



CONDORCET AND THE CONSTITUTION:
A RESPONSE TO
THE LAW OF OTHER STATES

Nicholas Quinn Rosenkranz

CONDORCET AND THE CONSTITUTION:
A RESPONSE TO
THE LAW OF OTHER STATES

Nicholas Quinn Rosenkranz*

INTRODUCTION.....	1281
I. THE POSNER-SUNSTEIN ARGUMENT.....	1284
A. <i>The Condorcet Jury Theorem</i>	1284
B. <i>The Posner-Sunstein Application</i>	1285
II. CONDORCET IN HISTORICAL CONTEXT.....	1287
A. <i>Benjamin Franklin</i>	1288
B. <i>Thomas Jefferson</i>	1289
C. <i>James Madison</i>	1290
D. <i>American Readers</i>	1291
E. <i>Historical Summary</i>	1292
III. CONDORCET IN CONSTITUTIONAL TEXT AND STRUCTURE.....	1292
A. <i>Bicameralism</i>	1293
B. <i>Federalism</i>	1295
C. <i>Juries</i>	1297
IV. CONDORCET AND FOREIGN LAW.....	1300
V. CONDORCET AND CONSTITUTIONAL INTERPRETERS.....	1301
VI. CONDORCET AND CONSTITUTIONAL CHANGE.....	1303
CONCLUSION.....	1308

INTRODUCTION

In two of the most controversial cases of the past decade, the Supreme Court relied on foreign law to help determine the meaning of the United States Constitution.¹ These foreign citations caused quite a stir. Several Justices have

* Associate Professor of Law, Georgetown University Law Center. Thanks to Randy E. Barnett, Nita A. Farahany, Jack Goldsmith, John O. McGinnis, and Jonathan Mitchell, as well as participants in workshops at Vanderbilt Law School and at Willamette University College of Law. Thanks also to Emil Bove and Hanah Metchis Volokh for invaluable research assistance.

1. See *Roper v. Simmons*, 543 U.S. 551, 575-77 (2005); *Lawrence v. Texas*, 539 U.S. 558, 568-74 (2003).

spoken extrajudicially about whether such reliance on foreign law is proper,² and Justices Scalia and Breyer even went so far as to debate the issue outside of court.³ Congress has held hearings⁴ and considered resolutions and bills disapproving the practice.⁵ And scholars, of course, have let their views be known as well.⁶

2. See Adam Liptak & Adam Nagourney, *Judge Alito the Witness Proves a Powerful Match for Senate Questioners*, N.Y. TIMES, Jan. 11, 2006, at A27 (discussing the testimonies of both Roberts and Alito); Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, Address Before South African Constitutional Court (Feb. 7, 2006) (transcript available at <http://www.concourt.gov.za/site/ginsberg.html>); Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, Remarks at the Southern Center for International Studies (Oct. 28, 2003) (transcript available at http://www.southerncenter.org/OConnor_transcript.pdf).

3. See Stephen Breyer & Antonin Scalia, Assoc. Justices, U.S. Supreme Court, Debate at American University: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (Jan. 13, 2005) (transcript available at <http://www.freerepublic.com/focus/f-news/1352357/posts>).

4. See, e.g., *House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. Res. 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005); *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004).

5. See H.R. Res. 97, 109th Cong. (2005); Constitution Restoration Act of 2004, S. 2323, 108th Cong.; H.R. Res. 568, 108th Cong. (2004); Constitution Restoration Act of 2004, S. 2082, 108th Cong.; Constitution Restoration Act of 2004, H.R. 3799, 108th Cong.

6. See, e.g., Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June-July 2005, at 33; Steven G. Calabresi, Lawrence, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal, 65 OHIO ST. L.J. 1097 (2004); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J. L. & PUB. POL'Y 223 (2006); Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357 (2005); Vicki C. Jackson, *The Supreme Court, 2004 Term—Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Eugene Kontorovich, *Disrespecting the "Opinions of Mankind": International Law in Constitutional Interpretation*, 8 GREEN BAG 2d 261 (2005); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353 (2004); John O. McGinnis, *Contemporary Foreign and International Law in Constitutional Construction*, 69 ALB. L. REV. 801 (2006); Kenneth W. Starr, *The Court of Pragmatism and Internationalization: A Response to Professors Chemerinsky and Amann*, 94 GEO. L.J. 1565 (2006); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239 (2003); Jeremy Waldron, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Ernest A. Young, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

But in a recent issue of this Law Review, and despite all the ink already spilled, Eric Posner and Cass Sunstein found something new to say.⁷ With characteristic iconoclastic creativity, they offer a new argument for reliance on foreign law: the Condorcet Jury Theorem. Put simply, this Theorem demonstrates that, under certain circumstances, the majority view on a question is very likely to be correct. It follows, Posner and Sunstein argue, that courts may be wise to rely on the majority view of foreign governments when deciding questions of U.S. law.

This invited Response concludes that, neat as it is, their argument puts the cart before the horse. The Posner-Sunstein article begins with the Condorcet Jury Theorem, which it presents in an entirely ahistorical way. Only afterwards does it turn, briefly, to the U.S. Constitution. This Response demonstrates how one might approach the same question from a more traditional starting point—constitutional text, history, and structure. As it turns out, Condorcet and his Jury Theorem do have a proper role to play in this discussion, but it is quite different from the one that Posner and Sunstein suggest.

While there are, in fact, intriguing historical connections between Condorcet and the Framers, the Constitution that the Framers ultimately wrote demonstrates a conception of governmental structure sharply different from that of Condorcet. In short, Condorcet's ideas can usefully inform constitutional interpretation—but primarily by way of contrast. It turns out that Condorcet's vision of law and politics was distinctly "universalist," imagining all people everywhere seeking the correct answer to questions of law and policy. This universalist vision is central to the Jury Theorem, the most basic condition of which is that each "juror" answer the *same* question. And it is also essential to the Posner-Sunstein application of the Theorem, which posits that questions of law will often be *relevantly similar* from country to country. But the Framers' vision, as reflected in many of the Constitution's textual and structural features, was distinctly more localist. As careful analysis of features like bicameralism, federalism, juries, and the amendment mechanism will show, the Constitution favors decisionmaking mechanisms that harness multiple collective bodies with *distinctly varied* geographic and institutional perspectives, each answering subtly *different* questions. In short, despite Condorcet, the Constitution itself ultimately refutes the notion that it should be interpreted by reference to the law of other states.

Part I of this Response briefly summarizes the argument put forth by Posner and Sunstein. Part II adds texture to the ahistorical Posner-Sunstein account, by locating Condorcet in historical and constitutional context. Part III tells a richer story of the dialogue between Condorcet and the Framers, exploring the complex interplay of their ideas. It concludes that the Framers self-consciously rejected many of Condorcet's most fundamental ideas of

7. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006).

constitutional design, including a central premise that is essential to the Posner-Sunstein application of the Jury Theorem. With this more nuanced account in mind, Part IV returns to the question of using foreign law to interpret the U.S. Constitution. It concludes that the Constitution itself, with its manifest rejection of central Condorcetian premises, refutes the notion that it should generally be interpreted by reference to foreign law. Part V points out that the Constitution itself implies several tiers of constitutional interpretation, by several different “juries”—but nowhere does it suggest that foreign governments, too, are to be “jurors” of the U.S. Constitution. Part VI recasts the issue as one not of constitutional interpretation but of constitutional change. From this perspective, as well, constitutional text and structure refute reliance on the law of other states.

I. THE POSNER-SUNSTEIN ARGUMENT

A. *The Condorcet Jury Theorem*

To understand the Posner-Sunstein argument, it is necessary to understand the Condorcet Jury Theorem on which it is based. This is the Theorem in its simplest form: Assume a factual, true-or-false question. Assume that any given person has a greater than 50% chance of getting the question right. Finally, assume that each person answers independently, based on his own private information. The Theorem states that under such circumstances, the more people one asks, the more likely it is that a *majority* of the answers given are likely to be correct.⁸ As the number of people asked increases, the chance that a majority will be correct approaches 100%.⁹

The Theorem has been extended to questions with more than two possible answers, where a single answer is selected by a plurality.¹⁰ It has also been extended, with certain qualifications, to situations in which the votes of the “jurors” are correlated.¹¹

The Condorcet Jury Theorem thus provides some formal mathematical support for majority rule. It holds that under certain circumstances, majority rule can effectively aggregate the imperfect information of a population to achieve a superior result.

8. This result should be unsurprising to anyone who has ever played blackjack in Las Vegas. If the casino’s odds of winning each hand are 51%, it might lose the first one, and it might lose seven of the first ten, but over a large enough number of hands, it is almost certain to win more than half.

9. For a formal proof, see, for example, Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617, 632-33 (1992).

10. See Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POL. PHIL. 277 (2001).

11. See Ladha, *supra* note 9, at 631-32.

B. *The Posner-Sunstein Application*

Posner and Sunstein seek to apply the Condorcet Jury Theorem to the current controversy over reliance on foreign law in U.S. courts. Here is a simplified summary of their argument.

