Framed

AMERICA'S
FIFTY-ONE CONSTITUTIONS
AND THE
CRISIS OF GOVERNANCE

SANFORD LEVINSON

OXFORD
UNIVERSITY PRESS

1

Introduction

I. CONNECTING THE DOTS

This book is the result of many years of reflection. But it—especially the title—also is a response to contemporary American politics. The most basic question that can one can ask about any political system is whether it is capable of governing effectively, even if one recognizes that there will be different criteria of "effectiveness." As the manuscript moved toward publication, the Minnesota state government was shut down for three weeks because of the inability of its divided state government to reach agreement on a budget.[1] In 2009, a similar budget crisis in California led to the nation's largest state being unable to pay its public employees and other creditors for several weeks; instead they were offered the equivalent of IOUs. In 2012, the unwillingness of two Republicans in the California Assembly to support a plea by Democratic Governor Jerry Brown to allow a public referendum on retaining some taxes that were scheduled to expire led to what many regarded as the decimation of the once-vaunted public education system in that state.[2] (It takes two-thirds of the legislature to place an issue on the ballot, and "only" a majority of the legislature was willing to place the issue before the electorate.) In some ways even more dramatic, because it goes to the heart of what one ordinarily thinks of as a basic attribute of government, is the possibility that the civil justice system in San Francisco will be functionally shut down because of drastic cuts in the judiciary's budget.[3]

The U.S. government shut down briefly but notably in 1995, as the result of seemingly irreconcilable differences between then Speaker of the House Newt Gingrich and President Clinton. Another shutdown in December

2010 was averted only by an almost literally last-minute compromise between President Obama and Speaker of the House John Boehner. A shutdown almost occurred at the end of September 2011, and almost everyone expects similar episodes to recur prior to the 2012 election and, perhaps well afterward if, for example, President Obama is reelected and Republicans retain the majority in the House of Representatives and gain control of the Senate. But the major national political issue in the summer of 2011 was whether the United States would default on its debts because of congressional unwillingness to increase the national debt limit. Such default, it was widely (but not unanimously) agreed, would be calamitous for the American and—quite likely—the world economy.[4] This crisis, too, was averted at the last minute because of almost torturous compromises generated by a sufficiently bipartisan agreement that default would have unacceptable consequences.

This, however, did not prevent the decision by Standard & Poor's to downgrade American debt from AAA to AA status. Among the company's rationales for doing so was the following: "The downgrade reflects our view that the effectiveness, stability, and predictability of American policymaking and political institutions have weakened at a time of ongoing fiscal and economic challenges."[5]

The S&P analysis reflects the widespread view that the American political system has become profoundly dysfunctional. As the distinguished British writer Timothy Garton Ash wrote on August 3, 2011, "A couple of years back, it was still vaguely original to describe America's political system as dysfunctional. Now the word is on every commentator's lips."[6] Nor is this perception confined to elite commentators. One need only look at national polling data to realize the profound dissatisfaction that most Americans have with their government. Whether they are of the left, right, or center, they believe that there are unmet needs that our national and state institutions are failing to adequately confront, even if they disagree about what decisions should be made. A *New York Times* article on September 16, 2011, titled "Approval of Congress Matches Record Low,"[7] reported that only 12 percent of the American public indicated "approval" of Congress, a number reached earlier in August 2008. The week before a different poll had found a similar 12 percent approval rate while 87 percent disapproved, a full 75 percent difference.[8] Such numbers constitute

a "bipartisan" rejection of what in a democratic system of government must surely be the most important single institution, the elected legislature. Analyzing responses to a somewhat broader question, the Gallup organization reported on September 26, 2011, that "Americans Express Historic Negativity Toward U.S. Government," noting that 81 percent of those polled were "dissatisfied" with the way the country is being governed.[9] Perhaps most shocking was an August 2011 Rasmussen poll finding that only 17 percent of those surveyed said that the present national government actually possesses the consent of the governed.[10]

The Gallup organization reports that trust in America's basic institutions is at historic lows. The most trusted governmental institution is the military; over three-quarters of the public has a "great deal" or "quite a lot" of confidence in our armed forces. At the other end of the spectrum is Congress, about which only a total of 12 percent are willing to express confidence. Four times as many respondents—a full 48 percent—described their confidence level as "very little or none." The presidency as an institution has the significant confidence of only slightly more than one-third of the public, 1 percent less than those with "very little or none." Even the U.S. Supreme Court must include the 41 percent who have "some" confidence to achieve a confidence level over 75 percent. If one adds those with "some" confidence, we find an overall 94 percent confidence level in the military.[11]

Would so few Americans have "approved of" or had confidence in the British Parliament or King George III had similar polls been taken in 1775?[12] Would three-quarters of all the colonists disapproved? It is impossible to answer these questions with any precision, but we do know that the numbers of Americans who strongly "disapproved" of those British institutions (including the British Redcoats) were sufficient to generate a violent secessionist movement within the British Empire that had monumental consequences.

No doubt it is hyperbolic to think that we are truly in an analogous situation today. But perhaps one should take seriously the comments of *Washington Post* columnist E. J. Dionne in his 2011 Fourth of July column on the Tea Party's rise in contemporary American politics. "Whether they intend it or not," writes Dionne, "their name suggests they believe that the current elected government in Washington is as illegitimate as was a distant, unelected monarchy... And it hints that methods outside the normal

political channels are justified in confronting such oppression."[13] Consider the comments of Republican candidate Sharron Angle in her 2010 bid to represent Nevada in the U.S. Senate:

> Our Founding Fathers, they put that Second Amendment in there for a good reason, and that was for the people to protect themselves against a tyrannical government. In fact, Thomas Jefferson said it's good for a country to have a revolution every 20 years. I hope that's not where we're going, but you know, if this Congress keeps going the way it is, people are really looking toward those Second Amendment remedies [suggested by the "right to keep and bear arms"].[14]

Remarkable changes have occurred in polities across the world over the past generation with the development of mass social movements protesting the perceived failures of established political orders. Can we be absolutely certain that "American exceptionalism" inoculates our own political system against such political movements? (We did, after all, have our own exceptionally bloody secessionist movement between 1861 and 1865.)

Many Tea Partiers proclaim the virtues of local and state government, but one can wonder if Americans are really significantly more contented with their political institutions closer to home. Thus, the widely respected Field Poll in California found in September 2010 that approval of the California legislature was at a "record low,"[15] with only one in ten Californians expressing approval of the state legislature. A Marist poll conducted in New York following the November 2010 elections discovered that "71% say the way things are done in Albany need major changes, and another 11% believe government in Albany is broken and beyond repair."[16] It remains to be seen whether the governors elected in 2010 in both states, Jerry Brown and Andrew Cuomo, will be able to generate a greater degree of confidence from the residents in the overall structures of government, whether or not they earn high degrees of personal approval for their actions as governors. Even with the recent constitutional change that eliminates the need for a two-thirds vote to approve a budget, California has immense difficulty coming to basic budgetary decisions because of the continuing importance of the unrepealed two-thirds majority requirement for tax increases. The California that once seemed

to be the beacon for America's bright future seems to have become more of a dystopia.

Public discontent is mirrored, and perhaps encouraged, by what can be found in mainstream journalistic commentary. *Newsweek,* for example, published a "viewpoint" essay in January 2010 titled "America the Ungovernable."[17] In 2009, the distinguished magazine *The Economist* labeled California "the ungovernable state," focusing on both its formal requirements for passing budget or tax legislation and on the crucial role played by a freewheeling process of popular initiative and referendum that, by definition, takes key decisions out of the hands of elected public officials.[18] Such referenda have amended the state constitution to both limit taxes and mandate expensive state policies,[19] a recipe for political breakdown.

A major premise of this book is that there is a connection between the perceived deficiencies of contemporary government and formal constitutions. This is especially true of the interplay between American national politics and the U.S. Constitution, but it is also true with regard to many state constitutions. To take the easiest case, almost no one believes that one can discuss California's problems without paying attention to the particularities of its state constitution, even if one acknowledges as well the importance of California's diverse political cultures, dramatically changing demographics, and the sheer size of its population.[20] Similarly, one can readily assign multiple causes to the present conditions in the United States and the consequent unhappiness and discontent of a large majority of its citizens. It may well be the case that these causes, in the language of modern political science, explain more of the "variance" between acceptable and unacceptable governance than do defects in constitutional structures.

But that does not render constitutions irrelevant unless they explain nothing at all, which is wildly implausible. And if this were true, then it logically follows that it is a mistake to credit the U.S. Constitution for what has gone well in American history, although doing so continues to be a common trope of American political analysts. All too typical are Thomas L. Friedman and Michael Mandelbaum, the authors of *That Used To Be Us: How American Fell behind in the World It Invented and How We Can Come Back,* who blithely assert that "for America's remarkable history, the Constitution deserves a large share of the credit."[21] Maybe yes, maybe no. But unless we believe that we have a perfect Constitution, one that generates only gains for the country

and never imposes any losses, we should be prepared to pay equal attention to what may be the less-happy aspects of our constitutions, both national and state.

This book is very much about constitutional *structures,* and not, for example, about constitutional *rights.* A question hovering over it is the actual importance of such structures. Does it matter to the overall health of our political order that we have a presidential system of government, and not, like Great Britain or Canada, a parliamentary system in which the legislature is supreme? Is it truly significant in our presidential government that the president has the power to negate congressional handiwork simply by issuing a veto, which he may frequently exercise if Congress is controlled by the opposition party? How important is it that presidents can pardon even those who have not yet been convicted of felonies? Does it matter that Nebraska has only one legislative house, whereas its neighbors uniformly have two? Does the manner by which judges are selected—whether by election or appointment—or their tenure upon joining a court explain their actions upon taking the bench and therefore the quality of perceived justice (or injustice)?

One might think that these are simply rhetorical questions, but political scientists have been sharply divided for decades about the fundamental importance of constitutions, including their structural provisions. What is really important, many political scientists argue, is the underlying *political culture* of a given society, or its economic situation, its demography—is it ethnically and religiously divided or more homogeneous?—and the like. Adherents of this position, like Friedman and Mendelbaum, argue that if America is ungovernable, we should look beyond our formal institutional structures both for diagnosis and cure. We may "only" need to reform our educational institutions or be more attentive to the implications of immigration, leaving constitutional structures intact to solve our problems.

But the formalities can make a real difference. The distinguished political scientist David Mayhew has written that "the plain language of the Constitution may still be an unsurpassed guide to U.S. legislative behavior."[22] This sentence is worth deep reflection. It suggests that the basic institutional structures set out in the 1787 document help to determine the actual behavior—that is, the outcomes of most concern to members of the American political community—of legislators today and thus

indirectly help to account for the levels of satisfaction or dissatisfaction felt by Americans assessing that behavior. Political scientists have become highly attentive to the "incentives" and "disincentives" created by particular political structures and how they help to shape the behavior of "rational" individuals seeking to gain their short- or long-term objectives.

There are, therefore, two basic ways to respond to the arguments of this book. One is to challenge the *empirical* assumptions, whether regarding a particular provision or the overall significance of any given American constitution, whether national or state. A second is to challenge the *normative* arguments that will also appear. We may agree, for example, on the empirical consequences of the U.S. Senate or the election of presidents by an electoral college but disagree profoundly on whether these consequences are desirable or undesirable.

Even if we believe that constitutions explain only relatively limited aspects of our lives together as members of various American communities, it may be the case that changing our constitutions, as difficult as it is, is easier than changing the other aspects of American society that undoubtedly play important roles in explaining both our triumphs and our tragedies. One might well, for example, emphasize the importance of the sheer size of the modern United States, in population or in territory, or its quite stunning cultural and religious diversity, or the implications of a global economy for retaining a traditionally strong manufacturing base. All these factors present their own challenges, including whether or not they are genuinely changeable. We can, though, at least in theory, imagine changing aspects of our constitutional realities.

Nothing in this book should be read to suggest that a "good constitution" is the cure to whatever ails a society or that a "bad constitution" is necessarily a harbinger of doom. It may be that other, non-constitutional factors are going so well that latent deficiencies in the Constitution don't matter. One might compare this situation to carrying in one's body a virus (or genetic defect) that remains dormant if one eats well, exercises, and gets ample sleep. But what if conditions arise where one doesn't (or can't)? At what point do latent diseases suddenly manifest themselves, causing serious, perhaps even fatal, damage to individual bodies—or the body politic? Do the survivors mutter to one another that the catastrophe could have been avoided by even relatively minor changes?

We regularly refer, with admiration, to the Framers of the U.S. Constitution. The very idea of a "frame" suggests a certain rigidity, whether one is thinking of a work of art or a constitution. It is fanciful, though, to believe that a frame that "worked" at one point in time will remain efficacious for all time. With art, we can talk simply about changed tastes; with constitutions we must address the extent to which a "framing document" fulfills the ends to which a society imagines itself devoted. Chapter 3 demonstrates that these ends are most likely to be set out in a *preamble* to the constitution, and that what follows the preamble are best viewed simply as proposed *means* to those ends. Frames may be necessary, but they can become problematic, even dangerous, if they remain unchanged in the light of new circumstances.

As will be seen throughout this book, state constitutions have often been transformed through amendment or, quite often, are replaced by a new constitution when they are deemed outmoded. Many analysts of California's situation take note of its state constitution—and, in some cases, the attendant need for a new constitutional convention to reform it. At the national level, however, critical analysts focus almost exclusively on the deficiencies of leadership or in the character of one's political adversaries, on an inchoate "political culture," or on the particular problems posed by campaign finance or partisan gerrymandering in the drawing of legislative districts. Again, all of these may well be worth discussing. But there is a refusal to "connect the dots" between the workings of our political system and the political structures that were adopted in 1787–1788—and left basically unamended ever since.

I return to Thomas Friedman because by any account he is one of the most influential columnists in the world today. He repeatedly decries "the failure of our political system to unite, even in a crisis, to produce the policy responses America needs to thrive in the 21st century."[23] His new book with Michael Mandelbaum is highly critical of our political system, calling it *"paralyzed"*[24] and "incapable or addressing [vital challenges] at the speed and scale we need."[25] The authors offer a vigorous critique of the "pathologies of the political system," including an "extreme polarization," particularly in Congress, generated at least in part by the corrupting role played by money in politics (and the need for an elected official to spend literally most of his or her time raising campaign contributions), and the

rise of a hyperfragmented contemporary media.[26] California, which was formerly the instantiation of the "American dream," has now lost that status, perhaps most dramatically with the dramatic decline of its educational system. As they note, whereas California in 1980 was spending approximately 10 percent of its general revenue on higher education and 3 percent on prisons, "today nearly 11 percent goes to prisons and 8 percent to higher education."[27] They agree with *The Economist*'s 2009 diagnosis: "the state has become virtually ungovernable."[28]

Friedman and Mandelbaum deserve credit for recognizing the failures of our political system, but they seem oblivious to the possibility that the U.S. Constitution, like its California counterpart, helps to explain that failure. Their final chapter, which flamboyantly calls for "shock therapy" to help correct our political "pathologies" includes the dismaying assertion that the country does not "need fundamental changes to its system of government, a system that has served it well for more than two centuries and has proven equal to task of coping with a series of major challenges."[29] Friedman, a deserved winner of multiple Pulitzer Prizes, would surely be more acute if asked to analyze, say, Iraqi or Egyptian politics and the interplay between constitutional forms and political possibilities. But that theme is totally absent from his columns and his new book. Instead, his and Mandelbaum's "solution" to our political pathologies is to call for an independent third-party candidate for the presidency in 2012 who could shake up the American political system the way other losing insurgent candidates, including Teddy Roosevelt, George W. Wallace, and Ross Perot, did in 1912, 1968, and 1992.[30] They completely ignore the implications of the fact that we elect our presidents in a most peculiar manner, as dictated by the U.S. Constitution. I'm referring, of course, to the electoral college, which renders the popular vote irrelevant and generates campaign strategies aimed at a relatively few "battleground" states.[31] Their suggestion would make great sense in either France or the state of Georgia, both of which in their presidential or gubernatorial elections require runoffs between the two highest vote-getters (assuming neither garnered an initial majority). That, alas, is not the way we elect presidents in the United States, a basic bit of American civics ignored by these authors, and neither seems to recognize at all the degree to which the U.S. Constitution, like its California counterpart, helps to explain that failure or our current crisis of governance.

The conservative columnist David Brooks has written that the "British political system is basically functional while the American system is not." He notes that the "British political system gives the majority party much greater power than any party could hope to have in the U.S., but cultural norms make the political debate less moralistic and less absolutist." Thus, Brooks concludes, "We Americans have no right to feel smug or superior."[32] Two months later, in the heat of the debt limit debate, he lamented the unwillingness of the Republican Party to accept what were quite astounding compromises offered by President Obama because they would require relatively slight tax increases. He noted the role that anti-tax zealot Grover Norquist plays in the contemporary Republican Party. "He enforces rigid ultimatums that make governance, or even thinking, impossible." But Brooks goes on to mention other aspects of contemporary politics, including the rise of "talk-radio jocks" who "portray politics as a cataclysmic, Manichaean struggle. A series of compromises that steadily advance conservative aims would muddy their story lines and be death to their ratings." He also denounced "political celebrities, who are marvelously uninterested in actually producing results," and "permanent campaigners" who are devoted only to winning the next election and not to actually passing laws that might benefit the country.[33] It is easy enough for me to agree with Brooks's often insightful diagnoses even if I do not share his general politics. But Brooks has never chosen to write on the mechanics of the American constitutional order, preferring instead to focus on political culture or the dynamics of "leadership." He did not, for example, suggest that America take seriously what is desirable about British political institutions and think of changing our own accordingly.

More probing, though certainly no less depressing, is the complaint by longtime political analyst Bill Schneider that "hyperpartisanship is making American government dysfunctional."[34] Many other countries suffer less from this problem because "when a party has a strong majority and unified control of government, it implements its program, passes laws, and makes changes." But that is not the case in the United States. The "U.S. system of government was designed with checks and balances, separation of powers, and federal-state divisions. It was designed to make government as weak and as difficult as possible." In addition, there are "extra-constitutional rules, such as the filibuster, which has come to require a normal working majority of 60 votes in the Senate." Thus government in America, certainly at

the national level, requires "the kind of consensus that usually comes out of a crisis, namely, an overwhelming sense of public urgency." But no such consensus is close to emerging regarding "the country's economic crisis, or the health care crisis, or the environmental crisis. Instead, each crisis has deepened the partisan divide and made government more dysfunctional." In some cases there is no agreement that there even is a crisis that must be confronted, and if there is such agreement, there are deep ideological divides on how best to address it. With his reference to the design of the U.S. government, Schneider at least suggests that we ask if we are well served by the eighteenth-century institutions within which our politics take place.

