall took pains to prove, the necessary-and-proper clause subtracted nothing from federal power. The clause "cannot be construed to restrain" the earlier enumerated powers of Congress. Therefore, Marshall believed that the earlier enumerations themselves included a propriety requirement—albeit an implicit one. Just as Blackstone, in a passage paraphrased at Philadelphia by Ellsworth and Wilson, had

insisted that ex-post-facto laws were not "*properly*" viewed as true laws, so Marshall insisted that all federal laws were governed by a propriety requirement, and would have been so governed even if the necessary-and-proper clause had never existed.

An illustrative hypothetical to highlight the difference between "proper" and "improper" congressional action: Suppose that in June 1789, the First Congress had enacted a law restricting the transportation across state lines of certain "noxious" items. Ordinarily, such a law would fall squarely within the letter and spirit of Congress's enumerated power to "regulate Commerce…among the several States." Suppose, however, that this law had defined "noxious" items to consist solely of "newspapers and pamphlets recommending that the people elect a different set of Representatives to Congress in 1790." Would such a law truly fit the spirit of the Constitution? Would this law be constitutionally "proper," or instead be an impermissible "pretext"?

In confronting this hypothetical, most modern Americans would instinctively reach for the First Amendment. But in June 1789, the First Amendment had yet to be proposed by Congress or ratified by the states.

No matter. The free-expression core of that amendment was itself merely declaratory—making textually plain what was otherwise strongly implicit. When we read the Constitution as a "whole instrument," we readily see that it was designed to establish a regime of fair elections and thus robust political expression. In such a republic, the people would freely choose their congressmen, and Congress would have no proper power to squelch or skew electoral discourse, especially discourse about whether incumbent congressmen should be reelected. In light of the entire Constitution's basic structure, our hypothetical law should be seen as an improper, and therefore unconstitutional, use of an express enumerated power—even in the absence of the First Amendment, and, indeed, even had the Constitution omitted the purely declaratory word "proper." From day one, the Constitution prohibited certain kinds of federal censorship even though the underlying prohibition could be said to be purely implicit.[34]

LET US NOW TURN to the second question decided by *McCulloch*, and Marshall's argument that no state could unilaterally tax the federal bank

(or any other proper federal instrumentality). Today, many treat this part of *McCulloch* as relying solely on the text of the Constitution's supremacy clause, which declares that "the Laws of the United States which shall be made in Pursuance" of the Constitution prevail over "Contrary" state laws. In 1983, Justice Harry Blackmun, joined by three colleagues, wrote that "the Supremacy Clause, of course, is the foundation of *McCulloch v. Maryland*, where the Court laid down the principle that the property, functions, and instrumentalities of the Federal Government are immune from taxation by its constituent parts."[35]

In fact, *McCulloch* invoked the supremacy clause in a more subtle way. Marshall treated the issue of state taxation of a federal agency as governed not so much by the decisive words of a single clause as by the deeper principles animating the document as a whole. Marshall insisted on reading between the lines to vindicate the document's spirit, rather than focusing solely on its letter:

> *There is no express provision for the case*, but the [bank's] claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. (Emphasis added.)

Marshall had at least three reasons for conceding that no "express provision" applied. First, nothing in the congressional statute creating the bank explicitly immunized it from state taxation, though such immunity was surely implicit. (It went without saying.) Second, the 1781 Articles of Confederation—the compact among the thirteen states that the Constitution had displaced—had included language in Article IV, paragraph 1, that spoke directly and specifically to the issue of state taxation of federal property: "[N]o imposition, duties or restriction shall be laid by any state, on the property of the united states." No clause in the Constitution itself was comparably explicit. Third, the Constitution, in Article I, section 10, declared that "[n]o State shall, without the Consent of Congress," impose

certain taxes on tonnage, imports, and exports. Maryland argued that these clauses should be read to set forth the *only* kinds of state taxes that were unconstitutional, and that otherwise states should be free to tax as they pleased.

