CHAPTER 1

AMERICAN CONSTITUTIONALISM

1. Constitutional Blueprint

This Chapter provides some background on the Constitution and the foundational principles of American constitutionalism. Read it for the "big picture." Constitutional analysis ought and does begin with the text. Every student and every interpreter of the Constitution is a documentarian. The complete Constitution appears in the back of this book. Always start with the text. But our study of constitutional law requires some appreciation for the historical and philosophical context of the Constitution.

American constitutionalism re-imagined the relationship between the government and the individual and codified the new social compact in a written document that is higher law. James Madison, known as the "Father of the Constitution," identified the central dilemma: how to empower the government sufficiently for its tasks and, at the same time, how to limit it from overreaching the individual. All of constitutional law—and all the rest of this book—is about how we attempt to resolve that 2dilemma. Madison described it most elegantly in *Federalist Paper No. 51*:

> It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

In 1776, the *Declaration of Independence* proclaimed, "Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes." In the *Articles of Confederation*, the original thirteen colonies had allied themselves in what they called a "perpetual union," ratified in 1781 to form a national government that was a loose confederation of member states. But, before long, prominent American leaders became convinced that the nation desperately needed a new charter. Their sense was that the national government simply was not equal to the tasks of nationhood and there was a fear that the state legislatures were going out of control. Americans were beset with grave worries that their hard-fought revolution would be for naught: that their country would come apart from within or be conquered from without. After a meeting in Annapolis 3in September 1786, reformers recommended a national convention and the states agreed. The Continental Congress responded in February 1787 by calling on the states to send delegates the following summer to a convention to be "held at Philadelphia for the sole and express purpose of revising the *Articles of Confederation*."

The delegates to the Constitutional Convention of 1787 quickly resolved to draft an entirely new constitution. Their "more perfect union"—as they described it in the Preamble—was designed to solve Madison's dilemma of self-government. They relied on structural mechanisms, a wonderful clockwork design of checks and balances, for protecting individual liberty while at the same time energizing the national government. They, at once, understood and mistrusted both human nature and power. They feared tyranny, especially the tyranny of the majority. They did not need to read George Orwell to appreciate that government power was the antithesis of individual liberty. They had lived under George III.

The constitutional blueprint of these political architects called for a foundation built upon the rule of law and republican theory. They would build a new national government to political specifications of limited government. They laid out a governmental structure arranged horizontally in separation of powers and vertically in federalism. It was on this elaborate structure that they depended for the protection of the individual against the seemingly historically-inevitable corruption of all forms of 4government into despotism. They intended their government to be just and lasting, an example to the world. They believed that it was up to their generation and their posterity to answer the historical question, as Alexander Hamilton put it in *Federalist Paper No. 1*, "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."

2. Rule of Law

"It is the proud boast of our democracy that we have 'a government of laws and not of men.' " *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). The rule of law is the fundamental principle that both the governed and the government are bound to follow and obey the law of the land. Belief in the rule of law is a way of imagining the relationship between the state and the individual.

This principle can be traced back to Aristotle and the writings of Cicero and followed through in *Magna Carta*. The Framers of the Constitution, classical scholars that they were, deemed this an essential tenet. In their writings leading up to the *Declaration of Independence*, revolutionists like Thomas Paine and John Adams insisted the rule of law was the *sine qua non* of self-government.

The Framers believed the rule of law was essential to a system of ordered liberty to guarantee 5social order and individual rights. If our relationships with each other and with the government are subject to a set of rules, rather than the mere whim of the individual, we are more likely to remain free individuals and less likely to suffer authoritarian tyranny or despotism from government. The rule of law thus obliges both the individual and the government to submit to the supremacy of the law.

The rule of law often finds expression in the power of judicial review (discussed in the next Chapter), *i.e.*, the idea that the will of the people—expressed in the Constitution—is superior to the will of the people's representatives in Congress or in the state legislatures—expressed in mere statutes. The Constitution is law and all three branches of the national government as well as all three branches of each state's government must adhere to the rule of law in the Constitution. *See* U.S. Const. art. VI (Supremacy Clause).

This principle also animates various constitutional provisions that disapprove of laws which are not of general applicability or laws which are not prospective, for example: the Due Process Clauses in the Fifth and Fourteenth Amendments, the Equal Protection Clause in the Fourteenth Amendment, and the prohibitions on bills of attainders and *ex post facto* laws and impairments of contracts in Article I, Section 10.

Just as the *Declaration of Independence* insisted that the King should be held accountable, so too the 6Constitution insists that Congress and the President are accountable to the rule of law:

> The essence of free Government is "leave to live by no man's leave, underneath the law"—to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. * * ** With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654–55 (1952) (Jackson, J., concurring).

3. Republican Form of Government

The story is told that at the end of the Constitutional Convention an onlooker asked 81 year-old patriarch Benjamin Franklin, "What have you given us?" "A republic," he replied, "if you can keep it." The foundational political philosophy of our Constitution is

republicanism. In their *Declaration of Independence*, the Framers already had rejected monarchy with its grandiose claims of the divine right of kings to rule over men. In a republic such as ours, popular sovereignty is the order of the day. Sovereignty—the ultimate measure of legitimacy in governmental power—resides in "We the People," *i.e.*, in the consent of the self-governed.

The Framers patented the convention as the proper mechanism for constitution-making. They 7drafted the Constitution in the Constitutional Convention of 1787 and held conventions in each of the states to ratify it in order to legitimatize the Constitution with popular sovereignty.

However, ours is not a pure democracy, like the democracies in ancient Athens or in a New England town meeting, where every person has a say and a vote on every decision, even down to such details as whether to build a road. In a republic, our laws are made by our representatives, hence the term "representative democracy." Popularly-elected officials serve for specified limited terms and must stand for regularly-scheduled elections. The history of the franchise in the United States has been to broaden participation, more accurately, to undo historical discriminations based on class, wealth, race, and gender. There is a decided emphasis on majority rule, but the majority rules within prescribed limits that respect political minorities and protect individual rights.

That is the kind of national government the Framers carefully designed in the Constitution. They went on to guarantee a republican form of government in the states, as well. U.S. Const. art. IV, § 4.

The ideals of civic republicanism contemplate an informed, active, and involved citizenry—individuals possessed of the qualities of integrity, political good faith, and civic virtue—always striving with high-minded purpose to pursue the common good. These ideals emphasize the centrality of individual 8First Amendment rights in the process of self-government and the importance of accessibility and equality in participatory politics. Good government is not just a means to an end; it is also an end in and of itself.

