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ARTICLES

WHEN DID THE CONSTITUTION BECOME LAW?

*Gary Lawson**

Guy Seidman†

Article VII of the United States Constitution declares that “[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”¹ On June 21, 1788, New Hampshire became the ninth state to ratify the Constitution. Under the plain terms of Article VII, that would seem to be enough to bring the Constitution into effect. States that subsequently ratified the Constitution, with or without knowledge of New Hampshire’s decisive action,² were electing to join an already existing union.

One might assume that June 21 would therefore have gone down in history as a national holiday: the day that the nation’s governing charter became law. Neither June 21 nor the New Hampshire ratifying convention, however, has become part of the national folklore. Nor are they even part of the specialized lore of the law. Indeed, according to the standard legal account, the Constitution did not become effective as law until March 4, 1789, when the first session of Congress began. The Supreme Court so held in 1820 in *Owings v.*

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1 U.S. CONST. art. VII.

2 Virginia ratified the Constitution on June 25, 1788 without definitively knowing about the events in New Hampshire. See 2 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 578 (New York, Harpet & Bros. 1865).

Speed,³ and that answer has endured as established hornbook doctrine.⁴

The standard account is wrong, or at least incomplete. It is wrong across a wide range of circumstances, including the specific circumstances at issue in *Owings v. Speed*. The truth about the Constitution's legal effect is far more complicated and nuanced than the Supreme Court recognized in 1820, and it is long past time for that ancient error to be corrected. Certain provisions of the Constitution, in accordance with conventional doctrine, did not in fact become effective until the First Congress was in session, but other provisions became law both earlier and later than that date. Provisions that require the action of the President did not become effective until a President had been properly elected and sworn into office on April 30, 1789. Still, other provisions became legally operative as soon as the Article VII ratification process was complete. Whether that latter date is June 21, 1788, when the ninth state ratified the document, or July 2, 1788, when the Confederation Congress received notification of that ratification,⁵ or some subsequent date when the ratification was or should have been verified by Congress, much of the Constitution became a binding legal document at some point during the summer of 1788.

There are three reasons why it is important to know the true date(s) of the Constitution's legal effectiveness. First, even in the twenty-first century, it is not difficult to imagine cases in which the effective date of the Constitution might prove dispositive. Indeed, one such case, with enormously high stakes, occupied a great deal of judicial attention in the 1980s. The Oneida Indian Nation sued in 1978 to recover five million acres of land in New York that it claimed was purchased by the State of New York in 1788 through an invalid

3 18 U.S. (5 Wheat.) 420 (1820).

4 See 16 AM. JUR. 2D *Constitutional Law* § 43 (1998) ("The Constitution of the United States did not take effect at once on its being ratified by the necessary number of conventions in nine states."); 16 C.J.S. *Constitutional Law* § 35 (1984) ("The Constitution of the United States did not become operative until . . . a day for commencing proceedings under the Constitution had been appointed by Congress."). The sparse law review commentary that mentions the effective date of the Constitution also follows *Owings* without comment. See, e.g., Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 556 (1995); Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1003 n.5 (1991); Hans W. Baade, *Time and Meaning: Notes on the Intertemporal Law of Statutory Construction and Constitutional Interpretation*, 43 AM. J. COMP. L. 319, 337 n.144 (1995).

5 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 281 (Roscoe R. Hill ed., 1937).

treaty.⁶ One of the plaintiff's many arguments was that the Constitution eliminated any power that the ratifying states might have had under the Confederation government to enter into treaties with Indians, and that the 1788 treaty with New York was therefore illegal.⁷ That claim was flatly dismissed by the courts on the strength of *Owings v. Speed's* 1820 declaration that the Constitution did not become binding law until March 4, 1789.⁸ While the litigation, which spanned more than ten years, involved a wide range of substantive, jurisdictional, and procedural issues,⁹ it is hard to say that *Owings's* holding was entirely irrelevant to the outcome. Put more bluntly, had the effective date of the Constitution been correctly understood two decades ago, a substantial portion of upstate New York might have changed hands.

Second, some theories of governmental legitimacy might turn on the precise sequence of events in the founding era, so it is important that those events be properly recorded and understood. For instance, Akhil Amar and Bruce Ackerman (along with his sometime-co-author Neal Katyal) have engaged in an ongoing debate concerning the legality of the adoption of the Constitution.¹⁰ Part of that debate involves the extent to which the Articles of Confederation, which clearly required unanimous consent among the states for any alterations, were

6 *Oneida Indian Nation v. New York*, 520 F. Supp. 1278, 1284–85 (N.D.N.Y. 1981).

7 *Id.* at 1288.

8 *See infra* note 9.

9 In all, there were four decisions on the merits. *See Oneida Indian Nation*, 520 F. Supp. at 1278, *aff'd in part & rev'd in part*, 691 F.2d 1070 (2d Cir. 1982), *on remand*, 649 F. Supp. 420 (N.D.N.Y. 1986), *aff'd*, 860 F.2d 1145 (2d Cir. 1988) (Originally the district court dismissed the case for failure to state a claim upon which relief could be granted. The circuit court then remanded the claim based on interpretation of the treaties and Articles of Confederation for an evidentiary hearing, but affirmed dismissal of all other claims. On remand the district court dismissed the claim holding that Congress did not have the authority under the Articles of Confederation nor intent to prohibit the state purchase of land. The circuit affirmed.). Additionally, there was a passel of decisions on procedural issues. *See Oneida Indian Nation v. New York*, 102 F.R.D. 450 (N.D.N.Y. 1984) (disqualifying counsel), *remanded*, 757 F.2d 19 (2d Cir. 1985); *Oneida Indian Nation v. New York*, 102 F.R.D. 445 (N.D.N.Y. 1983) (denying motion to intervene), *rev'd*, 732 F.2d 261 (2d Cir. 1984).

10 *See, e.g.*, 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 41–44 (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 49–68 (1998); Ackerman & Katyal, *supra* note 4, at 539–58; Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 462–87 (1994); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047–60 (1988).

in effect during the founding period.¹¹ As we shall later see, the existence of the Constitution did not necessarily preclude the continuing validity of the Articles of Confederation,¹² so the effective date of the Constitution does not definitively resolve the status of the Articles. Nonetheless, the relationship between the Articles and the Constitution is relevant to some important debates about theories of interpretation and legitimacy, and the effective date of the Constitution potentially bears on that relationship.¹³

Third, purely as a matter of history, there is something to be said for correcting the record. If history books had consistently reported the year of the Norman Conquest as 1067 and we now discovered that it actually happened in 1066,¹⁴ it probably would not change much of consequence in the world, but one might as well get it right. This is particularly true with something as basic as the effective date of the Constitution.

In Part I of this Article, we set forth the correct understanding of the Constitution's effective date. We show that the Supreme Court grossly oversimplified the problem in 1820. Different clauses of the Constitution actually became effective at different points in time, and certain crucial provisions, especially those limiting the power of state governments, took effect immediately upon completion of the ninth ratification in 1788. In Part II, we show how that understanding might have altered the course of the litigation in the 1980s between the State of New York and the Oneida Indian Nation. We demonstrate that the federal courts rejected the Oneida Indian Nation's claims to land in New York on the basis of a 1788 treaty that was invalid under a proper understanding of the Constitution's effective date. Part III contains brief concluding remarks.

The legal operation of the Constitution, like its adoption, was an ongoing process. That makes it difficult to fix a precise date for celebration,¹⁵ but the loss of a potential national holiday is a small price to pay for doctrinal and historical accuracy.

11 See Ackerman & Katyal, *supra* note 4, at 539–58.

12 See *id.* at 557.

13 We leave it to the combatants in those debates to determine whether and how it does so.

14 It would appear that much of what we “know” about the Norman Conquest is in fact error. See FRANK MCLYNN, 1066: THE YEAR OF THE THREE BATTLES *passim* (1999). But the date of October 14, 1066 for the Battle of Hastings has thus far survived the test of time.

15 Or for mourning, if one thinks that the Anti-Federalists had the better of the argument.

I. WHEN (AND WHOM) DID THE CONSTITUTION BIND?

A. *The Birth of a Nation—Or Was It Still a Pregnancy?*

On June 21, 1788, New Hampshire became the ninth state to ratify the United States Constitution.¹⁶ The Confederation Congress received official notification of New Hampshire's decisive ratification on July 2, 1788 and verified the official documents shortly thereafter.¹⁷ Pursuant to Article VII, that ninth ratification was "sufficient for the Establishment of this Constitution between the States so ratifying the Same."¹⁸

It was, however, well understood when the Constitution was proposed for ratification that the document was not self-executing in all respects. A Congress and a President had to be selected in accordance with the procedures set forth in the new Constitution. The states had to be notified of the final ratification and then had to conduct elections for the initial members of the House, Senate, and Electoral College. There had to be a time and place established for the first meeting of the new Congress. The electoral votes had to be cast and counted, and the new President and Vice President sworn in. Governmental officers had to be appointed. Thus, the new government could not totally displace the government established under the Articles of Confederation immediately upon the ninth ratification, because the new government did not yet exist. Provisions had to be made for an orderly transition to the new constitutional regime.

The Constitutional Convention specifically requested that the Confederation Congress provide such a transitional mechanism to effect a smooth transfer of power from the old to the new government. The Convention's resolution of September 17, 1787 submitted the Constitution to the Confederation Congress for transmittal to the states for ratification¹⁹ and further asked the Congress to spell out some procedural details in the event of successful ratification:

16 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788-1790, at 24 (Merrill Jensen & Robert A. Becker eds., 1976) [hereinafter FIRST FEDERAL ELECTIONS].

