of the federal government's third branch. Congress could fill in the blanks and pick the numbers as it saw fit to sculpt an institution that would largely do Congress's bidding. Much as the Constitution gave Congress wide power to structure other federal organs—the federal customs office, the federal postal department, the federal mint, and the like—so the Constitution gave Congress wide power to structure the federal judiciary, determining how many justices would sit at the apex of the judicial pyramid, which states they would come from, and so on.

But unlike many other federal agents and agencies established by Congress, life-tenured federal judges would eventually come to play a distinctive role in invalidating various laws enacted by Congress, doing so in the name of the higher law of the Constitution itself. Had every founder focused on this distinctive judicial role and fully grasped its enormous significance, especially when combined with federal judges' life tenure and non-diminishable salary, the document might well have specified how big and small states, slave and free states, and so on, would factor into the judiciary's apportionment.

In any event, the judiciary almost never challenged Congress's enactments in the founding era. Not once, prior to 1850, did the Supreme Court thwart any major Congressional measure. In an early lawsuit that today stands for the proposition that "the Supreme Court is the ultimate interpreter of the Constitution"—the famous 1803 case of *Marbury v. Madison*—the Court in fact said no such thing and did just as Congress wanted. (We shall consider this case in more detail later in our story.)

In its landmark 1789 Judiciary Act, Congress set the Supreme Court's size at six. To modern eyes, this even number looks . . . odd. What would happen if the justices divided three against three? Modern Americans focus overwhelmingly on the Supreme Court as America's highest appellate tribunal, laying down national precepts for all Americans everywhere, and doing so via written opinions of the Court, each opinion typically representing the collective judgment of at least a majority of the justices.

But much of this modern practice took root only in the nineteenth century. In the Court's earliest years, justices typically issued opinions seriatim, each man for himself, often orally. The Court did not yet routinely declare the law within any given case with one official written pronouncement, ex cathedra, available for immediate publication and republication. A tie vote among six jurists might not settle the law for all time, but it would suffice to decide the case at hand. In a three-three split, the lower court judgment would stand. If the Supreme Court were sitting as a trial bench, a tie would simply mean that the plaintiff would lose.

For most of the year, the Court's members would not sit together in the capital as an appellate tribunal, but would instead scatter across the country to preside, sometimes in pairs, over far-flung trials in their respective home regions. America was a vast land, and the new government aimed to bring justice to the people—to every man's door, proverbially. Justices "riding circuit" would spare litigants the burden of dragging every important dispute to the national capital. The circuit system would also facilitate vigorous participation by local juries, who had been slighted by British vice-admiralty practice. The 1789 act thus carved America into three distinct circuits—northern, middle, and southern. A six-man Supreme Court divided nicely by three, entitling each geographic circuit to two justices.

The seemingly odd even number of six suggests that in 1789 perhaps the most important function of the Supreme Court was not, as it is today in the minds of many citizens, to provide a timely and definitive answer to virtually every legal and constitutional question. Rather, the key role, or at least one key role, of the early justices was to fan out and spend time in cities and counties across the land, listening to—literally hearing the cases of—local folk. The high and haughty British ministers of the 1760s and 1770s had shown little interest in conversing with their far-flung cousins; this failure of the center to hear the periphery had destroyed the empire. The Judiciary Act aimed to ensure that America's Privy Council substitute would not make the same mistake. Just as senators and House members

would periodically return to their home states and districts, lest they forget whence they came, so, too, with the early Supreme Court.

Juries in this era were not potted plants. Far more than is true today, jurors at the Founding participated vigorously in legal and constitutional conversation. In federal trials, the 1789 act provided that two judges could in some cases team up as presiding officers. If the pair disagreed in their legal advice to the jury, individual jurors could follow whichever jurist they preferred, or, indeed, follow their own understandings of the law in certain situations—in particular, when rendering a "general verdict" involving blended issues of law and fact.[1] In one 1794 case in which the Supreme Court, en banc, presided over a civil jury trial, Chief Justice Jay expressly conceded in his instructions to the "gentlemen" of the jury that "you have . . . a right to take upon yourselves to judge of both . . . the law as well as the fact in controversy." To modern eyes, this case, *Georgia v. Brailsford*, seems utterly fantastical, involving as it did (1) the Supreme Court presiding over an actual trial in which (2) multiple trial judges (the justices) interacted with a single jury, and (3) the bench treated the jurors almost as equal partners in the enterprise. "On this, and on every other occasion," instructed Jay, "we [the justices] have no doubt, you [the jurors] will pay the respect which is due to the opinion of the court. For, as on the one hand, it is presumed that juries are the best judges of facts, it is, on the other hand, presumable that the court are the best judges of law. *But still both objects* [that is, both law and fact, in this general-verdict case] *are lawfully within your power of decision*."[2]

The most significant constitutional episodes involving the Supreme Court during the Washington-Hamilton era paint a picture of a genuinely independent but rather decentralized and weak institution compared to its modern incarnation.

In *Hayburn's Case*, various jurists—more than a decade before *Marbury v. Madison*—engaged in what is now called "judicial review." That is, several federal judges in 1792 declined to enforce as