E. J. Dionne has written, "I've reached the point where I'd abolish the Senate if I could. It is more profoundly undemocratic than it was when the Founders created it and less genuinely deliberative."[35] *New Yorker* writer Hendrik Hertzberg (a former speechwriter for Jimmy Carter) has moved far closer to connecting the dots. Hertzberg wrote a laudatory review in 2002 of Robert Dahl's *How Democratic Is the U.S. Constitution?* agreeing with Dahl that the answer is "not nearly enough."[36] More recently, in January 2011, he wrote that

> the biggest obstacles to energetic, coherent action are systemic. Our ungainly eighteenth-century legislative mechanism, drowning in twenty-first-century campaign cash, is shot through with veto points. We have three separately elected "governments" (House, Senate, Presidency), all of which must agree for anything big to happen. Our two-year election cycle leaves little time for long-acting changes to ripen and be judged fairly. That basic structure has its pluses as well as its minuses, of course. Anyway, we're stuck with it.[37]

Hertzberg has also been a longtime critic of the electoral college and its vagaries.[38] Still, perhaps the most important sentence in the quotation above is the last one, for he is indirectly noting (as Dahl had emphasized) that the U.S. Constitution is functionally impossible to amend (this is the subject of Chapter 15). It therefore may appear fruitless to expend much energy on constitutional reform, even if one can intellectually connect the dots.

The most dramatic example of dot connecting among the punditry is probably Fareed Zakaria, who in March 2011 wrote a remarkable cover story for *Time* magazine titled "Are America's Best Days behind Us?"[39]

He lamented that "at the very moment that our political system has broken down, one hears only encomiums to it, the Constitution and the perfect Republic that it created. Now, as an immigrant, I love the special and, yes, exceptional nature of American democracy. I believe that the Constitution was one of the wonders of the world—in the 18th century. But today we face the reality of a system that has become creaky." *Creaky* is an odd word in this context, but Zakaria recognizes the problem caused by attempting to govern ourselves under a Constitution that can all too accurately be described as a relic of times long past.

A crucial question throughout this book, directed to readers in the second decade of the 21st century, is whether we continue to share the assumptions that underlay the U.S. Constitution in 1787. If not, why do we remain so devoted to a Constitution based on them? No one should believe that there are "perfect" constitutions waiting to be written. There are not. As Chapter 2 emphasizes, *all* constitutions necessarily involve tradeoffs and compromises. Nothing in this book should be taken to indicate otherwise. I may be quixotic in calling for rethinking, and perhaps changing, some basic features of our constitutions, both state and national. However, I do not view this as being utopian, which might suggest that there is a Platonic form of the one best constitution that we should identify and then adopt. To err is human, after all. But some errors and tradeoffs are worse than others; some compromises, indeed rotten rather than merely unfortunate. It may be, as James Madison argued with regard to equal representation in the U.S. Senate, that one must accept lesser evils. Yet evils they remain, and one should always be willing to ask how necessary it is to accept them and their consequences in our own contemporary world, so distant from the world in which these compromises were indeed explicable and, given exigencies of the moment, perhaps defensible. But times change.

This book is not intended to denigrate those who wrote our national or state constitutions. They were, with some exceptions, honorable persons genuinely trying to do the best they could. If I denigrate anyone in what follows, it is ourselves, for refusing to ask the probing questions the Framers were willing to ask about the adequacy of their own institutions. In the opening paragraph of *The Federalist,* Alexander Hamilton wrote that "it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether

societies of men are really capable or not of establishing good government from reflection and choice."[40] The pride we take in our "founding" (and Founders) comes from a belief that such "reflection and choice" did indeed characterize the deliberations in Philadelphia and the ratification conventions thereafter. As Framers, they were not trying "to frame us" in the pejorative sense. (It would therefore have been a mistake to title this book "We Wuz Framed," which would analogize Madison and his associates to rogue police.) But Framers they were, generating a host of rigid structures with real consequences. One cannot believe that even the admirable deliberations that generated these structures were sufficient for all time. The Framers did not believe that, and neither should we.

As a matter of fact, there are some Americans who are, at least in their own way, connecting the dots. Among these are members of the so-called Tea Party, some of whom are vociferous proponents of at least two constitutional amendments. In June 2010, the Idaho Republican Party adopted a platform that advocates repeal of the Seventeenth Amendment, which provides that senators be popularly elected rather than appointed by their state legislatures.[41] Texas Governor and presidential candidate Rick Perry has also endorsed repeal.[42] An unsuccessful Utah Republican candidate for his party's Senate nomination explained his support of such a repeal: "We traded senators who represent rights of states for senators who represent the rights of special interest groups."[43] One may or may not accept the second half of his proposition, but it is hard to refute the argument that elected senators are less likely to care about the abstract "rights of states" and the prerogatives of state governments than senators appointed by state officials. To expect otherwise is to believe that voters happen to share that passion, an empirically dubious proposition.

Similarly, Randy Barnett, a noted law professor from Georgetown with a large following among Tea Party devotees, has proposed what he calls a Repeal Amendment that would give two-thirds of the state legislatures the right to invalidate any federal legislation.[44] I think that both proposals deserve emphatic rejection, but I have a grudging respect for their proponents, who at least realize that there is indeed a connection between political structures and the outcomes they support. The proper response to such proposals is not to denounce the very idea of constitutional change, an attitude best expressed in a well-known essay by former Stanford

Law School Dean Kathleen Sullivan dismissing all such suggestions as "constitutional amendmentitis"[45]—as if the very proposal of constitutional amendments constituted a disease. Instead of confronting proposed amendments on their merits, too many liberals have emulated Sullivan by condemning the very possibility of amendment. This comes dangerously close to suggesting that we have a basically "perfect Constitution" that should be worshipped rather than subjected to tough-minded analysis.

Moreover, a major theme of this book is that any consideration of American constitutionalism must pay ample attention to America's other fifty constitutions, those of the states. These constitutions are also the result of reflection and choice. Not only have they been far more frequently amended than their national counterpart, but many states have out-and-out replaced existing constitutions with new documents thought more conducive to facing the challenges of a new time. Even if one would not wish to emulate Georgia and Louisiana, which together have had almost two dozen constitutions, one might still believe that there is something to learn from the willingness of states to reflect on the adequacy of their existing constitutions and to do something about perceived deficiencies, in contrast to the all too rarely reflected-upon U.S. Constitution.

Americans should pay special heed to James Madison's ringing conclusion to *Federalist* 14:

> Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?... Had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the United States might, at this moment...must at best have been laboring under the weight of some of those forms which have crushed the liberties of the rest of mankind. Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course...They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great Confederacy, which *it is incumbent on their successors to improve and perpetuate.* (emphasis added)

We best honor the founding generation by forthrightly confronting the "lessons of experience" and accepting Madison's mandate to view the national Constitution and its state analogues as works in progress. We must therefore use our critical intelligence to "improve" them if they are to perpetuate themselves through time and, even more importantly, prove friends rather than enemies to achieving the great purposes most inspiringly set out in the Preamble to the national Constitution. This is especially important if we really are facing great challenges, even "emergencies," and if we have good reason to wonder whether our institutions are up to these challenges. We must connect the dots, even if that leads us to ask fundamentally critical questions about the Constitution we have been taught since childhood to venerate.

II. WHY IS THIS BOOK DIFFERENT FROM MOST OTHER BOOKS ABOUT THE CONSTITUTION?

Connecting the dots requires writing a book that is considerably different from almost all other books on American constitutionalism, and not only because it is more critical, both implicitly and explicitly, than the norm. Most such books, for example, focus almost obsessively on great interpretive debates attached to what Justice Robert Jackson once termed the "magnificent generalities" of the Due Process Clause of the Fourteenth Amendment.[46] Less upliftingly, he also refers to "the cryptic words of the Fourteenth Amendment."[47] Whether magnificent or cryptic, the words of the Fourteenth Amendment—and much else in the Constitution—are scarcely obvious in their meaning. It is not surprising, then, that many books have been written on the Fourteenth Amendment itself, let alone other parts of the Constitution that also beg for "interpretation." What unites many of those books, however bitterly they may differ, is the authors' claims that they have discerned the one true approach to constitutional interpretation. Whether one agrees or not, many of these books are certainly worth reading.[48] This book, however, focuses on other issues connected with the Constitution and is, I hope, worth reading for different reasons.

Because the history of American constitutionalism, especially at the national level, involves so much changing interpretation (along with the

occasional formal amendment), books usually have a historical focus congruent with an emphasis on change. That, after all, is what history is about. One can lament changes or applaud them, but any understanding of the general powers of Congress over our 225-year history will necessarily involve an immersion in important changes that have structured this history. And, especially if the books are written by fellow members of the legal academy, they are likely to feature many cases decided by the U.S. Supreme Court. Again, for reasons to be explained more fully below, this is not such a book.

Finally, most people (and too many academics) believe that one understands all one needs to know about American constitutionalism by exclusive study of a single Constitution, the U.S. Constitution drafted in 1787 and ratified in 1787–1788. I do not. In order to understand why there are serious questions about the contemporary national government's capacity to govern, one does have to understand that particular constitution. As suggested above, however, if one is also interested in understanding the travails of many of our states, including the shutdown of the government of Minnesota or the chaotic government of California, the national Constitution will provide little help; knowledge of state constitutions is essential.

The inspiration for the title of this section is the opening of the Passover Seder, celebrating the Exodus from Egypt and the foundations of Jewish political identity. The youngest child chants the Four Questions, asking why Jews distinguish the Seder meal from all other dinners during the rest of the year. The Seder service is a self-conscious attempt to instill in youngsters the habit of not only connecting with the past but also of asking often critical questions about the answers given to the various questions. As Americans, we too are connected in complicated ways to those who forged new political identities, generated by an exodus from the traditions established as members of the British colonial empire and the forging (and "framing") of new understandings of political reality. We are most aware of the new *national* identity that was established and of the document, the U.S. Constitution, that signified it, not least by its opening invocation of "We the People." But there was also a spate of constitution-drafting within the states that had declared their independence from Great Britain in 1776. All of these developments required asking—and offering provisional

answers to—profound questions about the nature of politics. Many of these questions continue to roil us today. They are not merely of theoretical interest, but arise within the context of fears about the very governability of contemporary America, whether at the national or state level.

So, the four questions underlying this book are as follows:

1. Most other books on constitutional law accept the Constitution as a given, while passionately debating exactly what certain passages of the document mean. So why does this book generally ignore such questions of constitutional "meaning" or constitutional "interpretation"?
2. Books on American constitutional law often (and properly) take an intensely *historical* approach insofar as their central goal is to understand the *changes* in constitutional understanding over time. So why is *stasis,* rather than *change,* the principal focus of this book?
3. Most American books on constitutional law focus exclusively on the federal Constitution. Why should we pay as much attention to the other fifty state constitutions that also make up "American constitutionalism"?
4. Finally, most books about American constitutionalism talk almost incessantly about the role of courts. Why does this book present only a relatively limited discussion of the role of courts (and judges) and almost no discussion of judicial opinions?

III. THE FOUR ANSWERS

A. Why does this book not focus on constitutional "meaning"?

There is a deceptively easy answer to this question. Debates about meaning generally arise only when there is a genuine controversy about how best to interpret a constitutional provision or practice. This does not mean that documents about which there is no controversy have no meaning. It is simply that if the meaning is clear to all the participants in a given conversation, the conversation shifts direction. The new discussion might well focus on the *wisdom* of the text in question, which is a very different question from its semantic meaning.

Consider two pieces of text from the U.S. Constitution. The first is the Inauguration Day Clause, which appears in the Twentieth Amendment. If you want to find out when an elected president takes office, this amendment tells you with great precision: "The terms of the President and Vice President shall end at noon on the 20th day of January...and the terms of their successors shall then begin." It would be odd if someone seriously asked, "What does the Constitution *mean* by January 20?" Take another example that applies directly to younger readers of this book, the "age-qualification" clauses of the Constitution that disqualify even "natural born citizens" from serving in the House of Representatives, Senate, or the presidency until they turn twenty-five, thirty, or thirty-five, respectively. (A "naturalized citizen" may have to wait considerably longer to serve in Congress and will *never* be eligible to be president.) One can debate at length about the *wisdom* of these clauses, but there is no need to debate what they mean save in the most highly theoretical academic seminars that, for better or worse, have no genuine connection with "ordinary interpretation."

Contrast these examples with the Fourteenth Amendment, by which "all persons" are guaranteed "the equal protection of the laws" and the right not to be denied "due process of law." No one could seriously say that reading the text is sufficient to know what "equal protection" or "due process" means. That is, after all, why Justice Jackson could so easily describe the language as a "generality," whether magnificent or cryptic. Similarly, Robert Bork once described another notably cryptic passage of the Constitution, the Ninth Amendment, as an "inkblot." (Even the meaning of "persons" is less than self-evident, as revealed in contemporary debates about abortion or the protection to be accorded those "artificial persons" called corporations.)

Anyone who believes that the Equal Protection Clause requires only the application of a singular concept of equality should confront a fine book tellingly titled *Equalities*,[49] which identifies no fewer than 108 logically defensible theories of equality (and the text of the Constitution provides no practical help in determining which one of these is the best meaning). So perhaps we can place the Inauguration Day Clause at one end of a spectrum of constitutional clarity and the Equal Protection Clause at the other. The Inauguration Day Clause is scarcely "magnificent" (or even "cryptic"), and there is nothing "general" about it.

This book is far more concerned with analogues to the Inauguration Day Clause than to the Equal Protection Clause. Though their meaning is indisputable, there is nothing trivial about such clauses. In fact, they may better explain the failures of our political system and fears about governability than the "magnificent generalities" explain its successes. The two ends of the spectrum might be called the *Constitution of Settlement* as against the *Constitution of Conversation*. It is the very point of the former to foreclose conversations about meaning. Most other books on constitutional law deal only with the latter. This book is different because it focuses on the former.

What explains the existence of *both* these aspects within any given constitution? To answer this question, we should ask the most general of all possible questions: What do constitutions *do*? What is their point? Not surprisingly, there are a number of things that constitutions can be said to do. One extremely important function of a constitution is to *settle* basic political disputes by adopting decidedly nonabstract and noninspiring language that gives a clear and determinate answer to what otherwise might be disputed. However, this is certainly not *all* that constitutions do. They can also express the highest—and most abstract—aspirations of a society. This might be the function of our Preamble, the subject of Chapter 3. The Constitution also includes clauses (like the Equal Protection Clause) that serve as goads to sometimes endless—and often acrimonious—conversations. But if any given constitution generated *only* conversations, however interesting they might be, it would be an abject failure.

Some skeptics believe that it is a mistake to expect constitutions firmly to settle anything of great importance. Among the political realities, for example, is the necessity of compromise, the topic of Chapter 2. One common tactic of compromise is to "kick the can down the street."[50] One can do this either by adopting ambiguous language that is acceptable to both sides because it lacks clear meaning or by remaining resolutely silent about an issue that might be too volatile. (Think, in this regard, of secession.)

But Madison, in *Federalist* 37, expresses considerable skepticism about the possibilities of perfect clarity even in the best of circumstances. Even the "continued and combined labors of the most enlightened legislatures and jurists," he observed, have failed to provide the "delineat[ion]" we might hope for with regard to "different codes of laws and different tribunals of

justice." Instead, "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." We must be aware of the inherent limits of language. We are therefore faced with "unavoidable inaccuracy... according to the complexity and novelty of the objects defined." He concludes the paragraph with a truly stunning sentence: "When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated." If the Almighty cannot be altogether clear, then why should we expect anything better from ordinary human beings? It would surely require the ultimate in delusions of grandeur. Madison does offer the possibility that disputes can be "liquidated" after sufficient conversation produces a consensus on meaning, though one wonders if such "liquidation" and settlement will ever occur with regard to the Fourteenth Amendment.

Perhaps, however, Madison was slightly exaggerating. One does not have to be a fundamentalist to believe that parts of the Bible have quite clear meanings. For example, while teaching at Harvard in 2009 I did not hold class on Monday, September 28, which was Yom Kippur, the Day of Atonement for even minimally observant Jews like myself. Why the 28th? Given that Harvard no longer schedules Saturday classes, why could the holiday not be observed on the previous Saturday, September 26th? Why put up with the frequent inconvenience to both me and my students caused by Jewish holidays falling on class days? Yom Kippur could be treated the way the United States treated Lincoln's and Washington's birthdays, combining them into a holiday called "Presidents Day," always celebrated, to public joy, on Mondays to create long weekends. The answer is easy: Leviticus 23:27 states that "the tenth day of this seventh month" of the Jewish calendar will forever after be the Day of Atonement. Beginning with a clear (perhaps too clear) text, practices have developed over what is now thousands of years, so that the date of Yom Kippur is as settled as, say, Inauguration Day. No doubt there are other examples as well. So perhaps we could even speak of the "Bible of Conversation"—the Ten Commandments or the parables of Jesus, for starters—and the "Bible of Settlement."

The Jewish calendar, like the Muslim or Chinese calendars, is a lunar one and is therefore different from the Christian calendar under which we generally operate, which is based on the earth's revolution around the sun. This could lead to some interesting tests of interpretation. The U.S. Constitution requires that the president be at least thirty-five. But it doesn't explicitly tell us under which calendar system, at least until one reads the very end of the Constitution declaring that it was signed in Philadelphia on September 17, "in the year of our Lord" 1787. But even if we use this as a conclusive determination that the Constitution is referring to the solar calendar, there is the fact that the Christian community was for several centuries divided as to how that calendar actually functioned. The traditional Julian calendar was succeeded by the reformed calendar introduced by Pope Gregory XIII in 1582 and adopted by most countries in the ensuing centuries. However, Protestant Great Britain (and therefore the American colonies) did not adopt the new calendar system until 1752, at which time it was necessary to correct the still-existing Julian calendar by eleven days. Thus Wednesday, September 2, 1752, was followed by Thursday, September 14, 1752. This meant also that George Washington's birthday suddenly shifted from February 11 to February 22. In any event, we treat the Gregorian form of the solar calendar as the "settled" way to measure age in the United States, so any claims based on alternative calendars would be rejected. This excursion into calendar systems illustrates the point that "settlement" often requires more than mere text; one must look to cultural assumptions underlying the bare-bones words in a document. Once one acknowledges the force of these underlying assumptions, though, conversation about "meaning" ceases with regard to texts of the Constitution of Settlement.

Many political scientists have emphasized that constitutions, if they are "to work," must ultimately be "self-enforcing," which means that members of the relevant community will voluntarily adhere to constitutional commands because such obedience is viewed as conducive to achieving mutually beneficial ends, including stability. What legal philosophers describe as "formal rules" are often conducive to achieving such stability.[51] Just imagine what would happen if there were genuine controversy as to when a newly elected president took office. Self-enforcement is no doubt easier if language appears to be "clear," at least within the operative assumptions

of the relevant community. It can also be achieved, though, when most people agree that constitutional conversations will be brought to a close by the decision of a particular person or institution. In our system, that role is often assigned to (or eagerly embraced by) the U.S. Supreme Court. As already suggested, though, this book is far less interested in the roles played by such "ultimate decisionmakers," not least because their decisions are often vigorously contested, as is the case with the Supreme Court. Most of the self-enforcing provisions appear to be sufficiently obvious in their meaning that they require no adjudication at all; anyone disregarding the clear meaning would be engaging at the same instance in radical disobedience, perhaps even revolution.