They posit that some difficult questions confronted by the Supreme Court have been answered already by foreign governments, and that under some circumstances, a given foreign government may be more than 50% likely to have answered the question correctly. If so, then by the Condorcet Jury Theorem, a *majority* of foreign governments are *very* likely to have answered the question correctly. Therefore, the Supreme Court would be wise to rely, at least in part, on the majority view of foreign governments when resolving such questions. In short, Posner and Sunstein say, “[T]he Jury Theorem provides the simplest argument for following the practices of other states: it suggests that if the majority of states believe that *X* is true, there is reason to believe that *X* is in fact true.”¹²

Of course, the Posner-Sunstein argument is quite a bit more nuanced than that. As one would expect, Posner and Sunstein anticipate many of the potential objections to their thesis.¹³ The analysis is subtle and sophisticated, and the article is eminently worth reading. The critique that follows, however, is largely

12. Posner & Sunstein, *supra* note 7, at 136.

13. *See id.* at 142 (“This argument is easiest to accept if we can assume without controversy that there is a right answer to the question whether a state should prefer rule *A* or rule *B*.”); *id.* at 143 (“For the Condorcetian argument to work, moreover, each state, or most states, must be more likely than not to make the right choice.”); *id.* at 144 (“[A] foreign state’s law must reflect a *judgment* based on that state’s private information about how some question is best answered.”); *id.* (“[A] foreign state’s law must address a problem that is similar to the problem before the domestic court.”); *id.* (“[T]he law of the foreign state must reflect an *independent* judgment; it must not be a matter of merely following other states.”); *id.* at 148 (“[T]he foreign law provides relevant information—it is a ‘vote’ on the relevant question—only if the foreign country is sufficiently similar *in the right way* to the United States.”); *id.* at 149 (“The relevance of the Jury Theorem when moral judgments are at issue is more complex, and depends on a number of conditions.”); *id.* at 155 (“Legal and institutional differences also matter. The stock example in the literature is Justice Breyer’s reliance on German law in making arguments about the meaning of American federalism.”); *id.* at 157 (“One objection [is that] . . . [i]f we want information, then the right way to obtain information is to perform regressions that control for differences among states, not to pick and choose among the states . . . while ignoring those that seem different.”); *id.* at 160 (“When cascades occur, there is far less reason to trust the judgments of many voters, or states, because the particular judgments of many or most do not add information.”); *id.* at 165 (“[T]he differences between foreign law and international law are important, and the case for relying on international law is trickier than the case for relying on foreign law.”); *id.* at 168 (“[T]he strongest argument against the use of comparative materials . . . [is] that the best inquiry is so complex, so unlikely to be helpful, and so likely to produce error, that it should not be undertaken at all.”); *id.* at 171 (“[N]one of the [Supreme Court] decisions [that have relied on foreign law] provided anything like a systematic account of the relevant laws, and for this reason they can be legitimately criticized.”).

independent of these nuances, and so, for current purposes and in the interest of brevity, this oversimplified summary will suffice.

C. The Application to U.S. Constitutional Interpretation

Only one additional introductory point is necessary. Posner and Sunstein mean for their argument to be entirely general, applying to all sorts of legal questions and all sorts of institutional actors. They suggest that courts (U.S. and foreign) should consult law foreign to their jurisdictions, whether for common law, statutory, or constitutional cases.¹⁴ They contend, further, that lawmakers (U.S. and foreign) should consult law foreign to their jurisdictions when deciding whether to enact legislation.¹⁵

This Response addresses only one slice of this broad, general claim—but it is by far the most controversial slice. This Response speaks only to the use of foreign law to interpret the U.S. Constitution.

As it turns out, the basic Posner-Sunstein insight—that the Jury Theorem and the Constitution have something to say to each other, and that the conversation between them might usefully inform the current controversy over foreign law—is more interesting than their article lets on. By locating Condorcet in constitutional context and contrasting his ideas with those embodied in constitutional text, history, and structure, a richer and more complex thesis comes to light. Condorcet and his Jury Theorem do have an appropriate and illuminating role to play in this analysis. But the role is quite different from the one that Sunstein and Posner describe. In short, the Framers self-consciously rejected many of Condorcet's most central notions of constitutional structure, and the Constitution itself refutes the use of foreign law in its interpretation.

Posner and Sunstein acknowledge that their argument is likely to have little or no purchase with originalists, who wonder “why a poll of United Nations members today has any bearing on the meaning of a constitutional text that James Madison drafted in 1791.”¹⁶ As Posner and Sunstein admit, “It is . . . to some extent correct to think that originalism, by itself, excludes reference to foreign precedents; if the Constitution means what it originally meant, the contemporary practices of foreign nations are usually immaterial.”¹⁷ And again: “[I]f the meaning of a constitutional provision is a matter of uncovering the original understanding, the views of other states may not be terribly informative.”¹⁸ And finally, in short, “[i]f the applicable theory of

14. *See id.* at 142 (“At least at first glance, the point applies to constitutional law no less than to statutory and common law.”); *id.* at 171.

15. *See id.* at 172.

16. Easterbrook, *supra* note 6, at 224.

17. Posner & Sunstein, *supra* note 7, at 137.

18. *Id.* at 142 n.46; *see also id.* at 157, 166 n.109.

interpretation makes international practice irrelevant, the argument for consulting international practice is over before it begins.”¹⁹

Just so. But the critique that follows is deeper than this basic originalist objection. It demonstrates that using foreign law to interpret the U.S. Constitution per the Condorcet Jury Theorem is inconsistent with basic principles reflected in the Constitution itself. The practice should generally be rejected not just by originalists but by anyone who takes seriously constitutional text, history, and structure.

II. CONDORCET IN HISTORICAL CONTEXT

To discern the proper role of Condorcet and his Jury Theorem in constitutional interpretation, one must begin by locating the Condorcet Jury Theorem in historical context, something that Posner and Sunstein make no attempt to do. Marie Jean Antoine Nicolas Caritat, Marquis de Condorcet, mathematician and social philosopher, Secretary of the Academy of Science in Paris, first published the Jury Theorem in his *Essay on the Application of Mathematics to the Theory of Decision Making (Essai)*.²⁰ For someone with a historical bent, of course, the first question is the date of publication—a fact that is oddly absent from the Posner-Sunstein article. As it happens, this remarkable work was published in the year 1785.²¹

That is to say, Condorcet published his Jury Theorem two years before the U.S. Constitution was written, four years before it was ratified, and six years before the Bill of Rights was ratified. Surely any article purporting to apply Condorcet’s work to questions of constitutional analysis should begin with this remarkable temporal proximity. And the date, of course, prompts the next question of historical context: is it possible that the ideas in Condorcet’s *Essai* might have crossed the Atlantic in time to influence the U.S. Constitution?

As it turns out, there is a fascinating body of scholarship on just this question,²² none of which is cited by Posner and Sunstein. This literature is too

19. *Id.* at 172.

20. MARQUIS DE CONDORCET, *ESSAY ON THE APPLICATION OF MATHEMATICS TO THE THEORY OF DECISION MAKING (1785)*, in CONDORCET: *SELECTED WRITINGS* 33 (Keith Michael Baker ed., 1976) [hereinafter CONDORCET, *ESSAI*].

21. *Id.* at 33.

22. See MARQUIS DE CONDORCET, *CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY* 14 (Iain McLean & Fiona Hewitt eds., 1994); NORMAN SCHOFIELD, *ARCHITECTS OF POLITICAL CHANGE: CONSTITUTIONAL QUANDARIES AND SOCIAL CHOICE THEORY* 98-134 (2006) [hereinafter SCHOFIELD, *POLITICAL CHANGE*]; PAUL MERRILL SPURLIN, *THE FRENCH ENLIGHTENMENT IN AMERICA: ESSAYS ON THE TIMES OF THE FOUNDING FATHERS* 124-26 (1984); Iain McLean & Arnold B. Urken, *Did Jefferson or Madison Understand Condorcet’s Theory of Social Choice?*, 73 *PUB. CHOICE* 445 (1992); Norman Schofield, *The Intellectual Contribution of Condorcet to the Founding of the US Republic 1785-1800*, 25 *SOC. CHOICE & WELFARE* 303 (2005) [hereinafter Schofield, *Intellectual Contribution*]; Arnold B. Urken, *The Condorcet-Jefferson Connection and the Origins of*

rich to be digested comprehensively here, but a brief sketch will suffice to show how one might proceed to locate Condorcet in constitutional context.