17 We have been unable to locate the precise moment at which the Confederation Congress authenticated New Hampshire's ratification. On July 2, 1788, the Confederation Congress referred the nine existing ratifications to a committee "to examine the same." *Id.* at 29. On July 9, the Congressional Committee on Putting the Constitution into Operation reported that nine states "have duly ratified the aforesaid Constitution." *Id.* at 33.

18 U.S. CONST. art. VII.

19 See FIRST FEDERAL ELECTIONS, *supra* note 16, at 6.

Resolved, That the preceding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it

Resolved, That it is the opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution.²⁰

The Congress complied with the Convention's request on September 13, 1788 by resolving

[t]hat the first Wednesday in January next be the day for appointing Electors in the several states, which before the said day shall have ratified the said Constitution; that the first Wednesday in February next be the day for the Electors to assemble in their respective states, and vote for a President; and that the first Wednesday in March next be the time, and the present seat of Congress the place for commencing proceedings under the said Constitution.²¹

According to this resolution, the new Congress would commence its operations in New York, the site of the Confederation Congress, on March 4, 1789.

It is interesting and significant that the Framers did not write the details of a transitional period into Article VII. The bare text of Article VII says only that nine ratifications are sufficient "for the Establishment of this Constitution."²² But the Convention and the Confederation Congress were surely right that something more was needed to create an operational government. The federal government could not pass laws, appoint officials, or enter into treaties without a Congress, Senate, and President. So was or was not the new government "Establish[ed]" on June 21, 1788? Or did the effectiveness of the Constitution await the entrance of the new Congress on March 4, 1789, or even the swearing in of a new President on April 30, 1789?

should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

Id. (quoting RESOLUTIONS OF THE CONVENTION SUBMITTING THE CONSTITUTION TO THE CONFEDERATION CONGRESS (17 Sept. 1787)).

²⁰ *Id.*

²¹ *Id.* at 131.

²² U.S. CONST. art. VII.

B. *The Supreme Court Speaks*

The Supreme Court faced this problem squarely in 1820 in the little-known case of *Owings v. Speed*.²³ In 1785, the Commonwealth of Virginia granted a patent for 1,000 acres of land to John C. Owings and another landowner.²⁴ On December 2, 1788, the Virginia legislature passed a statute vesting 100 acres of the Owings's tract in a set of trustees for the establishment of a new town.²⁵ Owings subsequently brought an ejectment action against lessees of the town property, claiming that the statute vesting the Owings's parcel in the trustees violated the Contracts Clause of the Constitution²⁶ by impairing the contract represented by the land patent.²⁷ The Supreme Court, per Chief Justice Marshall, held that the Constitution, and therefore the Contracts Clause, was not operative in 1788 when the Virginia legislature passed the statute divesting Owings of his property.²⁸ After recounting the actions of the Constitutional Convention and the Confederation Congress concerning implementation of the new Constitution,²⁹ Marshall declared:

Both Governments [i.e., the old Confederation government and the new constitutional government] could not be understood to exist at the same time. The new Government did not commence until the old Government expired. It is apparent that the Government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new government into operation. In fact, Congress did continue to act as a government until it dissolved on the first of November, by the successive disappearance of its members. It ex-

23 18 U.S. (5 Wheat.) 420 (1820).

24 *Id.* at 421.

25 *Id.*; see also Act of Dec. 2, 1788, 1788 Va. Acts ch. LX. The statute made reference to the tract vested in "John C. Owning." All of the records in the Supreme Court, however, used the name "Owings." We assume in this Article (for no reason that we can defend) that the lawyers in the case spelled Owings's name correctly.

26 U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

27 See *id.* Owings could not, of course, raise any claims under the Federal Constitution for the taking of property without just compensation, because there was no provision in the original constitutional text barring state takings of property.

28 See *id.* at 422-23.

29 Marshall's recounting left much to be desired. Marshall incorrectly fixed the date of assembly of the First Congress as March 3, 1789; it was actually March 4. And he dated the September 13, 1788 implementing resolution of the Confederation Congress as "in September or October, 1788." *Owings*, 18 U.S. (5 Wheat.) at 422.

isted potentially until the 2d of March, the day preceding that on which the members of the new Congress were directed to assemble.³⁰

In fact, as Marshall acknowledged, because Article I, Section 7 makes presentment to the President a prerequisite for the enactment of valid laws,³¹ the new government could not truly be fully operative until a President was selected and sworn in,³² which would make the effective date of the new constitutional government April 30, 1789. But whether one views March 4, 1789 or April 30, 1789 as the magic moment for the effectiveness of the Constitution, the Virginia statute of December 2, 1788 was enacted before the Constitution took effect, and Owings therefore lost. So, at least, the Court held.

It is virtually certain that *Owings* was wrongly decided. But determining precisely in what respect *Owings* was wrong proves to be a complicated task.

C. *A Multi-Tiered Theory of Constitutional Effectiveness*

An originalist might be tempted to say that if the Framers meant to delay the effective date of the new government beyond the moment of the ninth ratification, they could (and should) have said so in the text of the Constitution instead of issuing resolutions from the Convention on the side. If the Constitution does not take effect immediately upon ratification, this argument runs, then what sense does it make to say, in Article VII, that the Constitution is "Establish[ed]" by the necessary ratifications? The only question, on this view, is when "Ratification" of the Constitution pursuant to Article VII took place. Was it when the ninth state completed its vote, when that ninth vote was received (or certified) by the Confederation Congress, or possibly even when notice of that certification was given to the state governments? In any event, on this analysis the Constitution must have gone into effect sometime in June or July 1788.

On the other hand, one could equally say, in agreement with Chief Justice Marshall, that the Framers did not need to state the obvious: the Constitution, even once ratified, was not self-executing. As Marshall noted, and as the Convention recognized, the machinery of governance had to be put into place before the new national government could function.³³ And rather than constitutionalize the specific dates of transition, the Convention left it to the Confederation Con-

30 *Id.*

31 U.S. CONST. art. I, § 7, cl. 2.

32 *See Owings*, 18 U.S. (5 Wheat.) at 422-23.

33 *See id.*

gress to determine the transitional timetable. One could argue that just as treaties between nations are not necessarily self-executing, and thus do not necessarily create enforceable rights and obligations simply by virtue of their formal ratification,³⁴ so the Constitution, a “treaty” of sorts among states and people, did not create legal rights and obligations simply by virtue of formal ratification. Furthermore, one might continue, this position does not render the term “Establishment” in Article VII meaningless. Once the necessary nine ratifications were made, no state could then undo what had already been done: the Constitution was now “in place,” awaiting only its full implementation. Before the ninth ratification took place, presumably any ratifying state could undo its ratification.³⁵ The “Establishment” of the Constitution under Article VII, however, took away that freedom and made the Constitution part of the legal landscape, even if that landscape continued to include the Articles of Confederation as well until the machinery of the new government was fully (for want of a better term) established.

Both of these positions are partially right but seriously wrong. Each assumes, as did Marshall in *Owings*, that the Constitution must be operative or not as a whole. Perhaps, however, the Constitution becomes operative in stages, so that different portions of the document create rights and obligations at different points in time. For instance, one could say that the provisions of the Constitution that require legislative and presidential action—and this includes some of the most important provisions—could not be fully “in effect” until all of the executory steps necessary for its establishment had taken place. The national government could not pass laws, make treaties, or appoint officers until the Congress and the President were, both formally and functionally, in office. These provisions thus did not become legally operative until April 30, 1789.³⁶ Other provisions that require only unilateral congressional action might, on this argument,

34 See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 *passim* (1999) [hereinafter Yoo, *Globalism*]; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 *passim* (1999) [hereinafter Yoo, *Treaties and Public Lawmaking*].

35 Cf. Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 683 (1993) (arguing that Congress and the States may revoke proposals or ratifications of constitutional amendments until, but not after, the necessary three-quarters of the States have ratified).

36 HERBERT APTHEKER, *EARLY YEARS OF THE REPUBLIC: FROM THE END OF THE REVOLUTION TO THE FIRST ADMINISTRATION OF WASHINGTON (1783–1793)*, at 106 (1976).

have become effective on March 4, 1789;³⁷ these provisions would include such matters as the selection of legislative officers,³⁸ the establishment of legislative procedures,³⁹ and the discipline of members of Congress.⁴⁰ Still other provisions, however, do not require any legislative or executive machinery to make them operative. These provisions could meaningfully be "in effect" at some earlier time, such as the moment of ratification. The Contracts Clause appears to be precisely the kind of provision that is self-executing in this respect. No federal legislative or presidential action is needed in order to implement its prohibition on certain kinds of state laws. The Supremacy Clause ensures that state courts must give legal effect to the Contracts Clause even if no federal judges are in office.⁴¹ Indeed, the Constitution's few prohibitions on states were presumably designed to prevent major evils (in order to justify the extraordinary step of limiting the powers of states), so this is a context in which the norm might be thought to operate at the soonest possible time. One could therefore agree with Marshall that some of the Constitution's provisions did not take effect until March or April 1789, but still maintain that Owings should have won his case because the Contracts Clause was effective upon ratification.

This "multi-tiered" theory of constitutional effectiveness must be correct for a host of reasons involving the implementation of the new Constitution and the founding generation's understanding of analogous legal documents.

1. Lessons from the Founding

Go back to the actions of the Convention and the Confederation Congress in implementing the new Constitution. Many of the formalities necessary to carry the Constitution into effect were directly specified in the text of the Constitution. The Constitution itself prescribed the qualifications for electors for the House and Senate,⁴² and the

³⁷ *Id.*

³⁸ The Constitution empowers the House to "chuse [sic] their Speaker and other Officers." U.S. CONST. art. I, § 2, cl. 5. The Vice President is declared to be the President of the Senate. *See id.* art. I, § 3, cl. 4. But the Senate is empowered to "chuse [sic] their other Officers." *Id.* art. I, § 3, cl. 5.