So, return again to the Inauguration Day Clause as a paradigmatic example of "settlement." We know what day a president takes office (or is allowed to continue in office after a completed first term) simply by reading the Twentieth Amendment. A quick search on the Internet allows us to determine that the president elected in 2204—assuming the United States still exists and the Constitution has not been amended—will be inaugurated on Sunday, January 20, 2205, though it is possible that the inauguration celebrations will be delayed until Monday if a monstrous blizzard shuts down Washington (or if the United States has become so Christian in its public culture that it is thought unsuitable to have public celebrations on Sunday). But no one should believe that such a delay will have the slightest legal effect, for the presidency will have changed hands at noon the day before. That's just what the Constitution says!

Everyone should be aware that the Twentieth Amendment came along fairly late in our constitutional history, in 1933. So when were presidents inaugurated before then? The answer is March 4. Does the text of the Constitution give us that answer? Not quite. But the reason that all presidents who took office after George Washington were inaugurated on March 4 *does* follow from text that establishes the presidential term as four years, and not one day more or less. The last Congress operating under the Articles of Confederation, which the new Constitution supplanted, determined that the new government would begin operating—with all officers presumably taking their oaths of office—on the "first Wednesday of March 1789," which was March 4. As it happened, the new government scarcely got up and running with maximum efficiency, and George Washington

did not take his oath of office until April 29, 1789. But he did take his second oath of office on March 4, 1793, not least because the terms of office of all representatives and one-third of the Senate expired at noon on the 4th (given that the Constitution establishes a two-year term for members of the House and that the terms of one-third of the Senate expire at the same time). Even if one can argue about whether Washington's term really began on March 4, 1789, or only when he actually took the oath of office for the first time on April 29,[52] the Twelfth Amendment, added to the Constitution in 1803, in effect specified March 4 as Inauguration Day.[53] So it follows that any merely legislative change would automatically violate the Constitution by either shortening or lengthening the mandated four-year term. As a matter of fact, the Twentieth Amendment establishing January 20 as Inauguration Day operated to reduce Franklin Roosevelt's first term of office by roughly six weeks; his second term began on January 20, 1937, though he had initially been inaugurated, prior to the Twentieth Amendment, on March 4, 1933.

No doubt many readers view Inauguration Day as a minor aspect of the Constitution, perhaps because lawyers never argue about its meaning or threaten to bring litigation changing the time at which a newly elected president will take office. To be sure, many of the examples in the remainder of the book may grip the reader more. But it is a mistake to believe that there is no interesting conversation to be had about the Inauguration Day Clause. Indeed, this book is predicated on the proposition that almost *all* of the Constitution of Settlement is very much worth talking about by anyone interested in the practicalities of American government However, the nature of the discourse about the Constitution of Settlement is quite different from that generated by the Constitution of Conversation. The latter involves constitutional *meaning*; the former involves the *wisdom* of clear constitutional commands.

One might well believe that in the twenty-first century January 20 is as defective a day for inaugurating new presidents as the twentieth-century supporters of the Twentieth Amendment thought March 4 was. The outgoing incumbent continues to possess all the legal authority of the office, including the ability to issue pardons to persons convicted of violating federal law. But the incoming president, who has no legal authority, may possess a great deal of political authority, especially if he or she received

a majority of the popular vote (in addition to the majority of electoral votes). Things get even more complicated if the incoming president was elected on what might be termed a "repudiationist" platform vis-à-vis the incumbent.

The most dramatic illustrations of this phenomenon under the old regime occurred when Thomas Jefferson replaced the defeated and widely unpopular John Adams (1800–1801), Abraham Lincoln took over from the slavery-supporting James Buchanan (1860–1861), and Franklin D. Roosevelt trounced Herbert Hoover during the Great Depression (1932–1933). In all cases, basically a full five months separated the election from the inauguration of the successor. In the post-Twentieth-Amendment world things have gotten better, but perhaps not enough to lull us into complacence. Most readers of this book personally experienced during the winter of 2008–2009 the phenomenon of a soundly repudiated (even by the candidate of his own party) incumbent sitting in office and a president-elect, elected while the United States suffered through the greatest economic crisis of the past seventy-five years, possessing not a scintilla of legal authority until January 20. Older readers may recall that Richard Nixon had to wait to succeed Lyndon Johnson in 1969; Jimmy Carter, to succeed Gerald Ford in 1977; and—perhaps most notably—Ronald Reagan, to replace Jimmy Carter in 1981.

At one level—that is, ascertaining constitutional *meaning*—it really doesn't matter whether one applauds Inauguration Day or considers it a reprehensible feature of the Constitution. It is simply there, a settled feature unless a further amendment gives us a different—and perhaps more desirable—system than the one we have now. But we can still vigorously debate whether the Constitution *should* be amended, which requires arguing about whether we are well served by this feature of the Constitution.

In such a debate, it might prove illuminating to look at the quite different decisions of a variety of foreign countries and the fifty American states with regard to inaugurating their political leaders. Most notable, perhaps, is the practice in Great Britain of the incumbent prime minister leaving 10 Downing Street the day after the election, promptly replaced by the victorious candidate. There is no notion of a "transition period" in that country because the premise of the British parliamentary system is that the out-of-power party always contains a "shadow cabinet," ready to take

over at a moment's notice. No American state has adopted a parliamentary system; all emulate the national government by having a governor chosen independently of the legislature. Still, no state waits as long as the national government to install its new leader. In 2010, for example, both Alaska and Hawaii inaugurated their governors on December 6.[54] The new governors of New York and Michigan took their oaths of office on New Year's Day 2011, and a spate of governors, including California's, took office between January 3–6. The outliers are Alabama (January 17), Texas (January 18), and Maryland (January 19). Most states, however, appear to wish to limit the amount of time of de facto "caretaker governments," a term usually associated with parliamentary regimes and referring to an existing government in the interim between election and the new government's installation, which can take several months in a multiparty system.[55]

Even those who concede the practical relevance of inauguration clauses might be tempted to dismiss the importance of the various qualification clauses, whether the age requirements that prevent millions of American citizens, even natural-born citizens, from serving in national office for some years[56] or disqualify *any* naturalized citizens from ever aspiring to be president. But the Natural-Born Citizen Clause explained the inability of then—California Governor Arnold Schwarzenegger to run for the presidency in 2008, when he might have been a stronger opponent of Barack Obama than John McCain proved to be.[57] Not only does no state emulate the United States in barring naturalized citizens from serving as governors, but it is also almost certain that the Supreme Court would strike down any such attempt as a violation of the Equal Protection Clause. What prevents the national candidacy of someone like Schwarzenegger is the power of the raw text and the absence of a plausible argument that it has been amended by anything added to the Constitution since 1787. One might also believe that Bill Clinton would have run for reelection in 2000 and thereafter had the Twenty-second Amendment not clearly limited presidents to two terms. The meaning of these clauses is not open to practical doubt. Formalism rules, regardless of the practical consequences of denying Schwarzenegger or Clinton the right to run for the presidency.

Almost all of this book examines similar pieces of text that constitute our Constitution of Settlement: How many houses of Congress or state legislatures are there, with how many members, selected by what means?

What is the scope of presidential or gubernatorial vetoes, and how many legislators are necessary to override such vetoes? This book is an opportunity to converse and argue with its readers, but none of these arguments will really concern, at a pragmatic level, what the Constitution *means*. Instead, we talk about the *wisdom* of various constitutional provisions.

Return a final time to the Inauguration Day Clause and whether it is wise for the country to have to wait until January 20 to install new presidents. Quite obviously, any discussion in "real time" will inevitably have political overtones. Such political overtones will be even more present when we are discussing whether incumbent presidents should retain the power to veto legislation or whether it is defensible for Wyoming to have the same number of votes in the Senate as California. It would be foolish to ignore the political dimension of the topics considered throughout this book. Indeed, one of its purposes is to expose the connections between constitutional design and politics. But whether we have the capacity to think in terms of a longer time horizon than immediate political realities is crucial to determining the kinds of conversations we can have and the possibility of deciding to change aspects of our political systems in the future.

It may be tempting to discuss some of these issues only in the short run by focusing on the implications for particular presidents, such as George W. Bush, Barack Obama, or one of President Obama's opponents in 2012. That temptation should be resisted. For there is also the long-run aspect that involves confronting some basic questions in political philosophy and the practicalities of designing a government. To what degree do we want, into the indefinite future, a constitutional system that empowers majorities? Or should we instead prefer one that allows aggrieved and structurally well-located minorities to block majority-supported proposals? To what extent should the federal Constitution be redesigned to resemble the fifty state constitutions, which are significantly different in many dimensions? (Or, conversely, should state constitutions be rewritten to look more like their national counterpart?) Whatever your answers, you should imagine amending the Constitution in ways that would not take effect until a future date that will have political realities about which we are currently quite clueless, say, 2017 (or, should you be reading this book in 2015, until 2021 or 2025). Inevitable disagreements about various topics to be considered in this book need not divide us neatly into Democrats or Republicans, liberals or

conservatives, or even Tea Partiers or their opponents. Such division would almost certainly occur if we focused only on current events and immediate changes, of which the beneficiaries would be obvious. But once one adopts even a moderately long-term perspective, discussions that necessarily have *political* dimensions need not inevitably turn into *partisan* conversations.

B. Why is this book relatively ahistorical, in contrast to a book about the meanings of disputed portions of the Constitution?

My own approach when teaching American constitutional disputation—which is another way of referring to the Constitution of Conversation—is extremely historical. It is vitally important for anyone interested in the powers of Congress or the actual protections accorded "the freedom of speech" to know that the relevant assigners of meaning, including the U.S. Supreme Court, have historically offered sharply different notions on these issues. The same is obviously true of any "conversational" provisions of state constitutions. Indeed, with regard to state constitutions, one might well note not only states' frequent amendment of even "hardwired" provisions but also that most states have replaced an existing constitution with a sometimes quite different brand new one.

But the fact that the Constitution of Conversation must be taught historically does not mean that the same is true of the Constitution of Settlement. Whether we think of our own individual lives or of entire societies, dramatic changes often take place against a background of unexamined (and settled) givens. Each reader may have changed in profound ways, but none has developed a third eye or, as yet, the ability to run the mile in three minutes.

But much great literature has been written on how what we accept as a given can change in an instant, and we are well advised to consider our own assumptions and whether they are so unchangeable as we may think. Some may well be, but others might be malleable if only we have the imagination and the will. Would our lives actually be better if we made efforts to change some of the givens, or are they so "hardwired" (like our innate awareness that we all, sooner or later, actually die) that efforts to change are simply delusional?

Because this book focuses on the Constitution of Settlement, there is much more emphasis on what is static in American political life than one what has changed. Indeed, I will be offering a "Narrative of Statis" far more than the conventional "Narrative of Change" that typifies most books on American constitutionalism. History is not entirely absent. Certain practices associated with the veto or the electoral college have changed over time. Still, the emphasis is on the degree to which the world we are living in today is still, fundamentally shaped, politically, by decisions made in 1787.

C. Why should we pay at least as much attention to the fifty American state constitutions as to the national Constitution, especially when discussing the structures within which American politics are conducted?

If one is trying to understand the realities of "American constitutionalism," it is essential to look beyond the U.S. Constitution to the many other constitutions that are part of the American political system. To identify a single constitution, however important it may be, with the entirety of American thinking about the constitutional enterprise is equivalent to offering a course on European art that turns out to focus exclusively on the art of the Italian Renaissance. There is much to be learned by looking intensively at that particular tradition, but there is also much that is missed if one ignores what was occurring over many centuries in other parts of that complex continent (not to mention within Italy itself). Similarly, one simply does not understand American constitutionalism if one knows only about the national Constitution. "[T]here has never been," Laura Scalia has written, "a singular constitutional tradition in the United States."[58] John Dinan has similarly written a splendid book, *The American State Constitutional Tradition*,[59] in which he demonstrates at length the existence of a distinctive American state constitutional tradition that not only complements but is often in significant tension with the norms underlying the national tradition. Both must be considered by anyone attempting to learn how Americans think of organizing themselves politically. In addition, one should also be attentive to the extent that state constitutions make their own contribution to the turmoil—and potential ungovernability—that characterizes many contemporary states.

"When Americans speak of 'constitutional law,'" James Gardner has written, "they invariably mean the U.S. Constitution and the substantial body of federal judicial decisions construing it."[60] This is a mistake, in every conceivable way. Almost all of the more than three hundred million residents of the United States[61] live under *two* constitutions: one for the United States, the other for the states they inhabit. (And Americans who split their time in two or more states, or even foreign countries, come under the jurisdiction of additional constitutions.) It is therefore quite appalling that a 1988 poll demonstrated that "52 percent of the respondents did not know that their state had its own constitution"[62] and that a report issued the following year by the Advisory Commission on Intergovernmental Relations concluded that even "lawyers tended to be unaware of their state constitutions."[63] This is far more disturbing than the often cited fact that far more Americans can name the Three Stooges than any member of the U.S. Supreme Court.

One might easily explain this disregard of state constitutions if state governments dealt with mere trivialities of no interest to ordinary people (or even if they raised no interesting "interpretive issues" of the kind that legal academics obsess over). But either assertion is preposterous. Daniel Rodriguez has noted that "the basic range of policies and policy choices made by state and local officials dwarf—indeed *always have dwarfed*—national political activity."[64] Even if one accepts the proposition that constitutional federalism—that is, a state autonomy free from national government control—is only relatively weakly protected by the national Constitution, there can be no doubt that many issues of great public importance are decided—or, *not* adequately confronted—within the states. State constitutions—again, think of California—are relevant to such decisions, whether one thinks of state-level constitutions of conversation or analogous constitutions of settlement that, by structuring state politics in certain ways, have significant consequences for the actual decisions that will be made.

Many have written in recent years about American provincialism regarding other countries, and there are occasional references throughout the book to what we might learn by looking at aspects of various constitutions around the world. But it is important to recognize a more important provincialism, which is the almost willful ignorance of what we might learn

by looking at our own country and its extraordinarily rich constitutional experiences instead of remaining fixated on the singular U.S. Constitution. After all, there may be contemporary models of truly well-governed states; if so, it would be useful to try to understand if formal institutions might contribute to such a blessed state.

D. Why will the role of courts and judges be treated only in two chapters—and why will there be so little discussion of judicial opinions in the rest of the book?

Courts are especially important with regard to the Constitution of Conversation. There will *always* be litigation about "equal protection" or the meaning of "freedom of speech" because these are what political theorists call "essentially contested concepts." Equally important, there will always be people and groups interested in bringing such cases before courts in the hope that they can win victories perhaps unavailable through other institutions, such as legislatures or administrative agencies. And if we concentrate on those issues that are brought to the attention of courts, we will necessarily have to discuss what we believe the role of courts should be. Furthermore, we would also necessarily have to discuss the processes by which courts and other adjudicators assign concrete meanings to the contested concepts.

But if one takes seriously the notion of the Constitution of Settlement, then by definition there will be little litigation testing what has become settled. Even those who were upset at the delay of President Obama's inauguration until January 20 did not run off to the nearest courthouse in search of a determination that because this was so stupid it was therefore unconstitutional. Similarly, no one outraged at the equality of voting power between California and Wyoming in the Senate would file suit claiming that it violates the Constitution in addition to being indefensible under any attractive version of twenty-first century democratic theory.

Two chapters *do* address the role of courts and judges, but only because courts are significant institutions; concomitantly, a host of interesting questions arise with regard to designing judicial systems, including our own. Begin only with the fact that the U.S. Constitution is virtually unique

in its establishment of a judiciary appointed and confirmed for life by highly active and self-interested politicians. Most readers probably live in states that elect judges, and very few live in a state or another country that grants its judges what might be called "true life" tenure, that is, tenure until death rather than a stipulated age like seventy or seventy-five. Again, this illustrates the importance that *comparative constitutional analysis* plays in this book. But, as already implied, there is certainly no reason from the perspective of the Constitution of Settlement to treat courts as more significant than legislatures or executives, so two chapters are more than sufficient.

The argument for putting courts "in their place," at least with regard to the Constitution of Settlement, also explains why cases are basically absent. If there is no litigation—because we are talking only about what is deemed to be settled—there are no opinions to read or discuss. It really is as simple as that!

IV. CONCLUSION: THE FOUR CHILDREN

Anyone who has ever attended a Seder knows of the parable of the "four children," described as "wise," "simple," "evil," and "the one who does not know even what to ask." For our purposes, perhaps the most important division is between the "wise" and "evil" children, for the difference is rooted in *identification,* not in cognitive knowledge. Signifying shared membership in the community of questioners (and answerers), the "wise child" asks, "What is the meaning of the events described in the Seder service to *us*?" The "evil child," on the other hand, asks, "What is the meaning of these events to *you*?" thereby indicating a profound lack of identification and membership.

I would certainly be gratified to have readers from abroad, who are simply curious about American politics—or, perhaps, are charged with designing a new constitution for their own polities and wondering if there are any valuable lessons, either positive or negative, to be learned from the broad American experience with constitutionalism. There is no reason at all to expect such readers to view themselves as part of the American political community, just as a reader from Massachusetts is unlikely to

feel part of what is distinctive about the Oregon political community as instantiated in its constitution. That being said, I anticipate that most of my audience will be other Americans, almost all of whom are also citizens of one of the fifty states. But common citizenship is not enough to assure that we share a sense of community in the enterprise of achieving the magnificent goals set out in the Preamble to the U.S. Constitution. Some readers, even Americans, may be sufficiently alienated to ask only what the Preamble means to *others*. My hope is that you will be "wise" readers and citizens who are willing to see us as involved in a set of common projects—most dramatically at the national level but in our respective states as well—even if you have genuine worry about our capacities for effective self-government. Those most committed to enhancing that capacity might be especially likely to offer "loving criticism" of our various constitutions, including the one drafted in Philadelphia in 1787. We should not allow flaws and limitations inherent in the Constitution of Settlement to prevent us from aspiring to create the kind of country (or states) we desire for ourselves and our posterity.