4. Limited Government and Enumerated Powers

In our form of limited national government, the appropriate governmental goals or objectives are specifically enumerated. For example, Article I, Section 8 lists the powers of the Congress in some detail, adding at the end the Necessary and Proper Clause, sometimes called the Sweeping Clause or the Elastic Clause, "To make all laws necessary and proper for carrying into Execution the foregoing Powers * * *." *See* Chapter 5 , § 3 (Implied Federal Powers). How the government may decide what goals to pursue and how it will pursue them is thus prescribed in advance. Each of the first three Articles of the Constitution outlines procedures for the three branches of government, the legislative, the executive, and the judicial, respectively. Finally, the manner in which the government may pursue those objectives is limited by guarantees of individual liberty to be found in various places in the text, especially in the Bill of Rights.

It is not a digression, however, to emphasize that individual rights are not "granted" by the Constitution. Read the First Amendment, for example. Congress is expressly forbidden from abridging "the 9freedom of speech," a freedom that is assumed to preexist the Constitution and to be inviolate. The constitutional understanding, carried forward from the *Declaration of Independence*, is that freedom and liberty are the inalienable birthrights of all humankind.

The Framers' ultimate goal was to energize the national government to allow the United States to take its rightful place among the nations of the world and, at the same time, to preserve and protect individual civil rights and civil liberties.

5. Separation of Powers

The separation of powers depends on the insight from history that a people who depend on governmental self-restraint to protect their liberty will come to regret their political naiveté. In *Federalist Paper No. 48*, Madison lauded the way the Constitution would "guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." He invoked the "oracle" of separated powers, 18th-century French political philosopher Baron Montesquieu, to justify and defend the system of having three separate branches of government "connected and blended" to ensure that each has some "constitutional control over the others." Bicameralism, dividing the legislature into two houses, was added to ensure greater deliberation and to protect against the mischiefs of popular government.

But your seventh grade civics class description—"the Legislative Branch makes laws, the Executive Branch enforces the laws, and the Judicial Branch interprets the laws"—is neither complete nor fully accurate. Our separation of powers is much more complicated and sophisticated. *See* Chapter 6 (Structure of the Constitution). Functions are shared. Powers are blended. Consider two examples. Congress may pass a bill and then the President may veto it, but then Congress may override the veto by a two-thirds vote. A law duly passed by Congress and signed into law by the President may be declared unconstitutional by the Supreme Court, but then Congress and the states may override the High Court with an amendment to the Constitution.

6. Federalism

Like separation of powers, the principle of federalism is not found in so many words in the text but nonetheless is a basic feature of the constitutional structure. *See* Chapter 6 (Structure of the Constitution). Even though today we take it for granted, we should be reminded that the concept that two sovereign governments could somehow occupy the same territory and govern the same people at the same time was an invention of our 18th-century political philosophers. Back then it was a novel experiment, a way of organizing government that many critics at that time believed could not work in theory and would not work in practice. "The Framers split the 11atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

The great powers of nationhood—waging war and making peace, taxing and spending for the general welfare—were assigned to the national government. But many important powers and everyday governmental responsibilities were left to the states. Although the Framers disagreed among themselves and many were uncertain about this division between the national and the state governments, they all fully expected that there would be conflicts over sovereignty and power. Disputes over federalism have figured in critical episodes of our constitutional history, beginning at the Constitutional Convention and continuing to the present day. Indeed, a profound disagreement over federalism principles contributed greatly to the worst cataclysm in our constitutional history, the Civil War. The Supreme Court's epithet for that crisis was penned three years after the peace of the Appomattox courthouse by Chief Justice Chase: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

Today federalism rhetoric often is used like red, white, and blue bunting to hide baser political motives. Federalism philosophy, as originally understood by the founding generation, contemplated two 12distinct spheres of exclusive powers, one national and the other state. Each respective government would operate without interference from the other and each would respect the other's sovereignty. History trumps philosophy, however, and federalism today has come to be understood as encompassing the myriad of interrelationships and cooperations between the national and state governments. Since President Franklin D. Roosevelt and his Congress and his Supreme Court reconfigured the constitutional landscape during the 1930s, governmental power has flowed from the state capitals to

Washington, D.C., as a river flows to the sea.

Though some national politicians, obese with power, today sing the end of federalism, the constitutional opera is not over so long as the states continue to play their role. The science of government is the science of experimentation. In his day, Justice Louis D. Brandeis was fond of observing, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In many areas of public policy, this is still true today. Debates in Congress in the present day still reverberate with arguments that the states can do some things better than Washington. The Justices continue to wage a war of words over questions of federalism, in closely-divided rulings and turgidly-reasoned opinions.

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7. Legislative Power

On the 150th anniversary of the first Congress, Chief Justice Charles Evans Hughes began his address to the assembly by saying, “Here in this body we find the living exponents of the principle of representative government—not government by direct mass action but by representation which means leadership as well as responsiveness and accountability.” Congress is a constitutional creation designed to be responsive to the people, but like the other branches, Congress cannot go beyond the Constitution, even in the name of the people. The legislative Article starts off by saying as much: “All legislative Powers herein granted [read in the words: ‘and no other powers’] shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives.” U.S. Const. art. I, § 1. *See* Chapter 6, § 9 (Separation of Powers–Legislative).

The very idea of “legislative power” is a relatively modern concept in history. The medieval notion was that all authority was attributable to God, nature, or custom and that human institutions merely discovered and enforced the preexisting will. Part of the Enlightenment rethinking of mankind’s place in the universe was that laws were made, not found, and their meaning was derived from the will of the lawmakers.

During the founding period, however, this very concept of sovereignty was redefined and relocated. Under the British constitution, familiar to the 14Framers, sovereignty was defined as the will of the parliament in assembly. This notion was carried over in the early experiences of the states, whose legislatures took it upon themselves to write and ratify state constitutions upon becoming independent of the mother country. The Federalists, who favored adoption of the proposed Constitution, were obliged to rethink these assumptions in order to legitimatize a truly national government possessed of its own sovereign powers, independent from and supreme over state sovereignty. They came to believe that the ultimate sovereignty in a republic flowed directly from the people. The people surrendered portions of their ultimate sovereignty directly to the United States in bundled powers and to the state governments in an omnibus sovereign police power, respectively. What remained beyond the people’s delegations to their governments defined the inalienable freedoms and liberties of the individual.

Thus, the legitimacy of the Constitution and the national government it created did not, in any way, depend on the states or the state legislatures. Once ratified, the Constitution became “the supreme Law of the Land,” U.S. Const. art. VI, § 2, and the powers of the national government, within their proper spheres, were superior to the powers of the states. This explains the full import and significance of the Preamble’s beginning invocation of “We the People.” It also explains the hue and cry raised about that wording by the Antifederalists, who placed their loyalty to their own state first and 15foremost and who therefore opposed the Constitution.

These foundational principles of popular sovereignty were nowhere more obvious or more important than in Article I. Early in the Constitutional Convention, James Wilson, a delegate who would later serve as a Supreme Court Justice, described the basic dichotomy that “there are only two kinds of bad governments—the one which does too much and is therefore oppressive, and the other which does too little and is therefore too weak.”