A. Benjamin Franklin

Condorcet corresponded with Benjamin Franklin as early as 1773.²³ When Franklin went to Paris in 1776,²⁴ the two men got to know each other,²⁵ and, of course, they talked politics. Describing Franklin, Condorcet wrote that “his politics were those of a man who believed in the power of reason and the reality of virtue.”²⁶ Condorcet explained the groundwork for his argument in the *Essai* in a 1782 speech delivered to the Academy, while Franklin was still in Paris and an active member.²⁷ And there is at least some reason to believe that Franklin and Condorcet discussed the Jury Theorem specifically.²⁸

In 1785, after eight years in Paris, Franklin returned to the United States,²⁹ and he quickly took up a central role in Philadelphia’s political discourse as president of several organizations, including the American Philosophical Society,³⁰ the Supreme Executive Council of Pennsylvania,³¹ and the Society

Social Choice Theory, 72 PUB. CHOICE 213 (1991).

23. See Letter from Marquis de Condorcet to Benjamin Franklin (Dec. 2, 1773), in 20 THE PAPERS OF BENJAMIN FRANKLIN 489 (William B. Willcox ed., 1976) (asking Franklin to pose five of Condorcet’s questions, on behalf of the Academy of Sciences, to the American Philosophical Society); Letter from Benjamin Franklin to the Marquis de Condorcet (Mar. 20, 1774), in 21 THE PAPERS OF BENJAMIN FRANKLIN 151 (William B. Willcox ed., 1978) (providing brief responses and assuring Condorcet that the questions had been transmitted to the Society); see also SPURLIN, *supra* note 22, at 124; *id.* at 185 n.26 (noting that the American Philosophical Society “has other letters from Condorcet to Franklin and Jefferson on various subjects”).

24. See EDMUND S. MORGAN, BENJAMIN FRANKLIN 245 (2002).

25. Franklin and Condorcet were both friends of Madame Helvetius and occasionally discussed politics in her home. See Schofield, *Intellectual Contribution*, *supra* note 22, at 307; see also MORGAN, *supra* note 24, at 249 (noting that Franklin was a frequent guest of Madame Helvetius, as was Condorcet’s mentor and friend Anne-Robert Jacques Turgot).

26. Gerald Stourzh, *Reason and Power in Benjamin Franklin’s Political Thought*, 47 AM. POL. SCI. REV. 1092, 1092 (1953) (quoting 3 OEUUVRES DU MARQUIS DE CONDORCET 420 (A. Condorcet O’Connor & M. F. Arago eds., 2d ed. 1847)).

27. Keith Michael Baker, *Introduction* to CONDORCET: SELECTED WRITINGS, *supra* note 20, at xiii. Condorcet’s aim was to elevate the “truths of the moral sciences” to the status of natural science. *Id.* He did so based on a “rather eclectic philosophy of probability” first described in a series of fragmented notes leading up to the 1782 speech. *Id.* at xiii-xvi.

28. See JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 190-93, 240 (1992) (discussing the reciprocal influence of the Framers and their French colleagues, including Condorcet); Schofield, *Intellectual Contribution*, *supra* note 22, at 306-07 (observing that Condorcet knew Franklin from their membership in the French Academy of Sciences, that Condorcet presented the Jury Theorem there in 1785 while Franklin was still in France, and that “Condorcet’s work on Social Mathematics *must* have been discussed” at dinners that Franklin attended).

29. See MORGAN, *supra* note 24, at 297-99.

30. See *id.* at 300-02. Franklin founded the American Philosophical Society in 1743. See William E. Lingelbach, *Owen J. Roberts and the American Philosophical Society*, 104

of Political Enquiries.³² Both George Washington³³ and James Madison³⁴ visited Franklin in Philadelphia, presumably to discuss issues of constitutional design.³⁵ And of course, in 1787, Franklin attended the Constitutional Convention.³⁶

B. Thomas Jefferson

Meanwhile, the year before Franklin left Paris, Thomas Jefferson arrived.³⁷ Jefferson served as the U.S. Minister to France from 1784 to 1789,³⁸ and he got to know Condorcet even better than had Franklin.³⁹ Like Franklin, both Jefferson and Condorcet believed that scientific method could be applied to politics.⁴⁰ In fact, Condorcet coined the phrase *science politique* and Jefferson apparently coined the English translation, “political science.”⁴¹

It is clear that Jefferson was exposed to a number of Condorcet’s works. Jefferson (like Franklin, John Jay, and Robert Morris) received a copy of

U. PA. L. REV. 368, 368 (1955). When Franklin returned to the United States in 1785, he immediately resumed active participation. *See, e.g.*, Independence Hall Ass’n, The Electric Ben Franklin, <http://www.ushistory.org/franklin/philadelphia/aps.htm> (“At a meeting in September 1785, Franklin proposed a permanent home [for the American Philosophical Society].”).

31. *See* 2 JAMES PARTON, LIFE AND TIMES OF BENJAMIN FRANKLIN 543 (Boston, Houghton, Mifflin & Co. 1864).

32. *See* CLAUDE-ANNE LOPEZ & EUGENIA W. HERBERT, THE PRIVATE FRANKLIN: THE MAN AND HIS FAMILY 284 (1975) (“[T]he Society for Political Enquiries was founded in 1787 to apply to problems of government the rigorous study accorded the natural sciences, [and] Franklin was made its head.”).

33. *See* SCHOFIELD, POLITICAL CHANGE, *supra* note 22, at 122 (“Franklin . . . created a *Society for Political Enquiries* in Philadelphia, which Washington certainly attended.”); Schofield, *Intellectual Contribution*, *supra* note 22, at 307.

34. *See* RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 191-92 (1971) (“On May 16[, 1787], Madison and the other twenty or so delegates then in town assembled comfortably [at Franklin’s house].”); SCHOFIELD, POLITICAL CHANGE, *supra* note 22, at 122 (“Madison visited Philadelphia in early 1787, and presumably discussed the issue of the constitution with Franklin. It is possible that Madison heard more about Condorcet’s theorem from Franklin.”).

35. *See* Schofield, *Intellectual Contribution*, *supra* note 22, at 307.

36. *See* MORGAN, *supra* note 24, at 301.

37. *See* R. B. BERNSTEIN, THOMAS JEFFERSON 56-57 (2003).

38. *See id.* at 55.

39. *See* APPLEBY, *supra* note 28, at 240; WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 431 (1993); Iain McLean & Fiona Hewitt, *Introduction* to CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY, *supra* note 22, at 15 (“Condorcet was even closer to Franklin’s successor, Jefferson”); Urken, *supra* note 22, at 215.

40. *See* Iain McLean, *Before and After Publius: The Sources and Influence of Madison’s Political Thought*, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 14, 19 (Samuel Kernell ed., 2003).

41. *See id.*

Condorcet's *Vie de Turgot* as a gift in 1786.⁴² He also purchased two copies of Condorcet's *Réflexions sur L'esclavage des Nègres* when it was published in 1788, and even went so far as to attempt his own translation.⁴³ As for the *Essai*, in which the Jury Theorem appears, Condorcet himself apparently gave Jefferson a copy, though it is unclear when.⁴⁴

At one point, Reverend James Madison, president of the College of William and Mary, wrote to Jefferson that "Condorcet appears to me the ablest [and] at the same Time, equally as visionary as . . . any other."⁴⁵ Jefferson largely agreed.⁴⁶

C. James Madison

Jefferson was apparently anxious to share Condorcet's ideas with his colleagues across the Atlantic. Jefferson sent Madison some of Condorcet's political pamphlets, describing them as "the most judicious statement I have seen of the great questions which agitate [France] at present."⁴⁷ Madison was similarly enthusiastic, circulating the pamphlets to Edmund Randolph with the assurance that they "contain[ed] more correct information than has been communicated to the public through any other channel."⁴⁸

In addition, Madison received Condorcet's *Lettres d'une Bourgeois de New Haven*,⁴⁹ which was included in Philip Mazzei's *Recherches Historiques sur les Etats-Unis*.⁵⁰ Mazzei sent Madison a copy on August 14, 1786,⁵¹ and

42. SPURLIN, *supra* note 22, at 122. Spurlin notes that two English translations of the book were in the 1789 catalog of the Library Company of Philadelphia, and that other works by Condorcet were also available in America at the time. *Id.* at 123.

43. *Id.* at 125; McLean & Urken, *supra* note 22, at 447.

44. See SPURLIN, *supra* note 22, at 129; Urken notes that Jefferson's library included copies of the *Essai*, *Lettres d'un Citoyen des Etats Unis* (1788), *Sentiments d'un Républican sur les Assemblées Provinciales et les États Généraux* (1788), *Reflexions sur les L'esclavage des Nègres* (1788), *Esquisse d'un Tableau Historique des Progrès de L'esprit Humain* (1795). Urken, *supra* note 22, at 215, 218.

45. Letter from Rev. James Madison, President of William and Mary College, to Thomas Jefferson (Feb. 1, 1800), in 5 WM. & MARY Q. HIST. MAG. 147, 148 (1925).