Marshall sidestepped these mild clausal embarrassments by reminding readers of the principles that pervaded the Constitution as a whole, as distinct from those that had animated the Articles of Confederation. The Confederation had been proudly premised on state sovereignty: Its Articles had opened by proclaiming that "[e]ach state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation *expressly* delegated to the United States" (emphasis added). In a document that prioritized states' rights so emphatically and sweepingly, the immunity of federal agencies and federal property from state taxation was something that needed to be, and therefore was, stated expressly. As Marshall made clear at the outset of his *McCulloch* opinion, the Constitution stood on wholly different ground. It was not premised on state sovereignty. It pointedly omitted any language requiring that all limits on state power be "expressly" stated. In *this* document, no counterpart language to the old Article IV, paragraph 1, was needed. The impropriety of state taxes on proper federal agencies went without saying.[36]

Marshall proceeded to elaborate how state taxation of federal instrumentalities inverted first principles of logic and legitimacy. Logically, the whole was greater than the part; thus, no mere part of the union could undo what the union as a whole had done. States were represented in the Congress that had created the bank, but the union was not symmetrically represented in the Maryland legislature. In burdening the bank, Maryland was in effect taxing unrepresented out-of-staters who had financed the federal institution—New Yorkers, Pennsylvanians, and so on, who had no vote in Maryland. If the Revolution and the Declaration of Independence meant anything, surely they stood for the proposition that in America, there should be no taxation without representation.[37]

Here, as elsewhere, Marshall exemplified not clause-bound literalism, but holistic constitutional interpretation. From start to finish in *McCulloch*, he showed us by example how to read between the lines.

"Speech"

IF STATES MAY NOT OBSTRUCT a duly authorized federal bank, what about state obstructions of other legitimate federal functions? In particular, what about state obstructions of national political discourse? To answer these questions, we will need to move past *McCulloch*'s specific facts and venture into another legal quadrant altogether. Here, too, we shall see that faithful constitutional interpreters must transcend clause-bound literalism by fixing their eyes on the document as a whole.

A not-entirely-hypothetical hypothetical: Suppose that in 1858, an antislavery congressman from Illinois returned to his district to address his constituents. In vivid but wholly nonviolent, nondefamatory language, our hypothetical congressman proclaimed slavery "a vast moral evil and a monstrous injustice—a hateful and ungodly institution that corrupts the white man, tyrannizes the black man, and mocks the divine order in which all men are created equal." Our imaginary congressman—let's call him Lincoln Abraham—went on to opine that voters in every slave state should press their state lawmakers to "act now to put slavery on a path of extinction," and that Congress should enact federal legislation subsidizing these state reforms. Suppose further that Abraham printed his passionate speech as a campaign pamphlet and personally sent copies of this pamphlet, through private channels, to political allies outside Illinois, including friends and relatives in North Carolina. Finally, let's suppose that North Carolina then indicted Abraham for the crime of encouraging slave discontent.

History buffs will recognize this fictional case as only a slight twist on what actually happened in the late 1850s. Many slave states criminalized peaceful antislavery or egalitarian expression and tried to shut down core political speech by antislavery leaders, including northern congressmen. *[38]

* For example, a North Carolina statute, enacted in 1830 and revised in 1854, made it a crime to circulate "any written or printed pamphlet or paper…the evident tendency whereof is to cause slaves to become discontented with the bondage in which they are held…and free negroes to be dissatisfied with their social condition." First-time offenders could be whipped, pilloried, and imprisoned for at least a year. Repeat offenders could be put to death. In 1860, North Carolina's legislature decided that this law was too soft on crime, and instead authorized capital punishment of first offenders. In 1859, a North Carolina grand jury did in fact indict, and demand the extradition of, various northern political leaders who had lent

But surely the Constitution circa 1858, properly construed, did not allow states to criminalize political discourse between public servants and the voters they served. Our imaginary Representative Abraham's remarks exemplify a species of speech at the very heart of the American system of government—political opinions communicated by a congressman to his constituents and fellow citizens on the most pressing political issue of the era. No state could bar this sort of speech, or prevent voters from other districts from listening in if they so desired. If a state may not shut down a national bank, neither may a state shut down a national debate about national policy. True, the Constitution as of 1858 did not in any single clause explicitly say that North Carolina could not suppress a political address by an Illinois congressman. But read as a whole and in context, the document certainly implied at least that much.[39]

For a strict textualist, the First Amendment (which had of course become part of the federal Constitution long before the 1850s) is entirely beside the point. The first word of the First Amendment is "Congress." *Congress* may make no law abridging freedom of speech or of the press. No words of the First Amendment place any explicit restriction on *states*.