The *Articles of Confederation* generally were considered to be the weak variety of bad government, and the delegates believed it imperative that the new national government would be equal to the necessary tasks of government, something they were convinced was not possible without a radical restructuring. This was the period historians have labeled “the critical period in American history.” Many of the Framers, Federalists and Antifederalists alike, believed that their generation faced a turning point in history, that in a world of monarchy their political trial was the last best hope for republican self-government.

At the same time, there was a great anxiety abroad in the land, especially among those who served in the national government, that the state legislatures were devolving into bad governments of the other kind Wilson mentioned, governments that did too much and thus were oppressive and guilty of democratic excesses. Many modern historians believe 16that the Framers of the Constitution were primarily motivated to empower the national government in order to restrain the states from doing too much. These “small-r” republicans—like James Madison who had served in the Virginia legislature—were appalled at what we might call today the interest group politics and self-dealings practiced in the state houses, for example, debt-forgiveness statutes enacted at the behest of debtors against creditors. In their minds, legislators were supposed to be statesmen who should resist factional politics and rule with civic virtue for the common good.

The more-nationalistic Federalists believed that a natural elite would rise to positions of national leadership, especially in the Congress of the United States, so that was where the greatest political powers ought to be located. At least, it would be more difficult, if not impossible, for any single faction to capture the national legislature, because there would be so many factions as to cancel each other out in the competition for influence. Madison concluded *Federalist Paper No. 10*, his treatise on the inevitability of political factions and the vagaries of human nature, with a warranty that “the influence of factious leaders may kindle a flame within their particular states but will be unable to spread a general conflagration * * *.” The real power to govern would be placed beyond the reach of the less worthy, those of parochial rather than continental vision.

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The legislative Article establishes the structure and the general manner of proceedings of the Congress. The accepted principle of bicameralism afforded one more check on government power; under the terms of the so-called “Great Compromise” between the large and small states, the two houses would have different characters. Seats in the House of Representatives were apportioned among the states on the basis of population and filled by popular elections every two years by voters qualified under state election rules. Each state legislature would choose two Senators for staggered six year terms; in 1913, the Seventeenth Amendment would make them popularly-elected. Other prescribed procedures include: eligibility requirements for members; meeting requirements; quorum requirements; provision of an oath; authority to supervise the behavior of members; requirement of an official journal; designations for presiding officers; and establishment of general lawmaking procedures, including how to override an executive veto.

The great traditional powers of government, consistent with the separation of executive powers, are to be found in Article I, Section 8: to lay and collect taxes, to spend for the general welfare, to borrow money, to regulate commerce, to regulate immigration and naturalization, to regulate bankruptcy, to coin money, to fix standards of weights and measures, to regulate the mail, to regulate patents and copyrights, to establish federal courts, to define crimes, to declare war, to raise and support military forces, to regulate the militia, and to perform several 18other particular powers. To be sure, there are other clauses in the first Article, dealing with subjects like

habeas corpus, *ex post facto* laws, and bills of attainder, that restrain the Congress. But it was intended that the Congress would wield the great powers of government as the United States began to take its place among the nations of the world.

Perhaps the most expansive power the Constitution vests in Congress—or in any other branch for that matter—is the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18. There are similar provisions in the Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty–Fourth, and Twenty–Sixth Amendments.

Nevertheless, a written constitution, by its very nature, is a limited constitution. Article VI specifically obliges Senators and Representatives to be "bound by Oath or Affirmation, to support this Constitution." This is why President Franklin D. Roosevelt was constitutionally-misguided, in an infamous 1935 incident, to lobby members of Congress to support a bill by urging:

> Manifestly, no one is in a position to give assurance that the proposed act will withstand constitutional tests. But the situation is so urgent and the benefits of the legislation so evident that all doubts should be resolved in favor of the bill, 19leaving to the courts, in an orderly fashion, the ultimate question of constitutionality.

The President was acting improperly to ask the members of Congress to ignore the oath he and they had sworn. Under our Constitution, political ends do not justify unconstitutional means.

On the other hand, some constitutionalists have expressed concern that the pendulum of judicial review has at times swung too far toward distrust of legislative judgments, because legislatures may be becoming accustomed to judicial supervision and more and more readily inclined to ignore their sworn responsibility to follow the Constitution in the pursuit of politically expedient policies. Equally problematic, in terms of the first principle of limited and enumerated powers, is the legislative hubris that Congress can do whatever it likes, so long as the Constitution does not expressly forbid something. In our federalism, the states, not the Congress, are possessed with a sovereign police power to legislate for the general welfare. Members always need to be mindful that the Constitution speaks directly to Congress.

To recognize that Congress is obliged to make judgments about the meaning of the Constitution, however, is not to suggest a congressional supremacy in the interpretative function. Historically, there have been episodic claims of legislative supremacy. Early on, the Jeffersonians brooded over the idea. During the Reconstruction Congress, Radical Republicans moved in the direction of asserting hegemony 20over the other branches by impeaching President Johnson and by restricting the jurisdiction of the Supreme Court. But it is a basic tenet of constitutionalism that legislatures simply cannot have the final word. Alexander Hamilton explained in *Federalist Paper No. 78*, "It is not otherwise to be supposed that the Constitution could intend the representatives of the people to substitute their *will* to that of their constituents." Nonetheless, the Congress necessarily shares the responsibility to maintain our constitutional order. Political scientists refer to this theory and practical reality as "coordinate construction." We will leave it to the historians to decide whether the Congress or the Supreme Court has had the better record of being true to the Constitution.

8. Executive Power

The delegates to the Constitutional Convention were deeply persuaded of the importance of crafting a strong Executive. Drawing on lessons from the classical education they all shared, Alexander Hamilton articulated this principle of American constitutionalism in *Federalist Paper No. 70*:

> Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community from foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary 21course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasion of external enemies who menaced the conquest and destruction of Rome.

George Washington, like Cincinnatus in ancient Rome, was expected to come to the rescue of the Republic and then could be trusted to surrender power and return to his plow. Indeed, Washington's character and performance in office did more than the Constitution itself to establish the office of President as the republican opposite of a Caesar. For all subsequent generations the constitutional worry has been how to prevent the potential evils two eminent contemporary scholars of the Presidency, Clinton Rossiter and Arthur Schlesinger, described in their book-length critiques of presidential behavior, titled respectively CONSTITUTIONAL DICTATORSHIP (1948) and THE IMPERIAL PRESIDENCY (1973).

The delegates debated the executive Article more than any other topic, and that debate has yet to be concluded. They rejected a plural arrangement of ministers in favor of a unitary chief executive. They compromised on the manner of selection by creating 22the electoral college, which may get the prize for their most Byzantine invention. They settled on four-year terms and an open-ended tenure, though George Washington's tradition of two terms stood until Franklin D. Roosevelt broke it, only to be restored formally with the Twenty–Second Amendment (1951). They situated the Presidency within the system of checks and balances with interactive provisions such as the power of the veto, the treaty making power, the power of appointments, and the power of commander-in-chief.