46. See SPURLIN, *supra* note 22, at 129.

47. Letter from Thomas Jefferson to James Madison (July 31, 1788), in 11 THE PAPERS OF JAMES MADISON 210, 212 (Robert A. Rutland et al. eds., 1977); SPURLIN, *supra* note 22, at 122; see also McLean & Urken, *supra* note 22, at 445.

48. Letter from James Madison to Edmund Randolph (Oct. 28, 1788), in 11 THE PAPERS OF JAMES MADISON, *supra* note 47, at 320, 320; SPURLIN, *supra* note 22, at 122-23.

49. See MARQUIS DE CONDORCET, LETTERS FROM A FREEMAN OF NEW HAVEN TO A CITIZEN OF VIRGINIA ON THE FUTILITY OF DIVIDING THE LEGISLATIVE POWER AMONG SEVERAL BODIES: LETTER FOUR, in CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY, *supra* note 22, at 292 [hereinafter CONDORCET, LETTERS].

50. See McLean, *supra* note 40, at 21 ("Jefferson commissioned Mazzei to write a four-volume [work] . . . to counter anti-American propaganda in Paris . . . Mazzei (or Jefferson) inserted four chapters by Condorcet into this book . . ."); see also CONDORCET: SELECTED WRITINGS, *supra* note 20, at 64 ("The *New Haven Letters* were inserted into Philip

Jefferson sent him a second the next year.⁵² Madison wrote to Jefferson to thank him in a letter dated September 6, 1787—just as the Constitutional Convention approached its climax.⁵³

Sixteen months later, Jefferson again wrote to Madison: “We have lately had three books published which are of great merit in different lines. . . . The second is a work on government by the Marquis de Condorcet I shall secure you a copy.”⁵⁴ And Jefferson was apparently as good as his word. Scholars confirm that Madison possessed at least three works by Condorcet, including the *Essai* in which the full Jury Theorem appears.⁵⁵

D. American Readers

It does not suffice to show that Franklin, Jefferson, and Madison were familiar with Condorcet and his Jury Theorem. In order to demonstrate that the Condorcet Jury Theorem is relevant to constitutional interpretation, one would need to show that an educated American reader at the time might have understood the text in light of the Theorem.⁵⁶

As it happens, such a demonstration might be possible. In part because of his relationship with Franklin, Condorcet and his work were indeed becoming familiar to Americans during this period.⁵⁷ He was, for example, made a

Mazzei’s *Recherches Historiques* . . .”).

51. See Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776-1826, at 490, 492 (James Morton Smith ed., 1995) (“I have received [Mazzei’s] letter and book and will write by next packet to him.”); Letter from Philip Mazzei to James Madison (Aug. 14, 1786), in 9 THE PAPERS OF JAMES MADISON 100 (Robert A. Rutland et al. eds., 1975) [hereinafter Mazzei, Aug. 14 Letter to Madison]; Fiona Hewitt & Iain McLean, *Introduction to CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY*, *supra* note 22, at 65 (“Through Mazzei, Madison encountered the *Essai* and the *New Haven Letters* . . .”).

52. SCHOFIELD, POLITICAL CHANGE, *supra* note 22, at 122.

53. *Id.*

54. Letter from Thomas Jefferson to James Madison (Jan. 12, 1789), in 11 THE PAPERS OF JAMES MADISON, *supra* note 47, at 412, 413.

55. See McLean & Urken, *supra* note 22, at 447-48 (“Madison . . . had a copy of the *Essai*, at least for a short time, and two other social choice works of Condorcet.”).

56. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997) (“What I look for in the Constitution is . . . the original meaning of the text,” or, in other words, “how the text of the Constitution was originally understood.”); see also RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89 (2004) (“[T]he words of the Constitution should be interpreted according to the meaning they had at the time they were enacted.”).

57. See generally SPURLIN, *supra* note 22, at 121-29 (discussing the dissemination of Condorcet’s work in America through holdings in public libraries and private collections, as well as newspapers).

member of Franklin's Philosophical Society.⁵⁸ And, as another indicator of Condorcet's growing renown, the city of New Haven, Connecticut, went so far as to name him an honorary citizen.⁵⁹ In 1795, a Philadelphia book seller made several of Condorcet's works in French available for sale.⁶⁰ But even before that, in 1789, the Library Company of Philadelphia contained two translated copies of *Vie de Turgot*.⁶¹ And Condorcet availed himself of the popular press as well. In 1792, the *National Gazette* printed a column by Condorcet entitled, simply, "Thoughts on Constitutions."⁶²

E. Historical Summary

In short, there are intriguing historical connections between the Framers and Condorcet, and hints that his ideas were percolating through American political discourse at the time of the Framing. Some scholars have cast doubt on the extent to which Condorcet influenced the Framers,⁶³ and this may well be a fruitful area for future study. But what remains to be seen is the extent to which Condorcet's ideas are reflected—or rejected—in the Constitution itself.

III. CONDORCET IN CONSTITUTIONAL TEXT AND STRUCTURE

With these historical connections in mind, one can begin an analysis of constitutional text and structure, and explore the extent to which Condorcet's ideas are reflected in the U.S. Constitution. As it turns out, some of Condorcet's most central theories of constitutional design were either expressly rejected or substantially refined by the Framers.

58. See Letter from Thomas Jefferson to Christian Frederick Michaelis and Others (Feb. 4, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON 111, 111 (Julian P. Boyd ed., 1955) (transmitting the American Philosophical Society membership diploma to Condorcet and others on behalf of the President).

59. See SPURLIN, *supra* note 22, at 122; Max M. Mintz, *Condorcet's Reconsideration of America as a Model for Europe*, 11 J. EARLY REPUBLIC 493, 494 (1991).

60. See SPURLIN, *supra* note 22, at 123.

61. See *id.*

62. See *id.* at 124.

63. Compare Urken, *supra* note 22, at 231 ("Jefferson apparently never read or assimilated any of Condorcet's social choice theories and probably would not have understood them if he had the fortitude to study them."), with Schofield, *Intellectual Contribution*, *supra* note 22, at 304 (arguing that Condorcet's writings influenced both Madison and Jefferson).

A. Bicameralism

Condorcet favored unicameralism over bicameralism.⁶⁴ In his view, “increasing the number of legislative bodies could never increase the probability of obtaining true decisions,”⁶⁵ and he viewed bicameral legislatures as a product of “fear of innovation, one of the most fatal scourges of the human race.”⁶⁶ He was initially encouraged by a compilation of American state constitutional documents from the United States, including the Pennsylvania constitution,⁶⁷ that demonstrated examples of unicameral legislatures like the Articles of Confederation.⁶⁸ Yet, along with the other *americanistes*,⁶⁹ he was surprised and disappointed when copies of the Constitution arrived in Paris.⁷⁰ Condorcet reluctantly accepted American-style separation of powers, but about bicameralism, he was adamant.⁷¹

And he let the Framers know it. When the new U.S. Constitution arrived in France in November 1787, Condorcet and his peers complained directly to Franklin.⁷² And even before, in 1786, Mazzei had made Madison aware of Condorcet’s position: “At the end of my book you will see four well-reasoned letters sent to me by Condorcet, in which he *mathematically* upholds a unicameral legislature.”⁷³ Madison emphatically disagreed. He wrote to Mazzei: “If your plan of a single [l]egislature . . . were adopted, I sincerely [sic] believe that it would prove the most deadly blow ever given to

64. McLean & Urken, *supra* note 22, at 450 (“Condorcet was opposed to bicameralism, which he believed had no theoretical justification; he believed that checks on tyrannical legislatures and executives were better achieved by appropriate criteria for the franchise and a suitable voting rule involving qualified majorities.”); *see also* SCHOFIELD, *POLITICAL CHANGE*, *supra* note 22, at 122; Schofield, *Intellectual Contribution*, *supra* note 22, at 307; Mintz, *supra* note 59, at 496-97.

65. CONDORCET, *LETTERS*, *supra* note 49, at 325.

66. MARQUIS DE CONDORCET, *ON THE PRINCIPLES OF THE CONSTITUTIONAL PLAN PRESENTED TO THE NATIONAL CONVENTION (1793)*, in CONDORCET: *SELECTED WRITINGS*, *supra* note 20, at 156-57 [hereinafter CONDORCET, *CONSTITUTIONAL PLAN*].

67. Letter from John Adams to Samuel Perley (June 19, 1809), in 9 *THE WORKS OF JOHN ADAMS* 621, 623 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1854) (“Mr. Condorcet . . . admired Mr. Franklin’s [Pennsylvania] Constitution and reprobated mine.”).

68. Mintz, *supra* note 59, at 494.

69. The *americanistes* were followers of Turgot, Condorcet’s mentor, and were strongly in favor of unicameral legislatures. *Id.* at 496. They looked to the British House of Lords as an example of the potential for bicameralism to “permit the nobility and clergy to obstruct a program of reform.” *Id.*

70. *Id.* at 496. Condorcet proposed simply amending the Articles of Confederation. *See id.* at 496-97.