But this hardly means that state legislatures in antebellum America were by negative implication free to run roughshod. As we have seen, arguments from negative implication can sometimes seriously mislead us and point us toward constitutionally outlandish results. It is absurd to think (by negative implication) that the only time that the vice president must recuse himself is when the president is being impeached. It is erroneous to think (by negative implication) that the only proper limits on Congress's enumerated powers are those expressly and minutely set forth in the terse text. It is unreasonable to think (by negative implication) that the only taxes that states are prohibited from imposing are the ones explicitly banned by the Constitution. Likewise, it is wrong to think that Congress is the only government entity that must respect the freedom of speech or of the press.[40]

Today, almost no well-trained lawyer reads the First Amendment in so

their names in support of Hinton Helper's provocative (and presciently titled) antislavery pamphlet *The Impending Crisis*. More than sixty Republican congressmen had endorsed the pamphlet and had proposed to distribute an abridged version as a campaign tract.

narrow and literalistic a fashion. If a federal judge attempts to impose a gag order on reporters in the courtroom, or if the president tries to muzzle the press in order to prevent embarrassing leaks, lawyers immediately grab hold of the First Amendment, even if Congress is not directly involved and the other branches of the federal government purport to be acting under their own inherent powers. The famous 1971 Pentagon Papers case, *New York Times Co. v. United States*, was decided under the First Amendment, even though the case pivoted not on a statute enacted by Congress but on the unilateral actions of the president—Richard Nixon, who was trying to censor *The New York Times*. Modern lawyers instinctively heed the admonition of the Ninth Amendment, whose language cautions against drawing hasty negative inferences when reading the Bill of Rights.

The First Amendment's first word, "Congress," is now read as a synecdoche: The right of free expression applies against all branches of the federal government and rightly so. If the president and federal courts cannot censor citizens even with the backing of a congressional law, it would be odd to think that they can do so without such a law. Limits on the less electorally accountable branches of the federal government follow *a fortiori* from those imposed on Congress.

While it makes good sense to read the First Amendment as guarding against all *federal* abridgments of free speech, it would be far more troubling to construe the amendment as creating rights against states. That amendment was originally designed by Federalists in the First Congress to placate Anti-Federalists anxious about the wide scope of federal powers and eager to protect legitimate states' rights. Reading the Bill of Rights as giving the federal government (especially federal courts) broad extra powers to limit state governments does somersaults with that original understanding. Madison himself, the main sponsor of the First Amendment, drafted a separate amendment that would have safeguarded the rights of speech and press (and certain other rights) against states; but that proposed amendment failed to clear the Senate, where states'-rights sentiment ran strong.[41]

Thus, the First Amendment is not the ultimate source of the Constitution's limits on state censorship. But surely nothing in that amendment insulates state speech regulation from federal oversight if such oversight is

authorized by other clauses or by the Constitution as a whole. Members of Congress—and by extension, other agents of the federal government—are prohibited from *abridging* free expression, but not from *protecting* it.[42]

THERE IS ANOTHER FREE-SPEECH CLAUSE in the Constitution that deserves our attention as we ponder the fate of our imaginary Representative Abraham. Though the original Constitution contained no clause explicitly affirming the rights of ordinary citizens to speak and publish freely, it did guarantee, in Article I, section 6, that "Senators and Representatives…shall not be questioned" outside Congress for "any Speech or Debate in either House." Thanks to this clause, no government entity (except the House of Representatives itself, pursuant to its own internal disciplinary rules) could ever punish, tax, hold liable, or otherwise obstruct a House member for a House speech. In performing its vital function as America's preeminent debating society and policy-making forum, Congress could never be muzzled by the federal courts, by the president and his minions, *or by state legislatures, state executives, or state courts*.

In safeguarding congressional speech from state censorship, this clause built squarely on foundations laid by the Articles of Confederation, which had similarly provided that "[f]reedom of speech and debate in congress shall not be impeached or questioned in any Court, or place out of Congress." The main objective of this precursor clause was to protect congressional speech from state-law interference—an objective that lived on in the later language of the Constitution. If anything, the need to protect congressional speech from state assaults was even greater in a document designed to make the new Congress far more independent of states than the old Congress had been.