The Framers sought to ensure energy in the national government through its chief executor of the laws. Indeed, the office was a central feature of their nationalism project. They sought to empower the President against the Congress, which they feared was the most dangerous branch given its patent of powers. At the same time, they sought to make the chief executive accountable to the people. In the process, they rejected, once and for all, the form of executive that was predominant in their time, hereditary monarchy. The office they created in place of a king completely captured the imagination of succeeding generations here and abroad. Republics around the world have adopted the office of president for their executive branch at least in part because of the constitutional experience of the United States. At the same time, it has not been uncommon for notorious dictators to appropriate the title President in an attempt to legitimate themselves, much like the German and Russian 23monarchs called themselves "Kaiser" and "Czar" to appropriate the image of "Caesar."

Fast forward 200 years and consider what the modern American Presidency has become at the turn of the Millennium. Some contemporary constitutionalists have concluded that the Constitution has become an anachronism, that politics and power have overtaken the 18th-century republican design. They insist that presidential powers have become enormous and amorphous while the checks and balances have become evanescent.

Even if one is not persuaded with this verdict of history, there is no arguing with the premises that the President wields great, yet still largely undefined, powers and that the other two branches, especially the Supreme Court, have contributed to the aggrandizement of powers in the modern Executive. Supreme Court Justice Robert H. Jackson once quoted Napoleon's maxim as if to shrug this off, "The tools belong to the man who can use them."

Historically and philosophically, there have been two competing approaches to understanding the import of Article II. The fundamental point of disagreement between the two competing views of the Presidency is how to understand the first sentence of Article II, which reads simply: "The Executive Power shall be vested in a President of the United States of America." *See* Chapter 6, § 10 (Separation of Powers–Executive).

Is this first sentence simply a designation of the office as the locus which is assigned the powers 24listed in Article II, but only those powers specifically enumerated and no others? Or is everything that follows in the Executive Article surplusage because the first sentence itself is a grant of all imaginable plenary powers of an omnipotent executive, so that the clauses that follow are merely illustrative examples, not an exhaustive list, of Presidential powers? What does the Constitution ultimately contemplate: a President with powers that are limited and enumerated, like the Congress's, or a President with open-ended powers that are equal to unforeseen threats, foreign and domestic, more akin to the powers acceded to the Roman dictators? Among the Framers, James Madison took the narrow view and Alexander Hamilton took the broad view of the Executive's power.

This is one time when a close reading of the text cannot resolve the debate. Indeed, adherents of both views of presidential powers invoke the text. Those who take the broad view point out that the first sentence in Article II does not contain the limiting reference to "the powers herein granted," unlike the first sentence in the legislative article, Article I. Those who take the narrow view point out that Article II does not contain an expansive "necessary and proper" clause, like the one found in the list of legislative powers in Article I, Section 8, clause 18.

Presidents themselves have debated this issue in terms of their own incumbency. Theodore Roosevelt took the view that the Executive power was limited only by specific restrictions and prohibitions appearing 25in the Constitution or congressionally-enacted statutes. His successor, William Howard Taft, who served as President and Chief Justice, took the opposite view that a President can exercise no power unless it is fairly and reasonably based on a specific grant of power in Article II. Taft's narrow understanding may have been the original understanding of the 18th-century Framers themselves, but Roosevelt's broad understanding is more accurate and necessarily realistic for today's Presidents.

It can be observed without fear of contradiction that the Presidency has evolved along with historical changes in the dominant role of the United States in world affairs and in the pervasive role of the national government in domestic matters. Both roles were far simpler and much more modest back in 1789, as was the institution of the Presidency, when George Washington took the first oath of office.

9. Judicial Power

In the United States, we take federal courts for granted. But other modern countries with federal systems do not have two complete sets of federal and state courts coexisting alongside one another, as we do. Instead, other countries typically have trial courts that are all state courts and the only federal courts they have are appellate courts. It is a little-remembered fact that the United States came close to adopting this model.

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The debate at the Constitutional Convention of 1787 over the judiciary was protracted and intense. The arguments went back and forth, without much prospect for compromise. Things got so heated that at one point the delegates voted to strike a provision they had tentatively agreed upon, and instead they voted to eliminate any and all mention of a national Judicial Branch in the new Constitution. The argument was that the existing courts in the states were equal to the judicial tasks of the nation and, therefore, all that was needed was to provide for appeals from the state courts to a supreme national court. After a great deal more parliamentary wrangling, another version of compromise was reached, however, which yielded what we know as Article III. There would be one Supreme Court. Congress was authorized—but not required—to "ordain and establish" a separate and independent system of federal courts, separate from the state courts and independent from the other two branches of the federal government. U.S. Const. art. III, § 1. *See* Chapter 6, § 11 (Separation of Powers–Judicial).

The delegates' hard-fought compromise continued to be the subject of high and full controversy in the subsequent ratification debates in the states. Five entire issues of *The Federalist Papers, Nos. 78–82*, were devoted to defending the idea of a separate and independent federal judiciary, with considerable political passion, against the sustained attacks of the Antifederalists. Federalists insisted that the lack of a federal judiciary was a serious deficiency in 27the *Articles of Confederation* and they portrayed the proposed federal courts as guardians of civil liberties.

For their part, Antifederalists mistrusted all three heads of the federal Leviathan. They felt especially threatened by the congressional power to create a new federal judiciary because they believed federal courts would aggrandize power toward the central government and away from the state sovereigns, all to the eventual detriment of individual rights. At the same time, they argued that the lack of a written bill of rights was reason enough to oppose the proposed Constitution. In the end, the Federalists prevailed. The Constitution was ratified, though barely and by close margins in several key states: Massachusetts 187–168; Virginia 89–79; and New York 30–27. Thus, from the beginning, the Article III judiciary and civil liberties have been linked together fundamentally and inextricably in high political controversy.

One of the transcendent achievements of the first Congress assembled under the newly-ratified Constitution was to enact the Judiciary Act of 1789, a statute which has come to be considered a great law because, once and for all, it established the tradition of a separate and independent system of federal courts. Act of Sept. 24, 1789, 1 Stat. 73. But the role those courts would play within the separation of powers and in our federalism was left to be determined by constitutional experience. History and tradition have elaborated on the Delphic generality of Article III. The federal courts themselves, especially 28the Supreme Court, have done a great deal to shape this history and tradition by annotating the sparse language of Article III with an extensive body of case law and elaborate opinions.

The Supreme Court of the United States, of course, has been from the beginning and remains the most important as well as the most controversial federal court. Justice Oliver Wendell Holmes, Jr., aptly remarked, "We are very quiet there but it is the quiet of a storm centre."

