

Constitution Class Handout  
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## Lesson 17

### Amendments 11 and 12

#### **Further Limiting the Courts, Amendment 11**

The **Judicial Branch** was added almost as an afterthought. The judiciary was originally designed to be the weakest of the three branches of government. The Anti-Federalists feared the judicial branch becoming a judicial oligarchy, and therefore the judicial branch was constructed to only apply the law to cases they hear. All opinions the judges may have of the law after reviewing the law was considered to be only opinion. Any changes to law, regardless of what the courts felt about the law, could only be made legislatively. However, soon after the Constitution and the Bill of Rights, fears of a tyrannical court arose, and so additional limits were placed on the federal courts by the 11th Amendment. No case against a State by citizens of another State, or by the citizens or subjects of a foreign state, shall be heard by a federal court.

The 11th Amendment changes the intent of Article III. As limited as the courts were supposed to be, the Founding Fathers realized the courts weren't limited enough, and as a result, the 11th Amendment wound up being ratified in 1795.

Federal judges maintained that the federal courts should have the power of **judicial review**, or the power to determine the constitutionality of laws. In response to the judicial urgings for the powers to judge the extent of the federal government's powers, in the Kentucky and Virginia Resolutions of 1798, Thomas Jefferson and James Madison warned us that giving the federal government through its courts the power of judicial review would be a power that would continue to grow, regardless of elections, putting at risk the all important **separation of powers**, and other much-touted limits on power. The final arbiters of the Constitution are not supposed to be the courts, argued these Founding Fathers who were believers in the limiting principles of the U.S. Constitution. The power of the federal government must be checked by State governments, and the people. The States and the People are the enforcers and protectors of the U.S. Constitution.

As you may recall, John Jay, the first Chief Justice of the United States Supreme Court, resigned his position in 1795, disappointed in how few powers the federal courts had. When approached later by President John Adams to return to the United States Supreme Court as the high court's Chief Justice, Jay turned Adams down. He said the Court lacked "the energy, weight, and dignity which are essential to its affording due support to the national government." He also did not wish to serve under Thomas Jefferson, the victor in the 1800 Presidential Election, who was an advocate of limited government, and a judicial branch that existed as the weakest of the three branches of government.

While John Jay was Chief Justice, among the influences of his decision that the court was too weak to promote a strong, centralized **national government**, was the case of *Chisholm v. Georgia* in 1793, which

eventually led to the proposal, and ratification, of the 11th Amendment. A citizen of South Carolina sued Georgia for the value of clothing supplied by a merchant during the Revolutionary War. After Georgia refused to appear, claiming immunity as a sovereign state, as per the Constitution (Article III, Section 2) the federal courts took the case. The nationalist view by the justices deemed that in this case Georgia was not a sovereign State; therefore, the Supreme Court entered a default judgment against Georgia. What ensued was a conflict between federal jurisdiction and state sovereignty that reminded the anti-federalists of their fears of a centralized federal government consolidating the States, and destroying their right to individual sovereignty.

Realizing that the clause in Article III gave the federal courts too much power over State Sovereignty, Congress immediately proposed the 11th Amendment in order to take away federal court jurisdiction in suits commenced against a State by citizens of another State, or of a foreign state. This is the first instance in which a Supreme Court decision was superseded by a **constitutional amendment**, and evidence that the Founders saw the legislative branch and the States as being more powerful parts of government than the judiciary.

### **Terms:**

**Constitutional Amendment** - Changes made to an existing constitution.

**Judicial Branch** - The branch of the United States Government responsible for the administration of justice; a central judiciary that is limited to federal authorities, and separated from the will of the central leadership.

**Judicial Review** - The unconstitutional authority of the federal courts to review law, interpret the Constitution regarding laws, and then determine the constitutionality of laws.

**National Government** - Any political organization that is put in place to maintain control of a nation; a strong central government that does not recognize the individualism or local authorities of the smaller parts, such as states, of the nation.