³⁹ *See id.* art. I, § 5, cls. 2-3 (empowering each House to determine its rules of proceeding and to keep a journal).

⁴⁰ *See id.* art. I, § 5, cls. 1-2 (empowering each House to discipline, expel, and determine the qualifications of its members).

⁴¹ *See id.* art. VI, cl. 2.

⁴² For the House, "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," *Id.* art. I, § 2,

states were empowered to set their own times and places for congressional elections.⁴³ Thus, the states could provide entirely for the election of members of the new Congress without any help from the Confederation Congress. Accordingly, the Convention did not request, and the Confederation Congress did not provide, any machinery for implementing the constitutional directives on congressional elections.

There were two important matters, however, in which the intervention of the Confederation Congress was necessary. First, the Constitution specifically provided that the date for the meeting of the Electoral College "shall be the same throughout the United States,"⁴⁴ but did not fix a specific date (such as, for example, "six months after ratification"). Perhaps it would have been possible for the states to agree among themselves on a uniform date for the presidential election through some vehicle other than the Confederation Congress, but the preexisting Congress was the obvious locus for that choice. Second, the Constitution did not specify a location for the new government in the interim period before a seat of government could be established under the District Clause.⁴⁵ Accordingly, the *sole subjects* on which the Convention sought action by Congress concerned the selection of presidential electors (and the subsequent counting of electoral votes) and the specification of a location for the first meeting of the new government.⁴⁶ And the *sole subjects* on which the Con-

cl. 1, and the Senators from each state were (until the Seventeenth Amendment) "chosen by the Legislature thereof." *Id.* art. I, § 3, cl. 1.

43 *See id.* art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.").

44 *Id.* art. II, § 4. The full sentence reads: "The Congress may determine the Time of chusing [sic] the Electors, and the Day on which they shall give their Votes, which Day shall be the same throughout the United States." *Id.*

45 *See id.* art. I, § 8, cl. 17 (giving Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States").

46 The full text of the relevant Convention resolution read:

Resolved, That it is the opinion of this Convention, that as soon as the Conventions of nine States, shall have ratified this Constitution, the United States in Congress assembled should fix a day on which Electors should be appointed by the States which shall have ratified the same, and a day on which the Electors should assemble to vote for the President, and the Time and Place for commencing proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for

gress legislated for the operation of the new government concerned presidential elections and the selection of a site for the government.

The critical assumption underlying this whole procedure was that *the constitutional provisions that did not require any federal legislative (or executive) action were fully effective from the moment of ratification* (however that is ultimately defined). The provisions concerning the mechanisms for electing members of Congress and presidential electors were assumed by everyone to be in full force. As illustrated above, this was the unchallenged, operative assumption of the Convention and the Confederation Congress. There was substantial debate in the Confederation Congress about the proper location of the seat of government,⁴⁷ but none at all concerning whether the Congress should, for example, specify a mode of selecting presidential electors; everyone understood that the selection of electors (though not the time of their meeting) was left to the states by the now-operative Constitution.⁴⁸ This was also the unchallenged assumption in the states following ratification of the Constitution. For example, on September 27, 1788, Governor Thomas Pinckney of South Carolina issued a proclamation in the wake of the election ordinance of the Confederation Congress.⁴⁹ After reciting the text of that ordinance, Governor Pinckney declared:

And whereas the times, places and manner of holding elections for senators and representatives *under the constitution of the United States are to be prescribed in each state by the legislature thereof* I do therefore issue this proclamation giving authentic information of the above act of Congress as an additional inducement to the punctual attendance of the members of the legislature on the seventh day of October next being the day to which they stand adjourned.⁵⁰

the Election of the President, and should transmit their votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

FIRST FEDERAL ELECTIONS, *supra* note 16, at 6–7.

47 See generally *id.* at 23–143 (providing letters, journals, and newspaper articles surrounding issues relating to the adoption of the Constitution).

48 See generally *id.* (detailing the debates concerning the Confederation Congress's election ordinance of Sept. 13, 1788).

49 *Id.*

50 *Id.* at 152 (emphasis added).

This clearly assumes that the Constitution's provisions concerning the staffing of the new government were in full effect long before March 4, 1789. We know of nothing in any state's proceedings during the founding period that called this assumption into question. Accordingly, the evidence is overwhelming that at least some parts of the Constitution—those which did not require implementation by the new federal legislature and executive—were in effect immediately upon ratification.

2. Lessons from the Law

This view of immediate legal operation of (at least part of) the Constitution is consistent with general eighteenth-century norms concerning the effective date of governmental instruments. There were three kinds of public governmental instruments with which the framing generation was familiar: treaties, state constitutions, and statutes.⁵¹ All three kinds of instruments were clearly understood presumptively to operate from their moment of effectiveness. Just as importantly, all three kinds of instruments were understood to be capable of taking effect in stages, with different provisions generating legal effects at different times.

a. Treaties

Treaties have long been understood to operate from the moment of their ratification.⁵² The Supreme Court expressed the correct founding-era rule in 1850 when it observed,

In the construction of treaties, the same rules which govern other compacts properly apply. They must be considered as binding from the period of their execution; their operation must be understood to take effect from that period, unless it shall, by some condition or stipulation in the compact itself, be postponed.⁵³

51 Governments execute many other kinds of instruments, such as licenses, charters, land patents, and contracts, but they pertain more to private than to public law. In any event, all of these instruments are also effective from the moment of issuance (though one can argue about precisely what events are necessary for "issuance"—as in the case, to pick a random example, of a commission of appointment to a government post). Indeed, we have been unable to think of an instrument that is not presumptively effective from the moment of execution.

52 This does not mean that all treaties are necessarily self-executing. See sources cited *supra* note 34. But to the extent that treaties have independent legal force, that force radiates from the moment of ratification.

53 *United States v. Reynes*, 50 U.S. (9 How.) 127, 148 (1850).

This rule of immediate effectiveness is graphically illustrated by the traditional practices of nations concerning such matters as the termination of war.⁵⁴ Suppose that two governments complete all of the necessary formalities for ratification of a treaty of peace. Peace cannot be an effective reality until the troops engaged in combat are informed of the treaty's ratification and lay down their arms. In a pre-modern era without near-instantaneous forms of communication, the process of notification to the belligerent forces could take weeks or months. If the ratification of the treaty truly "ends" the war for legal purposes, then those belligerent forces are engaged in (at the very least) tortious acts if they continue fighting, even if they have no means of knowing that the war is over. Despite this somewhat jarring consequence, international law traditionally deemed the treaty effective immediately upon ratification. The drafters of the treaty were left to deal with the potential liability of unwitting combatants once the war ended. As we have elsewhere written:

A well-drafted treaty will include realistic timetables for notification and withdrawal of troops and will contain provisions for immunizing the soldiers and their governments from liability for damage inflicted before news of the peace can reach them; perhaps it will also contain provisions for compensation to the citizens and governments that suffer such damage. The end of the "war," in the extended sense that includes the post-treaty period of transition, will thus normally be determined by reference to the treaty.⁵⁵

This scheme assumes that treaties take legal effect immediately upon ratification. If the contracting states want to delay the legal effectiveness of some portion of the treaty, they need to say so.

It is commonplace, however, for different parts of the treaty to take effect at different times. In treaties that end a war of occupation, for instance, the provisions that transfer sovereignty to the conqueror can take effect immediately,⁵⁶ while provisions that deal with the ending of actual hostilities, the notification to combatting troops of the war's end, and the withdrawal of troops from the transferred territory

54 The ensuing discussion is drawn from a number of sources, including T. BATY & J. H. MORGAN, *WAR: ITS CONDUCT AND LEGAL RESULTS* 398 (1915), WILLIAM EDWARD HALL, *INTERNATIONAL LAW* 482-95 (J.B. Atlay ed., Oxford 5th ed. 1904), and COLEMAN PHILLIPSON, *TERMINATION OF WAR AND TREATIES OF PEACE* 185-98, 214-17 (1916).

55 Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 *Nw. U. L. Rev.* 581, 605 (2001).

56 We have elsewhere discussed at some length how treaties that transfer control or sovereignty of territory from one nation to another generally take effect immediately upon completion of the necessary ratifications. *See id.* at 604-07.

might take place on a very different schedule. All parts of the instrument need not take effect at the same time.

For an illustration, one needs to look no further than the Jay Treaty of 1794⁵⁷ that formalized the peace between the United States and Great Britain.⁵⁸ The vast bulk of the Treaty, involving matters such as borders, navigation, property, and trade, was obviously designed to go into immediate operation, but Article II specified a delayed timetable for the withdrawal of British troops:

His Majesty will withdraw all his troops and garrisons from all posts and places within the boundary lines assigned by the treaty of peace to the United States. This evacuation shall take place on or before the first day of June, one thousand seven hundred and ninety-six, and all the proper measures shall in the interval be taken by concert between the Government of the United States and His Majesty's Governor-General in America, for settling the previous arrangements which may be necessary respecting the delivery of the said posts⁵⁹

In sum, treaties operate from the moment of their ratification unless the treaty itself provides a different effective date, and different provisions of the treaty can take effect at different points in time.

b. State Constitutions

Another useful analogue to the Federal Constitution is the impressive set of state constitutions that was already in place in 1787. These documents were in large measure models for the drafting of the Federal Constitution and formed an essential part of the legal background against which the Constitution was written and ratified.⁶⁰ "Many at the Constitutional Convention in 1787 had assisted in the writing of state constitutions."⁶¹

We do not want to make too much of what is found in these state constitutions. The early models, in particular, were experiments in drafting that explored a fair amount of uncharted territory. The drafters and ratifiers of these constitutions did not always have a clear

⁵⁷ Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., art. II, 8 Stat. 116.