71. *Id.* at 497.

72. *See* APPLEBY, *supra* note 28, at 242.

73. Mazzei, Aug. 14 Letter to Madison, *supra* note 51, at 102-03, *translated in* McLean & Urken, *supra* note 22, at 454.

republicanism.”⁷⁴ Likewise, according to the Supreme Court, Alexander Hamilton believed unicameralism “antithetical to the very purposes of the Constitution.”⁷⁵ Of course, the U.S. Constitution vests the legislative power in a bicameral Congress,⁷⁶ despite Condorcet. Indeed, despite Condorcet, “there was never any serious consideration given to the possibility of a single-house Congress.”⁷⁷

Condorcet’s preference for a unicameral legislature reflects a particular theory of political decisionmaking. As one scholarly article explains:

Condorcet approached politics as an exercise in the *revelation of truth* by sampling from individuals’ beliefs that were more or less enlightened. . . . [W]hen political decision making is viewed in Condorcet’s terms, bicameralism amounts to splitting the sample information and results in a reduction in the effective sample size, rather than any improvement in the process.⁷⁸

This vision of politics, which informed Condorcet’s preference for a unicameral legislature, is also essential to the application of his Jury Theorem. Recall that the Condorcet Jury Theorem turns on asking a number of people a binary question that each has a greater than 50% chance of answering correctly. Embedded in this condition is an even more basic one: it is essential, obviously, that each person answer “the *same* question.”⁷⁹ Thus, all legislators in Condorcet’s unicameral legislature would presumably ask themselves the perfectly abstract question “is *X* good public policy?” in some Platonic sense.

74. Letter from James Madison to Philip Mazzei (Dec. 10, 1788), in 11 THE PAPERS OF JAMES MADISON, *supra* note 47, at 388, 388-89.

75. INS v. Chadha, 462 U.S. 919, 949 (1983) (citing THE FEDERALIST NO. 22, at 135 (Alexander Hamilton) (H. Lodge ed., 1888)).

76. See U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

77. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 23 (5th ed. 2006). This is not the end of the story, however. Modern social choice theory has come to favor bicameralism, because it decreases the problem of cycling majorities. See Cheryl D. Block, *Truth and Probability—Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975, 1021-22 (1998) (“Modern social choice theory suggests that an unicameral legislature is more likely to experience cycled preference distribution and, therefore, to present a more troublesome case than the bicameral legislature.”); Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT’L REV. L. & ECON. 145, 147-48 (1992) (“Bicameralism can thus be understood as an antidote to the manipulative power of the convener, or agenda setter, when faced with cycling preferences.”). Ironically, cycling majorities are a problem first identified by none other than the Marquis de Condorcet. See CONDORCET, *ESSAI*, *supra* note 20, at 53-57; Block, *supra*, at 1008 n.155.

78. Geoffrey Brennan & Alan Hamlin, *Bicameralism and Majoritarian Equilibrium*, 74 PUB. CHOICE 169, 177 (1992) (emphasis added).

79. Posner & Sunstein, *supra* note 7, at 141 (emphasis added); see also *id.* at 148-60 (discussing the similarity condition).

But the Framers realized that in the legislative process, it may be useful to have two different legislative bodies answering two slightly different questions.⁸⁰ As the Supreme Court explained, “the Great Compromise [of Article I], under which *one House was viewed as representing the people and the other the states*, allayed the fears of both the large and the small states.”⁸¹ In other words, both Houses would not simply ask “is X good public policy?” in some abstract or Platonic sense. Instead, the House of Representatives would ask one question (“is X good for the people?”),⁸² and the Senate would ask a different question (“is X best implemented by the federal government rather than by the states?”).⁸³ Only if a majority of *both* Houses answered their respective questions affirmatively could the measure become law.

B. Federalism

Likewise, consider the Tenth Amendment and the Constitution’s federal structure. Condorcet apparently opposed federalism, at least for France. In his view, “[e]verything seem[ed] to make France suited to a system of absolute unity”⁸⁴ He believed that a system of federalism would weaken the national defense, and that “a nation which holds the purest principles of reason

80. See THE FEDERALIST NO. 51, at 350 (James Madison) (Jacob E. Cooke ed., 1961). Madison elaborated:

In republican government the legislative authority, necessarily, predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit.

Id.

81. *INS v. Chadha*, 462 U.S. 919, 950 (1983) (emphasis added); see also *Reynolds v. Sims*, 377 U.S. 533, 576 (1964) (“A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures.”).

82. See THE FEDERALIST NO. 52, at 355 (James Madison) (Jacob E. Cooke ed., 1961) (“As it is essential to liberty that the government in general, should have a common interest with the people; so it is particularly essential that the [House of Representatives], should have an immediate dependence on, & an intimate sympathy with the people.”); Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) (“[T]he House was meant to be the ‘grand depository of the democratic principle of the government,’ as distinguished from the Senate’s function as the forum of the states” (quoting George Mason, Address at the Constitutional Convention, 5 ELLIOTT’S DEBATES 136 (1876))).

83. See Wechsler, *supra* note 82, at 548 (“[T]he Senate cannot fail to function as a the guardian of state interests as such, when they are real enough to have political support or even to be instrumental in attaining other ends.”).

84. MARQUIS DE CONDORCET, A SURVEY OF THE PRINCIPLES UNDERLYING THE DRAFT CONSTITUTION (1793), in CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY, *supra* note 22, at 190, 191 [hereinafter CONDORCET, SURVEY].

and justice, but which is alone in holding such principles, needs to be very closely united.”⁸⁵

As part of the constitutional plan that he presented to the French National Convention in 1793, Condorcet proposed primary assemblies that were to meet annually in order to select a national legislature.⁸⁶ And he insisted that the purpose of the assemblies was to address national—not local—concerns.⁸⁷

[T]hese assemblies in which the citizen votes not for himself but for the whole nation, are absolutely different, in form and in the territory to which they correspond, from those to which the same citizens could be called to deliberate as members of a particular territorial division. . . . [T]he primary assemblies do not act each for itself as a portion of the whole⁸⁸

Condorcet reasoned that the only way to ensure that the primary assemblies expressed the “general will” of the people was to take care that the *same* question be posed to each assembly.⁸⁹ Thus, Condorcet designed these primary assemblies to connect “the particular places in which citizens empirically lived” with politics at the national level.⁹⁰ Here, again, “Condorcet approached politics as an exercise in the *revelation of truth* by sampling from individuals’ beliefs”⁹¹ Condorcet imagined a national, unicameral legislature asking the question “would *X* be wise policy?” in some Platonic sense.⁹² By his Jury Theorem, if a majority votes yes, then *X* is very likely to be good national policy, and that is the end of the matter.

Obviously, though, “Condorcet, in [his] pleas . . . against . . . federalism, had chosen the wrong audience [in Madison].”⁹³ Despite Condorcet, the Tenth Amendment declares: “The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

85. *Id.*

86. See Block, *supra* note 77, at 1013. Condorcet recognized the need for some degree of decentralization in a representative government, but to him, “federalism . . . seemed to be more an expediency to cope with a large territorial state than a value of its own.” Nadia Urbinati, *Condorcet’s Democratic Theory of Representative Government*, 3 EUR. J. POL. THEORY 53, 72 n.24 (2004).

87. See CONDORCET, CONSTITUTIONAL PLAN, *supra* note 66, at 150-51.

88. *Id.* at 151.

89. See CONDORCET, SURVEY, *supra* note 84, at 194 (“[T]he question which is to be decided [by the assemblies] must be precisely determined; everyone knows how the manner in which a question is presented can influence the decision.”).

90. Urbinati, *supra* note 86, at 67 (“The purpose of [the local assemblies’] local aspect was to link the citizens to the political life of the national community and vice versa, not to federalize the sovereign or particularize the law.”).

91. Brennan & Hamlin, *supra* note 78, at 177 (emphasis added).

92. See MARQUIS DE CONDORCET, ON THE CONSTITUTION AND THE FUNCTIONS OF PROVINCIAL ASSEMBLIES APPENDIX TWO: ON THE FORM OF DECISIONS MADE BY A PLURALITY VOTE (1788), in CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY, *supra* note 22, at 157, 159 (“We must therefore establish a form of decision-making in which voters need only ever pronounce on simple propositions, expressing their opinions with a *yes* or a *no*.”).