2

Of Compromises and Constitutions

The Philadelphia Convention—like all other constitutional conclaves—teaches a variety of lessons about constitutional formation. One is that there is a basic decision involved between continuing with some existing set of "rules laid down" or choosing instead what one thinks best for the social order, even if the latter requires significant transformations from the status quo. This, to a great extent, involves a discussion of legal rules, such as those established by the Articles of Confederation, which are discussed extensively in Chapter 16. But there are other rules, including moral rules (or norms), that are inevitably a part of any discussion of what constitutions should say. But do these moral norms have absolute priority when designing constitutions? "Free constitutions," James Madison once wrote, "will rarely if ever be formed without reciprocal concessions."[1]

Do such concessions sometimes include waiving what one might consider, for very good reason, fundamental norms of justice? Ideally, we hope that the answer would be a resounding no. This answer would be offered by anyone influenced by John Rawls, the dominant American political philosopher since World War II. Rawls's *A Theory of Justice* (1971) used as its central conceit the notion of deriving basic norms of politics behind a "veil of ignorance" that limited one to having almost no knowledge of his or her own concrete social reality (including, for that matter, gender identity). Rawls argued that under such circumstances—especially if additional assumptions about risk aversion are held—rational decisionmakers would almost automatically choose (so long as they remained "rational") what all of us would readily accept as the basic norms of justice and "fairness." Since one would not know what one's identity (in terms of race, gender, religion, economic resources, etc.) would be when the veil was lifted, one would

make sure that everyone was guaranteed certain basic rights and liberties. It is not my intention to offer any further analysis of the Rawlsian argument; many bookshelves could be filled with both critiques and defenses of Rawls's positions. Rather, there is simply no reason to believe that the U.S. Constitution, or any other constitution in the history of the world, was drafted under Rawlsian conditions of fundamental ignorance of one's own situation and the linked inability to predict whether one would be the beneficiary or loser under any particular proposed constitutional settlement. Constitutions are *always* drafted in what might be called "real time" by people who have a very strong knowledge of the groups with which they identify. Not surprisingly, they are primarily concerned with protecting the perceived interests of those groups. This is to say only that constitutions are the products of political struggle and invariably respond to what might be termed "facts on the ground." The desire to actually achieve a constitutional settlement thus may require a willingness to compromise one's basic convictions, including what may be described—especially by critics—as "selling out" the (legitimate) interests of one group in order to achieve the greater goal of establishing a constitutional order.

To be sure, I suggested in the last chapter that readers detach themselves from the immediate political moment by contemplating the powers they would wish (or at least be willing) to grant the (unknown and unpredictable) president who will be elected in 2016 (or 2020) and inaugurated in 2017 (or 2021). This invitation gestures to Rawls; by adopting a longer time horizon, we can tame some of the partisan passions almost necessarily present if we focus on known political leaders or groups. The question facing anyone grappling with issues of constitutional design is whether people can successfully lift their eyes from present actualities and take a longer-term perspective. Still, even if able to do that, one would inevitably be required to decide among conflicting values and therefore discern what kinds of compromise one would be willing to make.

I. CONCRETE STRUGGLES (AND COMPROMISES) IN PHILADELPHIA

The delegates who did come to Philadelphia were hardly agreed on many basic issues. Consider only the two central issues that generated the most

famous and enduring "great compromises" that made the Constitution a political possibility: political representation and slavery.

A. The basis of representation

1. The Senate

Representation is obviously a major issue facing any constitutional designer. Any decisions reflect debatable resolutions to profound questions of political theory. But those decisions inevitably have real consequences for the various interests—each eager to maximize its own power—contending in the here and now over the shape of a new government. But for now we focus on the issue that admirers of the Convention call the Great Compromise: the resolution of the deep conflict between large and small states over representation in the Senate. By definition, proportional representation based on population favors large states; equal representation, small states. The Great Compromise was to have one house committed to each principle. The House of Representatives would rest on proportional representation, while the Senate would be organized around the equal representation of states. This meant that Delaware, which was the smallest state (population of about 59,000 in the 1790 census), would have the same number of senators as Virginia, the largest state (population of 691,000, if one included its slaves). Indeed, the delegates from Delaware had been instructed—apparently at the behest of John Dickinson, one of the delegates—by the legislature that picked them to walk out of the Convention if the principle of equal representation was not adopted. In the late eighteenth century, the population ratio of Virginia to Delaware was approximately 11.5:1; today, the comparable ratio is that of California to Wyoming, approximately 70:1.

Madison, a Virginian, was appalled by equal representation of states and was determined to reject the idea. But he was ultimately persuaded to accept it. The reason was not that he changed his mind about its merits in some abstract sense; rather, he accepted as credible the threat by Delaware and its allies to simply walk out of the Convention, torpedoing the whole project of constitutional revision. (Perhaps it was also relevant that the small states outnumbered the large ones and that the voting rule

in Philadelphia was by state, not by individual delegates.) If one believed, as did Madison and many other delegates to the Philadelphia Convention, that the United States would not long survive under what they viewed as a thoroughly inadequate Articles of Confederation, failure to achieve a new constitution would doom the Union. Thus came about the Great Compromise, by which the Constitution became a genuine possibility and the Union was preserved.

2. The House of Representatives

But the Senate was not the only forum for compromises about representation. The House represents states on the basis of their population. This may seem a simple enough notion, until one addresses the all-important question: how, precisely, would the delegates define the population that to be "represented"? Recall the comparison offered above between Virginia's and Delaware's populations. As a matter of fact, Delaware was also a slave state, as were most states in 1787. A 1783 case decided in Massachusetts did suggest that slavery was no longer legitimate in that state, so perhaps we can say that the approximately 379,000 persons counted in the 1790 census from that state were all "free." New Hampshire, with its population of 96,540 in 1790, was also "free," inasmuch as slavery had seemingly been legally and morally delegitimated there as well. But slavery did not end in New York until 1827,[2] which means that the population recorded in at least the first four censuses included both free persons and slaves.

The central question was whether the basis of representation in the House would rest only on the free population or on the entire population instead. Note that this differs significantly from arguing that representation should be based either on the number of people entitled to vote or the actual voters. We are referring to the most elemental distinction between free (even if subordinated) persons, such as women and children on the one hand, and slaves on the other. The decision was to adopt the Three-Fifths Compromise, whereby the representation base was computed by adding the number of all free persons and three-fifths of the slaves. Thus, 100 free persons and 100 slaves would compute as a total of 160 persons. If the representation were based only on free persons, then there would be

no "bonus" for slave states. Whatever one thinks of the three-fifths rule, it had nothing to do with slaveholders believing that their slaves were only three-fifths human. The slave states would have been utterly delighted to count each slave as a whole person, *so long as no right to vote was attached to that status.* It was the anti-slave states that insisted on slaves counting as only three-fifths of free persons, and that was indeed a compromise from their preferred outcome that slaves not count at all in computing the basis for representation. And, after all, why should they count? There was no plausible argument that those entitled to vote in a slave state would take the interests of slaves into account, though there were arguments made at the time about women being "virtually represented" by their husbands, fathers, or brothers. (One need not agree with such arguments with regard to the wives, children, or sisters. However, it was widely thought at the time to be a good argument, whereas no one made similar virtual representation arguments that required masters to identify with their slaves and thus take their interests into account.)

So the outcome in Philadelphia was that slave states got an enormous bonus with regard to the number of representatives they would be electing. And this bonus scarcely stopped at the entrance to the House of Representatives. Given that the president was elected via the electoral college, in which the vote allotted each state was the total of its number of representatives and its two senatorial votes, slave states also gained additional power to select our chief executive. This might help to explain why seven of the first nine presidents were slave owners—the two exceptions being the Massachusetts presidents, John Adams and his son John Quincy Adams, each of whom served only one unsuccessful term. John Adams, however, would have been reelected in 1800 had it not been for the slavery bonus that gave Thomas Jefferson the advantage. Moreover, John Quincy Adams was elected by the House of Representatives, given that none of the candidates received a majority of the electoral votes. (The House votes by state, with each state delegation having one vote, so Adams had to concern himself only with gaining a majority of the states in the House rather than a majority of the actual representatives.)

The three-fifths rule affects not only the House and the presidency; inasmuch as it is presidents who nominate members for the Supreme Court, it also helps to explain why the Supreme Court was consistently

pro-slavery until 1861. So, the three-fifths rule takes us fully into the belly of the beast, in other words, the quite literally "compromised" nature of the original Constitution and the utter inapplicability of any "veil of ignorance" notion associated with Rawls's ideal political process.

B. Collaborating with slavery

Hard-wired structures versus parchment barriers

Thus, the second great compromise—and one may believe that it was more important to the nature of the American Union than the makeup of the Senate—involved slavery. Three important aspects of that compromise were found in the Constitution: (1) the fugitive slave clause, (2) the protection of the international slave trade until 1808, and (3) the three-fifths clause.

It's worth taking a few moments to distinguish among these three aspects of the Constitution. The first one, the fugitive slave clause by which states promised to return any slaves who had "unlawfully" escaped from a slave state, might be described, in the dismissive words used by James Madison in the forty-eighth *Federalist,* as a "parchment barrier." That is, the text of the Constitution did not include a mechanism of enforcement; nor, as is well known, did it even use the words *slave* or *slavery.* Slave states had to rely on the good faith of other states, some of which were already quite dubious about the legitimacy of slavery. Yet one had to believe that these latter states would readily comply with the implicit promise to return fugitive slaves (and not only indentured servants who decided to renege on their contractual commitment to work for a certain number of years before becoming a full-scale member of the free labor force).

To be sure, Congress passed the Fugitive Slave Law in 1793 that provided some teeth to the guarantee. However, there were no guarantees in 1787 that Congress would in fact pass such a law; nor is it absolutely clear—from a reading of the grant of powers to Congress in Article One, Section 8 of the Constitution—that such a law would necessarily be constitutional. (As a matter of fact, the Supreme Court, in an 1842 opinion by Justice Joseph Story of Massachusetts, *did* uphold the Fugitive Slave

Law as within Congress's power, largely on the grounds that any other conclusion would imperil the Union—as might well have been the case.) Moreover, there was the felt need in 1850 to pass a new Fugitive Slave Act, as part of the so-called Compromise of 1850, inasmuch as the mechanisms established in 1793 were scarcely thought sufficient to protect slaveowners as fully as they desired. Abraham Lincoln, for all of his resolute anti-slavery beliefs, defended the 1850 Act as part of carrying out the bargain with slaveowners living in states that recognized the legitimacy of slavery. The 1850 Act was generated by the fact that American politics in the 1840s and thereafter amply demonstrated that many of the residents of non-slave states—and state leaders responsive to these residents—were not at all eager to comply with their ostensible duties to return alleged fugitives.

The protection of the international slave trade for twenty years took a somewhat different form; it was presented as an absolute limitation on the powers that Congress had been assigned in Article I, Section 8. One might well think, for example, that Congress's power to regulate interstate and international commerce easily reached to prohibition of the slave trade. Maybe yes, maybe no. The real point is that it didn't matter. The international slave trade was given an embedded status for two decades (at which time Congress in fact prohibited American participation in the international slave trade). But what if Congress had jumped the gun by passing a prohibitory law in, say, 1802? One might easily enough say that it would have been unconstitutional for Congress to do so, but who, precisely, would get to say? Perhaps the president, arguably under a constitutional duty to veto any such legislation, whatever his own beliefs about slavery. But one can also imagine that someone involved in the international slave trade would have run to the nearest court, claiming that Congress had no authority to stop the trade prior to 1808. This involves the question, among other things, of judicial review, which will be the subject of later discussion.

A gigantic leap of faith might not have been necessary in 1787 with regard to protection of the international slave trade at least until 1808, compared with the somewhat vaguer promises contained in the fugitive slave clause, but there was still no self-enforcing mechanism for the bargain struck in Philadelphia. One had to trust Congress not to pass a statute

abolishing the trade, or trust the president to veto such a statute, or trust the judiciary to invalidate any such act that was, perhaps, passed over a presidential veto.

It was entirely different, though, with regard to the three-fifths clause. All one had to do was count the population in the constitutionally mandated census—an important part of the Constitution, incidentally—and then multiply the number of slaves by three-fifths to get the total population by which representation would be calculated. To return to a central theme of this book, it provides nothing about which to have a conversation as to constitutional meaning; there is only a settled rule, the violation of which—by, say, the concerted refusal of a majority of free state representatives to seat the "extra" representatives sent by slave states—would trigger a basic collapse of the polity and, perhaps, civil war.

III. REFLECTIONS ON COMPROMISE

It is worth taking some time to reflect on some of the broader problems presented by the notion of "compromise." Is a willingness to compromise necessarily a virtue, or does it sometimes raise the most troublesome of questions? One view was well expressed by Edmund Burke in 1775, in his great speech criticizing the policies of King George III and his ministers vis-à-vis the American colonies, which he gave just weeks before the outbreak of revolutionary violence at Concord and Lexington and more than a year before the American Declaration of Independence. "All government—indeed every human benefit and enjoyment, every virtue and every prudent act—is founded on compromise and barter."[3] Madison's emphasis on the necessity of "reciprocal concessions" in order to form "free constitutions" can be viewed as supportive of Burke's insight.

These eighteenth-century insights are certainly not absent from our present understanding of politics. A basic textbook written by the late political scientist Clinton Rossiter began: "No America without democracy, no democracy without politics, no parties without compromise and moderation."[4] More recently, an anguished 2011 article by former Representative Mickey Edwards decrying the partisanship of contemporary

American politics notes that the very absence of a "consensus" in our 300-million-person polity makes it even more necessary to recognize that "*compromise* is the key ingredient in legislative decisionmaking."[5]

Especially illuminating in this regard is a remarkable book, *Constitution by Consensus,* written in the aftermath of over two years of intense meetings and debates among a group of diverse Israelis about what form a written constitution for that country might take. The group was not so diverse as it might have been; it included no Israeli Arabs, for example. But it certainly drew from both the secular and sectarian Jewish communities, as well as from strong nationalists and more cosmopolitan liberals. The first section of the book is a group of essays titled "I Believe," in which the participants write quite candidly of their mixed feelings regarding their common enterprise. The chair of the group, Arye Carmon, refers to "compromise as an integral element" of resolving the "existential need in Israel now."[6] Not surprisingly, the word *compromise* reappears often in the various statements and in a final collective statement acknowledging that necessary "compromises and concessions will be painful" in order to achieve the goal.[7] There is, however, no guarantee that compromises—because they *are* painful—will in fact take place. There is only the expression of a strong belief that a failure to compromise may be fatal to the future of the Israeli project, however defined.

There was nothing at all inevitable about the secession of the American colonies from the British Empire. A willingness on the part of King George III and Lord North to compromise and barter, or to adopt more moderate policies, might have fundamentally transformed subsequent world history. The events of 1775–1783 exemplify what can happen when an obtuse officialdom refuses to compromise and instead stands on ostensible principle, in this case, the continued sovereign authority of the British Parliament over its colonies.

Similarly, one can view the events of 1787–1790 as equal exemplars of the importance (and presumptive goods) attached to a willingness to compromise. There simply would never have been a Constitution without the two especially important compromises involving slavery and the Senate. But the addition of the Bill of Rights itself can be viewed more as a compromise by supporters of the Constitution (like Madison) than as a reflection of any deep conviction that the addition of so many "parchment

barriers"—likely to make little difference to the actual governance of the new political system—would truly enhance the Constitution. (As a matter of fact, the Bill of Rights was almost entirely irrelevant to the American constitutional order until well into the twentieth century.)

Moreover, consider an all-important 1790 dinner arranged by Thomas Jefferson, motivated, as he later wrote, by his belief "that reasonable men, consulting together coolly, could [not] fail, by some mutual sacrifices of opinion, to form a compromise which was to save the union."[8] The Compromise of 1790, as Stanford historian Jack Rakove labels it, accomplished this goal by trading Jefferson's support for national assumption of states' war debts—a windfall for financial speculators—in return for Hamilton's support for establishing the new nation's capital along the Potomac River in what would of course come to be called Washington, D.C.

One can fast-forward to the aftermath of the shellacking taken by Democrats in the 2010 midterm elections, when President Obama negotiated a compromise with Senate Republicans that, among other things, extended all the Bush-era tax cuts for two years. Castigated by many members of his own party, the president answered them at a news conference, noting that the United States is

> a big, diverse country and people have a lot of complicated positions[;] it means that in order to get stuff done, we're going to compromise...This country was founded on compromise. I couldn't go through the front door at this country's founding. And if we were really thinking about ideal positions, we wouldn't have a union.[9]

So is this a set of stories designed to vindicate Burke and underscore the necessity of compromise and, concomitantly, to scoff at those stiff-necked persons resistant to compromise? Is *everything* subject to compromise, or are there circumstances when one expects people to draw lines in the name of presumed absolutes? Should we understand President Obama to in effect praise those anti-slavery delegates who accepted the various compromises on slavery (which had the consequence of entrenching the oppression of his wife Michelle's ancestors) lest they risk the dissolution of the Union?

Return to Israel—one of the few countries in the modern without a formal written constitution—and consider the following statement made by a member of the Israeli Knesset in 1948 during the debate over whether the new country should adopt a written constitution:

> I would like to warn: the experience of drafting a constitution would necessarily entail a severe, vigorous uncompromising war of opinions. A war of spirit, which is defined by the gruesome concept of *Kulturkampf*...Is this a convenient time for a thorough and penetrating examination of our essence and purpose? It is clear that there is no room for any compromises, any concessions or mutual agreements, since no man can compromise and concede on issues upon which his belief and soul depend.[10]

A similar comment was offered by the Israeli minister of welfare: "The Jewish people are willing to resign themselves to many things," said Yitzhak Meir Levi, "but the moment the issue touches upon the foundations of their faith, they are unable to compromise. If you wish to foist upon us this type of life or a constitution that will be contrary to the laws of the Torah, we will not accept it!"[11] These turned out to be winning arguments, inasmuch as Israel did not in fact adopt a canonical written constitution. As Arye Carmon and his associates emphasize, Israel will get a constitution in the twenty-first century only if those like Levi agree to compromise in return for similarly anguished compromise from their secular opponents.

Perhaps Americans are tempted to view comments (or threats) like those above as simply an example of sectarian intransigence that we in this country were blessedly spared in our own halcyon days of 1787 and the drafting of our own Constitution. We *did* get a Constitution, purchased through two central compromises and a host of smaller ones. There was, one might argue, relatively little kicking the can down the road for decisions to be made later on. Instead, slavery *was* protected, and small states *did* get their disproportionate power in the Senate.

But consider now arguments made by another Israeli, the philosopher Avishai Margalit, in his recent book *On Compromise and Rotten Compromises.*[12] As the title suggests, he sharply distinguishes between acceptable compromises and those that should be condemned as "rotten"

and therefore indefensible, except *perhaps* (and therefore perhaps not even then) in the most exceptional of conditions. He defines a "rotten political compromise" as one that agrees "to establish or maintain an inhuman regime, a regime of cruelty and humiliation, that is, a regime that does not treat humans as humans."[13]

It takes no great feat of imagination to think of slavery in this context and therefore to ask whether the U.S. Constitution was purchased through a truly rotten compromise, what abolitionist William Lloyd Garrison so memorably called "a covenant with death and an agreement with hell" that, indeed, led to further compromises to preserve the Union, such as the already-mentioned dreadful strengthening of the 1793 Fugitive Slave Act in the interests of slaveowners as part of the Compromise of 1850. (A distinguished historian refers to the collection of bills passed in 1850 as the *Armistice* of 1850, precisely because it responded to the already-existing tensions between North and South that exploded into full-fledged war roughly a decade later.[14]) Margalit quotes Garrison's statement that "with the North, the preservation of the Union is placed above all other things—above honor, justice, freedom, integrity of soul."[15] There is more than a trace of similarity between Garrison and Rabbi Levi quoted above, but does that automatically lead us to condemn one or the other?