**Separation of Powers** - A division of governmental authority into three branches: legislative, executive, and judicial; division of powers between the States and federal government.

### **Questions for Discussion:**

1. Why did the Founding Fathers design our governmental system with the Judicial Branch being the weakest of the three branches of government?
2. Why is judicial review only supposed to be an opinion?
3. How did *Chisholm v. Georgia* change the authorities granted to the federal judiciary?
4. How does the 11th Amendment protect State Sovereignty?

### **Resources**

*Chisholm v. Georgia*, 2 Dall. 419 (1793), Cornell College - Politics:

[http://cornellcollege.edu/politics/courses/allin/365-366/documents/chisholm\\_v\\_georgia.html](http://cornellcollege.edu/politics/courses/allin/365-366/documents/chisholm_v_georgia.html)

Jefferson's Draft of the Kentucky Resolutions - October 1798, Avalon

Project, Yale University: [http://avalon.law.yale.edu/18th\\_century/jeffken.asp](http://avalon.law.yale.edu/18th_century/jeffken.asp)

Joseph Andrews, *A Guide for Learning and Teaching The Declaration of*

*Independence and The U.S. Constitution - Learning from the Original Texts Using Classical Learning Methods of the Founders*; San Marcos: The Center for Teaching the Constitution (2010).

Philip B. Kurland and Ralph Lerner, *The Founder's Constitution – Volume Five - Amendments I-XII*; Indianapolis: Liberty Fund (1987).

Virginia Resolution of 1798, Constitution.org:  
<http://www.constitution.org/cons/virg1798.htm>

## **Electoral Procedures for Electing President Changed, Amendment 12**

*“Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”*

The 12th Amendment changes the procedure for electing the President and Vice President originally provided for in Article II, Section 1, Clause 3. The procedure has remained the same since its ratification, save for the States changing their procedures from appointing the electors by the choice of the State legislatures, thus following the instructions of the State legislatures, to the citizens voting for who the electors are expected to vote for. Though the electors are free to vote for anyone eligible to be President, in practice they usually vote for the candidates chosen by the voters in their State. 1824 is the last election in which electors were primarily appointed by their State legislature. In that election, six states followed that procedure. South Carolina was the final State to follow the practice, ceasing the appointment of their electors by the State legislature upon the approach of the American Civil War.

Each State is constitutionally allowed to choose how to appoint or elect their electors, and the methods vary from State to State. Generally, electors are nominated by their State political parties in the months prior to Election Day. In some States, the electors are nominated in primaries, the same way that other candidates are nominated. Other States nominate their electors in party conventions.

The need for the 12th Amendment became apparent after the problems that arose in the elections of 1796 and 1800. The Twelfth Amendment was proposed by the Congress on December 9, 1803, and was ratified by the requisite number of state legislatures on June 15, 1804.

Before the 12th Amendment, electors could vote for two candidates, though at least one had to be from a State different from that of the elector (as a protection against a larger State dominating the federal government). A majority of the vote needed to be received in order to win the presidency. If no candidate received a majority vote, then the House of Representatives chose the President.

In 1800, after a tie in the **Electoral College**, the House tied 36 times. That particular election was marked by a battle between the Federalists, and Jefferson's Democratic-Republicans. Even though Burr was Jefferson's running mate, Aaron Burr wound up Jefferson's adversary when the vote went to the House. The lame-duck House controlled by the Federalists threw their support behind Burr, because they did not trust Jefferson's philosophy of a **limited government**.

The term Electoral College did not appear until the early 1800s, and did not appear in legislation until 1845. The concept was designed to act in a manner similar to Congress, where a portion of the election was connected to the population-based premise that was also used by the House of Representatives, and another portion of the Electoral College would be based on the State appointment premise used by the U.S. Senate.

In *Federalist No. 39*, James Madison explained that the Constitution was designed to be a mixture of State-based and population-based government.