93. McLean & Urken, *supra* note 22, at 455.

respectively, or to the People.”⁹⁴ And one of federalism’s virtues, which was perhaps not fully appreciated by Condorcet, is similar to the virtue of bicameralism discussed above. Federalism, like bicameralism, recognizes that *different legislative bodies may usefully ask slightly different questions*. The Framers vision of legislative inquiry is sharply different from the abstract and Platonic “is *X* good public policy?” of Condorcet’s unicameral, national legislature. They imagined, instead, the *Virginia* legislature asking: “Would *X* be wise policy for *Virginia*?” In Madison’s words, “The Federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular, to the state legislatures.”⁹⁵

And here we have the insight that is missing from a pure, abstract proof of the Condorcet Jury Theorem. Many questions of law and policy are *inherently local*, turning on the special conditions of a place and the particular values and priorities of a people. Federalism holds that a wide range of policies are not wise or unwise in some abstract sense; rather, they may be wise for some people in some places and unwise for other people elsewhere.⁹⁶

In short, bicameralism recognizes that different legislative bodies may usefully ask subtly different questions about the same public policy, and federalism builds on this insight by recognizing that these subtly different questions may usefully reflect distinctly local concerns and mores. These insights are the heart of the rich, constitutional counterpoint to Condorcet’s brilliant but arid Jury Theorem, which, as discussed above, requires that all jurors be asked the *same* question.

C. Juries

This discussion leads directly to the most obvious feature of the Constitution to consider in light of Condorcet—its reification of juries. The Bill of Rights, ratified six years after Condorcet published his Jury Theorem,

94. U.S. CONST. amend. X.

95. THE FEDERALIST NO. 10, at 63 (James Madison) (Jacob E. Cooke ed., 1961).

96. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“[A] federalist structure . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society”); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (reviewing RAOL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)) (“The first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes, while a national government must take a uniform—and hence less desirable—approach.”); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 9 (1988) (“For a nation composed of diverse interest groups, this opportunity to express different social and cultural values is essential.”); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1402 (1997) (“[F]ederalism is a decentralized decisionmaking system that is more responsive to local interests and preference, that can tailor programs to local conditions and needs”).

enshrines juries in three of the ten original amendments. The Fifth Amendment guarantees that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury [except in certain military cases].”⁹⁷ The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law”⁹⁸ And the Seventh Amendment guarantees that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”⁹⁹ As Akhil Reed Amar has written, “If we seek a paradigmatic image underlying the original Bill of Rights, we cannot go far wrong in picking the jury.”¹⁰⁰

All this was presumably very congenial to Condorcet. From his perspective, the great advantage of a jury is that it increases the chance of a “correct” decision—guilty people found guilty, liable people found liable, and so forth. Indeed, Condorcet was emphatic that Louis XVI should be tried by jury,¹⁰¹ and he particularly “emphasized that the trial must be based on sound social choice procedures to insure that the jury would have a high probability of making a *correct* decision.”¹⁰² Correct decisions are at the heart of Condorcet’s Jury Theorem.

But the likelihood of “correct” decisions is not the only, or even the primary, rationale for the juries in the Bill of Rights. Amar has shown that the structural case for juries was substantially richer than that. In particular, the jury enshrined in the Constitution is a distinctly *local* institution.¹⁰³ To see how important this aspect of the institution was in 1791, consider that Article III of the original Constitution guaranteed that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.”¹⁰⁴ This provision guarantees a jury, and a local trial—but, by its terms, it does not guarantee a *local jury*. This oversight was evidently considered so serious that it was

97. U.S. CONST. amend. V.

98. *Id.* amend. VI.

99. *Id.* amend. VII.

100. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 96 (1998). Amar’s terrific book informs much of this section.

101. *See* Urken, *supra* note 22, at 221.

102. *Id.* (emphasis added).

103. *See* AMAR, *supra* note 100, at 88-89. Interestingly, however, Amar proceeds to argue that while the Framers’ jury was distinctly local, the Reconstructors’ jury right had a distinctly nationalist cast. *See id.* at 274 (“The Founders’ jury right was not merely political and collective; it was also localist. The Reconstructors’ jury right was not just (initially) civil and individualistic; it was also nationalist.”).

104. U.S. CONST. art. III, § 2, cl. 3.

immediately corrected by the Sixth Amendment, which guarantees a “trial[] by an impartial jury *of the State and district wherein the crime shall have been committed.*”¹⁰⁵

This emphasis on local jurors is a counterpoint to Condorcet’s emphasis on correct outcomes. Indeed, this counterpoint is closely related to the federalism counterpoint examined above.¹⁰⁶ As discussed earlier, a central premise of federalism is that a Virginia legislature will ask not “is *X* good policy” in some universal, Platonic sense, like a Condorcetian unicameral national legislature, but rather “is *X* good policy *for Virginia?*” Likewise, a local Virginia jury will not quite ask whether the defendant is “guilty” in the eyes of God, but will rather ask whether he is “guilty, *by Virginia standards*”—indeed, by the standards of the particular district where the crime was allegedly committed. (Or to put the point another way, under the Bill of Rights, even guilt or innocence *in the eyes of God* is a local question.)¹⁰⁷ As Amar explains, “the jury would be composed of citizens from the same community, and *its actions were expected to be informed by community values.*”¹⁰⁸

So here, again, while it may be illuminating to consider the Constitution in light of Condorcet, it is also essential to note the substantial differences between Condorcet’s vision and the vision of the Framers. Condorcet, like the Framers, reified juries. And the Framers, like Condorcet, no doubt appreciated the truth-seeking abilities of juries (even if the Framers intuited the point rather than deducing it by mathematical proof). But the formalism of Condorcet’s Jury Theorem necessarily requires that all jurors be asked the *same* question, and seek the “correct” answer. The vision of the Framers—reflected in the bicameralism of Congress, reflected in the federal structure preserved by the Tenth Amendment, and reflected in the careful emphasis on local juries—contemplated subtly *different* questions asked from place to place, questions that could not be disaggregated from the conditions of the place and the mores of the people.¹⁰⁹

105. *Id.* amend. VI (emphasis added).

106. See AMAR, *supra* note 100, at 88 (“Early in the Philadelphia convention, Madison captured an important truth in a telling analogy, arguing for the need to ‘preserve the State rights, as carefully as the trials by jury.’” (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 490 (Max Farrand ed., rev. ed. 1937))).

107. See U.S. CONST. amend I (“Congress shall make no law respecting an establishment of religion”); AMAR, *supra* note 100, at 34 (“The original establishment clause . . . is not antiestablishment but pro-states’ rights; it is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally.”).

108. AMAR, *supra* note 100, at 88-89 (emphasis added).

109. This point should not be overstated. The vision of the Framers was complex, and it also had a “universalist” strain, as reflected, for example, in their conception of both natural law and common law. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”); Thomas C. Grey, *Origins of the Unwritten Constitution*:

IV. CONDORCET AND FOREIGN LAW

Once again, the controversy at issue is the Court's sometime practice of relying on foreign law in the interpretation of the U.S. Constitution, and Sunstein and Posner have found support for the practice in the Condorcet Jury Theorem. In light of the previous Parts, it is now possible to offer a richer account of the issue, and a richer critique of their argument.

Part II sketched the intriguing historical connections between the Framers and Condorcet. But Part III demonstrated that the Framers did not incorporate Condorcet's ideas into the Constitution unreflectively. To the contrary, they self-consciously rejected some of his most central theories of constitutional design, and they refined others in a distinctly American way.

Condorcet's vision of political decisionmaking was as a search for truth in some Platonic and universal sense. As noted above, "Condorcet approached politics as an exercise in the *revelation of truth* by sampling from individuals' beliefs that were more or less enlightened."¹¹⁰ And, likewise, he reified juries for their ability to make "correct" decisions.¹¹¹ His Jury Theorem reflects this emphasis on truth and correctness. So long as everyone is asking the *same* question—a question about the truth, or rightness, or wisdom of some policy or decision—then, per Condorcet's Jury Theorem, a simple majority of jurors are likely to reach the "correct" answer.

In their article, Posner and Sunstein are constrained to adopt Condorcet's outlook. As they admit, their argument "is easiest to accept if we can assume without controversy that there is a right answer to the question whether a state should prefer rule *A* or rule *B*."¹¹² They argue that foreign governments have

Fundamental Law in American Revolutionary Thought, 30 STAN. L. REV. 843, 891 (1978) ("The appeal to the great world outside the British empire had to be stated in terms of standards to which all would give assent. In the western world of 1776, these standards were the self-evident truths and inalienable rights of rationalist Enlightenment philosophy—the standards on which Jefferson relied in the familiar opening lines of the Declaration."); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1132 (1987) ("The idea that certain fundamental rights could not be ceded away also colored the American view of fundamental law. Fundamental rights were God-given, and were rights 'which no creature can give, or hath a right to take away.'" (emphasis and footnote omitted)); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) ("[In 1789], the accepted conception was of the common law as 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'" (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))). This strain is, perhaps, reflected in the Ninth Amendment. See, e.g., BARNETT, *supra* note 56, at 55 ("[T]he evidence both that the founding generation were committed to natural rights, and that this commitment is reflected in the words of the Ninth Amendment, is so overwhelming that few deny it."). But at the same time, federalism and localism are dominant structural themes of the Constitution, in substantial tension with the vision of Condorcet.