Are there times to reject compromise in the name of higher values? Should one accord some validity to the dictum *Fiat justitia ruat caelum*, usually translated as "May justice be done though the heavens fall"? Or, on the contrary, should *everything* be subject to sacrifice in order to prevent such a dire outcome? Consider an exchange at the Virginia ratifying convention between George Mason, a leading opponent of ratification, and James Madison regarding the Constitution's guarantee of a twenty-year period protecting the international slave trade before Congress could regulate (and presumably ban) it. Mason was willing to accept the prospect of union without "the Southern States," by which he meant Georgia and South Carolina, which apparently would not accept a Constitution that did not protect the slave trade. As Pauline Maier writes in her magisterial history of the ratification debates, "Mason was ready to leave those states out of the Union unless they agreed to discontinue 'this disgraceful trade.'" What was Madison's response? "'Great as the evil is, a dismemberment of the Union would be worse.'"[16]

Two recent discussions of Henry Clay—known to American history buffs as "the Great Compromiser"—are illuminating. In the first, historian Andrew Cayton, reviewing two books on Clay,[17] noted that both authors appeared to view "compromise as an unqualified good...Good men (Clay) compromise; bad men ([John C.] Calhoun) don't." But, wrote Cayton, "that approach obscures the obvious fact that...sometimes people value a sense of justice above everything else. After all, had the Founders of the Republic pursued compromise in 1776, there might never have been a Union to save. Similarly, the price of compromise in 1850 was prolonged enslavement for millions." Indeed, if one privileges compromise above all, particularly when viewed as instrumentally necessary either to form the Union (as in 1787) or to save it (as in 1850), then what do we wish to say about Abraham Lincoln, who refused to compromise on the issue of extending slavery into the territories of the United States? Had he been willing to compromise, it would almost certainly have prevented the war that broke out in 1861 and cost the lives of a full 2 percent of the American population. Lincoln, of course, could not have known in advance the full costs of the war, but he certainly had reason to know that he was choosing war by what many viewed as his intransigence on the issue of allowing slaves in the territories. Cayton concludes his review by stating that "we remember Lincoln more than Clay, in short, not just because he saved the Union, but also because he insisted that a Union worth saving was a Union that stood for something more than itself."

At least as interesting as Cayton's review was the second discussion, in the maiden speech of Kentucky's Senator Rand Paul to his new colleagues—he was swept in by the "Tea Party" tidal wave in November 2010—in which he took the occasion to distance himself from his Kentucky predecessor Henry Clay. Paul noted that on arriving in Washington, "one of my new colleagues asked me with a touch of irony and a twinkle in his eye, 'Will you be a great compromiser?'"[18] To his credit, Paul took the question with consummate seriousness and devoted his first speech to answering it. He began by describing Clay's life story as, at best, sending a "mixed message," given that so many of his compromises involved slavery. He critically compared Clay with other great Americans of the time, including William Lloyd Garrison and Frederick Douglass. He also spoke at length about Cassius Clay, a cousin of Clay's who became an abolitionist.[19]

"Cassius Clay was a hero," said Paul, "but he was permanently estranged from Henry Clay. Henry Clay made no room for the true believers, for the abolitionists." And then Paul asks the key question: "Who are our heroes? Are we fascinated and enthralled by the Great Compromiser or his cousin Cassius Clay?"

Presumably, it occasions no surprise that Paul casts his own vote for Cassius against Henry. "As long as I sit at Henry Clay's desk, I will remember his lifelong desire to forge agreement, but I will also keep close to my heart the principled stand of his cousin, Cassius Clay, who refused to forsake the life of any human simply to find agreement." And perhaps it occasions no surprise that the *Washington Post* headlined a commentary on the speech, "Rand Paul, the Great Uncompromiser,"[20] in which Dana Milbank, quoting a number of historians, takes Paul to task for his seeming disrespect to Henry Clay. He notes, altogether accurately, that Abraham Lincoln was also a great admirer of Clay. Finally, Milbank plays the counterfactual history card, suggesting that Clay's compromises, including the Compromise of 1850, were eminently defensible: they in effect purchased the North additional time to prepare for the oncoming war. Had secession occurred in 1850, Milbank argues (again quoting some eminent historians) the Confederacy might well have been successful. Not only is there no way of knowing this for sure, but there is also a recent argument by Paul Finkelman, one of leading historians of slavery, that the North was even stronger than the South, relatively speaking, in 1850 than in 1860, so a civil war at that time might have led to an easier Union victory at less cost than 2 percent of the entire population of the United States.[21] At the very least, this illustrates the inevitable admixture of abstract principle and empirical consequences in making basic decisions about the legitimacy of compromise—and the selection of one's heroes.

So, for better or worse, one *must* ask if the heavens would have fallen had there been no Compromise of 1850 or even no Constitution at all in 1787 (or, perhaps, as George Mason suggested was possible, a Union that did not include South Carolina or Georgia?). If the Philadelphia Convention had failed, it is certainly likely that there would have been at least two, possibly three, separate countries taking form, distinguished, among other ways, by their stance toward chattel slavery. Was it worth entrenching slavery into the Constitution through, most importantly, the three-fifths clause, which gave

slave states a huge bonus not only in the House of Representatives but also in the electoral college? More to the point, how do we calculate worth?

There are very good reasons to believe that our collective history would have been very different had the Convention not succeeded. As political scientist David Hendrickson has well argued, the Philadelphians were consumed by the fear that multiple countries in what we today think of as the United States would no more be able to remain at peace than the multiple countries sharing the European continent. Thus the overwhelming *necessity* for a peace pact, which—as we all know—almost inevitably requires compromises, often with extraordinarily unattractive enemies (or, more accurately, those one wishes to turn into former enemies.) Truly "imposed" peace settlements, like that at Versailles after World War I, rarely prove stable and indeed may provoke such a backlash on the part of the ostensibly victimized state that it ends up triggering yet another war. The so-called Reconstruction Amendments added (i.e., imposed on defeated white Southerners) in the immediate aftermath of the Civil War, particularly the Fifteenth Amendment prohibiting denial of the right to vote on grounds of race, had remarkably little effect on the law of race relations until almost a century later, not least because the Compromise of 1877 basically sacrificed the interests of beleaguered African Americans to those of Southern whites who were ever more welcomed back into the Union they had tried to leave.

As already noted, the compromise over slavery was not the only one deemed necessary to purchase acquiescence to the Constitution that was signed on September 17, 1787. There was also the decision to accept the extortionate demand of Delaware and other small states for equal voting power in the Senate. As a matter of fact, as Jack Rakove noted, Madison correctly viewed this as a "defeat, not [a] compromise"[22] for a very simple reason: American bicameralism, unlike many bicameral systems around the world, gives each house a death lock over any legislation passed by the other. We have a constitution filled with veto points, and among the most important of these is the ability of what Madison regarded as an indefensibly structured Senate to kill any and all legislation it finds unacceptable. A "compromise" might have allowed, say, the House, with the support of the president, to override a senatorial veto with an attainable supermajority, as is possible in some European bicameral systems. We pay the costs

every day, even over two centuries later, for *both* of the great compromises that procured the 1787 Constitution.

Even if one finds the Senate as created by the Constitution loathsome—the best that Madison could do, as we shall explore at greater length later, was to describe equal voting power in the Senate as a "lesser evil" (to having no Constitution at all)—would one describe it as a "rotten compromise" similar in its moral offensiveness to slavery? Or would one consider that an example of rhetorical "wretched excess"? Politics, as both Burke and President Obama suggested, is indeed the art of accepting all sorts of "lesser evils," and one might well agree with Madison that equal voting power in the Senate was a price worth paying in 1787. This does not in the least suggest that we should not wish in our own time to have a better Constitution than the one we have, but that's a different topic.

Perhaps the correct analogy is the price paid in 1945 to gain assent to the creation of the United Nations, which involved not only the "great power" veto system in the Security Council but also the de facto granting of extra representation to the USSR by giving seats to Ukraine and Belarus. That the particularities of the veto system may make little sense two generations later—and, indeed, may do a great deal of damage to prospects for a stable world order—does little to demonstrate that it was a mistake in 1945. *Rather, the mistake is feeling ourselves indelibly wedded to such institutional structures long after their rationales have ceased to make much sense.*

One might argue that one of the differences between the two "great compromises" of 1787 was that those who made the compromise with regard to voting power in the Senate bore the costs. That is, states such as Virginia were the big losers in the decision to give equal voting power to Delaware and Rhode Island, just as the United States and the rest of the West paid a marginal cost by giving the Soviet Union extra representation in the General Assembly. Bargaining, by definition, involves a willingness to bear direct personal costs in order to attain a desired goal. Madison, as one of Virginia's delegates, ultimately decided that it was a cost worth paying by Virginians, as did the Virginia ratifying convention when it decided to grant its own assent to the Constitution. And Virginia was the big beneficiary of the Three-Fifths Compromise, which increased its power in the House and the electoral college (and therefore the White House and the Supreme Court appointed by presidents). But the parallel doesn't

really work, for the obvious point is that those who paid the primary costs of the Great Compromise involving slavery, the slaves themselves, were in no plausible sense represented in Philadelphia or the beneficiaries of the successful founding of a new political order. Slavery *did* ultimately end, but only as the result of a catastrophic war, itself fundamentally caused by various aspects of the Constitution, and its carnage.

IV. STRUCTURING COMPROMISES

It is worth noting that some structures may be more conducive to encouraging compromise than others. We shall certainly have occasion to discuss this further when considering institutions like bicameralism or the presidential veto. But the question of how one assures a tilt toward compromise was very much at the center of organizing the Philadelphia Convention. A number of decisions made compromise easier than it might otherwise have been. Consider the remarkable fact, almost incomprehensible to anyone living today, that the vow of secrecy taken by all of the delegates was maintained through the entire Convention (and for many years afterward, for that matter). There were no leaks, period. This has led the political theorist Jon Elster, studying the procedures involved in the drafting of a number of national constitutions, to argue that, in many important respects, the opacity characteristic of the Philadelphians is far preferable to transparency, at least if one wishes to reach agreement. This is the case precisely because transparency, by definition, means that often-intense outsiders can monitor the deals on offer and do whatever they can to thwart them, even threatening retribution against their ostensible representatives, should they be viewed as compromising vital interests.[23] This is obviously an empirical assertion, and full consideration is beyond the scope of this book. It is certainly plausible, though; assume for argument's sake that it is correct.[24] Does this suggest that one should actively *prefer* compromise-producing structures, even if that means reduced transparency in the process by which agreements are produced? Carrie Menkel-Meadow has written that "the brilliance of our Framers... was not only in the substance of their constitutive documents, but in the processes they selected to create them,"[25] including, most obviously, secrecy. If Elster and Menkel-Meadow are correct in

linking the success of the Convention, assuming that one in fact admires the outcome, to the almost complete opacity of its process, does this have any implications for the institutions actually designed in a constitutional convention? If opacity is thought conducive to gaining a constitution in the first place, then why would one not infer that it would be equally conducive to gaining more desirable legislation than a transparent political system?

If one believes that one explanation for the present polarization and gridlock in American politics is too much transparency, might one suggest greater secrecy and therefore reduced accountability (save perhaps for whatever accountability attaches to the final product of the compromise, e.g., the text of the Constitution itself, a medical care bill, or whatever)? To a significant extent, this turns democracy, which is often thought to require a great deal of transparency in order to gain an adequate sense of the public opinion on which most democratic theories rely, into a negative rather than a positive attribute of a political system. Precisely this is argued by former Obama budget director Peter Orszag in an article forthrightly titled "Too Much of a Good Thing: Why We Need Less Democracy": "Our current legislative gridlock is making it increasingly difficult for lawmakers to tackle the issues that our central our country's future," he writes. He calls for "jettison[ing] the Civics 101 fairy tale about pure representative democracy." Instead, we should "begin to build a new set of rules and institutions that would make legislative inertia less detrimental to our nation's long-term health." Orszag advocates, among other things, the increasing use of "more independent institutions," such as commissions of independent experts who are empowered to make binding decisions unless Congress affirmatively overrules them.[26] In fact, the accountability mechanisms that are generally thought to be the sine qua non of representative democracy may assure the near inability to make decisions at all about important issues of public policy—particularly if much of the relevant electorate is taken by the idea of an "uncompromising" champion of their interests doing battle against an often-demonized opposition. Transparency might have doomed the Philadelphian enterprise and therefore assured that the United States had no Constitution at all.

V. THE CENTRAL QUESTION: WAS THE CONSTITUTION WORTH IT?

What *does* one think about the U.S. Constitution and the compromises that were almost certainly necessary to achieve it? Does the willingness to compromise bring honor to the Framers? Do we share Margalit's view that the entrenching of certain slaveowner interests was ultimately a morally indefensible "rotten settlement" because it required accepting chattel slavery? Recall his definition of "rotten compromise": "an agreement to establish or maintain an inhuman regime, a regime of cruelty and humiliation, that is, a regime that does not treat humans as humans." Can there be any doubt that this describes chattel slavery in America?

It is often argued, altogether accurately, that one cannot make an omelet without breaking some eggs. And, to revert to Burke, we properly honor those who make significant concessions, even regarding their most precious values at times, in order to achieve or preserve peace. Indeed, it is no coincidence that Margalit is a longtime critic of many Israeli policies vis-à-vis Palestinians and laments the uncompromising rigidity of many Israeli positions, just as he is critical of similar rigidity on the part of Palestinian leadership. Thus he describes the aim of his own book as "provid[ing] strong advocacy for compromises in general, and compromises for the sake of peace in particular."[27] But there are limits, and his notion of rotten compromise is just such a limit. Ultimately, better no peace than a rotten compromise that preserves the peace by the ruthless subjugation of others.

But was peace or war the dilemma facing the Philadelphians and those called upon to ratify the Constitution afterward? One might believe the answer was yes, for the strongest arguments for ratification in fact involved the various threats—today we would speak of national security—facing the young country from Great Britain, France, Spain, and many American Indian tribes, some of them former allies of Great Britain in the Revolutionary War. After all, a basic purpose of the new Constitution, enunciated in the Preamble, is to provide for the common defense.

Alexander Hamilton offered an especially broad exegesis of this basic constitutional end when he wrote in Federalist 26 that the "powers [relating to the common defense] ought to exist without limitation, *because*

it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." To adopt a modern phrase, one might ask if it was rational to view the United States in 1787 as facing an "existential threat" to its very existence. If so, that carries implications not only for the assignment of powers to the new government—in other words, whatever is necessary to meet the threat—but also for the making of compromises requisite to getting a constitution in the first place. In this context, think of the alliances countries enter into when fighting a war, particularly a war that is viewed as involving existential threats. The United States notably allied with Stalin's Soviet Union in order to fight (and defeat) Nazi Germany. There are times, as recently argued by Harvard Law Professor Robert Mnookin, that one must indeed make "pacts with the devil," even if, obviously, one wants to minimize the occasions for doing so.

I conclude with the following three questions:

1. If one assumes that the consequences of not reaching agreement in Philadelphia or not ratifying the proposed Constitution would have been dissolution of the Union *and* bloody warfare, resulting from the two or three countries being carved out along the Atlantic coast, does that justify the compromise on slavery and the consequent costs imposed on the slaves themselves?[28] If one defends the compromise on such basically consequentialist grounds, what implications does that have for those charged with drafting constitutions in the twenty-first century? Think only of the process of drafting new constitutions in Iraq or Afghanistan. How much of, say, the rights of women or of those who don't share a particular vision of Islam would one be willing to sacrifice in order to gain (relative) peace and avoid civil war and possibly catastrophic bloodshed, not to mention the bleeding over of such wars into adjacent countries like Iran and Pakistan?

2. What if one confidently believes that the failure to achieve consensus would have resulted in three separate countries—call them New England, Mid-Atlantica, and Dixie—that would have grown to interact with one another in the same way that the United States has learned to deal with

Canada and Mexico, sometimes awkwardly, but only rarely by embarking on war? Is compromise with slavery justified under this latter scenario? Under this set of assumptions, is Margalit correct in saying that the great compromise involving slavery was and remains a rotten compromise that, however explainable, is not defensible?

3. Can we simply avoid wrestling with such questions by declaring that what was done in 1787 is irrelevant to our own world and its concerns? That was then and this is now, one might say. But on what basis does one decide that the past is or is not relevant? Is there a historical statute of limitations after which it is "unfair" to dredge up what happened "long ago"? If so, when does that occur and, all importantly, who gets to decide when we as a society "move forward" and "put the past behind us" rather than wrestle with what may be monumental past injustices whose consequences resonate even in our own world today?

3

What Is the Point of Preambles (in Contrast to the Rest of a Constitution)?

Why discuss preambles in a book that emphasizes Constitutions of Settlement? One might think that preambles are quintessential examples of Constitutions of Conversation. After all, they often use abstract, even grandiose, words articulating value commitments like "justice" and "liberty," to mention just two of the key words in the Preamble to the U.S. Constitution. The reason to consider preambles is twofold. First, they often help us to understand the *point* of the particular constitution's enterprise. Evaluating constitutions requires having some sense of what they are intended to do, and it is a feature of the clauses that are the central subject of this book that they rarely, if ever, announce their purposes. To return to my favorite example, the Inauguration Day Clause, we are not told *why* January 20 is the appropriate day, only that it is the day required by the Twentieth Amendment. But the best way to address the Constitution of Settlement is to ask how well it does (or does not) work to achieve the constitution's purposes, and preambles are the first place one should look to find out what the ostensible purposes are.

Secondly, it is an anomaly of American—and much other—constitutional discourse that the Constitution of Conversation rarely includes overt reference to preambles, for reasons that are explored below. So, if one aim of this book is to encourage long overdue conversation about ignored features of our constitutions, then preambles have their own claim to our attention.

Relatively few drafters of the hundreds of written constitutions that now exist have limited themselves only to setting out basic institutional

structures or even to enumerating the rights that their new constitutions should guarantee. Most constitutions also include preambles. Some are short and easy to memorize, as is the case with the Preamble to the U.S. Constitution: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." Some are even shorter, such as the preamble to the Texas Constitution: "Humbly invoking the blessings of Almighty god, the people of the State of Texas, do ordain and establish this Constitution." And there is the Greek Constitution, which begins simply by invoking the Greek Orthodox Trinity. Others are considerably longer, as illustrated by the preamble to the Massachusetts Constitution of 1780, the oldest continuing constitution in the United States:

> The end of the institution, maintenance and administration of government, is to secure the existence of the body-politic; to protect it; and to furnish the individuals who compose it, with the power of enjoying, in safety and tranquillity, their natural rights, and the blessings of life: And whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.
>
> The body-politic is formed by a voluntary association of individuals: It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a Constitution of Government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.
>
> We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the Great Legislator of the Universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new Constitution of Civil Government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, DO agree upon, ordain and establish, the following

Declaration of Rights, and Frame of Government, as the CONSTITUTION of the COMMONWEALTH of MASSACHUSETTS.[1]

A number of preambles of contemporary national constitutions—such as those of Croatia, Pakistan, or Vietnam—are far, far longer. Asking why reveals important lessons about the functions of preambles, which—unlike the rest of the constitutional text—may have relatively little to do with "law" in its ordinary sense.