The stunningly broad immunity that this clause gave to congressional speech surpassed the protection that the First Amendment afforded to ordinary citizen speech. Even if a representative on the House floor intentionally spewed malicious falsehoods about some hapless citizen, the speaker was nonetheless shielded from the ordinary defamation laws applicable to ordinary speakers. No criminal prosecution, state or federal, could ever be brought against a representative even when a floor speech

had been designed to incite and had in fact incited immediate lawless violence, or had spilled military secrets in wartime.

Counterbalancing this extraordinary breadth and absolutism of protection were several notable limits in Article I, section 6. First, only sitting congressmen—political leaders who had won widespread respect and cleared high electoral hurdles—could claim this privilege. Second, Congress itself had broad authority to prevent improper speech from taking place on the floor. Parliamentary rules of order and decorum could be invoked to cut off an abusive or irresponsible speaker—in midsentence, if necessary. Third, Congress could punish miscreant members after the fact, with sanctions ranging up to temporary imprisonment in the Capitol and expulsion from Congress.

Although the letter of the Article I speech clause confined itself to congressional utterances within the Capitol, the spirit of the clause radiated more broadly. Given that the fictional Lincoln Abraham would have been untouchable by North Carolina had he simply addressed his colleagues, his constituents, and his fellow Americans from the House floor, it would be odd to think that he should lose protection merely because he made it easier for his far-flung audience to hear his ideas. Surely the right to hear what was actually said on the floor of the people's House should not be limited to those Americans who happened to live in or close to the District of Columbia. Had Abraham first delivered his speech in the House and then merely repeated it verbatim in his district and in his pamphlet, a strong case could be made for absolute protection of his mere repetition and republication.[43]

But let's suppose that our imaginary Abraham was not merely repeating in his district and in his pamphlet words that he had first uttered in the House. Although Abraham would then fall outside the particularly absolute version of freedom of speech built into the congressional free-speech clause, he could still lay claim to the basic free-speech right of all Americans: the right to voice his nonviolent, nondefamatory political opinions to any citizen willing to listen, a right implicit in the very structure of the Constitution.

HERE, AT LAST, we reach the heart of the matter. The entire Constitution was based on the notion that the American people stood supreme over government officials, who were mere servants of the public, not masters over them. Under first principles of popular-sovereignty theory and principal-agent law (which governs, for example, employer-employee relations), it was improper—not to mention impudent—for mere public servants in either the federal or the state governments to prohibit their legal masters, the sovereign citizenry, from floating political opinions and weighing political proposals among themselves. The voters had an inalienable right to voice and hear nonviolent, nondefamatory criticisms of (and apologies for) incumbent legislators, state and federal, and also had a foundational right to voice and hear vigorous arguments about legal institutions such as slavery and legal reforms such as abolition. The entire structure of the American system presupposed these rights.[44]

The federal system also presupposed that Illinois speakers had a right to communicate with willing listeners in North Carolina, who in turn had a right to import this speech from out of state, just as they had a right to other forms of interstate commerce. No state official could unilaterally bar this commerce in ideas and opinions. Nor could Congress have "properly" prohibited this species of interstate commerce, even prior to the adoption of the First Amendment, whose free-expression language was largely declaratory, adding textual emphasis to a principle already evident in the Constitution's basic structure.

Indeed, in deciding whether to ratify the Constitution in the late 1780s, the American people held a year-long continental conversation among themselves that featured remarkably robust and uninhibited interstate political speech and publication free from any notable government censorship, even though much of the expression was sharply critical of existing governmental authorities and legal institutions (including slavery). Even before the First Amendment, the very act of constitutional ordainment itself gave legal validity to a robust right of political expression. Without such a right, the Constitution might never have come into existence, and the people's vaunted right to alter or abolish government might have become a grim joke rather than a proud reality.

We shall return to this issue in the next chapter, where we shall more systematically analyze various unwritten elements that were part of the very process by which the people ordained, and, later, amended, the written Constitution. For now, it is worth emphasizing that nothing in the strong antislavery words uttered by our hypothetical Lincoln Abraham differed in any relevant way from passionate utterances that occurred abundantly and without legal repression during the great constitutional conversation of 1787–1788.