⁵⁸ For a similar analysis of the Treaty of Guadalupe Hidalgo that terminated the Mexican-American War, see Lawson and Seidman, *supra* note 55, at 605-06.

⁵⁹ Treaty of Amity, Commerce, and Navigation, *supra* note 57, art. II, 8 Stat. at 117.

⁶⁰ See DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 2 (1988) (noting that state constitutions are "[r]eferred to directly or by implication more than fifty times in forty-two sections of the U.S. Constitution").

⁶¹ *Id.* at 12.

picture of what they were doing, or even of what they were trying to do, and they certainly did not have the luxury of long reflection on deep questions of political theory. Nonetheless, much of what happened with these state constitutions confirms the basic propositions about legal effectiveness gleaned from a study of treaties.

The drafters of state constitutions prior to and contemporaneous with the adoption of the Federal Constitution were keenly aware of the baseline rule of immediate legal effectiveness, and they often took great care to accommodate that principle when making provision for a transfer of power from one government to the next. The most direct solution was provided by the Georgia Constitution of 1789, which declared that “[t]his constitution shall take effect, and be in full force, on the first Monday in October next, after the adoption of the same”⁶² By specifically delaying the effective date of operation of the constitution, the Georgia drafters evidently recognized that in the absence of any such provision, the constitution would take immediate effect. The delay in operation permitted the existing institutions to continue until the new government was in place.

We admit that this interpretation of the Georgia Constitution is not inevitable. It is possible that the specified date was understood to replace some different date that would otherwise govern, such as “whenever it is reasonable for the pre-existing institutions to terminate.” That is, perhaps the specified date was designed to *advance* rather than *delay* the effective date of the Georgia Constitution by mandating that the new institutions appear at a set time. In order for this to be a plausible hypothesis, however, one must identify the background rule, other than immediate effectiveness, that the Georgia Constitution was displacing. It is possible to invent such rules (as we have done in this paragraph), but we are aware of nothing that would single out any such rule as a good candidate. The only background rule that had any currency, and therefore the only background rule that the constitution’s drafters might reasonably seek to avoid, was the rule of immediate effectiveness.

North Carolina had a similarly direct solution to the problem of transition. The North Carolina Constitution of 1776 stated, in a brief coda following the last numbered article, that “[t]his Constitution is not intended to preclude the present Congress [operating under the colonial charter] from making a temporary provision, for the well ordering of this State, until the General Assembly shall establish a government, agreeable to the mode herein before described.”⁶³ Again,

62 GA. CONST. of 1789, art. IV, § 8.

63 N.C. CONST. of 1776, coda.

the clear underlying assumption is that the constitution takes effect immediately upon adoption unless the document states otherwise. Instead of specifying a particular date of operation, as did the Georgia Constitution of 1789, the North Carolina drafters gave authority to the preexisting government to implement the transition. Thus, the effective date of the constitution was not strictly delayed; the constitution simply empowered existing institutions to continue in effect for some time. The distinction is important, because those provisions that did not require any period of transition, such as the Bill of Rights, were presumably operative from the moment of adoption.⁶⁴ That is the difference between the Georgia approach, which straightforwardly delays the effectiveness of the constitution, and the North Carolina approach, which allows the constitution to take immediate effect but provides for transitional mechanisms.

Georgia, as far as we can tell, was the only state that flatly delayed the effective date of its constitution. The other states all provided some kind of transitional device. One common approach was to make express provision for the continuance in office of existing public officials until the machinery of their new governments was operative. For instance, the Massachusetts Constitution of 1780 provided:

To the end there may be no failure of justice, or danger arise to the commonwealth from a change of the form of government, all officers, civil and military, holding commissions under the government and people of Massachusetts Bay in New England, and all other officers of the said government and people, at the time this constitution shall take effect, shall have, hold, use, exercise, and enjoy, all the powers and authority to them granted or committed, until other persons shall be appointed in their stead; and all courts of law shall proceed in the execution of the business of their respective departments; and all the executive and legislative officers, bodies, and powers shall continue in full force, in the enjoyment and exercise of all their trusts, employments, and authority; until the general court, and the supreme and executive officers under this constitution, are designated and invested with their respective trusts, powers, and authority.⁶⁵

The New Hampshire Constitution of 1784 similarly provided:

To the end that there may be no failure of justice or danger arise to this state from a change in the form of government, all civil and military officers, holding commissions under the government and people of New Hampshire, and other officers of the said govern-

64 We have to say "presumably," because we have not been able to find a case, in any of the original states, that squarely presents the point.

65 MASS. CONST. of 1780, pt. 2, ch. VI, art. IX.

ment and people, at the time this constitution shall take effect, shall hold, exercise and enjoy all the powers and authorities to them granted and committed, until other persons shall be appointed in their stead.⁶⁶

The Pennsylvania Constitution of 1790 contained elaborate provisions for the continuation in office of the existing authorities:

That no inconvenience may arise from the alterations and amendments in the constitution of this commonwealth, and in order to carry the same into complete operation, it is hereby declared and ordained:

. . . .

That the president and supreme executive council shall continue to exercise the executive authority of this commonwealth, as heretofore, until the third Tuesday of December next; but no intermediate vacancies in the council shall be supplied by new elections.

That all officers in the appointment of the executive department shall continue in the exercise of the duties of their respective offices until the first day of September, one thousand seven hundred and ninety-one, unless their commissions shall sooner expire by their own limitations, or the said offices become vacant by death or resignation, and no longer, unless reappointed and commissioned by the governor; except that the judges of the supreme court shall hold their offices for the terms in their commissions respectively expressed.

That justice shall be administered in the several counties of the State, until the period aforesaid, by the same justices, in the same courts, and in the same manner as heretofore.⁶⁷

The Delaware Constitution of 1776,⁶⁸ the South Carolina Constitution of 1778,⁶⁹ and the Virginia Constitution of 1776⁷⁰ also expressly provided for the continuation in office of various officials until elections were held under the new constitutions. All of these provisions made sense only on the assumption that preexisting governmental institutions had authority *only to the extent that such authority was recognized by the new constitutions*. And that, in turn, assumes that the new constitutions were, to the extent possible, operative from the moment of their adoption.

As in the case of North Carolina, this approach of "granting a continuance" to preexisting institutions presumably has the effect of

66 N.H. CONST. of 1784, pt. II, para. 17.

67 PA. CONST. of 1790, sched. §§ 2-4.

68 DEL. CONST. of 1776, art. 27.

69 S.C. CONST. of 1778, art. II.

70 VA. CONST. of 1776, paras. 11, 14.

allowing provisions that do not require transitional mechanisms, such as bills of rights and selection procedures for the new government, to take effect immediately.⁷¹ Other provisions that require action by officials under the new government cannot, of course, take effect until those officials are in place. Thus, the notion of a constitution that becomes operative in stages was familiar, at least in structure, from the models of state constitutions that were available in the late eighteenth century.

A number of states expressly recognized that preexisting laws had to be in some sense ratified by the new constitutions. A good illustration is article XXI of the New Jersey Constitution of 1776:

[A]ll the laws of this Province . . . shall be and remain in full Force, until altered by the Legislature of this Colony (such only excepted as are incompatible with this Charter) and shall be, according as heretofore, regarded in all Respects by all civil Officers, and others, the good People of this Province.⁷²

Not only does this provision reflect the view that the old laws would expire unless reaffirmed by the new constitution, but the clause stating that laws “incompatible with this Charter” do not survive again shows how the document was understood to operate from the moment of its adoption.

In states like New Jersey that did not expressly provide for the continuation in office of pre-constitutional authorities, did the rule of immediate operation instantaneously wipe out the existing governmental authorities, even before the new institutions were in place? The answer is obviously no, and it can be reached through several lines of reasoning. First, one could say that a reference to “all the laws” that remain in effect under the new constitution includes laws concerning governmental structure. Those laws would thus continue in effect until displaced by action of the existing authorities pursuant to the new constitution. Second, one could say that the continuation of the existing authorities was implicit in the new constitution, even

⁷¹ As noted above, *see supra* note 50, we must base this conclusion on inference rather than authority.

⁷² N.J. CONST. of 1776, art. XXI; *see also* MASS. CONST. of 1780, part II, ch. VI, art. VI (“All the laws which have heretofore been adopted, used and approved in the province, colony or State of Massachusetts Bay, and usually practiced on in the courts of law, shall remain and be in full force:”); N.Y. CONST. of 1777, art. XXXV (stating that English common and statutory law, as well as acts of the New York colonial legislature through April 19, 1775 “shall be and continue the law of this State”); S.C. CONST. of 1776, art. XXIX (“The resolutions of this or any former congress of this colony, and all laws now of force here, (and not hereby altered,) shall so continue until altered or repealed.”).

without an express provision preserving their authority. Obviously, an express provision would be preferable, as some of these states ultimately realized,⁷³ but it would not be bizarre to say that the new constitution implicitly retained the existing governmental institutions until their replacements had taken office. But under any of these understandings, some parts of the constitutions became immediately effective, while others had to await the transition to the new regime to become fully effective.