The Supreme Court is the only court created directly by the Constitution. It has supervisory and appellate jurisdiction over the lower federal courts and reviews cases involving federal issues from the highest courts of the states. It is composed of nine Justices—although the number of justices has been changed no fewer than seven times by congressional statutes and has varied between five and ten members—who are appointed by the President, with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2.

Members of the Supreme Court are as independent as the lot of humanity will allow. Justices serve "during good behaviour," effectively until they retire or die, and they are protected against having their salaries diminished while they serve. U.S. Const. art. III, § 1. The House of Representatives can impeach and the Senate can remove a Justice upon conviction of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. I, §§ 2 & 3, art. II, § 4. Early in our history, 29however, impeachment became what Thomas Jefferson called "a mere scarecrow." It would be unthinkable today for Congress to impeach and remove a Justice based on some ruling or a judicial opinion.

The Framers' expectation was to create a federal judiciary that was independent, but neither too much nor too long at odds with popular sovereignty. Historically, predicting what specific issues will come before the Court has been impossible, except in the short term, and then only in the most general terms. Furthermore, predicting how any individual jurist will interpret the Constitution over the course of lifetime tenure is highly problematic. Nevertheless, Presidents and Senators engage in such political-branch forecasting each time a vacancy occurs and the nomination and confirmation process is the primary external restraint on the Supreme Court.

Confirmation battles between a President of one party and a Senate majority of the other party too recent to be called history have

shed more heat than light on what is at stake for the Constitution. There are no constitutional rules beyond James Madison's mechanism of "ambition checking ambition." *Federalist Paper No. 51*.

A President can nominate a person for the Supreme Court for good reason or for bad reason or for no reason at all. The Constitution is completely silent on qualifications. Merit is almost always the announced criterion, of course, although other reasons that have been invoked over the years have 30included political and personal patronage, geography, race, religion, and gender. For periods in its history, particular chairs have been temporarily designated, such as "the Jewish (or Catholic) seat" or "the African–American (or Woman's) seat," but these appellations are by and large newspaper constructions. For the most part, a President wants a justice who will be faithful to the President's views about the Constitution on the issues the President deems politically important. And, for the most part, Presidential sponsors have been pleased by their judicial protégées.

The Senators can confirm or reject for any of the same reasons that a President chooses a nominee. In a controversial nomination battle between the President and the upper chamber, the Senators usually end up bowing to the will of their constituencies, more so now that the proceedings are televised. This is high stakes politics, but politics nonetheless. In the constitutional long run, nomination and confirmation shape the Supreme Court as an institution in the image and likeness, not of the 18th-century Framers, but of "ourselves and our posterity."

From the beginning down to modern times, Americans have singled out particularly controversial decisions—on such divisive issues as racial remedies, the death penalty, abortion, and the contested Presidential election of 2000—but for the most part, Americans consistently have maintained their confidence in the Supreme Court as an institution of government. Over the 200–plus year history of the 31Constitution, "We the People" seem to have been arguing about its meaning the entire time. The Supreme Court, like a republican schoolmaster, has presided over that debate.

The role of the Supreme Court in our constitutional regime is at once profound and subtle, and as difficult to understand as it is impossible to overstate. Alexis De Tocqueville understood:

> The peace, prosperity, and the very existence of the Union rest continually in the hands of these [nine] judges. Without them the Constitution would be dead letter; it is to them that the executive appeals to resist the encroachments of the legislative body, the legislature to defend itself against the assaults of the executive, the Union to make the states obey it, the States to rebuff the exaggerated pretensions of the Union, public interest against private interest, the spirit of conservation against democratic instability. Their power is immense, but it is power springing from opinion. They are all-powerful so long as the people continue to obey the law; they can do nothing when they scorn it. Now, of all powers, that of opinion is the hardest to use, for it is impossible to say exactly where its limits come. Often it is as dangerous to lag behind as to outstrip it.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 150 (J.P. Mayer, ed. 1969).

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10. Individual Rights

The Constitution of the United States has been described as one of the greatest achievements of political philosophy. The underlying philosophy of American constitutionalism is the philosophy of individual rights. *See* Chapter 4 (Constitutional Liberty).

The subject of individual rights takes us back to the Madisonian dilemma, which was introduced earlier in this Chapter. There is, at bottom, a fundamental contradiction in liberal political theory. "Liberal," of course, refers to the political traditions of western democracies and includes Federalists and Antifederalists, Democrats and Republicans, liberals and conservatives. The fundamental contradiction is that the justification of the state, ultimately, is to provide the legal force necessary to protect all individual rights, including basic rights in property as well as political and civil rights. Thus, liberal political theory calls the state into existence, and the citizen needs the state to protect individual rights. The state, at the same time, represents the greatest threat to the realization and enjoyment of our rights.

How is it possible to make government more powerful without making those subject to its authority less free? This is the fundamental paradox at the bottom of all constitutional analysis—the irreducible question of American constitutionalism. This paradox explains, in large part, how and why constitutional law issues are so open-ended, forever 33being reconsidered and reargued, never being fully and finally settled. The relationship between individual liberty and government power, by theoretical and practical necessity, is subtle and complex and is constantly evolving. Internalizing this paradox will go a long way towards mastering constitutional analysis.

Liberalism, with its primary emphasis on the individual, is the ideology of rights, of capitalism, and of the limited state. It is at the opposite end of the ideological spectrum from communitarianism, which is the ideology of relatedness, of social solidarity, of an activist state with an emphasis on the collective. The United States always has been a country of rights. Lockean or liberal constitutionalism posits a sphere of individual liberty, guaranteed by property rights writ large, with a fixed government constituted by majority consent. A liberal constitutional government is representative, responsible, and limited, and its great powers are separated among coordinate branches. It is maintained by a perpetual threat of popular revolution, at least in theory. In practice, the consent of the governed is expressed in regular elections participated in by an enfranchised citizenry. "Here the people rule," remarked Gerald Ford, upon taking the oath of office as President.

Indeed, the idea of rights was part of the United States even before there was a Constitution. In the beginning, there was the dramatic invocation of unalienable rights in the *Declaration of Independence*, based on the belief that the governed could 34withdraw or withhold their consent from government: "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." Though this familiar declaration is now more than two centuries old, it was a quite radical departure in its day. The English constitution, by comparison, had been limited only by the rule of law and by established procedures as were to be found in *Magna Carta*. English constitutional history, the legal history of the colonists, could not imagine any limits in principle on the purposes of government. No one in the 18th century could even imagine a British version of the First Amendment—"Parliament shall make no law * * *." Americans would be different. We would have a written Constitution and then a written Bill of Rights. With those formative documents our liberal American constitutionalism became forever rights-centered.