So, just as we should ask why most nations and states think it is important to have *written* constitutions rather than to rely on customary conventions, we should also ask why so many drafters of constitutions believe that it is essential to include preambles. What is *their* point? With regard to written constitutions, it is easy enough to emphasize a functionalist explanation of the benefits of having clear-cut rules for the gaining and maintenance (and loss) of political power that constitute a Constitution of Settlement. It is harder, though, to come up with a functionalist account of preambles, and not only because they often feature glittering generalities (like "establishing justice"). They also generally do not serve as invitations to *legal* conversations; moreover, if they were taken too seriously with regard to non-legal conversations, they might well serve more as sources of instability than of settlement. So we must explain why constitutional drafters feel impelled to precede the identification of political officials and their powers—or even the delineation of protected rights—with the kinds of statements that are regularly found in preambles. Preambles presumably have a point but certainly not the same kind of point that would be attributed to the main body of a written constitution.

I. THE LEGAL STATUS OF CONSTITUTIONAL PREAMBLES

The easiest way to demonstrate the difference between preambles and the main bodies of constitutions, at least in the United States, is by reference to their very different legal statuses. The Preamble to the U.S. Constitution is rarely cited—and even more rarely seriously discussed—by the Supreme Court, which tends to set the terms of legal argument for most lawyers.

One of the earliest decisions of that Court, *Chisholm v. Georgia* (1793), in holding that Georgia was liable to being sued in a federal court by a resident of South Carolina, did include just such a discussion in the separate opinion of Justice James Wilson, one of the primary figures in both the Philadelphia Convention and the Pennsylvania ratifying convention. Wilson justified the decision from "the declared objects, and the general texture of the Constitution of the United States," including its commitment "to form a union more perfect, than, before that time, had been formed." Moreover, he noted, "Another declared object is 'to establish justice.' This points, in a particular manner, to the Judicial authority."[2]

Wilson was offering what is sometimes called a *purposive* reading of the Constitution. That is, the Constitution has a point, which is to achieve the purposes set down in the Preamble. Whenever possible, therefore, a judge should resolve any constitutional dispute by choosing that outcome that would lead to a "more perfect Union" or take us closer to "establish[ing] justice." Why, after all, would one ever choose an outcome that makes us "less perfect" or generates "injustice"?

One response is to note that such terms are what political theorists call *essentially contested concepts,* which means that there is endless debate about what terms like "justice" mean. Everyone agrees that justice is important, and almost everyone in the modern world applauds the notion of democracy. The problem is that there is not—and, according to some theorists, there never will be—agreement on what exactly constitutes these notions. After all, John Rawls's great book is titled *A Theory of Justice* rather than *The Theory of Justice,* as if to acknowledge that there has been at least a 2500-year-long debate about the meaning of justice, and it scarcely came to an end upon the publication of Rawls's contribution in 1971.

The Court's decision in *Chisholm* was met with a storm of protest from objecting states, which most certainly saw the decision as both unjust and dangerous to the Union. In fact, the very first amendment to the Constitution following the Bill of Rights—the Eleventh Amendment—was designed to overrule the offending decision in *Chisholm.* That might have been enough to discourage citation of the Preamble, but John Marshall notably adverted to it in what is perhaps the most important single decision in our constitutional canon (especially concerning the Constitution of Conversation), *McCulloch v. Maryland,* an 1819 case that

upheld a capacious national power to establish national banks while at the same time limiting the right of the state to tax that bank. "The government proceeds directly from the people," Marshall reminds the reader; it is "'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.'"[3] Why does he bother to do this? Presumably, it is to bolster the view that it would be anomalous for the Court to construe a Constitution with such noble purposes in a crabbed manner that would make fulfillment of those purposes more difficult. Still, even the example of the person often described as "The Great Chief Justice," writing in a truly canonical case, was not enough to make the Preamble an ordinary part of the lawyer's argumentative arsenal. Far more important, and basically dispositive for practicing lawyers, was the Court's comment over a century ago: "Although th[e] preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments."[4] Nor, just as importantly, has it been treated as a source of establishing the *limits* on governmental power.

One reason for such reticence was well stated by the nation's first attorney general, Edmund Randolph, in his 1791 memorandum to George Washington concerning the constitutionality of Congress's chartering the proposed Bank of the United States. Had Congress been granted power to do such a thing under the terms of Article I, Section 8 of the Constitution, which sets out the powers "herein granted" to Congress? Since the Constitution had been sold to some of its state-oriented detractors as establishing only a "limited government of assigned powers," many of the great debates early in our history concerned the extent to which the promise of a limited national government would be adhered to. Or would clever lawyers instead come up with arguments for the endless expansion of national power (and the concomitant diminution of state power)?

President Washington did not see the Constitution as obviously "settling" the question of whether Congress in fact had the power to charter a national bank. So he asked the three members of his cabinet—Thomas Jefferson (secretary of state), Alexander Hamilton (secretary of the treasury), and

Randolph—to write him memoranda stating their views on the question. Hamilton had been the Bank's active proponent, so it is not surprising that he believed it was thoroughly constitutional, given a capacious reading of the Necessary and Proper Clause at the conclusion of Article I, Section 8, defining *necessary* to basically mean "convenient" or "useful." Thomas Jefferson, on the other hand, advised Washington that Congress was restricted to passing legislation described quite specifically in the Constitution, unless failure to act would doom the entire constitutional fabric. No clauses allowed Congress to charter corporations, and the Bank, even if "useful," didn't meet the stringent conditions Jefferson established for "necessity."

Randolph agreed with Jefferson that the Bank was unconstitutional and that Washington should therefore exercise his constitutional power to veto the bill, since signing an unconstitutional bill would violate the oath of office. Noting that some proponents of the Bank relied on the Preamble, Randolph told Washington that "the Preamble if it be operative is a full constitution of itself; and the body of the Constitution is useless."[5] If, after all, it became sufficient to make direct appeals to "establishing justice" or "assuring domestic tranquility," then why bother either demonstrating that Congress had been assigned specific powers or—even more to the point—pay any heed to barriers to governments achieving such happy goals? Thus, he pronounced "the legitimate nature of preambles" to be "declarative only of the views of the convention, which they supposed would be best fulfilled by the powers delineated."

Randolph might have been correct that the authors of the Constitution believed that the purposes set out in the Preamble would in fact "be best fulfilled by the powers delineated." But it is an *empirical* question as to whether that is the case, and one might well believe, especially with the passage of time, that the "powers delineated"—or perhaps the explicit restraints on such powers—might prove inadequate. In that case, which should take priority, the achievement of those great purposes or adherence to the text? Consider in this context perhaps the most remarkable aspect of Marshall's opinion in *McCulloch.* Marshall emphasized that "we must never forget, that it is a *Constitution* we are expounding" and then went on to explain that the U.S. Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." In effect, Marshall recognized that the United States Constitution *had* to be a living Constitution

(a term that he did not use) if it was to achieve the most fundamental purpose of "endur[ing] for ages to come." In this belief, he was a faithful disciple of his despised adversary Thomas Jefferson, who wrote that just as "manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."[6] Such adaptation is surely an important part of our constitutional history. This is presumably what Oliver Wendell Holmes meant by emphasizing that "the life of the law" was experience, or what he called "the felt necessities of the time," rather than responses to the ostensible demands of cold "logic."[7] Yet even Marshall did not succeed—assuming that he wished to—in preserving the Preamble as part of the repertoire of standard American legal rhetoric.

There is nothing unusual about this. Although most constitutions around the world include preambles, few of them seem to invite legal arguments based directly on them. Probably the most notable exception is modern France, operating under the 1958 constitution establishing the Fifth Republic. In 1971, the French Constitutional Council, which can be analogized to the U.S. Supreme Court, invalidated a law passed by the French parliament based in part on the "fundamental principles" instantiated in the preamble.[8] So perhaps it is fair to place the U.S. Preamble at one end of a spectrum as barely "legalized," whereas the 1946 French preamble, given new life by the Constitutional Council, has become strongly generative for modern French constitutional law.[9] Still, even taking into account such examples, one might find it safe to say that only rarely is the motive force behind writing a preamble to provide material from which lawyers can directly draw their arguments.[10] So if preambles typically—and most certainly so within the United States—are not meant to supply the basis for standard-form legal arguments, what functions *do* they serve?

II. THE "NON-LEGAL" FUNCTIONS OF CONSTITUTIONAL PREAMBLES

A. Delineating the nation

For better or worse, one important clue regarding the importance of preambles is provided by the German legal philosopher Carl Schmitt, whose

legal brilliance is certainly complicated by his support in the 1930s of the Nazi Party. For Schmitt, the existence of a political nation (which may or may not have been organized into a political state) precedes the adoption of a constitution and indeed gives life to it. It is the unified political will of a people (as in "We the People") that creates a constitution—at least in those political orders that purport to rest on popular sovereignty. And any constitution adopted by a national *volk* instantiates the particular perspectives of that discrete national entity, including, for Schmitt, the all-important differentiation of the world into friends and potential enemies. To define who is within a nation is, logically speaking, also to declare who is outside, with potentially ominous consequences.

Consider in this context the Preamble to the Swiss Confederation, which proclaims its "intent of ... maintaining and furthering the unity, strength and honor of the Swiss nation."[11] Even if the Swiss do not look askance at the unity, strength, and honor of other nations, these are clearly not the concerns of those gathered together under the auspices of the Swiss constitution. It may not be entirely coincidental that Switzerland has some of the most rigorous barriers to immigrants gaining citizenship of any country in the world. It is worth noting, incidentally, that—at least since the addition of the Fourteenth Amendment to the U.S. Constitution in 1868—no American state can adopt such a parochial conception of its purpose. Individual states, unlike the United States as a whole, have no control over who can join their community. If citizens or even aliens who are legal residents of the United States wish to move, say, from Massachusetts to Wyoming, there is nothing Wyoming can do to stop them. And, at least since several Supreme Court decisions in the 1970s, these new residents—if citizens of the United States—are also entitled to vote no later than two months after their arrival.

The South African Constitution may be remarkably universalistic and cosmopolitan in some of its language, including the emphasis expressed in the preamble on advancing universal "human rights and freedoms."[12] Still, no one reading the preamble would doubt that the constitution is aimed at residents of South Africa, even "citizens" of South Africa. Perhaps the best evidence of its non-universalism is the concluding phrase, in which God's blessings are invoked in the eleven official languages of South Africa (including—in addition to English and Afrikaans—isiZulu, isXhosa,

Sesotho, and Xitsonga). Whatever the multitude of languages, they are all "local." Arabic, for example, is *not* an official language, nor are any of the other languages identified with other parts of Africa, such as Swahili.

Returning to the American Preamble, we can ask about the precise referent of the phrase "We the People." After all, Article VII provided for constitutional ratification by the individual states, most certainly not by a national convention. There can be little doubt that most of the population had a greater sense of themselves as Virginians or New Hampshirites than as Americans. This is, after all, one of the reasons that the United States of America disintegrated in 1861 when West Point–trained Robert E. Lee, among many others, gave his identity as a Virginian priority over any national loyalties. So does the Preamble mean to evoke one national people—"the People of the United States of America"—or rather a group of peoples (plural) living in the various states of the Union?

The draft of the Preamble that was sent to the Committee of Detail in August 1787 spelled out the names of each of the thirteen states, including Rhode Island and Providence Plantations. However, the final draft, signed on September 17, 1787, omitted the names. One possible explanation for this is that it was a clever way of announcing that the states were being rendered next to irrelevant, at least as a source of basic identity, and that they would be supplanted by a single national American identity. It might have been far easier to do this if, as some had suggested, the name of the country had been changed to, say, Columbia. But the very term "United States" is fatally ambiguous, depending for its force on whether one inflects "united" or "states." Thus the other rationale offered for the final draft of the Preamble is that Article VII contemplated the possibility that one or more of the thirteen states would in fact refuse to ratify the new document, as was originally the case with regard to North Carolina and Rhode Island, and it would be embarrassing to include that state in the Preamble if it chose to remain out of the Union.

It is illuminating to consider in this context the preamble to the United Nations Charter of 1945, which begins:

> WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war... and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person,

> in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained...HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.[13]

Would anyone easily refer to a "world political community" that had effaced the reality of national identities? After all, what is the point of referring to "nations large and small" if they are to be rendered irrelevant by membership in de facto world government?

B. Are "the people" constituted by a given religious identity?

But let us look at a number of other preambles and discern what they might be telling us about the visions of their authors (and the social groups they represent). One might, for example, wish to ascertain the relevance of religion to the communities for which a constitution's framers purport to speak. Although the South African Constitution would not strike most observers as religiously sectarian, it does acknowledge the community's presumptive belief in a God who is capable of "blessing" South Africa's new venture in democratic constitutionalism. In this the South African Constitution is not alone.

Americans, for example, need only look to their north to find the opening words of the Canadian Charter of Rights and Freedoms: "Whereas Canada is founded upon the principles that recognize the supremacy of God and the rule of law."[14] Switzerland begins its preamble "In the Name of God Almighty!" And Germany's post–World War II Framers were "Conscious of their responsibility before God and Men."[15] One might well regard these invocations of "God" as relatively non-sectarian, unless one does not believe in any god. But one might be a religious believer who, however, presumes that the "God" invoked by Canada, Switzerland, or Germany is some version of a Christian (or, at best, Judeo-Christian) god that one might not in fact believe in. And, obviously, this is not simply a matter of integrating Islamic members of such communities. There are, after all, said to be over three-quarters of a million Hindus in Canada;

perhaps they could be forgiven for believing that the ostensible community that is organizing itself around the Charter of Rights, by referring only to "God" instead of multiple "gods," at worst excludes them or at best merely tolerates the alien presence of religious deviants.

One cannot take refuge in some vague invocation of the post–World War II "Judeo-Christianity" (or its contemporary variant "the Abrahamic communities") when reading some other preambles, even of those countries considered well within the West. The preamble of the Greek Constitution is simply: "In the name of the Holy and Consubstantial and Indivisible Trinity."[16] Probably the most remarkable of such constitutions, in what we usually call the West, is Ireland's, whose preamble begins by speaking "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred," and immediately "acknowledg[es] all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial."[17]

Can it possibly be the case that a predicate condition of membership within the "people of Eire" is "humbly acknowledging all our obligations to our Divine Lord, Jesus Christ"? What is the status, then, of those who acknowledge no such obligations? Many years ago, Dublin had a Jewish mayor, Robert Briscoe, who presumably acknowledged no such obligations. Any attempt by contemporary Ireland to deny citizenship to, say, immigrants who do not acknowledge such obligations might well run afoul of the European Convention of Human Rights. But then how do we really make sense of the existing preamble? Should the Irish be expected to change it to acknowledge the decidedly new reality of their membership in the contemporary European Union?

As one moves away from the West, one finds even more religiously assertive statements of identity. Perhaps the best non-Western analogue to Ireland's constitution is that of the Islamic Republic of Pakistan, whose preamble can also be described as a form of political theology. It begins by noting that "Almighty Allah alone" enjoys "sovereignty over the entire Universe," including, presumably, Pakistan itself.[18]

Needless to say, not all countries in the modern world, even (or especially) those with distinctly sectarian pasts, wish to embrace such a sectarian self-understanding as do Greece, Ireland, or Pakistan (among many

other examples that might be given). Thus, the preambles of at least some constitutions written in recent years, especially in Europe, seem to wish to define the relevant political community—and its ostensible "unity"—in less religious terms. Especially interesting in this regard is Poland, not least because of its strong historic identification with Roman Catholicism, but also because its new constitutional self-understanding was developed during the reign of "the Polish Pope," John Paul II. The preamble, written as part of the 1997 constitution, speaks of "the Polish Nation," but it defines that nation as "all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources." Similarly, there is recognition that "our culture [is] rooted in the Christian heritage of the Nation and in universal human values."[19] Given Poland's history, one can only rejoice that the sectarian lion is being invited to lie down in peace with the secular lamb, but there is certainly nothing "innocent" about the phraseology adopted by the Polish framers.

Huge controversies broke out, for example, with regard to the preamble to the draft treaty that would have established a constitution for Europe[20] and whether it would make any kind of bow to the Christian past of most of Europe, as the Catholic Church and several European governments (including Italy) demanded. The answer was no, partly because of the militant opposition of France, but also, one suspects, because one major issue before the European Union is the ultimate admission of Turkey, which, however described, is most certainly not Christian. One might be forgiven if one thinks of Turkey as Islamic, especially given the country's current government, but its constitution is in fact probably the most militantly secular constitution of any major country in the world today.[21] Its preamble defines loyal Turks as those committed to "the concept of nationalism outlined and the reforms and principles introduced by the founder of the Republic of Turkey, Atatürk, the immortal leader and the unrivaled hero." Among these values is "the principle of secularism": "there shall be no interference whatsoever of the sacred religious feelings in State affairs and politics."

So let us return to the Preamble to our own Constitution, which is clearly among the most secular of national preambles. The Preamble offers nothing to support the notion, for example, that we are a "Christian nation" in anything more than a sociological sense. The lack of any such theological

pronouncement is indeed striking in its absence, and one might even go so far as to say that it "settles" that aspect of our national identity. Whatever it means to be part of the national "We the People," religious identity has nothing to do with it. Moreover, Article VI of the Constitution explicitly states that "no test oath," such as belief in the Trinity or presumably even belief in God, shall be required of any public official.

Before one accepts this reading of the Constitution—either joyfully or with regret—one should also consider the very last line of the Constitution: "Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of *our* Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth." One might view this simply as the thoughtless English specification of the often-used *Anno Domini*. Although this sentence plays no part in standard legal argumentation, it may have importance for those who are interested literally in every word of constitutions regardless of their interest to ordinary lawyers. It should be clear that even at the time of the framing, when a synagogue had long been established in Newport, Rhode Island, there was not a unanimous belief in a common "Lord" who was born (more or less) 1787 years prior to the great events in Philadelphia. One can be confident that the use of any such language in a contemporary statute passed by Congress would properly be found to violate the Establishment Clause of the First Amendment. Still, there it is, in every copy of the Constitution.

There is one other clause of the Constitution worth noting, relating to the number of days the president has to decide whether or not to veto legislation sent him by Congress. It is, obviously, very important that this be settled. It would be decidedly awkward to allow the president a "reasonable time" to read and then to decide on the fate of a given bill. So, says Article I of the Constitution, "If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law," at least if Congress is in session. It does not seem difficult to explain why Sundays are excepted, though one might ask if anyone designing a constitution for the America of the twenty-first century would include such a phrase.