110. Brennan & Hamlin, *supra* note 78, at 177 (emphasis added).

111. See Urken, *supra* note 22, at 221.

112. Posner & Sunstein, *supra* note 7, at 142.

sometimes confronted the same (or relevantly similar) questions as those posed by U.S. constitutional cases.¹¹³ Per the Condorcet Jury Theorem, a majority of those foreign governments are likely to be “right” about those questions. So the Supreme Court should study foreign law in such cases and rely on the majority view as some evidence of the “correct” answer.

But the Framers’ vision was substantially less universalist and more local than that of Condorcet. They did not necessarily believe that “moral questions do not have right answers,”¹¹⁴ a view that Posner and Sunstein acknowledge would undercut the application of the Jury Theorem,¹¹⁵ but the Framers did evidently believe that many questions of law and policy are distinctly *local*. (Indeed, consider that even the deepest metaphysical questions were to be left to the States, so that answers could vary from place to place.)¹¹⁶ As Posner and Sunstein admit, “one does not have to be any kind of moral skeptic or relativist to think that insofar as they are properly translated into law, some moral norms are state specific,”¹¹⁷ and thus to think that, “constitutional law is culturally relative even if morality is not.”¹¹⁸ Posner and Sunstein correctly allow that on this view, “perhaps the meaning of the founding document does not depend on what other nations do.”¹¹⁹ But what should now be clear is that *this view is the Constitution’s view*. In its establishment of a bicameral legislature, in its structural innovation of federalism, and in its insistence on local juries, the Constitution seeks to harness the strength of collective decisionmaking and majority rule—but with different collective bodies asking subtly *different*, and distinctly *local*, questions.

In short, the Constitution itself furnishes an answer to whether it should be interpreted by reference to foreign law. It evinces a clear vision that most questions of law and policy are inherently local. And so it implicitly rejects the Posner-Sunstein premise that foreign policy choices are relevantly similar to questions of U.S. constitutional law.

V. CONDORCET AND CONSTITUTIONAL INTERPRETERS

To see the point from a different angle, consider that the Constitution itself provides for a wide variety of constitutional interpreters. Article VI requires

113. *Id.* at 148.

114. *Id.* at 142.

115. *See id.*

116. *See* U.S. CONST. amend I (“Congress shall make no law respecting an establishment of religion”); AMAR, *supra* note 100, at 34 (1998) (“The original establishment clause . . . is not antiestablishment but pro-states’ rights; it is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally.”).

117. *Id.* at 155.

118. *Id.* at 150.

119. *Id.*

that “[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”¹²⁰ Each branch of the federal government has an independent obligation to interpret the Constitution.¹²¹ State officials are likewise sworn to support the Constitution, and this oath probably imposes an independent obligation of interpretation on them as well.¹²² Moreover, local juries themselves, which occupy a central place in the Bill of Rights as discussed above, arguably possess an independent power of constitutional review.¹²³

Thus, the Constitution itself provides for several different tiers of constitutional review both at the state and federal level: bicameral legislatures, executive officials, trial and appellate judges, grand and petit juries (to say nothing of “The People Themselves”¹²⁴). And as Posner and Sunstein acknowledge, “The Condorcet Jury Theorem teaches that the informational value of an additional vote declines rapidly after a certain number of votes have been registered.”¹²⁵ So even under the premises of Condorcet, Posner, and Sunstein, the many American “jurors” of constitutional review might be thought to suffice.¹²⁶

120. U.S. CONST. art. VI, cl. 3.

121. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 921 (1990) (“[E]ach [department] must in the exercise of its functions be guided by the text of the Constitution according to his own interpretation of it . . .” (alteration in original) (quoting from an unpublished memorandum of James Madison)); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 222 (1994); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 n.7 (2002) (“Each branch has an independent obligation to read the Constitution in the best way it knows how.”).

122. On this point, Michael Paulsen has written that

state government actors possess, by virtue of their oaths to support the U.S. Constitution and the supremacy of the written Constitution over all instrumentalities of the federal government, the prerogative and duty faithfully and independently to interpret the Constitution of the United States and to resist, with the powers at their disposal, violations of that Constitution by the federal government.

Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2737 (2003); see also Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 711 (2004) (reviewing DANIEL FARBER, *LINCOLN’S CONSTITUTION* (2003) (“The affirmative case for state government interpretive competence . . . is surprisingly straightforward, finding support in the text, structure, history, and early interpretations of the Constitution.”)).

123. See AMAR, *supra* note 100, at 98-104.

124. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing that the American people historically played a large role in interpreting the Constitution).

125. Posner & Sunstein, *supra* note 7, at 169.

126. See *id.* (suggesting that ten jurors are sufficient for a reliable result).

But the point is deeper than this. From a Condorcetian perspective, all these different *tiers* of American constitutional review are redundant,¹²⁷ what is called for is one, large, well-educated, majoritarian institution to analyze competing constitutional interpretations and decide which one is correct. But the Framers realized that each of these constitutional interpreters would ask the constitutional question in a slightly different way, informed by a particular institutional perspective. The various “juries” of constitutional interpretation—each house of the legislature, the grand and petit juries, the multi-member appellate courts—are no more redundant than they are certain to agree. They each ask the constitutional question from a different *institutional and geographical perspective*—answering, perhaps, slightly different questions or different facets of the same constitutional question.¹²⁸ Only if all of them agree can someone be deprived of life or liberty.¹²⁹

The Constitution itself thus establishes a system in which constitutional interpretation is undertaken by a variety of different interpreters, with a variety of different geographical and institutional perspectives. Axiomatic in such a system is that geographic and institutional perspective *matters*,¹³⁰ and that for each question, some perspectives should be harnessed and polled and others should not. Nowhere in this finely wrought mechanism, with its many layers of majoritarian review, is there any suggestion that foreign governments, too, should be “jurors” of the U.S. Constitution.

VI. CONDORCET AND CONSTITUTIONAL CHANGE¹³¹

Parts IV and V framed the issue as one of constitutional *interpretation*. But alternatively, it may be characterized as an issue of constitutional *change*. For if contemporary foreign law is relevant to the interpretation of the U.S.

127. See CONDORCET, LETTERS, *supra* note 49, at 325.

128. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 423 (1819) (“[T]o undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.”); Laurence Claus, “*Uniform Throughout the United States*”: *Limits on Taxing as Limits on Spending*, 18 CONST. COMMENT. 517, 542-43 (2001) (arguing that, under the General Welfare Clause, the meaning of the word “general” is a justiciable question even if the content of the word “welfare” is a political one).

129. See AMAR, *supra* note 100, at 102.

130. See Posner & Sunstein, *supra* note 7, at 155 (“Legal and institutional differences also matter. . . . [And Justice Breyer perhaps] erred in ignoring institutional differences between [German and American federalism].”).

131. Much of this Part appeared, in different form, in testimony given to the House Judiciary Committee Subcommittee on the Constitution in 2005. See *House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 30 (2005) (statement of Nicholas Quinn Rosenkranz, Associate Professor, Georgetown University Law Center).

Constitution, it follows that a change in foreign law can change the meaning of the U.S. Constitution.

The notion of unelected judges updating the Constitution to reflect their own evolving view of good government is troubling to some, in itself. But the notion that this evolution may be brought about by changes in foreign law raises even deeper issues of democratic self-governance.¹³² Again, to put the point most sharply, when the Supreme Court declares that the Constitution evolves, and declares further that foreign law effects its evolution,¹³³ it is declaring nothing less than *the power of foreign governments to change the meaning of the U.S. Constitution*.

Moreover, it might take only one foreign country to tip the scales and create a majority for Condorcet Jury Theorem purposes. After all, Posner and Sunstein suggest that a survey of as few as ten countries might suffice.¹³⁴ Even if they require a “substantial majority”¹³⁵ or a “clear majority”¹³⁶ of the ten, at the margin, a single country could make the difference. So if constitutional interpretations are based even in part on foreign law, then under some circumstances, a single foreign country would have the power to change the meaning of the U.S. Constitution.¹³⁷

And there is no reason why a foreign country could not do this at least semi-self-consciously. Indeed, France has expressly announced that one of its priorities is the abolition of capital punishment *in the United States*.¹³⁸ On the Posner-Sunstein view, perhaps such an express declaration would disqualify the

132. See Easterbrook, *supra* note 6, at 228 (“Foreign law post-dating the Constitution’s adoption is relevant only to those who suppose that judges can change the Constitution or make new political decisions in its name, which I think just knocks out the basis of judicial review.”).

133. If foreign citations appear in a Supreme Court opinion, the Court is presumptively relying on them at least in part. The Court has no business spending government money to print its thoughts in the *U.S. Reports* unless those thoughts are in service of an exercise of the judicial power. See *Roper v. Simmons*, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting) (“‘Acknowledgment’ of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court’s judgment—which is surely what it parades as today.”).

134. See Posner & Sunstein, *supra* note 7, at 169.

135. *Id.* at 142.