We need only compare the nearly contemporaneous revolution in France to understand the uniqueness of this development in its time. The French people followed Rousseau toward more equality and fraternity than liberty; these values were expressed in the general will of the community; but importantly there were no individual "rights" against the general will. The people in the French republic, as in England, enjoyed rights only by laws, by legislative grace, because only the Parliament spoke for the general will. Our *Declaration* insisted otherwise. 35Our political creed was based on the fundamental tenet that certain rights were inherent in human nature, that individual human dignity did not depend on government authority and was superior to it. While *Magna Carta* granted rights, our Constitution grants no rights, not because we do not value individual rights, but because our understanding is that liberty is not a matter of governmental grace.

The Framers' first line of defense of individual rights was to be found in the structure of their government. Government power always and everywhere was to be mistrusted; it had to be divided to be limited. Federalism principles divided power vertically between the

states and the national government. Separation of powers divided power horizontally within the national government. The most powerful branch, the Legislative Branch, was further subdivided by bicameralism. Their system of checks and balances was designed with all the complexity of the inner workings of a clock. Their purpose was to prevent government power from becoming concentrated in one institution that would then lord over individual liberty.

The new national government would be limited to enumerated powers and necessary and proper powers, no less nor no more. The Framers sought to empower the government sufficiently for its essential tasks and, at the same time to prevent it from overreaching the individual. Thus, the Constitution, as originally intended and understood, was arranged in its entirety to protect the individual. This is why the delegates did not take long to consider 36and reject a proposal to add a bill of rights—suggested almost as an afterthought near the end of the Constitutional Convention—by a unanimous 10–0 state vote. It was not that the delegates were opposed to a bill of rights. Rather they deemed one basically unnecessary. For Federalists like Alexander Hamilton, "the Constitution is itself, in every rational sense, and to every useful purpose, a bill of rights." *The Federalist Paper No. 84*. He concluded, "For why declare that things shall not be done which there is no power to do?" There was no need to elaborate further and state what the national government could *not* do, in the first place because it could only do what it was expressly empowered to do, and in the second place because of the peril that any list of rights might be incomplete and overlook some freedom or fail to anticipate some essential liberty.

Federalists' protestations notwithstanding, it soon became apparent that the lack of a bill of rights, like the ones to be found in the contemporary state constitutions, was a serious flaw in the proposed Constitution. Virginia's George Mason refused to sign the Constitution for this reason. Thomas Jefferson chastised his friend James Madison for leaving out a bill of rights. In the ratifying conventions in state after state, Antifederalists raised the alarm for individual liberties. For a time, it looked like the Federalists had made a serious political miscalculation. Antifederalist opponents of the proposed Constitution were prominent and influential and their attacks on the Constitution 37gained momentum. It was only after Federalist leaders, Madison included, pledged to add a bill of rights immediately upon ratification that the proposed Constitution garnered the necessary support and then only by slim margins in several key state conventions.

One of James Madison's claims to fame as a statesman of the highest integrity is that he kept his campaign promise to sponsor a national bill of rights. After defeating the Antifederalist candidate James Monroe, one of the first things Madison did as a member of the House of Representatives was to sponsor a set of constitutional amendments. In a speech on June 8, 1789, he pledged: "I shall proceed to bring the amendments before you and advocate them until they shall be finally adopted or rejected." He continued, "this House is bound by every motive of prudence, not to let the first session pass over without proposing to the State legislatures some things to be incorporated into the Constitution, that will render it acceptable to the whole people of the United States." He explained his belief that most of those who had opposed the Constitution "disliked it because it did not contain effectual provisions against encroachments on particular rights." The newly-elected President, George Washington, who had presided at the Convention and then lent his critical support to the proposed Constitution, had himself made note of the fact of the widespread demand for a bill of rights in his first official message to Congress. Now, Madison insisted, it was up to the Congress under Article V 38"to provide those securities for liberty and expressly declare the great rights of mankind secured under this constitution." Madison deserves credit for being the prime mover behind the proposed bill of rights. He framed it and he shepherded it through the Congress. Madison's influence also was felt when his own Virginia was the necessary eleventh state to ratify on December 15, 1791, making the Bill of Rights part of the Constitution.

In the grand scheme of American constitutionalism, the Bill of Rights has amounted to much more than a mere parchment barrier to the majority will—in large part owing to an ever vigilant and independent federal judiciary. Each guarantee represents a hard fought victory for human dignity and individual integrity in the centuries-old struggle between the individual and government. More than any other part of the Constitution, the Bill of Rights is deeply ingrained in our people's collective consciousness, as a cherished part of our political heritage. More than any other branch, the Article III Judicial Branch has performed as the guardian of our civil rights and civil liberties.

However, there was one not-so-small constitutional difficulty that had to be overcome to realize the full potential of the Bill of Rights. This was a consequence of federalism. The Constitution of the United States, after all, is a national document which, for the most part, establishes the terms of the social compact between citizens and the national government. Consequently, there was no room for disagreement or dispute when Chief Justice 39Marshall and a unanimous Supreme Court ruled in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), that the provisions in the Bill of Rights were effective only against the national government and not the states. This was the original understanding, demonstrated by the text itself, as for example the First Amendment prohibition that "Congress shall make no law * * *." The national government was expressly bound by the Bill of Rights, but the states could have their way with individual liberties, subject only to state laws and state constitutions.

Historic later amendments and the Supreme Court's power of interpretation changed all this. The Fourteenth Amendment was ratified in 1868, in the aftermath of the constitutional paroxysm of the Civil War. Along with the Thirteenth Amendment, which abolished slavery and forever banished that witch of the 1787 christening, and the Fifteenth Amendment, which guaranteed the freedmen the franchise, the Fourteenth Amendment was addressed directly to the states. For the longest time, however, its constitutional potential went unrealized because the earliest Supreme Court interpretations of the Fourteenth Amendment were begrudgingly narrow. Tentatively at first, later more insistently during the Warren Court years (1953–69), in case after case the Supreme Court "interpreted" the guarantee of "liberty" in the Fourteenth Amendment Due Process Clause to include almost all of the particulars of the Bill of Rights. This development is known in constitutional circles as the "incorporation doctrine," because the formal 40conception is that the 1868 due process clause incorporated the particular 1791 Bill of Right protection and made it applicable to the states. The national and state governments today are both obliged to respect the same Bill of Rights guarantees, with few exceptions. That this process of incorporation is virtually complete and now almost taken for granted is demonstrated when Supreme Court Justices themselves lapse into the *lingua franca* and refer to a state having violated the First Amendment freedom of speech, for example, even though, technically speaking, the amendment being violated is the Fourteenth Amendment. *See* Chapter 3, § 4 (History of Constitutional Liberty).

Nothing is rooted more deeply in our constitutional culture and political tradition than the American creed of individual civil liberties and civil rights. The vocabulary of rights is the dominant dialectic of modern constitutional law. This has been true from the beginning. From the *Declaration of Independence* through the Bill of Rights and the Reconstruction Amendments, the debate has never been whether or not individuals hold rights against their government. That truth has been self-evident. The debate has been over the scope and content of rights, how the balance ought to be struck in particular situations, *i.e.*, determining where in a particular case the Constitution draws the line between government power and individual liberty.