"executive Power"

WE HAVE PLAYED LONG ENOUGH with the imaginary Lincoln Abraham. Let us now confront the flesh-and-blood Abraham Lincoln. To what extent could a Lincoln-hating slave state—say, North Carolina—have lawfully obstructed the president in the early days of his administration by trumping up criminal charges against him and demanding that he immediately come south to face trial? With this hypothetical—our last one in this chapter—we shall see once again the need to read each constitutional clause in the context of the document as a whole.

HAD NORTH CAROLINA simply indicted Abraham Lincoln for the political opinions put forth in his speeches and publications, the president could of course have claimed the same inalienable rights of expression enjoyed by our hypothetical Lincoln Abraham or any other citizen. But let's suppose that North Carolina instead cooked up charges that did not on their face arraign the president merely for his political opinions. Imagine, for instance, a grand jury indictment charging that Lincoln had secretly conspired to incite bloody slave uprisings and the mass murder of innocents by sending arms, ammunition, and funds to John Brown and his fanatic partners in crime.[45]

No provision of the Constitution explicitly shields a sitting president from state criminal prosecution—or from state imprisonment upon conviction, for that matter. Also, counseling against presidential immunity is our old friend, the argument from negative implication. As we have already seen, Article I, section 6, does explicitly shield senators and representatives

from state (or federal) lawsuits based on their floor speeches. That section also shields congressmen from certain civil-litigation tactics involving physical arrests—arrests that might improperly prevent the targeted lawmakers from attending Congress. No comparably worded clause of the Constitution expressly protects the president from state (or federal) litigation that might intrude upon the proper performance of his duties. According to the negative-implication argument, when the Founders meant to create special shields for federal functionaries, they did so explicitly. On this logic, a sitting president must face a jury of his peers just like the rest of us.

Perhaps—but only if this result makes sense of the document as a whole and its deep structures and principles. After all, the argument from negative implication is itself only an implication. No explicit constitutional clause says that Article I, section 6, enumerates the only constitutional immunities deserving of recognition. No explicit constitutional clause says that "the president shall enjoy no privileges or immunities save those expressly enumerated." On the contrary, Article II begins, sweepingly, by vesting the president with "[t]he executive Power" of the United States. As a textual matter, the question is whether immunity from a state criminal proceeding (and from potential state imprisonment) should be understood as an implied component of federal "executive Power." The argument for reading immunity into this Article II phrase is hardly a wild textual stretch: It may be rather difficult (to put it mildly) for a president to fulfill the many and varied duties of his office from a state criminal courtroom or a state prison cell.

True, the president's immunity was not textually specified to the same degree as was Congress's. The framers may well have felt a special need to mark the contours of congressional immunities in black and white because as a practical matter the protection of these immunities would be committed to the other two branches in ordinary law enforcement and adjudication. Whatever implicit immunities were appropriate for those other branches, the framers might have assumed, would be effectively self-enforcing and hence needed little textual reinforcement. Presidents armed with the federal executive power could simply use their executive muscles to resist improper state arrest warrants and the like issued against them;

and federal judges could similarly protect themselves from pesky litigation by simply refusing to entertain certain improper federal-court suits and by reversing meddlesome state-court judgments.[46]

Federal courts over the centuries have done just that, holding repeatedly that no federal judge may be sued under state defamation law for any utterance in a judicial opinion—in effect recognizing a judicial freedom of speech in a federal court remarkably similar to the congressional freedom of speech in the Capitol.

Remarkably similar except, of course, for the fact that the judicial immunity is entirely an implication from the Constitution's general structure, whereas the congressional immunity is explicit in the Constitution's text. Much as Ellsworth, Wilson, and Blackstone argued that certain well-settled background principles of the rule of law went without saying, so, too, the Supreme Court has insisted that judicial free speech is an implicit element of the basic Anglo-American system of law. As the Court explained at the turn of the twentieth century,

> a series of decisions, uniformly to the same effect, extending from the time of Lord Coke to the present time, established the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice.…"This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."[47]

Granted, no federal judge or congressman enjoys blanket immunity from state criminal prosecution. Neither does any cabinet officer; nor does the vice president.* If any of these federal figures becomes the victim of a state criminal-law vendetta, he must ultimately rely on federal courts