To be fair, not every early state constitution demonstrated the same level of care about the details of transition. The New Hampshire Constitution of 1784, as noted, paid acute attention to these matters, but the New Hampshire Constitution of 1776 said only that the existing legislators "assume the Name, Power and Authority of a House of Representatives or Assembly."⁷⁴ The 1789 Georgia Constitution specified an effective date for the instrument, but the 1777 state constitution merely set a date for the election of legislators and county officers.⁷⁵ And while the Pennsylvania Constitution of 1790 had one of the most complete transition schedules to be found in any early constitution, the state's 1776 constitution merely maintained the existing legislature by implication.⁷⁶ Nonetheless, the overwhelming message from the state constitutions, and particularly from the constitutions that were framed after the initial wave of adoptions in 1776 and 1777,⁷⁷ is that eighteenth-century constitution-makers were keenly aware that such documents took effect upon adoption. One can fairly say that by 1789, it was the clear understanding in the states that constitutions presumptively take effect immediately upon their adoption.⁷⁸ It was just as clear that constitutions could take effect in stages:

73 See, e.g., N.J. CONST. of 1844, art. X; S.C. CONST. of 1778, art. II.

74 N.H. CONST. of 1776, pt. 3.

75 GA. CONST. of 1777, arts. II, LIII.

76 See PA. CONST. of 1776, *Plan or Frame of Government for the Commonwealth of Pennsylvania* § 9 ("The members of the house of representatives shall be chosen annually by ballot, by the freemen of the commonwealth, on the second Tuesday in October forever, (except this present year)."). The 1777 Vermont Constitution followed the Pennsylvania model in this respect, as it did in many others. See VER. CONST. of 1777, *Plan or Frame of Government* § VIII.

77 On the different stages, or "waves," of state constitutional development, see LUTZ, *supra* note 60, at 103-04.

78 This understanding did not disappear. Twentieth-century drafters were, if anything, even more acutely aware of the need for constitutions to provide specifically for transitional mechanisms because of the presumptive rule of immediate effectiveness. See COMM. ON STATE GOV'T, MODEL STATE CONSTITUTION 21-22, 51-52 (5th ed. 1948) (recommending, and explaining the need for, a transitional schedule in new constitutions).

some provisions could take effect at once, while others awaited transitional action by the preexisting authorities.

c. Statutes

The same rule concerning effectiveness applies to statutes. It has long been settled that statutes take effect on the day of their enactment unless the statute itself specifies a different time.⁷⁹ The First Congress under the Constitution evidently shared this view. That Congress knew how to prescribe an effective date later than the date of enactment: the second statute of the First Congress, which imposed various customs duties, delayed the effective date of the tariffs by periods ranging from four weeks to sixteen months.⁸⁰ Significantly, the Congress had no problem with the idea that different parts of the statute would take effect at different times, as reflected in the (widely) differential periods of delay for different tariffs.

The government's other early statutes, however, including the federal government's first major criminal enactment containing such matters as a provision imposing the death penalty for counterfeiting federal securities,⁸¹ specified no effective date, meaning that the legislature must have intended the date of enactment to serve as the effective date.

But could the government really have meant this? Suppose that on April 30, 1790, the federal legislature enacts a criminal statute prescribing the death penalty for knowingly passing counterfeit federal securities. On May 1, 1790, a person in Georgia commits an act that falls within the terms of the statute. The conduct occurs after enactment of the statute, but there is no way in 1790 that news of the enactment could have reached every recess of Georgia by the next day. It was therefore metaphysically impossible for the defendant to have learned of the statute before committing the acts. Can that person lawfully be sent to the gallows?⁸²

Although it may jar modern sensibilities, the answer—or at least the eighteenth-century answer—is almost surely yes. The Constitu-

79 See *Arnold v. United States*, 13 U.S. (9 Cranch) 104, 119 (1815); *LaFontant v. INS*, 135 F.3d 158, 160–61 (D.C. Cir. 1998).

80 Act of July 4, 1789, ch. II, § 1, 1 Stat. 24, 24 (making most duties effective “from and after the first day of August next ensuing”); *id.* ch. II, § 2, 1 Stat. at 26 (duties on hemp imposed “from and after the first day of December, which shall be in the year one thousand seven hundred and ninety”).

81 See Act of Apr. 30, 1790, ch. IX, § 14, 1 Stat. 112, 115.

82 Lest there be any doubt, the statute prescribed that “the manner of inflicting the punishment of death, shall be by hanging the person convicted by the neck until dead.” *Id.* ch. IX, § 33, 1 Stat. at 119.

tion does exhibit a measure of concern for notice of the law. The Constitution flatly prohibits either the states or the federal government from passing *ex post facto* laws⁸³—that is, laws that punish conduct that was legal at the time that the conduct occurred. But that goes only to the problem of retroactive criminalization.⁸⁴ It does not reach the problem of communication: the necessity of a time lag between enactment of a law and its promulgation to the affected public. It is quite clear that the *ex post facto* clauses do not address this latter issue. State constitutions prior to 1789 often contained provisions prohibiting *ex post facto* laws, and those provisions uniformly and expressly referred only to statutes that sought to punish conduct that took place before the statutes came into existence.⁸⁵ A law does not become “*ex post facto*” simply because one does not, and cannot, have knowledge of its enactment.

Nor do notions of due process impose a constitutional “waiting period” on the effectiveness of statutes.⁸⁶ As noted above, the clear tradition, reflected in early statutory and decisional law, treated immediate effectiveness of even criminal laws as the accepted, and acceptable, norm. The English practice was even harsher. Until an enactment of 1793 made the date of the King’s assent to a statute the standard commencement date for the statute’s operation, the rule was that statutes were deemed to relate back to the first day of the session in which they were passed.⁸⁷ The American prohibition against *ex post facto* laws neatly dealt with the retroactivity problems inherent in this scheme, but the British and American practices—and the narrow response to the practices reflected in the various *ex post facto* clauses—argue very strongly against the existence of any kind of tradi-

83 See U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, §10, cl. 1.

84 It has long been held that the *ex post facto* clauses apply only to criminal laws. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–91 (1798) (Chase, J.); *id.* at 396–97 (Paterson, J., concurring); *id.* at 399–400 (Iredell, J., concurring). We accept that conclusion here without seriously engaging it.

85 See *id.* at 396–97 (Paterson, J., concurring).

86 We say “notions of due process” to accommodate the fact that due process constraints applied to federal legislative action before ratification of the Fifth Amendment in 1791. The requirement in the sweeping clause, see U.S. CONST. art. I, § 8, cl. 18, that executory laws be “necessary and proper” contains the substance of most of what was codified in the Bill of Rights in 1791. See Gary Lawson, *The Bill of Rights as an Exclamation Point*, 33 U. RICH. L. REV. 511, 513–14 (1999).

87 See 44 HALSBURY’S LAWS OF ENGLAND 567 (R. Peter Moore ed., 4th ed. 1983); HENRI LEVY-ULLMANN, *THE ENGLISH LEGAL TRADITION: ITS SOURCES AND HISTORY* 243–44 (1935).

tion of post-enactment notice that could form the foundation for a due process challenge.⁸⁸

Accordingly, the general rule for the legal effectiveness of statutes in the late eighteenth century was quite clear: statutes were deemed operative from the moment that they came into existence unless the provisions themselves contained a different effective date.

d. The Constitution

Thus, with respect to every major governmental instrument that was available as a model in the late eighteenth century, the rule respecting effectiveness was the same: such instruments take effect from the moment of their adoption unless there is some provision that says otherwise.⁸⁹ And where provisions say otherwise, the delay in effectiveness can be partial. Legal instruments need not be effective or ineffective in total at any particular moment in time.

Nothing in the Constitution categorically delays its effectiveness. On the contrary, Article VII strongly indicates that ratification (adoption) is enough for the "Establishment" of the Constitution.⁹⁰ So why doesn't that mean that the whole document took effect immediately in the summer of 1788? The simple answer is that some provisions were incapable of taking effect immediately because they required action by governmental actors who did not yet exist. Although the Constitution could have expressly provided for a transitional period, as did many of the contemporaneous state constitutions, its failure to do so poses no great problem for originalist textualists. Even the most ardent textualist (and at least one of the present authors fits that description quite nicely) will agree that inferences from a document's structure and context are permissible interpretative tools. If it is obvious on the face of a legal instrument that its effective date, or the effective date of at least part of the instrument, must be at some point in the future, one should give effect to that obvious meaning. It is clear that the Constitution, even without saying so expressly, contemplates that its provisions for legislative and executive action do not take effect until appropriate steps have been taken to put the new government into place. This also means that the preexisting authori-

88 Needless to say, we are talking about the original meaning of due process limitations. A litigant today in the position of our hypothetical 1790 counterfeiter might well have a very strong claim under modern assumptions about due process.

89 Finally, one should note that judicial orders—another form of governmental instrument—are enforceable when they are issued, unless the court or legislature in some fashion stays the mandate.

90 See U.S. CONST. art. VII ("Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution.").

ties, such as the institutions created by the Articles of Confederation, were not immediately displaced by ratification of the new Constitution. The machinery of the old regime could continue until the machinery of the new regime was in place.

But those considerations apply only to the parts of the Constitution that, by necessary inference, carry an implied effective date that goes beyond the moment of ratification. Provisions that are eminently capable of taking effect upon ratification, such as the selection provisions for members of Congress and presidential electors and the Article I, Section 10 restraints on state power, such as the Contracts Clause, do take effect immediately. An implication from necessity only goes as far as the necessity requires.

There remains only the task of determining when the Constitution was ratified and when its self-executing provisions immediately took effect. Although it is possible to argue that a "Ratification" is not really a "Ratification" until it has been verified by some official authority, the straightforward answer appears to be the correct one: the Constitution was properly ratified when the necessary ninth state convention completed its work, which in this case was 1:00 p.m. on June 21, 1788. All subsequent events, such as notification to Congress and the other states and verification by Congress of the authenticity of the ratifying documents, merely communicate or give evidence of the relevant event. Just as a statute or treaty binds even those who do not (and cannot) know about its adoption, the ninth ratification of the Constitution was legally effective without regard to the extent to which that adoption was communicated to the world. The Contracts Clause of the Constitution, and all other provisions that were capable of taking effect upon adoption of the Constitution, became effective on June 21, 1788. When Chief Justice Marshall said otherwise, he was simply wrong.