In all this "rights talk," the Supreme Court must always be mindful of the Madisonian dilemma. Our Constitution demonstrates a profound bias against 41claims of absoluteness from either side, the individual or the government. It is the genius of American constitutionalism that neither government powers nor individual rights should ever be allowed to reach their logical extreme. Rights and powers coexist in balance and, properly understood, always in tension. Thus, the constitutional relationship between the individual and the government can be described as a zero-sum game. That is the *leitmotif* of this book, that is this NUTSHELL in a nutshell.

11. Amendments

Article V of the Constitution represents the Framers' best effort to reconcile the need for change with the desire for stability in government structures. In the words of James Madison, the amending procedures are designed to "guard equally against that extreme

facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults." *Federalist Paper No. 43*.

There are two procedural steps to amend the Constitution and two alternatives for each step, arranged in what Madison described as a process that is "partly federal, partly national." *Federalist Paper No. 39*. First, amendments may be proposed either by a two-thirds majority in both houses of Congress or by a special convention called at the request of two-thirds of the state legislatures. Second, amendments are ratified by three-fourths of the states, either by the existing state legislatures 42or by special state conventions, depending on which forum Congress designates. U.S. Const. art. V.

The amendment procedure was a deliberate compromise between those who feared that Congress would seek to increase its powers at the expense of the states and those who feared that the states would seek to truncate the powers of the federal government. Like so many other compromises at the Convention, the delegates resolved to align those competing jealousies in direct opposition in order to check and balance each other.

Thus, amending the Constitution was made difficult, but not impossible, in significant contrast to the predecessor constitution, the *Articles of Confederation*, which had required the unanimous consent of all the states for amendments. The Framers did not anticipate frequent or detailed amendments, however. Rather, regular lawmaking in the form of statutes would respond to economic, political, cultural, and moral developments in American society. They understood the Constitution to be a permanent and higher law intended to last for the ages.

Amending the Constitution is very much an exercise in representative democracy, another important responsibility of republican self-government. The whole responsibility for amendments is given over to the elected representatives of the people: the Congress in conjunction with the state legislatures. And it is a super-majoritarian arrangement. Thus, 34 Senators, or 146 Representatives, or any combination of 13 state legislative chambers are sufficient 43opposition to keep a proposed amendment from becoming part of the Constitution.

There is no explicit role for the Executive provided in the text of Article V; a President need not sign and cannot veto a congressional proposal. Of course, there is nothing to prevent the President from initiating or participating in the formation of public opinion supporting or opposing a proposal to amend the Constitution.

In numerous decisions, the Supreme Court has consistently ruled that Article V places the primary responsibility for amending the Constitution within the province of the Congress. The High Court has refused to play any role in the process of considering amendments, either substantively or procedurally. Such questions are left to the political branches. *See Coleman v. Miller*, 307 U.S. 433 (1939) (questions of the efficacy of state ratifications are for Congress). The judicial role begins once an amendment is ratified and becomes part of the law of the Constitution, which is the province and responsibility of the judiciary to interpret. There have been six amendments ratified to reverse various Supreme Court case holdings: Eleventh Amendment (1795); Thirteenth Amendment (1865): Fourteenth Amendment (1868); Fifteenth Amendment (1870); Sixteenth Amendment (1913); and Twenty–Sixth Amendment (1971).

By some estimates there have been more than 10,000 bills introduced in Congress to amend the Constitution. Of these, only 33 garnered the necessary 44two-thirds vote in both houses and proceeded to the states and only 27 have received the necessary ratifications of three-fourths of the states.

There has never been a convention for proposing amendments. All 27 amendments have been proposed by Congress, although in the 1980s as many as 32 states had at one time or another issued a variety of calls for a constitutional convention to consider an amendment to require a balanced budget for the federal government. All but one of the amendments have been ratified by the state legislatures. Only the Twenty–First Amendment—which repealed the Eighteenth Amendment's failed social experiment with Prohibition—was ratified by state conventions upon the stipulation of Congress.

It is significant that, ever since the initial historic precedent of the Bill of Rights in 1791, amendments have been added at the end of the document, rather than incorporated directly into the existing text that is being amended. This long-standing practice symbolizes the fact that an amendment is a separate and contemporaneous exercise in constitution-making and serves to remind us that it is *a constitution* we are amending. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshal, C.J.) ("[W]e must never forget, that it is *a constitution* we are expounding.")

Looking back at the history of American constitutionalism, we can see that amendments have been ratified in constellations shaped by the political issues and national priorities of four distinct eras in 45American history. Between 1789 and 1804, the "Anti-federalist" or "Jeffersonian" amendments were adopted. The first ten amendments, popularly known as the Bill of Rights (1791), secure the fundamental rights of the individual against the national government. The Eleventh Amendment (1795) prevents federal courts from entertaining lawsuits against the states. The Twelfth Amendment (1804) sought to solve the problems that occurred in the 1800 election between Thomas Jefferson and Aaron Burr.

The "Civil War Amendments," the Thirteenth, Fourteenth, and Fifteenth Amendments, were ratified during the Reconstruction era, in the years 1865, 1868, and 1870, respectively. Ratified in the aftermath of a cataclysm that shook the constitutional structure to its foundations, those majestic provisions ended slavery, enforced due process and equal protection against the states, and guaranteed the recently freedmen the right to vote.

The populist and progressive movements at the beginning of the 20th century yielded four ratifications: the federal income tax in the Sixteenth Amendment (1913); the direct election of Senators in the Seventeenth Amendment (1913); the national Prohibition in the Eighteenth Amendment (1919); and women's suffrage in the Nineteenth Amendment (1920).

The most recent spate of amendment ratifications revolved around federal election reforms: the Twenty–Second Amendment (1951) limited the President 46to two terms in office; the Twenty–Third Amendment (1961) awarded the District of Columbia three electoral votes in presidential elections; the Twenty–Fourth Amendment (1964) abolished the poll tax; the Twenty–Fifth Amendment (1967) established rules for presidential succession and disability; and the Twenty–Sixth Amendment (1971) lowered the voting age to eighteen.

Admittedly, this patterning is not perfect and a few amendments cannot be drawn into these four groupings: the Twentieth Amendment (1933) limited the lame duck session of Congress and the Twenty–First Amendment (1933) repealed prohibition. The Twenty–Seventh Amendment (1992) requires that any pay increase for members of Congress can go into effect only after an election. It was proposed by the first Congress as part of the original Bill of Rights and was all but forgotten for more than 200 years before it was dusted off and ratified by the requisite number of states—something that is not likely to happen again because the modern practice is for Congress to include a time limit, usually seven years, in proposed amendments.