* At the time that he served as the Senate's presiding officer during the 1805 impeachment trial of Supreme Court Justice Samuel Chase (no relation to Salmon), Vice President Aaron Burr stood indicted by both New York and New Jersey for having killed Alexander Hamilton in an 1804 duel at Weehawken. During the Chase impeachment, newspapers quipped that ordinarily "it was the practice in Courts of Justice to arraign the *murderer* before the *Judge*, but *now* we behold the *Judge* arraigned before the *murderer*."

to protect him. In some situations, the trial itself, though based on state criminal law, may properly be removed from a state to a federal courthouse because a federal officer stands accused. In other situations, the Supreme Court may simply review and reverse any state-court conviction obviously based on state discrimination against federal officials.[48]

The presidency, however, is constitutionally unique. Here, the power of an entire branch of the federal government centers in one man. (This is the plain meaning of the above-noted opening clause of Article II.) Congress can operate at full speed even if an indicted or imprisoned member is absent. So can the federal judiciary. Cabinet secretaries exist mainly to help the president himself and can be temporarily replaced by undersecretaries. Effective substitutes for the vice president are also easy to find; the VP's main constitutional duty is to preside over the Senate, and in his absence this chair can be filled by a senator. Article II, by dramatic contrast, revolves around one man who is expected at all times to be at the ready to do whatever may be needed at a critical moment to keep the nation afloat and on course. When the president is told that he must—upon pain of imprisonment—appear at a particular state criminal hearing at a particular place and time, the executive branch itself is being held hostage, perhaps at an hour of national danger when even a small distraction may spell national disaster. Not only is the president unable to devote his entire attention to the business of the American people, but someone other than the president—some local judge or local prosecutor or local jury, perhaps with pretextual or partisan motives—is usurping the authority to define the national executive agenda.[49]

Of course, in such situations the vice president may take over. But if so, the votes of millions across the continent are being set aside by a local body of grand jurors and petit jurors from one city or county.* In these scenarios, the part is undoing the decision of the whole, turning the con-

* Pop quiz: Name Lincoln's vice president in his first term. Hint: The answer is not Andrew Johnson, but someone whom few Americans today can easily recall—a fact that should remind us that vice presidents are not always perfect substitutes for presidents. This was especially true prior to a pair of mid-twentieth-century amendments—the Twenty-second and Twenty-fifth Amendments, to be precise—that have elevated the constitutional and electoral status of vice presidents.

stitutional order topsy-turvy. A courageous president faithfully discharging his constitutional duty may at times need to take actions that render him hugely unpopular in one city, county, state, or even region. No single locality should be allowed to prevent or punish this faithful discharge of national duty. Abraham Lincoln became president by dint of a national vote of confidence, and only a comparable national process could properly dislodge him from the presidency.

The Constitution provided for just such a process to dislodge a miscreant president: impeachment. In this process, nationally accountable bodies would make the pivotal decisions to intrude upon, and, if necessary, oust, a nationally elected executive. The House, acting as a special grand jury, would represent not one city or county but all America, as would the Senate in its capacity as impeachment judge and jury. In addition, the American people themselves would have regular opportunities to judge the president at election time and to send him packing if they found him wanting. Once out of office, an ex-president could stand trial for his alleged crimes without undue prejudice to the national business.[50]

Even if the underlying criminal conduct alleged by a state against the president did not rise to the level of an offense that warranted impeachment and removal, House and Senate members might in certain situations properly view the president's decision to invoke immunity as itself grossly corrupt and hence impeachable. Imagine a scenario of national peace and prosperity where the president did have spare time, and where the state criminal charges proffered against him seemed on their face to be entirely nonpretextual, based on strong evidence, and susceptible of quick adjudication in an ordinary criminal trial. In such a case, congressmen might believe that an honorable president would waive immunity and clear his name. If the president refused to take this path, that refusal itself might cast doubt on his probity and fitness to hold high office.[51]