3. Lessons from the Founders?

Our argument thus far is based on the straightforward text of Article VII and inferences from the founding era's treatment of similar legal instruments. What about direct evidence of the original understanding of the effect of New Hampshire's ratification? What did people say about the legal effectiveness of the Constitution in the summer of 1788? Didn't the Virginia legislature, for instance, make a very powerful statement when it passed a law divesting Owings of his land after Virginia had ratified the Constitution?

There are two kinds of answers to these obvious queries: interpretative and substantive. The interpretative answer threatens to take us

far afield and can be treated here only briefly: so-called direct evidence of constitutional meaning, consisting of statements of informed individuals made during the relevant events, is not really as direct as is commonly thought. If one is looking for the actual intentions or understandings—the mental states—of persons who lived during the founding era, their recorded statements are good (even if not conclusive) evidence of those intentions. But we do not regard the search for original meaning as a search for historically concrete understandings. Instead, we conceive of the inquiry in hypothetical terms: What would a fully-informed public audience, in possession of all relevant information about the Constitution and the world around it, have understood the Constitution to mean? Although evidence of actual mental states is admissible and relevant to prove constitutional meaning in this sense—after all, one cannot really know what a hypothetical audience would have thought at a particular time without knowing something about what real audiences actually thought—it is not conclusive and often is not even the best available evidence. Actual mental states may not reflect actual meaning if people did not fully understand certain important features of the Constitution or the world. That is why arguments from text, structure, and general background understandings are, in general, more powerful than arguments from historical authority—not because of any problems of discovering, reconciling, and aggregating intentions (though these are real problems), but because of the nature of original meaning.⁹¹

At the substantive level, even if one is interested in historical commentary on the legal status of the Constitution in 1788, one is likely to be disappointed. The simple fact is that people were not thinking much about the legal effect of New Hampshire's ratification in the summer of 1788. Attention was focused on the concrete problems of putting together a functioning union. New Hampshire was a minor player in this drama. The lead actors were Virginia and New York, with North Carolina playing a supporting role.⁹² To put it bluntly, no one much cared if there was a new federal union of nine states if Virginia and New York did not sign on. A fairly typical comment—perhaps especially pointed for its objectivity—came from the French

91 Of course, to explain, much less defend, this understanding of original meaning would require a book. One of us is planning such a book, though it will not be forthcoming any time soon. For some very preliminary thoughts on the meaning and mechanics of originalism, see generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550–59 (1994); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

92 Rhode Island was also in the cast, but only as a bit player.

Minister Plenipotentiary, who upon learning of New Hampshire's ratification wrote that "without Virginia and New York the new Government will exist more in name than in fact."⁹³ Ezra Stiles said virtually the same thing in his diary: "Adoption of the new foederal Constitution by the State of New Hampshire So now the new Constitution is ratified, ie, literally—but if N York, Virga. & No Caro should not accede, it will yet be some time before the Ratification may be considered as completely established."⁹⁴ This was no doubt the general sentiment: even if, in some legalistic sense, the Constitution was now ratified as law, the union would be of little practical use without the remaining big states. The legal effectiveness of the Constitution simply was not the major issue of the day.⁹⁵ That role was filled by the attempt to get New York and Virginia on board. To the extent that people talked about the New Hampshire ratification, it was largely in the context of its potential effect on the conventions in other states. As another French observer astutely put it, "[New Hampshire's] Ratification is enough for the Establishment of the new Constitution But it is believed that Congress, before joining together the nine States in the new Confederation, is waiting until Virginia, North Carolina and New-York, whose conventions are now assembled, have adopted or rejected the proposed Constitution."⁹⁶ Even after Virginia joined the union, George Washington was still focused on the practical need to bring the other states into the fold.⁹⁷

93 Letter from Comte de Moustier to Comte do Montmorin (June 25, 1788), reprinted in 18 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 189, 192 (John P. Kaminski & Gaspare J. Saladino eds., 1995) (original spelling retained) [hereinafter Kaminski & Saladino].

94 Ezra Stiles Diary, June 25, 1788, in Kaminski & Saladino, *supra* note 93, at 194 (original spelling retained).

95 This is reflected in the ambivalence of historians concerning the significance of New Hampshire's ratification. See HERBERT APTHEKER, EARLY YEARS OF THE REPUBLIC 102 (1976) ("New Hampshire ratified on June 21, 1788 and since she was the ninth State to do so, her action *in a formal sense* satisfied the requirements for ratification as established by the Philadelphia convention . . .") (emphasis added); ANDREW C. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 202 (1935) ("The New Hampshire convention . . . adopted the Constitution, June 21, 1788. But the all-important states of New York and Virginia were still in doubt."); RICHARD B. MORRIS, THE FORGING OF THE UNION 1781-1789, at 312 (1987) ("Although New Hampshire, the ninth state, ratified the Constitution four days ahead of Virginia, *thus putting the charter into effect*, a key battle remained to be waged to attach New York to the Union. Without New York the nation would remain split asunder.") (emphasis added).

96 Letter from Phillipe Andre Joseph de Letombe to Comte de la Luzerne (June 26, 1788), in Kaminski & Saladino, *supra* note 93, at 194, 194-95.

97 See Letter from George Washington to Charles Coteworth Pinckney (June 28, 1788), in Kaminski & Saladino, *supra* note 93, at 207, 207.

In short, the purely legal question that we address here, and that Chief Justice Marshall faced in *Owings v. Speed*, was not a question that people were asking, much less answering, in the summer of 1788.⁹⁸ Their attention was directed to the more immediately practical problems of putting together a nation. A legal union was not necessarily a functioning union. Nine states may have been enough to establish the Constitution, but if New York and Virginia were not among them, they were not enough to fulfill the objectives of unification.

The founding generation can be forgiven for not paying attention to the legal niceties of the effect of ratification. We now have the luxury of time and hindsight. So did Chief Justice Marshall, which makes his decision in *Owings* all the less excusable.

D. *If One Government Was Not Bad Enough . . .*

Chief Justice Marshall's argument in *Owings* boils down to the single statement that the constitutional government and the government under the Articles of Confederation "could not be understood to exist at the same time."⁹⁹ Because the government under the Articles continued to exist after the decisive ninth ratification—how else could it verify the ratifications and fix dates for the session of the new

98 If one must have an obligatory contemporaneous document, the most relevant discussion that we have found is in two letters from Tenche Coxe and Nalbo Frazier to some merchants in Barbados. On July 10, 1788, Coxe and Frazier wrote that "the affairs of this Country are now placed upon a safe & promising footing by the Adoption of the New Constitution[.] [I]t is binding on the ten States that have adopted" Letter from Tenche Coxe & Nalbo Frazier to James O'Neal (July 10, 1788), in Kaminski & Saladino, *supra* note 93, at 255 (emphasis added). On July 11, they wrote:

[T]he various foreign Gentlemen connected in the American Trade will have great safety hereafter in their Connexions with this County from the final Adoption & ratification of the new form of Government. *No papers tenders & no law impairing or staying the execution of Contracts can hereafter take place*, and our State courts will not have to determine between foreigners & us; but an impartial federal Court

Letter from Tenche Coxe & Nalbo Frazier to Stephen Blackett (July 11, 1788), in Kaminski & Saladino, *supra* note 93, at 255–56 (emphasis added). Taken out of context, the emphasized portions could be taken to suggest that the authors understood the Constitution's prohibitions on states to be immediately effective. But the subsequent reference to federal courts, which clearly could not operate until the machinery of the new government was in place, indicates that authors were not focusing on the possible differential effects of various constitutional provisions. Thus, aside from any questions about how much weight to attach to private commercial correspondence—even from so notable a figure as Tenche Coxe—there is no indication that anyone was thinking directly about the effective date of the Article I, Section 10 prohibitions on states.

99 *Owings v. Speed*, 18 U.S. (5 Wheat.) 420, 422 (1820).

Congress and for the selection of presidential electors?—and indeed continued to exist “potentially until . . . the day preceding that on which the members of the new Congress were directed to assemble,”¹⁰⁰ the new constitutional government could not possibly be said to exist until the new Congress met.

Taken at face value, this is a very peculiar position. The new government clearly could not exercise legislative, executive, or judicial authority until it had legislative, executive, and judicial personnel capable of carrying those powers into effect. Had the Constitution been nothing but the structural blueprint for a new set of federal institutions, Marshall’s point might have some force. But the Constitution was obviously more than that. It was also a denial of state power in certain important respects. There is nothing illogical about the simultaneous existence of the governmental institutions under the Articles and the prohibitions on state action contained in the Constitution.¹⁰¹ And that, as we have seen, is precisely what the best understanding of the Constitution’s effectiveness requires. Marshall’s all-or-nothing view of constitutional effectiveness is simply unwarranted.

It is hard to resist another response to Marshall as well. The idea that there is something logically impossible about two governments existing simultaneously over the same territory is, to say the least, strange coming from a Federalist judge. Any federal system that does not absolutely separate the realms of authority of the national and local governments presents this picture of overlapping sovereigns. Of course, any such regime requires conflict-of-laws norms to resolve jurisdictional disputes, but the idea that you cannot have two governments that both have some measure of authority over a territory is just silly. Moreover, this notion of overlapping jurisdiction is familiar from international law. In *United States v. Rice*,¹⁰² the Court (with Chief Justice Marshall on board) explained the occupancy of foreign territory during wartime gives the occupying nation a right to administer the territory, but does not make the occupied territory a formal part of the administering nation.¹⁰³ The scheme of private rights that pre-existed the occupation continues until changed in accordance with appropriate domestic and international norms. And although the public institutions of governance of the occupied nations are immediately displaced upon occupation, those institutions do not disappear.