Congress has voted to propose six amendments that have failed to be ratified by the requisite three-fourths of the states. An amendment proposed along with the Bill of Rights would have set a population limit for congressional districts which, given today's population, would have required more than 5,000 members in the House of Representatives. In the early 19th century, an amendment was proposed that would have automatically expatriated 47anyone who accepted a title or honor from any foreign government without the consent of Congress, a measure that would have played havoc with Nobel prize winners and knighted former Presidents. There was a desperate and futile effort on the eve of the Civil War to appease the Southern states by proposing to prohibit any future amendment that would eliminate slavery. As part of the progressive movement in the 1930s, a proposed amendment would have authorized Congress

to regulate child labor in the face of an unwilling Supreme Court, but the Justices eventually came around to finding the power in the Commerce Clause. In the 1970s, a Democrat-majority in Congress proposed to grant congressional representation to the District of Columbia, but the political reality that the measure would result in the election of at least three more Democrats to Congress was enough for Republicans to stall the measure in the statehouses.

The most important recent showdown over a proposed amendment was the ten years of debate whether to add an amendment for sex or gender equality, the Equal Rights Amendment. Congress proposed the ERA in 1972 with the usual seven year deadline for ratifications, then extended the period for three more years. After some early momentum, however, in the end only thirty-five states ratified the measure—three short of the number needed—and some states that had ratified the proposal went back to try to rescind their earlier ratifications.

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Opponents of the controversial measure warned that it would lead to co-ed bathrooms, women in combat, and the elimination of marital alimony in favor of no-fault divorce laws. It is interesting that their cultural predictions have come true despite the failure of the proposed amendment. In the years since, seven states have added equal rights amendments to their state constitutions and each year other states take up similar measures. And Supreme Court interpretations of the Equal Protection Clause in the Fourteenth Amendment have gone a long way toward achieving the constitutional change that was intended by the drafters of the ERA. *See United States v. Virginia*, 518 U.S. 515 (1996) (excluding women from a state military college did not satisfy the requirement of an exceedingly persuasive justification under the Equal Protection Clause). Still, women's rights organizations continue to press Congress to resubmit the ERA to the states to preserve political gains and to serve as an important symbol to the nation. But opponents continue to resist and worry that the measure could lead to a unisex society and gay marriages.

The amendments being debated at any given time usually include the most divisive political issues of the day. One side or the other, sometimes both sides of a contentious issue, often seeks to ratchet its point of view up to the next level of politics with the hope of constitutionalizing its policy preference once and for all. Frequently, proponents of constitutional amendments have been disappointed in the regular lawmaking process in Congress. They also 49regularly try to use Article V in attempts to trump controversial Supreme Court decisions with which they disagree.

Some critics complain that Congress seems to be suffering from a bad case of "amendmentitis"—an inappropriate willingness to rewrite the Constitution. A sampling of the amendments recently considered by Congress include proposals to: authorize Congress to prohibit and punish flag burning; authorize the President to exercise a line-item veto; require that federal judges be re-confirmed every ten years; abolish the electoral college to provide for the direct election of the President; establish term limits for members of Congress; and guarantee rights to victims of crimes. As with all things political, different people assign different value and importance to these various proposals to change the nation's fundamental law. Thus, the perceived wisdom—likewise the perceived folly—of a particular proposal to amend the Constitution often is in the eye of the beholder.

Some amendments go out of fashion while they are still under consideration, disappearing from popular concern. For example, the balanced budget amendment was in the headlines and looked close to passing Congress in the 1980s, partly as a consequence of pressure felt from the calls of thirty-two states for a constitutional convention to consider it. But when the burgeoning economy began to yield federal surpluses, the political pressure for passage lessened and the measure disappeared from view, at least temporarily. And by now the bills introduced 50annually over the last so many years to propose amendments to permit prayer in public schools or to outlaw school busing or to ban abortions have become more symbolic rituals than realistic efforts to change the Constitution. They amount to rallying cries for organizations on their side for purposes of direct mail fundraising and membership recruitment, but they are no longer perceived by the other side as a genuine political threat.

The experience with amending the Constitution illustrates an important feature of American constitutionalism. Ultimately, it is the Constitution that unites us as "We the People," thus only matters of a lasting national consensus fully deserve our constitutional allegiance. Everything else, from the mundane to the important, is merely politics. Just as all politics is said to be "local," all politics is temporary and always in play—always debatable and always subject to another vote. Most things Congress and the state legislatures do can be undone by the next election. That is to say that the people always can "vote the rascals out" and replace them with new legislators who can repeal the unwise or unwanted laws. Not so with constitutional amendments, they must be repealed by the arduous procedure of ratifying another amendment. Only one amendment has ever been repealed: Prohibition was ratified in 1919 and eventually repealed in 1933.

The reason that there have been only 27 amendments over more than 200 years is that constitutional amendments must have the sustained and 51one-sided support of great majorities in the Congress and across the states. Very few political issues ever garner that level of priority and support. Consider, for example, that by one account the political campaign to guarantee women the franchise took 72 years and included 56 state referenda campaigns, 480 state legislative campaigns, 47 state constitutional conventions, 277 state party conventions, 30 national party conventions, and 19 campaigns in successive Congresses before finally succeeding in 1920 with the ratification of the Nineteenth Amendment.

Most issues of public policy are too ephemeral or too closely contested to achieve and sustain the necessary super-majorities at the national and state levels. Such issues neither merit nor permit constitutional amendment. In American constitutionalism, this is how most issues in our democratic republic properly are left to ordinary politics—to simple and temporary majorities in the legislature—to determine and to change through the regular legislative process. The Constitution is a higher order of politics and properly-understood so too is constitution-amending. A measure that successfully runs the Article V gauntlet rightly belongs in the Constitution. Our experience with amending the Constitution demonstrates beyond peradventure that such measures are few and far between.

12. Conclusion

In the very first reported case decided by the Supreme Court upon the express authority of the 52Constitution, Justice James Wilson concluded, "Whoever considers, in a combined and comprehensive view, the general texture of the Constitution, will be satisfied, that the people of the United States intended to form themselves into a nation for national purposes." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 465 (1793) (Wilson, J., concurring). Thus was born the modern notion of nationhood.

American constitutionalism has been characterized, from the beginning, by republicanism, the separation of powers, federalism, the rule of law, and by majority rule along with minority rights. These are the foundational principles, the deep structure, of our system of government. The essential Constitution is this "scheme of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.).

In his greatest decision, the great Chief Justice John Marshall proclaimed, "A written constitution" was for its time "the greatest improvement on political institutions." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). By the law of the Constitution, Americans ordained and established, organized and coordinated, empowered and limited their government for themselves and their posterity. Every republic founded in the succeeding two centuries—the whole world over—has borrowed from their political principles, the fundamental principles that constitute a regime that Abraham Lincoln described as a "government of the people, by the people, and for the people."