This interpretation of constitutional structure finds considerable support in constitutional history. In two separate *Federalist* essays, Hamilton/Publius suggested that any proper criminal trial of the president should take place only after his impeachment and removal by Congress. The president "would be liable to be impeached, tried, and upon conviction [in an impeachment court] removed from office; and would *afterwards* be liable

to prosecution and punishment in the ordinary course of law" (emphasis added). He would "at all times" be "liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to the forfeiture of life and estate by *subsequent* prosecution in the common course of law" (emphasis added).[52]

Other leading Federalists expressed similar views. At the Philadelphia Convention, Gouverneur Morris declared that "a conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President *after* the trial of the impeachment" (emphasis added). During the North Carolina ratifying convention of 1788, Governor Samuel Johnston spoke even more sweepingly: "[M]en who were in very high offices could not be come at by the ordinary course of justice; but when called before this high tribunal [of impeachment] and convicted, they would be stripped of their dignity, and reduced to the rank of their fellow-citizens, and then the courts of common law might proceed against them."[53]

Several other Founding statesmen and statements muddied the waters. At one point in the Pennsylvania ratifying convention, James Wilson declared that "far from being above the laws, he [the president] is amenable to them in his private character as a citizen, and in his public character by impeachment." The structural argument for presidential immunity does not flatly contradict Wilson's generalization, but it does qualify and clarify Wilson's rhetoric by highlighting that impeachment should ordinarily occur first (unless a president opts to waive his immunity, which he might do precisely in order to avoid an impeachment). The subtle issues of timing and the exact relationship between impeachment and the regular criminal-law process were topics that Wilson (unlike Hamilton, Morris, and Johnston) did not come close to addressing.[54]

Wilson also boasted that the Constitution did not give the president even "a single privilege," but this rhetorical exaggeration in the heat of debate has not stood the test of time. Beginning with George Washington, presidents have repeatedly and with the approval of other branches asserted various privileges—including, for instance, privileges to withhold information related to national security, secret international diplomacy, and internal executive-branch deliberations. The last of these privileges

was explicitly endorsed by a unanimous Supreme Court in the 1803 case of *Marbury v. Madison* (in a passage that has escaped the notice of most modern law professors).[55]

Shortly after the Constitution was ratified, a brief discussion took place in the Senate about whether a sitting president could be criminally prosecuted. Vice President John Adams and Senator Oliver Ellsworth agreed that "you could only impeach him [the president] and no other process whatever lay against him." Otherwise, "you put it in the power of a common justice to exercise [coercive] authority over him and stop the whole machine of Government." If, for example, the president were to commit murder in the streets, he would be promptly impeached and removed, and "when he is no longer President you can indict him." Writing several years later, Thomas Jefferson—not usually an ally of Adams and Ellsworth—offered a similar analysis: "[W]ould the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?"[56]

In 1833, Justice Joseph Story published a landmark treatise on American constitutional law, and he, too, offered a structural defense of presidential immunity: "There are…incidental powers, belonging to the executive department, *which are necessarily implied* from the nature of the functions, which are confided to it. Among these, must necessarily be the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of his office." Though Story went on to hedge his bets on the issue of presidential immunity, it would be hard to find a clearer defense of honoring not only what the Constitution says explicitly, but also what it says implicitly.[57]

IF A SITTING PRESIDENT may simply brush aside a state prosecutor, may a sitting governor do so as well? After all, many state constitutions purport to vest their governors with "executive power." Despite this surface similarity, the structural case for gubernatorial immunity is quite weak and in general has not carried the day as a matter of state constitutional law.

Governors differ from presidents along several dimensions. First, most state constitutions over the years have created prosecutorial structures strongly independent of, and designed to counterbalance the power of, state governors. Today, the great majority of states elect their attorneys general and governors independently, whereas at the federal level the attorney general answers directly to the president and has done so without interruption since the days of George Washington. Structurally, state executive and prosecution powers do not truly revolve around a single, unitary executive as they do under the federal Constitution. Second, presidents are entrusted with vast powers of diplomacy and national security on which the very existence of the nation may depend. Governors have no comparable authority. In this respect, the executive power of a state is inherently different from the executive power of the United States. Intruding upon a sitting governor is not the same as distracting or disabling a president during a potential international crisis. Third, when a state prosecutor brings suit under state law in state court against a sitting state governor, the specter of the part undermining the whole does not arise as it does when a single state tries to undo the effects of a national presidential election.[58]