But, as suggested earlier, we make a serious mistake, when delineating "American constitutionalism," to refer only to the U.S. Constitution

and its Preamble. Perhaps its message is that the states and their assorted populations do not share a particular religious identity, at least if by "particular" one means the specific denominations within Protestantism.[22] Or one might even argue that the particular members of the political elite who were in Philadelphia were significantly less religious than were more ordinary Americans. George Washington, the President of the Convention, was notable for making no overt references to Jesus during the course of his political career, though he did proclaim the "utility" of religion as a social bond; importantly, he didn't seem to emphasize any particular religion. He was notable as well for reaching out to the Jewish community of Newport, Rhode Island, and assuring them of their rightful place in his America.

But can we infer similar views about American society or stances toward religion from a look at American state constitutions? When we look at them, we discover a remarkable pervasiveness of religious language. I have already quoted Texas's brief preamble: "Humbly invoking the blessings of Almighty god, the people of the State of Texas, do ordain and establish this Constitution." Texas may be exceptional in many ways, but this is not one of them. *All* the preambles to American state constitutions include religious evocations,[23] even if sometimes they are a bit muted, as was the case with the 1780 Massachusetts Constitution, drafted largely by John Adams:

> We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other, and of forming a new constitution of civil government for ourselves and posterity; and devoutly imploring His direction in so interesting a design, DO agree upon, ordain, and establish the following declaration of rights and frame of government as the CONSTITUTION of the COMMONWEALTH of MASSACHUSETTS.[1]

If one proceeds alphabetically through the American state constitutions, one finds first the 1901 Alabama Constitution: "We the people of the State of Alabama, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution."[24] Finally, there is Wyoming's constitution of 1890: "We, the people of the State of Wyoming, grateful to God

for our civil, political, and religious liberties ... establish this Constitution." One might see these as reflecting the cultures of particular regions and the particular times in which they were drafted. We have, though, already seen that even the 1780 Massachusetts Constitution, however "deist" its language might be, is considerably less secular than the U.S. Constitution written seven years later. And consider the New Jersey Constitution, drafted in 1948, which retained the language of its nineteenth-century predecessor: "We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution." Similarly, the 1972 Montana Constitution speaks of "We the people of Montana [who are] grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains." The most recent state constitution is that adopted by Rhode Island in 1986, whose preamble states that "We, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same, unimpaired, to succeeding generations, do ordain and establish this Constitution of government."

American Indian tribes have also contributed to the American constitutional fabric. The preamble to the 1928 Constitution and Bylaws of the Oglala Lakota (or Sioux) People defined the object of the constitution as "securing to ourselves, and our posterity the political and civil rights guaranteed to us by treaties and statutes of the United States," including the "encourage[ment] and promot[ion of] all movements and efforts leading to the good of the general welfare of our tribe, acknowledging Almighty God as the source of all power and Authority in Civil government, the Lord Jesus Christ as the ruler of Nations, and His revealed will as of supreme Authority."[25] This constitution did not endure, replaced in 1936 by the present amended constitution, which included a new preamble that recognized "God Almighty and His Divine Providence."[26] One should be aware that the Establishment Clause of the First Amendment, though it certainly applies to states, does not apply to Indian tribes. However, no one has suggested that the state preambles must be rewritten to conform with the prohibition on establishment of religion.

Justice William O. Douglas notably wrote in a controversial 1952 Supreme Court decision that Americans "are a religious people and our institutions presuppose a Supreme Being."[27] It is hard (though not impossible) to support this proposition from looking at the U.S. Constitution. If, however, one looks only at state constitutions or the Oglala Sioux constitution, one finds almost overwhelming support for Douglas's statement. Moreover, as Gordon Wood notes, both "Connecticut and Massachusetts continue[d] their tax-supported Congregational establishments" into at least the early nineteenth century. Indeed, "the Revolutionary constitutions of Maryland, South Carolina, and Georgia authorized their state legislatures to create in place of the Anglican church a kind of multiple establishment of a variety of religious groups, using tax money to support 'the Christian religion.'"[28] Most of the states imposed religious tests for public office. Maryland and Delaware were relatively liberal among this group in requiring only that one be Christian, though Delaware required a belief in the Trinity as well. New Hampshire, Connecticut, New Jersey, North Carolina, and Georgia specified that officeholders be Protestant; no Catholics need apply. Pennsylvania and South Carolina officials had to believe in one God and in heaven and hell. The outliers in this regard were Georgia, Virginia, New York, and Massachusetts.

So we have to determine the implications of this collection of facts about both the past and present of American state constitutionalism. Anyone familiar with contemporary American culture would be hard-pressed to deny the hold that the purported connection between "Americanness" and religiosity, even if religious "particularism" for millions has become something named the "Judeo-Christian tradition."[29] One can say with confidence both that the U.S. Supreme Court is completely unlikely to declare these various state preambles unconstitutional[30] and that it would be foolhardy in the extreme to throw one's energies into campaigns to amend any of these state preambles in order to make them as secular as the U.S. Constitution.

C. "National narratives" and civic tutelage

I have mentioned the Turkish preamble in the context of its full-throated embrace of a secular polity (whatever the realities of modern Turkey).

But that preamble raises many questions beyond those of religion and secularism. It is also suffused with Turkish nationalism. It appears to require, for example, that all who wish to be deemed "good Turks" must recognize Atatürk as their "immortal leader" and "unrivaled hero," in spite of the fact that any mulicultural society will almost by definition feature a multiplicity of "heroes," some of whom—like Robert E. Lee and Ulysses Grant or Abraham Lincoln and Jefferson Davis—may be out-and-out adversaries and unlikely to be objects of universal admiration. Like more concrete public monuments, preambles can be tutelary inasmuch as they attempt, with whatever degrees of empirical success, to shape the consciousness of the citizenry, including future generations who must be inculcated with norms of political correctness. Most often, future generations forget whom the monuments are intended to commemorate and, more importantly, why. Perhaps that is the fate of preambles as well, especially if they lose purchase as part of our ongoing constitutional conversation.

Few other preambles are so specific as is the Turkish one in its valorizing Kemal Atatürk. Many, though, reflect the desire of their authors to model a suitably inspiring history of the particular nation that, as Schmitt suggested, precedes and therefore is basically to be served by the new constitution. Exemplary in this regard is the constitution of Croatia, written in the aftermath of the dissolution of the multiethnic state of Yugoslavia in 1992, itself the prelude to a devastating civil war. The preamble presents an extended history lesson, presumably part of an effort to educate the surrounding community, though one assumes that it will also play a role in the future civic education of young Croatians. Again, it is very long, as one might expect of a document dedicated to outlining the "millenary identity of the Croatian nation and the continuity of its statehood" beginning in the seventh century and continuing to the present. Thus it concludes by referring to "the presented historical facts and universally accepted principles of the modern world, as well as the inalienabile and indivisible, non-transferable and non-exhaustible right of the Croatian nation to self-determination and state sovereignty, including its fully maintained right to secession and association, as basic provisions for peace and stability of the international order, the Republic of Croatia is established as the national state of the Croatian nation."[31] It does recognize membership of other "national minorities" within the state, including Serbs, Czechs, Slovaks, Italians, Hungarians,

Jews, Germans, Austrians, Ukrainians, and Ruthenians. Although they are guaranteed "equality with citizens of Croatian nationality," they should presumably always be aware that the primary purpose of the Croatian state is to vindicate the particular narrative of the Croatian people and to return them fully to the stage of world history. It would be reassuring to believe that the commitment to self-determination, a concept identified with President Woodrow Wilson, who made that one of the principal aims during World War I, can coexist easily with multinationalism and pluralism. Yet there is all too much evidence that this may not be the case, and one might be especially doubtful with regard to countries that present themselves in their preambles in the language of assertive nationalism.

Similarly tutelary is the preamble to the 1992 constitution of the Socialist Republic of Vietnam, which, after referring to the "millennia-old history" of "the Vietnamese people," goes on to offer a synopsis of developments "starting in 1930, under the leadership of the Communist Party of Vietnam formed and trained by President Ho Chi Minh."[32] Needless to say, this includes reference to the 1945 declaration of independence by the Democratic Republic of Vietnam and the military victories over France and the United States that "reunified the motherland, and brought to completion the people's national democratic revolution." Along the way constitutions were adopted in 1946, 1959, and 1980. A constant throughout, though, is the commitment, "in the light of Marxism-Leninism and Ho Chi Minh's thought, [to] carrying into effect the Programme of national construction in the period of transition to socialism."

Imagine what difference it might have made had the American Framers included as part of the Preamble the "long train of abuses" charged against King George III in the Declaration of Independence. That would have transformed the Preamble from a highly abstract statement of admirable goals to an attempt to educate future generations as to the particulars of the American past that generated independence and then the new Constitution. No such mistake is made by the drafters in Croatia or Vietnam. Still, one wonderful thing about the American Preamble is its brevity; it has literally been set to music. In contrast, one may find many of the contemporary preambles tedious to read unless one is a devotee of nineteenth-century organic nationalism or of vanguards that claim to speak in the name of the entire social order.

III. DO WE SHARE A COMMITMENT TO "FUNDAMENTAL VALUES"?

We come to the final and most important question posed by the phenomena of preambles. How accurate is the frequent positing by preambles of social or national unity on the part of the particular people ostensibly behind the constitution? There is a reason, after all, that Hanna Lerner titled her book on Israel, Ireland, and India *Making Constitutions in Deeply Divided Societies*, or that Sujit Choudhry similarly titled an excellent collection of edited essays *Constitutional Design for Divided Societies*.[33] Or consider a famous 1905 opinion written by Justice Oliver Wendell Holmes, which proclaimed that the U.S. Constitution "*is made for people of fundamentally differing views.*"[34] Even if there is a consensus that certain terms form the basis of our conversation, they may indeed be "essentially contested" and therefore serve at least as much to divide as to unite us. So perhaps anyone who agrees with Holmes's perspective should agree that the writing of preambles is at least as much a testament to a yearning for homogeneity—whether of religion, ethnicity, or political ideology—as the reflection of a far more complicated, and often disconcerting, actuality. And, if one does not share the visions instantiated in a particular preamble—including the religious overtones of all the state preambles—is it fair to view them as exemplifying a power play in the struggle over defining (or "constituting") particular societies?

When teaching about "constitutional design," I ask students to imagine themselves as "certified constitutional designers" requested to consult with constitutional framers near and far. So, imagine your own response to clients who ask if they should write a preamble to a newly drafted constitution. What would be its point—and, therefore, what would you advise them?

12

How "Independent" a Judiciary Do We Really Want?

The last chapter discussed the desirability of building some "wall of separation" between a president and attorney general. The reason to build such a wall with regard to the attorney general is the perception that law—and its enforcement—should be truly distinguishable from what we ordinarily call "politics." "Political justice" is usually a term of opprobrium, referring to the self-conscious use by political authorities of the machinery of law to go after or intimidate one's political opponents.

If there are those who are concerned about the "independence" of attorneys general, there are many more people who emphasize the importance of "judicial independence" as part of the very definition of "the rule of law." Judges should be accountable, it is often asserted, only to the law, not to the wishes of a president or of Congress, whatever role they may have played in the initial appointment process. But the appointment process is scarcely free from political overtones. Various appointment processes, including those established by the United States and state constitutions, have been criticized as injecting too much politics into what ought to be a non-political institution, the judiciary.

That being said, readers can test their own intuitions about what they mean by independence and whether it is in fact a good thing. Independence is primarily a notion of autonomy and, therefore, basically of non-accountability to those possessing particular political (or what Madison might call "factional") interests insufficiently embraced by the independent decisionmaker. "Brutus," one of the leading anti-Federalists, was harshly

critical of the Constitution with regard to the independence accorded the judiciary, especially the Supreme Court.[1] The Philadelphians, Brutus argued "have made the judges independent, in the fullest sense of the word. There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself."[2] So for Brutus, "judicial independence" was a bug rather than a feature. Let me offer an example of a maximally "independent" institution and ask if it offers a desirable model for designing a judiciary.

Consider the French Academy, which is remarkably "independent" in the particular sense that it is a self-perpetuating body. When a vacancy occurs among the forty "immortals" who comprise the Academy, the remaining academicians select a new member. Outsiders may express some interest in who is chosen, but the one certainty is that the surviving members will cast their votes and make whatever selection they want. Now put this within the context of judges and judiciaries. Would any readers endorse a judiciary that operated under the rules of the French Academy? Whenever a vacancy occurred in the Supreme Court, it would be filled following selection by the remaining justices. In addition, one might give to the members of the Supreme Court the prerogative of selecting all members of "inferior" courts, as they are labeled by the Constitution.

This is not an entirely fanciful notion. For many years, Aharon Barak, the former president of the Israeli Supreme Court, played what many considered a dominant role in selecting new members of his court, though, at least formally, he was only one among several members of a judicial selection commission in Israel. Students of the Indian political system have concluded that the Indian Supreme Court basically selects its own successors, even if the formal appointment is by the president of India. Similarly, the Danish Supreme Court is said to have a de facto, even if not constitutionally specified, right to veto any judicial appointments. These may all be informal, but they are very real practices. Moreover, as Tom Ginsburg notes in his invaluable book *Judicial Review in New Democracies*, a number of political

systems assign some formal appointing authority to current members of the judiciary. In Bulgaria, Italy, Georgia, and Ukraine, members of the highest court get to name some designated percentage of the total membership of the court, with no possibility of veto by the president (in presidential systems) or the legislature. Many other systems, including in many of the American states, include some form of "nominating commissions," also designed to restrict political discretion. Interestingly enough, attorneys general or ministers of justice often are members of such commissions, but this depends on the perception that persons filling those offices are in fact apolitical in some important sense.

So, to summarize, one form of independence involves an appointment process that is designed to limit the play of "political" considerations in any decisions that are made. One may also take a desire for independence into account when deciding how long judges shall serve. If independence fundamentally means "non-accountability," one might be tempted by life tenure, coupled with constitutional barriers against the reduction of salary. But the central question is how tempted we are by what might be termed "maximal non-accountability" to political considerations.

Such considerations can take multiple forms. An appointing authority might be eager to curry favor with a particular demographic constituency by appointing one of their own. Or the primary consideration might instead be a commitment by the appointing authority to only one constitutional vision among many that have contended with one another throughout our history. One might even describe such a singular commitment as an attempt to shut down important aspects of the Constitution of Conversation by suggesting that there is only one legitimate answer to the questions posed by the Constitution.

But judicial independence remains a mysterious notion even after any questions presented above are resolved. A valuable collection of essays, *Judicial Independence at the Crossroads*,[3] is rife with challenges to the very utility of the concept. Thus Lewis Kornhauser titles his own contribution *Is Judicial Independence a Useful Concept?* His answer is a resounding no. He concludes that "legal debates over adjudication, debates about the design of judicial institutions, and the explanation of the emergence and performance of various judicial institutions would be clearer and

progress more rapidly if we abandoned the concept."[4] Part of the problem is empirical: how, exactly, do we measure independence in a way that allows us to determine that a particular court or an overall judicial system is more independent than another?[5] As already suggested by reference to the French Academy, even if we can confidently define what constitutes "autonomy" or "independence," we must still engage in the normative task of evaluation. It is easy enough to assert that a court with life tenure, maximum freedom to take any and all cases brought before it, and the ability to choose its own successors free of any participation by elected political officials is more "independent" than one at the other end of the spectrum with regard to all these attributes. But does that tell us anything useful about whether that degree of independence is to be applauded or lamented?

After all, it is a settled reality that almost all judges face the prospect of their decisions being appealed to higher authority. As the Canadian scholar Peter Russell has written, "the influence of the decisions of higher courts on lower court judges is surely not to be regarded as a violation of judicial independence."[6] By any measure, members of the U.S. Supreme Court—or of state supreme courts in certain contexts—are more autonomous than the members of what the Constitution in Article III deems "inferior" courts. Every judge on one of these lesser courts must always be looking over his or her shoulder and wondering what a reviewing court might say about any given decision. Indeed, built into our standard definition of the rule of law is precisely the notion that "inferior" judges will feel bound by the decisions of their "superiors," *even if the "inferior" judges believe, perhaps with good reason, that the hierarchically superior judges are deeply mistaken on what "the law," best interpreted, really is.* Why would anyone describe such judges as "independent" if they are forced to acquiesce to decisions they believe to be mis-statements of the law? With regard to statutory interpretation, an ever-more-important aspect of the contemporary judiciary, judges must always be aware of the possibility that legislatures might overturn their decisions should they deviate too far from legislative preferences.[7] In any event, even if judicial independence is not completely useless as an analytical concept, it is in fact a truly complex notion. Few, if any, people are truly committed to what I have termed "maximal" judicial independence.

I. WHAT DOES THE U.S. CONSTITUTION SAY (AND NOT SAY) ABOUT THE JUDICIARY?

Consider what the U.S. Constitution specifies about the about the federal judiciary: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." Also relevant is Article II, Section 2: "[The President] shall nominate, and by and with the advice and consent of the Senate...judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

A. The Supreme Court

1. Size

Congress, it appears, *must* establish a Supreme Court—one can scarcely imagine the Supreme Court "constituting itself" in the absence of such congressional authorization—but Congress remains free to decide whether there shall be any "inferior" courts at all. It is theoretically possible that the *only* federal court would be the Supreme Court, and that all other courts would be state courts. That is obviously not the way things worked out, but it is worth recalling that the nation didn't have a separate tier of appellate courts between district courts and the Supreme Court until 1891. To be more precise, an appellate judiciary *was* established by an act passed by a lame-duck Federalist Congress on February 13, 1801, three weeks before the inauguration of their hated adversary Thomas Jefferson and the shift of power in Congress that would reflect the elections of 1800. Not at all surprisingly, outgoing President John Adams appointed only Federalists to fill the positions that were created, and the Federalist Senate quickly confirmed them. The newly empowered Jeffersonians did not take this lying down; the Judiciary Act of 1801 was repealed on April

29, 1802. Some might describe this as a "purge" of the federal judiciary based entirely on politics, but the creation of those courts and the identity of those appointed to places on them can also be explained only by reference to the deep and bitter politics of the moment.

But consider a question about which the Constitution is completely silent. How large should the Supreme Court be? Does it count as a bug or a feature of the U.S. Constitution that there is no answer provided in the text, which implies that the number will basically be a joint political decision of the Congress and the president? If one looks at a variety of American state constitutions, one usually finds the number of supreme court justices specified in the text. The Virginia Constitution, for example, says that the supreme court shall consist of seven justices; the New York Constitution specifies a chief justice plus six other justices. California's constitution also specifies a total of seven justices, while the Texas Constitution names nine as the constitutionally required number. Texas is unique among the states, incidentally, in having *two* supreme courts, one that handles only civil appeals, the other hearing only criminal appeals. Smaller states, not surprisingly, make do with fewer judges. Thus the supreme court of our smallest state, Wyoming, "shall consist of five (5) justices," and, interestingly enough, "the justices shall choose one (1) of their number to serve as chief justice." North Dakota is also satisfied with a constitutionally designated supreme court "consist[ing] of five justices, one of whom shall be designated chief justice in the manner provided by law."