100 *Id.*

101 Indeed, many of the Constitution’s prohibitions on state action were foreshadowed by similar prohibitions in the Articles of Confederation.

102 17 U.S. (4 Wheat.) 246 (1819).

103 *See id.* at 253–55.

If the occupying nation leaves without permanently acquiring the territory through cession, the original sovereign does not need to re-create all of its prior institutions of government; they simply laid dormant until the end of the occupation. In a very real sense, wartime occupation of territory involves overlapping governments.

It is doubtful that Marshall really meant something as silly as the proposition that there cannot ever be overlapping governments. Perhaps he had in mind something more functional: in the absence of the institutional machinery of the new constitutional government, who would enforce the “self-executing” prohibitions, such as the Contracts Clause? Until federal judges were appointed, there were no federal courts. Until a Congress and President were selected, there could be no federal enforcement mechanism for any constitutional provisions. If, as modern positivists will doubtless insist, there cannot be any legal rights without corresponding remedies,¹⁰⁴ what can it mean to say that the Constitution created legal rights and obligations in the summer of 1788?

A full treatment of the issues lurking behind this seemingly simple objection would require a separate article, but a few remarks will be sufficient for our purposes here. The simplest answer is that an enforcement mechanism for constitutional violations was indeed in place in 1788. Article VI of the Constitution provides that “[t]his Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹⁰⁵ State courts, as courts of general jurisdiction, were therefore bound to apply federal constitutional rules in cases to which they apply as soon as the Constitution became effective. It is true that federal courts would not sit in superintendence of state decisions until sometime in 1789, but even after the federal personnel were in place, state courts were expected to be the front-line defense against many constitutional violations, including violations by their own states.¹⁰⁶ Thus, the necessary govern-

104 See, e.g., Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 579 (2000) (“As a central tenet of his jurisprudence, Llewellyn believed that people only had legal rights to the extent that the law provided them remedies.”).

105 U.S. CONST. art. VI, cl. 2.

106 That is not to say that the founding generation unanimously expected state courts to entertain all possible cases arising under the Constitution. See Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 52–78. But to the extent that there were thought to be “enclaves” of exclusive federal jurisdiction, claims under the Contracts Clause were unlikely candidates. See *id.* at 78–105 (discussing the types of cases for which the arguments for exclusive federal jurisdiction were most prominent).

mental apparatus to enforce the Constitution was in place on June 21, 1788.

Even if one will settle for nothing but a federal enforcement mechanism, it is still meaningful to say that the Constitution became law when it was ratified. It was evident in 1788 that the new government would be up and running in relatively short order. A potential plaintiff in 1788 had only to wait for the appropriate machinery of federal governance to be in place in order to raise constitutional claims. There is nothing absurd about a scheme in which rights are established at one time and remedies are provided at another. Justice delayed is not—or at least is not always—justice denied; it is justice delayed. The delay may be inconvenient, hurtful, and occasionally fatal, but conceptually one can hold fast to the notion that rights must have remedies, and even to the notion that federal rights must have federal remedies, and still conclude that the Constitution became law in 1788.

Moreover, the idea that legal rights could not exist without an external enforcement mechanism is hard to square with the founding-era acceptance of international law. The Constitution, of course, expressly recognizes the “law of nations”¹⁰⁷ as a distinct legal category, and founding-era documents and early cases are filled with references to the law of nations as a robust source of authority.¹⁰⁸ Indeed, in 1819, Congress went so far as to criminalize “piracy, as defined by the law of nations.”¹⁰⁹ There was (and is) obviously no legal enforcement mechanism external to the United States whose function was to enforce the law of nations. That did not prevent eighteenth-century thinkers from viewing it as law. Nor did the (short-term) absence of federal enforcement machinery prevent the federal Constitution from having the status of law prior to the spring of 1789.

Underlying this concern about rights and remedies is the slippery concept of *sovereignty*. Who was the sovereign in the United States on June 21, 1788? To what extent was that sovereign’s power defined by the Constitution? Can one speak of a document as “sovereign,” or can that term be applied only to a concrete set of human institutions? These are questions for another day. For now, it is enough to note that the concept of sovereignty was undergoing a revolution in eight-

107 See U.S. CONST. art. I, § 8, cl. 10 (giving Congress power “[t]o define and punish . . . Offences [sic] against the Law of Nations”).

108 See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 820 (1989).

109 Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14. The statute was upheld (over a vigorous dissent) as a constitutional exercise of the power to “define” the offense of piracy. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820).

eenth-century America that may dwarf the role of the written Constitution as a distinctively American contribution to political theory. If sovereignty is not a single brute fact, but is instead a complex interplay among sometimes complementary and sometimes competing human institutions, then that understanding harmonizes well with the notion of a constitution that is, at a particular moment in time, partially effective and partially ineffective. The legal status—or, rather, the legal statuses—of the Constitution in the summer of 1788 may thus provide insight into some very deep questions of governance that are at the heart of the American revolutionary political experience.

II. THIS LAND IS WHOSE LAND?

Ill-defined speculations about deep political theory aside, why would anyone today care about such arcane matters as the “true” effective date of the Constitution? The fate of a good portion of upstate New York, however, turned on the question a mere two decades ago, and the Supreme Court’s wrong answer in 1820 had major consequences. One suspects that a correct understanding of the Constitution’s effective date would not—and perhaps should not—have altered the outcome in that case, but we will never know.

In the 1780s, the Oneida Indian Nation was in possession of more than five million acres of land in central New York State.¹¹⁰ The State wanted the land. On June 23, 1785, the Oneidas were induced—allegedly by threats from the state Governor to refuse to protect their lands from trespasses—to sign a treaty selling 300,000 acres of their territory to the State.¹¹¹ On September 22, 1788, New York procured another treaty with the Oneidas—this time allegedly by fraud and misrepresentation—for the remaining lands.¹¹²

Two hundred years later, the Oneidas sued to recover their property.¹¹³ The primary substantive issue in the case involved whether the Articles of Confederation disabled the states from entering into treaties with Indians.¹¹⁴ After considerable effort, the federal courts con-

110 *Oneida Indian Nation v. New York*, 520 F. Supp. 1278, 1286 (N.D.N.Y. 1981).

111 *Id.* at 1287.

112 Some of the relevant court opinions provide a fuller statement of the facts. See *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1148–49 (2d Cir. 1988); *Oneida Indian Nation*, 520 F. Supp. at 1286–88.

113 State statutes of limitations for the recovery of real property do not apply to claims by Indian tribes. See *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1083–84 (2d Cir. 1982).

114 The case also presented a host of issues concerning jurisdiction, justiciability, and remedies that are not relevant here. For a discussion of some of the remedial

cluded that the Articles did not invalidate the transactions.¹¹⁵ We accept that conclusion here without examining it. Our concern is with a different argument that received almost no attention.

The Treaty of Fort Schuyler, which transferred the vast bulk of the land in question to the State of New York, was signed on September 22, 1788.¹¹⁶ New Hampshire became the ninth state to ratify the federal Constitution on June 21, 1788. New York added its ratification on July 26, 1788. Thus, when the Treaty of Fort Schuyler was signed, New York was officially part of the new federal union.

The Constitution prescribes that "[n]o State shall enter into any Treaty, Alliance, or Confederation."¹¹⁷ The President and Senate have the exclusive power to make treaties under the Constitution.¹¹⁸ Although the Articles of Confederation also restricted the power of states to enter into treaties,¹¹⁹ those restrictions were substantially more limited than those provided in the federal Constitution.¹²⁰ It was taken for granted in the *Oneida* litigation that federal power to enter into treaties with Indians was plenary and exclusive under the

issues, see generally Joshua N. Lief, Note, *The Oneida Land Claims: Equity and Ejectment*, 39 SYRACUSE L. REV. 825 (1988).

115 It took four decisions to finalize that conclusion: the original district court decision rejecting the claims, see *Oneida Indian Nation*, 520 F. Supp. 1278; a court of appeals decision remanding for further consideration, see *Oneida Indian Nation*, 691 F.2d 1070; a second district court decision reaffirming the original disposition, see *Oneida Indian Nation v. New York*, 649 F. Supp. 420 (N.D.N.Y. 1986); and the final affirmance by the Second Circuit, see *Oneida Indian Nation*, 860 F.2d 1145.

116 See *Oneida Indian Nation*, 860 F.2d at 1149.

117 U.S. CONST. art. I, § 10, cl. 1.

118 See *id.* art. II, § 2, cl. 2. Congress has power to "regulate Commerce . . . with the Indian Tribes." *Id.* art. I, § 8, cl. 3. Whether that power is also exclusive is another story.

119 See ARTS. OF CONFEDERATION, art. VI(1) ("No State without the consent of the United States in Congress assembled, shall . . . enter into any conference, agreement, alliance or treaty with any king, prince or foreign state.").

120 The language of Article I, Section 10 is more categorical than the language in Article VI of the Articles of Confederation: it is a flat prohibition on state treaties, rather than a requirement of congressional consent, and it contains no specific mention of treaties with "any king, prince or foreign state," which language could conceivably exclude treaties with Indian nations or tribes. Moreover, the Indian Commerce Clause of Article I, see U.S. CONST. art. I, § 8, cl. 3 (giving Congress power "[t]o regulate Commerce . . . with the Indian Tribes"), is not subject to the substantial reservation of state authority contained in the analogous grant in the Articles of Confederation. See ARTS. OF CONFEDERATION, art. IX(4) (giving the Confederation Congress "sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any States, provided that the legislative right of any State within its own limits be not infringed or violation").