The fact that presidents may properly enjoy certain implicit privileges that governors do not (and vice versa) reminds us that even though advocates for certain implicit presidential privileges may stress the words "executive Power"—and indeed I invoked these very words a few pages back—this phrase is not always the weight-bearing workhorse it might seem. Like other textual arguments, the appeal to the Article II clause vesting the president with "executive Power" is at times merely a handy textual label affixed to an argument whose main force derives from constitutional structure and spirit—that is, from America's implicit Constitution.[59]

BUT WHAT ABOUT THE RULE OF LAW? Does presidential immunity from state prosecution and imprisonment improperly place the president above the law? In a word, no. For this immunity is itself implicit in America's highest law, the Constitution.

Consider, one last time, the Article I, section 6, clause guaranteeing congressional freedom of speech and debate. No one today sensibly says that this particularly absolute form of congressional free speech places con-

gressmen above the law. The law itself provides for this privilege and does so for sound reasons of public policy. So, too, with federal judicial immunities from state libel law, immunities that are implicit in the Constitution's structure and history rather than explicit in the Constitution's text. The same thing is true of any presidential immunity derived from the Constitution itself—an immunity that of course applies equally to all presidents, liberal and conservative alike. This immunity does not arise from some sort of aristocratic birth privilege. Rather, it exists for those who have been democratically selected to serve as the nation's first officer. Here, what might at first seem like a mere private privilege really serves a larger public purpose, safeguarding the rights of the American people to choose their president, unfettered by any clever state effort to nullify that national choice.

It is worth reiterating that none of the immunities that we have considered allows unchecked lawlessness. These immunities simply create alternative legal structures of decision and judgment. Congress itself may punish congressional speakers who abuse the Article I speech privilege. Appellate tribunals may review, reverse, and chastise judges who wantonly defame others, and abusive judges may also be removed from office by an impeachment court. Likewise, presidents may be judged by America's high court of impeachment; and once out of office they may be tried on bona fide state charges, just like the rest of us (with all the standard rights of other citizens and of other federal officers to protect them from state vendettas).[60]

The real question is not "Are presidents above the law?" but rather "What is the law for presidents?" Rightly understood, the law itself says that sitting national executives should be judged nationally and impartially. Though the Constitution does not say this in so many words, no single state criminal judge or jury may properly preside over an unconsenting incumbent president, just as no vice president may properly preside over his own impeachment. No party may properly judge his own case, and no part may properly judge the whole. Principles such as these make sense of the entire document.

THIS CHAPTER HAS HOPPED WITH abandon from one specific constitutional topic to another to another. Substantively, the topics—the proper composition of impeachment courts, the scope of congressional lawmaking power and the limits on state authority to tax federal entities, the sweep of free-speech rights, and the immunity of sitting presidents from criminal prosecution—share little in common and are rarely discussed together. Some topics (such as the limited authority of states to tax federal entities) are pure issues of governmental structure; others (such as the freedom of speech) raise classic questions of individual right. Some matters (for example, impeachment) would almost never come before regular courts, while others (for instance, the scope of congressional lawmaking power) are the stuff of daily adjudication.

There is a method—*le mot juste*—in this madness. A single methodological idea unifies all the foregoing case studies and hypotheticals. On each topic, clause-bound literalism fails. Sometimes the key clause in isolation is simply indeterminate. (The phrase "executive Power" can be read narrowly or broadly on the issue of presidential immunity from prosecution.) Other times, the most salient clause, in isolation, sends a rather misleading message. (The First Amendment speaks only of "Congress," but surely presidents, federal courts, and states must also honor citizens' rights to express political opinions.) On occasion the Constitution's true meaning is very nearly the opposite of what the applicable clause seems to say quite expressly. (The vice president does not properly preside over his own impeachment.) This chapter's unifying idea is that we must read the Constitution as a whole—between the lines, so to speak.

The Constitution does not expressly command us to do this. The rule of holistic construction is itself unwritten. But it is a rule deeply faithful to the written Constitution, even as it tells readers to transcend narrow literalism.

This technique is not the only proper way to find America's unwritten Constitution. In the next chapter, we shall deploy a quite different technique for staying true to the written Constitution while going beyond it—a technique that views "the Constitution" not as a document, but as a deed.