136. *Id.*

137. Compare *Roper*, 543 U.S. at 577 (“The United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the *Eighth Amendment’s* own origins.” (emphasis added)), with *id.* at 626-27 (Scalia, J., dissenting) (“The Court has . . . long rejected a purely originalist approach to our *Eighth Amendment*, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) *our Nation’s current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War . . . a legal, political, and social culture quite different from our own.” (first emphasis added)).

138. See Ken I. Kersch, *Multilateralism Comes to the Courts*, PUB. INT., Winter 2004, at 3, 4-5.

French “vote” on grounds of “insincerity,”¹³⁹ but, of course, foreign governments will rarely be so forthright about their mixed motives. And while Posner and Sunstein are awake to the danger that a foreign country, in casting its “vote,” might “merely [be] following other states,”¹⁴⁰ they do not seem to recognize the symmetrical danger that a country will “vote” deliberately to *lead* other states. This phenomenon, likewise, could skew the vote in a suboptimal way. Assume, for example, that the death penalty makes a country marginally safer by deterring some crimes, but that any execution anywhere in the world imposes some psychic cost on us all. On these assumptions, a French legislator might decide in favor of the death penalty, because the increased safety outweighs the psychic costs, *if he is deciding only for France*. But if his vote has a chance to eliminate the death penalty not just in France but also in the United States and other countries, his calculus may be quite different. By hypothesis, he does not care much about marginal safety in the United States, so he does not much value the deterrence of the American death penalty. But he does bear the psychic costs of American executions. On these assumptions, then, a French legislator might have voted for the death penalty if he were only considering France, *but he will nevertheless vote against it there in hopes of eliminating it elsewhere*.

Yet surely it would come as a shock to the American people to imagine the French Parliament engaging in this calculus: implicitly deciding whether to abolish the death penalty not just in France, but also in America.¹⁴¹ It is hard to imagine any Americans, other than a small coterie of law professors, subscribing to such a system—even if a Frenchman’s Jury Theorem says that they should.

After all, ending foreign control over American law was the primary reason given for the Revolution in the Declaration of Independence; the Declaration’s most resonant protest was that King George III had “subject[ed] us to a jurisdiction foreign to our constitution.”¹⁴² After the Revolution, it was not

139. See Posner & Sunstein, *supra* note 7, at 147-48.

140. *Id.* at 144 (emphasis added).

141. See Easterbrook, *supra* note 6, at 228 (“When other nations abolish the death penalty . . . , they do this by voting and can reverse the result by voting. How, then, can these deliberations and results possibly eliminate the role of the people of the United States in making decisions?”).

142. THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776). The Declaration protests further:

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

Id. paras. 2-4.

supposed to be this way, as the Constitution itself makes clear in its first, resonant phrase: “We the People of the United States . . . ordain and establish this Constitution”¹⁴³

And it is not only the Preamble that makes this clear. An entire article of the Constitution, one of only seven, is dedicated to creating an elaborate mechanism for constitutional change.¹⁴⁴ This mechanism has two phases, proposal and ratification, and each phase has two options. At the proposal phase, Congress may propose amendments “whenever two thirds of both Houses shall deem it necessary.”¹⁴⁵ Or alternatively, “on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments”¹⁴⁶ Likewise, at the ratification stage, there are two options: an amendment may be “ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.”¹⁴⁷

With its two proposal options and its two ratification options, Article V is actually four mechanisms in one. Each of these mechanisms has a complex combination of majoritarian and supermajoritarian aspects.¹⁴⁸ And all of this, by the way, has powerful public choice justification.¹⁴⁹ As John McGinnis and Michael Rappaport have explained:

143. U.S. CONST. pmb. (emphasis added).

144. *See id.* art. V.

145. *Id.*

146. *Id.*

147. *Id.*

148. For Congress to propose amendments, two-thirds of both houses are required. And for a convention to be called to propose amendments, two-thirds of state legislatures are required. *See id.* Note, though, that the state legislatures themselves are not required to achieve supermajorities; presumably, they are to be governed by state law, which may require only simple majorities. Nor does the Constitution require that an amendment convention itself operate by supermajority; presumably the convention rule is to be simple majority, since the Constitution seems to specify in the rare case when it requires supermajorities, and majority rule appears to be the default. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 496 n.154 (1994) (“An Article V proposing convention should follow majority rule (it goes without saying)”). Likewise, to ratify, three-fourths of state legislatures or three-fourths of state constitutional conventions (at Congress’s option) are required. U.S. CONST. art. V. Again, though, the Constitution does not specify a voting rule in the state legislatures or the state constitutional conventions. Presumably, these matters are governed by state law, and, most likely, simple majority rule.

149. Note that supermajority requirements, like bicameralism, can ameliorate the problem of cycling majorities identified by Condorcet. *See* CONDORCET, ESSAI, *supra* note 20, at 52-56. McGinnis and Rappaport have observed:

Supermajority rules decrease cycling without the need for powerful agenda setters. The proof of this fact is quite complicated, but intuitively the reasons are clear. A unanimity rule prevents all cycling because any inconsistent preferences would operate to prevent passage of any alternative. For instance, under a unanimity rule neither proposal a, proposal b, or proposal c would be adopted. Supermajority rules require a greater consensus for passage and

Stringent supermajoritarian entrenchment has feedback factors—the removal of partisanship, the focus on relatively few laws, the veil of ignorance—that may powerfully counteract the low accuracy rates of legislators with respect to entrenchment under majority rule. Moreover, an insurance rationale undergirds supermajoritarian entrenchment: it reduces the risk of bad entrenchment and risk adverse citizens will welcome that reduction. Finally, there is likely to be more bad legislation than good legislation considered in the entrenchment process under majority rule. Because of the joint influence of the effects, supermajoritarian entrenchment is both more desirable than majoritarian entrenchment and likely has net benefits.¹⁵⁰

Or, in Madison's less technical words:

[Article V] guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the State governments to originate the amendment of errors as they may be pointed out by the experience on the one side or on the other.¹⁵¹

In short, the Constitution creates a complex, carefully wrought mechanism—really four such mechanisms—for constitutional change. All of these mechanisms require the concurrence of many different collective bodies, each with a different geographic and institutional perspective. And all of them include majoritarian and supermajoritarian elements in elaborate and precise combination.

There is simply no reason to believe that, in addition to the four express mechanisms of constitutional change in Article V, there is also a fifth mechanism, unmentioned in the text, by which foreign governments may change the meaning of the U.S. Constitution by simple majority vote.¹⁵²

thus make inconsistent preferences count against enactment, thus reducing cycling. At some point, this effect is so powerful that a supermajority rule prevents cycling.

John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 460 n.369 (1999).

150. John O. McGinnis & Michael B. Rappaport, *The Condorcet Case for Supermajority Rules*, 15 SUP. CT. ECON. REV. (forthcoming 2007).

The supermajoritarian theory also has implications for the appropriate way of interpreting the Constitution. The theory suggests that judges should construe the document in accordance with its text and original meaning. It is only the original meaning of a constitutional provision that has passed through the double supermajoritarian filter and has the strong presumption of correctness that such a process provides. Interpretations based on the modern meaning of constitutional language could not have been known by the electorate that had to evaluate whether to enact the constitutional provision.

John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 802-03 (2002).

151. THE FEDERALIST NO. 43, at 296 (James Madison) (Jacob E. Cooke ed., 1961).

152. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 424 (1819).

To impose on [the federal government] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.

Id.; see also Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV.

CONCLUSION

Eric Posner and Cass Sunstein defend the Court's sometime practice of relying on foreign law to interpret the U.S. Constitution on the novel ground that the Condorcet Jury Theorem justifies the practice. Their argument is characteristically creative and careful. But it gets off on the wrong foot by starting with Condorcet and his Jury Theorem. This Response has attempted to show how one could address the same question from a more traditional starting point: constitutional text, history, and structure.

Constitutional history demonstrates intriguing connections between Condorcet and the Framers. But text, history, and structure show that the Framers either expressly rejected or significantly refined many of Condorcet's most central ideas. In particular, Condorcet's primary focus was on the ability of collective, majoritarian bodies to identify universal truths and correct answers. His Jury Theorem shares this focus, crucially assuming that all jurors are answering the same abstract question. By contrast, the Constitution created by the Framers—with its bicameralism, its federal structure, its local juries—recognizes that the answers of collective bodies are inevitably informed by geographic and institutional context. The Constitution requires each interpretive question—and each question of constitutional change—to pass through several different collective bodies, each with a different geographic and institutional perspective.

In short, the Constitution is quite specific about who its “jurors” are supposed to be, and how their preferences are to be tallied on constitutional questions. Nowhere does it suggest that foreign governments also get a vote.

1867, 1911 (2005) (“Surely the Founders would have been surprised to learn that a United States statute—duly enacted by Congress and signed by the President—may, under some circumstances, be rendered unconstitutional at the discretion of, for example, the King of England.”).