Constitution.¹²¹ Thus, assuming that the constitutional term "Treaty" includes agreements with Indian tribes,¹²² and assuming that the Constitution was in effect when the Treaty of Fort Schuyler was signed, it would appear that New York had no power to enter into the treaty in 1788.

The Oneidas advanced this argument in 1981, and it was casually dismissed by the District Court on the strength of *Owings v. Speed*:

Crucial to the plaintiffs' argument is their assertion that the Constitution was in effect on September 22, 1788, the date on which the Treaty was concluded. The plaintiffs contend that the Constitution became effective after ratification by the ninth State on June 21, 1788, with New York ratifying in July of 1788.

However, the Supreme Court long ago concluded otherwise in a case in which the issue was whether the provisions of the Constitution applied to acts of state legislatures in 1788

The Court in *Owings* ruled that the Constitution did not become operative until the first Wednesday in March of 1789, the date set by resolution of the old government. Therefore, plaintiffs' claims under the Constitution must fail.¹²³

121 See *Oneida Indian Nation*, 860 F.2d at 1159-60.

122 For an argument that agreements with Indians might not be treaties in the full constitutional sense, see Karen D. Kendrick-Hands, Note, *State Sovereignty and Indian Land Claims: The Validity of New York's Treaties Prior to the Nonintercourse Act of 1790*, 31 SYRACUSE L. REV. 797, 816-19, 835-39 (1980). The claim is substantial: it has considerable support in founding-era materials and may be the only view that makes sense of the doctrine of discovery, as it applies to title descended from European conquests in North America. Nonetheless, it is probably wrong. Congress did not require Indian land sales to take place through treaties "entered into pursuant to the constitution" until the Indian Trade and Intercourse Act of 1793. See Indian Trade and Intercourse Act of 1793, ch. 19, § 8, 1 Stat. 329, 330. The original 1790 version of the Intercourse Act required merely that such sales "be made and duly executed at some public treaty, held under the authority of the United States." Indian Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 (emphasis added). The word "at" indicates that the term "treaty" in the 1790 act merely meant a public meeting of some kind—a usage that was not uncommon in the eighteenth century. See Kendrick-Hands, *supra* at 816-17 & n.153. If, however, Indian treaties were not treaties in the constitutional sense, then Congress had no authority in 1793 to require their use—as it has done for the past 200 years. See 25 U.S.C. § 177 (1994) ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."). Congress cannot make something a constitutional "treaty" if it doesn't already fit the description.

123 *Oneida Indian Nation v. New York*, 520 F. Supp. 1278, 1323 (N.D.N.Y. 1981).

The issue does not appear in any subsequent decision involving the Oneidas' claims; the plaintiffs presumably (and quite reasonably) abandoned it once the court invoked *Owings*.

The clause prohibiting the states from entering into treaties, however, surely went into effect upon ratification of the Constitution. The clause does not require any federal legislative or executive action for its implementation; it is a straightforward denial of state power.¹²⁴ Accordingly, as of June 21, 1788, no state that ratified the Constitution could enter into a treaty. When New York ratified the Constitution on July 26, 1788, it thereby surrendered its power to make treaties. Even if, as the federal courts held in the *Oneida* litigation, the Articles of Confederation did not disable the states from purchasing land from Indians through treaties, those states that ratified the Constitution bound themselves to the document's prohibitions, including the prohibition on treaties. As far as the ratifying states were concerned, the government under the Articles had the exclusive right to enter into treaties with Indians until the new federal government had a functioning President and Senate (and perhaps a functioning House of Representatives to the extent that treaties were not self-executing).¹²⁵ Accordingly, the Treaty of Fort Schuyler was palpably illegal.

Perhaps concerns about justiciability or remedies would, and should, have ultimately prevented the Oneidas from reclaiming their

124 The district court, echoing the thoughts of Ms. Kendrick-Hands, see Kendrick-Hands, *supra* note 122, at 836–37, suggested that federal legislation was necessary in order to deprive the states of their right to acquire title to Indian lands. See *Oneida Indian Nation*, 520 F. Supp. at 1323 n.45. This makes sense, however, only if agreements with Indians are not “treaties” in the constitutional sense. The prohibition on state treaties is part of a single clause that contains most of the original Constitution’s denials of state power. See U.S. CONST. art. I, § 10, cl. 1.

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

Id. The Treaty or Alliance Clause no more requires federal legislative implementation than does the Bill of Attainder Clause, the Contracts Clause, or the Titles of Nobility Clause. If the state can acquire Indian title through some means other than a treaty, that is a different matter. But there is little to be said for the view that the Treaty or Alliance Clause is not self-executing.

125 For a spirited debate over the extent to which treaties are self-executing under the Constitution, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land”*, 99 COLUM. L. REV. 2095, 2099 (1999); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2155 (1999); Yoo, *Globalism*, *supra* note 34, at 1960–61; Yoo, *Treaties and Public Lawmaking*, *supra* note 34, at 2218–19.

land. Perhaps there may even have been a way for New York validly to have purchased the land through some mechanism other than a treaty. We have no considered opinion on these subjects. But surely the Oneidas' arguments deserved more consideration than Chief Justice Marshall's ancient blunder permitted.

III. THE MARSHALL PLAN

John Marshall was a smart man. He seldom acted in a major way without an agenda and without a keen eye for consequences. How could he make such an obvious mistake in *Owings* about something as basic as the effective date of the Constitution?

It is possible, of course, that neither he nor anyone else thought of *Owings* as a major case. Perhaps the decision was tossed off hurriedly (it certainly reads as though it was hastily written), and no one gave the matter any serious thought. One should at least entertain the idea, however, that Marshall knew exactly what he was doing.

What would have happened (other than the restoration of Owings's possession of his land) had Marshall ruled in favor of Owings? By March 4, 1789, everyone had had a chance to get used to the idea of the new federal government. Elections had been held, and the changing of the guard from the Articles to the Constitution was complete. State legislatures, in particular, were certainly aware by that time that the Article I, Section 10 prohibitions needed to be obeyed. Was that really true before that date? If the Constitution became effective for nine states as of June 21, 1788 (and as of the date of their ratifications for Virginia and New York), then the Article I, Section 10 prohibitions were legal norms as of that date. They thus bound states that may not even have been aware of the decisive ninth ratification for some time. And as evidenced by the Virginia statute in *Owings*, even after ratification states were not necessarily acting under the impression that they were bound by the Constitution's restrictions.¹²⁶ It is possible that many land titles beyond Owings's could be called into question by a holding that the Contracts Clause was in effect from the moment of ratification. The disruptive consequences of a judgment for Owings might be significant.

126 Is that not strong evidence of a public understanding that the Constitution was not, in any sense, effective until (at least) March 4, 1789? It is perhaps evidence, but not strong evidence. Everyone treated the selection provisions for the staffing of the new government as being effective from the moment of ratification. There is no good distinction between those provisions and the Article I, Section 10 prohibitions. If Virginia legislators thought otherwise, that was (or should have been) their misfortune.

More to the point, the Constitution also declares that “[n]o State shall . . . emit Bills of Credit [or] make any Thing but gold and silver Coin a Tender in Payment of Debts.”¹²⁷ Were all of the ratifying states in compliance with these provisions from June 21, 1788 on? The point is not whether they were or were not. We do not know. Neither, we suspect, did John Marshall in 1820. But if states were in fact (so Marshall could at least imagine) issuing paper money in various forms between the summer of 1788 and the spring of 1789, what would be the consequences in 1820 of reaching back thirty years to undo at least some of those transactions? Perhaps most of those claims would be time-barred. Perhaps the effect of holding the Constitution to be in effect from ratification would be minimal. Perhaps there were in fact no transactions to undo. But why (from Marshall’s perspective) risk it when a simple resolution, with a clearly drawn line, is readily at hand? And it is all the more attractive because the rule works in favor of state legislation. Just one year after *McCulloch v. Maryland*,¹²⁸ did it really make sense to drop another potential bomb on the states, with hard-to-foresee consequences?

We have no way to know whether any of this speculation even remotely rings true. But if it is at all close to the mark, there is an interesting convergence between *Owings* and the *Oneida* cases. The strict question of the legal rights of the Oneida Nation clearly took a back seat to more practical problems of remedies: What would happen if five million acres of land in New York suddenly had to change hands after 200 years? No one, I trust, seriously expected the federal courts to hand over New York to the Oneida Nation, no matter how compelling their claims might be in terms of law and justice—just as Chief Justice Marshall, three years after *Owings*, was not about to declare the European occupation of North America to have been illegal.¹²⁹ Judges can practice legal nullification just as effectively as can juries. We have elsewhere discussed at length another context in which the prospect of unsettling existing legal relations induced the Supreme Court (and the United States executive department) to adopt legal positions of dazzling absurdity.¹³⁰ We do not mean to endorse that practice. Quite to the contrary, we think it the job of scholars, or at least our job, to pursue knowledge as objectively and dispassionately as possible. What others do with that knowledge is beyond our control.

127 U.S. CONST. art. I, § 10, cl. 2.

128 17 U.S. (4 Wheat.) 316 (1819).

129 See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

130 See generally Lawson & Seidman, *supra* note 55.

The Constitution became law over a period of time beginning on June 21, 1788. That conclusion may be inconvenient in some respects (not the least of which is the awkwardness of encyclopedia entries on the effective date of the Constitution), but it is right.