In *Federalist No. 10*, James Madison argued against "*an interested and overbearing majority*" and the "*mischiefs of faction*" in an electoral system. His definition of "faction" in relation to elections was "a number of citizens whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." In a republic it was necessary, according to Madison, to vary the distribution of powers, including those powers held by the members of the populace. Only a thorough division of power throughout the American System would protect the United States from the excesses of democracy, and countervail against factions. Madison further explained that the greater the population and expanse of the Republic, the more difficulty factions would face in organizing due to such issues as **sectionalism**.

Prior to the 12th Amendment, the choice of the Vice President went to the second place winner of the presidential election. The Vice President, unlike the President, did not require the votes of a majority of electors. If a tie arose, the Vice President was chosen by the Senate, with each Senator casting one vote. Though it was not specified in the Constitution whether the sitting Vice President could cast a tie-breaking vote for Vice President, because the sitting Vice President is President of the Senate and casts the tie-breaking vote, it is assumed that if that situation had arisen, the sitting Vice President would indeed be the deciding vote for his successor. Because the second place winner became Vice President, it was very possible for the President and the Vice President to be from different parties. In fact, that is what happened in the 1796 election. John Adams won that election as the Federalist Party candidate, and Jefferson became the Vice President as a Democratic-Republican candidate. The fear was that by the two men being of different parties, the Vice President may do what he could to impede the ability of the President, or could even launch an effort to remove the President from office so that the Vice President could succeed to the office of the President.

The 12th Amendment eliminated the possibility of problems arising between the President and Vice President due to them being from different parties by having the President and Vice President elected as a ticket, thus lessening the Vice President's motivation for staging a coup.

The 12th Amendment also eliminated the “two votes for presidential candidates” method, changing it instead to the electors casting distinct votes for President and Vice President.

The 12th Amendment indicates that no elector may vote for both candidates of a presidential ticket if both candidates inhabit the same State as that elector, a provision consistent with the Framers’ original language against **collusion**.

The 12th Amendment also clarified language to not allow those constitutionally ineligible to be President from being Vice President.

A majority of Electoral Votes is still required for one to be elected President or Vice President. As in the case before the 12th Amendment, when nobody has a majority, the House of Representatives, voting by States and with the same **quorum** requirements as under the original procedure, chooses a President. The 12th Amendment requires the House of Representatives to choose from the three highest receivers of Electoral Votes, rather than the top five as was the process under Article II, Section 1, Clause 3.

The Senate chooses the Vice President if no candidate receives a majority of Electoral Votes. The 12th Amendment requires a quorum of two-thirds for balloting.

### **Terms:**

**Collusion** - Conspire together.

**Electoral College** - A body of electors chosen by the voters in each State to elect the President and Vice President of the United States.

**Limited Government** - A government that acts within the limitations granted to it; a governmental system that is restrained by an enumerated list of authorities; a limited government is the essence of liberty.

**Quorum** - Minimum number of members of an assembly necessary to conduct the business of that group.

**Sectionalism** - Loyalty to the interests of one's own region or section of the country, rather than to the country as a whole; loyalty to a political agenda or ideology rather than to the country as a whole.

### **Questions for Discussion:**

1. Why did the States originally appoint electors, rather than the electors being elected directly by the popular vote by the public?
2. What lessons did the Election of 1800 provide?
3. Now that the presidential election is determined by party tickets, which ensures

### **Resources**

David McCollough, *John Adams*; New York: Simon and Schuster.  
(2002)

Edward J. Larson, *A Magnificent Catastrophe: The Tumultuous Election of 1800*; New York: Free Press (2007)

Joseph Andrews, *A Guide for Learning and Teaching The Declaration of Independence and The U.S. Constitution - Learning from the Original Texts Using Classical Learning Methods of the Founders*; San Marcos: The Center for Teaching the Constitution (2010).

Philip B. Kurland and Ralph Lerner, *The Founder's Constitution – Volume Five - Amendments I-XII*; Indianapolis: Liberty Fund (1987).

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