National constitutions seem somewhat more prone to leave the number out, though one can certainly find many counterexamples. Thus the initial Constitution of India specified that "there shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges." It appears that the current number of members of the Indian Supreme Court is twenty-nine.[8] One might ascribe this to the sheer population of India, which is approaching four times the current U.S. population of approximately three hundred million, but it could also be explained by the fact that it is far easier to gain access to the Indian Supreme Court than it is to the U.S. Supreme Court (or, for that matter, *any* federal court). Tom Ginsburg, in his review of recent constitutional developments throughout the world, notes that numbers of supreme court (or "constitutional court")

judges range from eighteen in the Ukraine and seventeen in Estonia and Guinea-Bissau down to five in Cape Verde, El Salvador, Senegal, Tanzania, and Uruguay.

In any event, the U.S. Constitution is silent as to number, and the number chosen by the First Congress, when passing the Judiciary Act of 1789, was six.[9] The Federalists who passed the Judiciary Act of 1801 reduced the number to five, hoping to limit Jefferson's ability to appoint his own preferred candidates to the bench, but that was also repealed by the Judiciary Act of 1802. Congress increased the number to seven justices in 1807 and then to nine justices in 1837. These additions could easily be justified on the basis of the rapidly increasing size, whether defined by population or acreage, of the United States. The greatest number of justices was ten, as the result of a statute passed in 1863 by a Republican Congress in order to give Abraham Lincoln an extra appointment. (The tenth justice appointed by Lincoln was Stephen J. Field, a Democrat Union loyalist, unlike many Democrats.) In 1866 Congress passed an act providing that the next three justices to retire would not be replaced, thus reducing the size of the Court to seven. Apparently, the Court itself requested the diminution. But this act also had the no-doubt desirable effect, for Republicans, of depriving Andrew Johnson of the opportunity to appoint anyone to the Court. "Court packing" (or, in Johnson's case, "unpacking") is therefore as American as apple pie, at least if one looks at the first century or so of our history.

Thanks to the 1867 Act, the Court's membership temporarily dipped to eight, but the Judiciary Act of 1869, passed after Ulysses H. Grant succeeded the widely despised Johnson, raised the number back to nine, giving Grant an immediate appointment. The Court's composition has remained at nine justices ever since, though Franklin Roosevelt very controversially tried to raise it to fifteen as part of his so-called Court-packing plan in 1937, when he was battling a Court still controlled by five conservative justices who were invalidating as unconstitutional key aspects of the New Deal. The Court ultimately backed down—some still speak of the "switch in time that saved nine"—and due to human mortality and resignation, Roosevelt had by 1942 appointed seven of the nine justices, who were now regularly upholding, often by unanimous votes, extraordinarily expansive regulatory legislation passed by Congress and signed by the president.

The events of the 1860s especially underscore the importance of the Court's size and the potential for manipulating it in order to achieve political ends. Anyone who believed in serious regime change in the South as a part of "Reconstruction" should have welcomed depriving Johnson of the opportunity to place someone with his anti-Reconstructionist sympathies on the Court, though this may obviously discomfort those who view the judiciary as "above politics."

One might well argue that by 2012, the nine-justice Court has become part of our "unwritten Constitution," as revealed by the remarkable failure of President Roosevelt, even after his overwhelming victory in 1936, to gain sufficient support for raising the number to fifteen.[10] Equally telling is that no one suggested, in the days immediately after President Obama's inauguration in 2009, that Democrats should increase the number of justices to eleven in order to overcome the current majority of five conservative Republicans (which, because of the ages of the justices, could outlast even a two-term Obama Administration). To the extent that one thinks keeping the Supreme Court a nine-member body is a good thing, perhaps it was a weakness of the 1787 Constitution that it didn't specify Court size and that American state constitutions provide a better guide of judiciary size to those designing constitutions today in other countries. One the other hand, India (and all other countries that do not fix the size of the court in their constitutions) may provide a better model because the size can be adjusted to take account of population changes. Recall the critique of the Constitution's limiting each state to two senators, which means that we have not been able to "hire" additional senators despite the significant increase in population and senatorial work load over the past half century.

2. How does someone get to the Supreme Court (or, for that matter, to any federal court)?

The formal answer to this question is that one gets to the Supreme Court by being nominated by the president and then confirmed by the Senate. There are no formal constraints on the president in nominating persons. Unlike many constitutions around the world, ours does not require that judiciary nominees have any particular level of experience. Many constitutions

require that nominees be "learned in the law," which is taken to mean many years in legal practice, an extended career as a legal academic, or service on the lower judiciary. There is no such constitutional requirement in the United States, although Congress by statute requires that the solicitor general of the United States be "learned in the law." But there are certainly many examples in our history of appointees to the federal judiciary who would not meet the definition of "learnedness" established in these other constitutions. As a technical matter, it is not necessary to be a lawyer at all, though no non-lawyer has ever been nominated for the federal judiciary.

Justice Joseph Story was nominated at age thirty-two, and William O. Douglas and Clarence Thomas were nominated while in their early forties. Not surprisingly, Story served for thirty-four years and Douglas holds the current record for length of service at thirty-six years and 209 days, followed closely by John Paul Stevens, who retired in 2010 at the age of ninety, two years before he would have replaced Douglas as the longest-serving justice.

Compared with many other political systems, we have a decidedly less "professional" judiciary. In contrast to the European process, students here do not train to become judges and accept, upon graduation, employment as low-level judges, with expectation of promotion as experience accrues over the years. It is important to realize that most of these European countries have generally, following World War II, established "constitutional courts" with special responsibilities for enforcing constitutional limits against other branches of government, and the appointment process for these is far different than for lower courts. Still, by any measure, the process by which federal court judges in America are selected maximizes the role of political considerations. Whether this is a strength or weakness of the American system depends on the functions one envisages for the Court.

It should be clear that there is remarkable variation, both at home and abroad, in how people get to the judiciary. Most other systems appear to try to constrain appointments by limiting the discretion of the nominally appointing authorities.[11] Such constraint can be achieved either by requiring the authorities to be deferential to other participants in the process, through "nominating commissions" and the like, or by carefully specifying criteria that any nominee must meet, including age, prior experience, region, political party, language, or whatever.

Consider, for example, that half of the Belgian constitutional court must be former legislators. This guarantees what is notably absent on the current U.S. Supreme Court, which is the presence of even one judge who has successfully run for elective office and thus has some hands-on experience with legislating. Only Justice Thomas has had experience managing even a mid-level federal agency—in his case, the Equal Employment Opportunity Commission. Otherwise, his colleagues are almost spectacularly devoid of high-level governmental experience (save for having been federal judges prior to their appointment). Compare this, for example, with the Court that decided *Brown v. Board of Education* in 1954, which included as chief justice a former governor of California, three former senators (Black, Minton, Burton), two former attorneys general (Clark and Jackson), two former solicitors general of the United States (Jackson and Reed), a former head of an important federal agency (William O. Douglas), and one of the leading law professors of his time (Felix Frankfurter). Does this tell us something important about the changes in the composition of our Supreme Court over the past fifty years? If so, we should decide which kind of Court we find preferable.

Several countries informally require a certain amount of diversity on their highest courts. The French constitutional court, for example, usually has at least one Protestant among its members, just as Ireland seems to take care to have at least one non-Catholic. Germany apparently is attentive to maintaining a balance between its Protestant and Catholic members as well. Israel traditionally has had on its supreme court at least one Orthodox Jew who is knowledgeable about traditional Jewish law; in 2004 Salim Joubran, a Christian Arab, became the first non-Jew to be appointed to the Israeli Court. The current U.S. Supreme Court, as of 2011, consists of six Catholics and three Jews. To be sure, Protestants apparently no longer constitute a majority of the American population,[12] though one still might find their absence from the Supreme Court to be quite remarkable.

Canada's Supreme Court Act requires that three of its nine justices be from Quebec.[13] Although the Canadian House of Commons passed a law requiring that all the justices be bilingual, the minority government engaged in what the Toronto *Globe and Mail* described as the "constitutionally controversial practice" of killing the bill in the Canadian Senate through what Americans would call a filibuster.[14] Article 107 of the previous

Swiss Constitution required that parliament, when choosing members of the federal court, be attentive to maintaining a balance in the representation of the country's three primary language groups; interestingly, that requirement did not become part of the brand new constitution adopted by referendum in 1999 that went into force on January 1, 2000. Geographic considerations appear to play a role in other polities as well. In Austria, a fourth of its high court justices must live outside of Vienna. Within the United States, Tennessee's constitution requires that its supreme court include justices from the three geographic regions of the state.

One may have mixed opinions about the "diversity" of the current U.S. Supreme Court, but one measure of its non-diversity is really beyond argument: the last justice (successfully) appointed while living west of the Mississippi River was Anthony Kennedy, in 1987. The current Court basically consists of people from the East Coast, in terms of where they either spent their adult lives prior to appointment (Stephen Breyer was in fact born in California and attended Stanford as an undergraduate, though his principal career was as a professor of law at Harvard and member of the federal circuit court based in Boston) or where they have lived since appointment. There is no reason to believe that any current member of the Court knows much, if anything, about the American West, including, for example, issues surrounding access to and control of water or the complexities of American Indian life and law. Given that all of the current justices (as of 2011) attended the Harvard and Yale law schools (though Ginsburg, having transferred from Harvard for her third year, received her degree from Columbia), there is no reason to believe that attention to such legal issues was an important part of the curriculum.

Perhaps the maximum constraint on political appointments is to take appointment authority entirely away from elected officials, as is a common practice particularly (and basically uniquely) in the American states, many of which have chosen to select judges by election. As legal historian Jed Shugerman demonstrates in an important study of the rise of elected judiciaries in nineteenth-century America,[15] this was a deliberate attempt to make judiciaries *more* rather than less independent, given the widespread perception that appointment by governors (and confirmation by the legislature) simply assured the presence in office of judges who would basically legitimate whatever it was that these institutions wished to do.

Thus election was designed to liberate judges from such influences and to make more likely the exercise of judicial review that would invalidate overreaching by given governors or legislatures.

Many people, including sitting state court judges, were shocked by the decision of the Iowa electorate in November 2010 to remove three of that state's seven state supreme court justices—presumably because they had joined in a unanimous decision holding that the Iowa legislature's ban on same-sex marriage violated the state constitution. The Iowa constitution provided the voters an opportunity to determine whether to "retain" judges at the end of their eight-year terms of office. One can well believe that there will increasingly be retention election battles in the future should judges be perceived as antagonizing public opinion. This is obviously difficult to square with protecting the independence of judges, though it is an excellent example of making judges accountable to the public whom they ostensibly serve.

Election of judges horrifies almost all non-Americans and, to be fair, many Americans as well. In Texas, for example, where every judge is elected, running as Democrats or Republicans (or members of other parties) for terms of four or six years, there are often calls, led by members of the judiciary themselves, for the abolition of the elected judiciary in favor of gubernatorial appointment. Such calls are sparked in part because of pressures to raise money for increasingly expensive political campaigns, not least because business interests have strongly invested in attempting to place "friendly" judges on the bench. So far such efforts have been unavailing, and there is no reason to believe they are likely to be successful in the future. Why not? One answer was provided by the author of a 2009 letter to the editor of the *Austin American Statesman* that suggested that replacing the popular election of judges would not guarantee "merit selection" but rather a less transparent form of continuing *partisan* selection. The author could well have been mimicking some of the arguments offered in the 1846 New York state constitutional convention that established judicial elections in that state and influenced many other states when the latter designed (or redesigned) their own constitutions. Some contemporary political scientists, moreover, vigorously challenge the critiques of elected judiciaries, which tend to be offered most strongly by elite lawyers and judges themselves. The co-authors of the leading defense of

judicial elections almost flamboyantly assert that "contrary to the claims of judges, professional legal organizations, interest groups, and legal scholarship, judicial elections are democracy-enhancing institutions that operate efficaciously and serve to create a valuable nexus between citizens and the bench."[16]

A leading critic of judicial elections is former justice Sandra Day O'Connor, but consider her own description of her selection by Ronald Reagan in 1981.[17] The president was, said Justice O'Connor, looking for a *Republican* woman who had plausible qualifications, and she was the most compelling person on what was a very short list. At the time, she was serving as an intermediate judge in the Arizona state judiciary. There were many *Democratic* women who might have been equally compelling, but they obviously were of no interest to the Republican Reagan. It is a given that presidents will seek appointees to the Supreme Court exclusively from their own parties,[18] something that is overwhelmingly true for appointees to inferior courts as well. George W. Bush did appoint some Democrats to the bench, and Barack Obama will undoubtedly appoint some Republicans, but these appointments will be the result of political deals carefully worked out with opposite-party senators representing given states (within given circuits). For example, a deal cut with New York Democratic Senator Daniel Patrick Moynihan led George H. W. Bush to nominate Sonia Sotomayor to serve as a federal judge in that state.

3. Length of term

Is the length of a judicial term simply a "technical" consideration or is it instead deeply infused with political overtones? I begin with one of our favorite family stories, involving our then three-year-old daughter, whom we took out for a special dinner the night before my wife was scheduled to give birth via induced labor to our younger daughter. Our daughter first asked how the baby was going to arrive, and my wife painstakingly explained, once more, the miracle of birth. Then came the killer question, "And how long will the baby stay?" That was when we delivered the very "bad" news: the baby would indeed stay forever; she would not "return home" after a suitably brief visit, at which time our older daughter could revert to her privileged status as the only child.

So, even after we fix on a method of appointing justices, there remains the altogether important question of how long the judges will be staying. Again, there is striking variation within the states and around the world in answering this question. Many states and countries have age limits; others have term limits, sometimes allowing re-election or re-appointment, sometimes not. Extraordinarily few, however, emulate the Constitution of the United States by granting life tenure. Among our fifty states, only Rhode Island and New Hampshire grant life tenure;[19] of the "selected new democracies" canvassed by Tom Ginsburg, only Brazil, Ecuador, Cape Verde, and Guinea-Bissau seem to have chosen life tenure. All others have either limited appointments or age limits. Basically, the only people left in America who have true lifetime tenure are federal judges and university professors. One can doubt whether the respective institutions are really well served in either case—though I can testify personally to the joy of having such tenure!

Needless to say, life tenure does not mean that one *must* serve forever. Presumably, most judges (like most professors) will in fact choose to retire. But the point is that it is up to them to time their retirements. Sometimes purely personal considerations, such as the desire to keep doing something really interesting rather than move out to pasture, explains a refusal to retire. In other instances, and for men especially, a premature death ends service. But, as one might expect, politics may also play a role in a justice timing their retirement.

Recall Justice O'Connor's comment about her own selection, early in the Reagan Administration. Potter Stewart, a Cincinnati Republican named to the Supreme Court by President Eisenhower in 1958, almost certainly chose to outlast the Carter Administration in the (successful) hope that the next president would be a Republican who could name a fellow Republican as his successor. (As a result, Carter became the only elected single-term president to have no opportunity to make an appointment to the Court.) One may suspect similar motivation—with party identity reversed—in Byron White's decision to retire early in Bill Clinton's term, thus paving the way for Justice Ginsburg's accession to the Supreme Court.

In addition to problems regarding exiting the court, it has also become obvious that lifetime tenure has created an incentive to appoint relatively young men and women to the Supreme Court, precisely so they can

continue their support of the appointing president's (and his party's) broad agenda well into the future. Increasingly, if you haven't made it to the Supreme Court by age fifty-five, you should develop other aspirations.

4. How does the Court speak?

A final topic worth at least brief mention is the voice in which a Court speaks. Consider the initial rule of the post–World War II German Constitution, which prohibited dissents, as remains the case in Greece and on the European Court of Justice. In contrast, there is the traditional practice of the House of Lords in England, in which each of the five Law Lords hearing a case would deliver an individual opinion.[20] That was also the original practice of the U.S. Supreme Court. One of John Marshall's signal accomplishments was to replace this custom of *seriatim* opinions whenever possible with a single "Opinion of the Court," though the name of the author was given. Almost all constitutional opinions were written by Marshall himself, and for many years there were no dissents at all. The modern Supreme Court is often sharply divided, with a significant number of 5–4 opinions or even more fragmented decisions in which there is *no* Opinion of the Court but rather a collection of opinions that end up in a particular result as to who wins or loses.

We are obviously used to our own way of doing things, but it is worth asking why some countries or courts have chosen to suppress dissent and issue only impersonal opinions of the court with no attribution of individual authorship. The answer is simple: some people believe that this adds to the perception that "the law" is impersonal and not dependent on the particular identity of the judges who happen to be members of the court. Moreover, dissents (and even concurrences) underscore the view that equally competent judges can disagree, often heatedly and even bitterly, as to the correct legal result. An obvious question is why those who disagree with the result should be particularly respectful of the court if, for example, it appears to be the result of a cleavage in the court that is easily describable in political terms, whether liberals versus conservatives or Democrats versus Republicans. The most (in)famous example of such a cleavage, for many, is the 2000 decision in *Bush v. Gore*, in which a majority consisting of five conservative Republicans shut down the Florida recount and

therefore gave the White House to George W. Bush, against the vehement dissent of four justices who could, if you wish, be described as two Democrats and two disgruntled Republicans.

II. CONCLUSION: ON IDENTIFYING COURTS AS "DEMOCRATIC" OR "REPUBLICAN"

A fundamental reality of the Supreme Court, obviously, is that everyone who seriously follows the Court—and many others as well—identifies the judges in terms of their political party backgrounds or ideology. Political scientists refer to the post-1938 Supreme Court as "the Roosevelt Court," by which they also mean that it was a distinctly Democratic Court. Today's Court might be called "the Roberts Court," under the less-than-useful convention of naming courts after their chief justices, but many would identify it simply as a conservative-Republican Court, although there are now four Democrats nipping at the heels of the Republican majority.

In the famous debate between Senator Stephen A. Douglas and Abraham Lincoln, Douglas noted that Lincoln professed his mistrust in the "Democratic" Supreme Court that gave us the *Dred Scott* case. Lincoln said that the proper response to *Dred Scott* was the future appointment of Republican justices committed to the constitutionality of barring slavery in the territories. Douglas then spoke as follows:

> Suppose you get a Supreme Court composed of such judges, who have been appointed by a partisan President upon their giving pledges how they would decide a case before it arise, what confidence would you have in such a court? ["None, none."]...It is a proposition to make that court the corrupt, unscrupulous tool of a political party. But Mr. Lincoln cannot conscientiously submit, he thinks, to the decision of a court composed of a majority of Democrats. If he cannot, how can he expect us to have confidence in a court composed of a majority of Republicans, selected for the purpose of deciding against the Democracy, and in favor of the Republicans? [Cheers.] The very proposition carries with it the demoralization and degradation destructive of the judicial department of the federal government.[21]

Whatever else one thinks of Douglas, who was in effect defending slavery against the anti-slavery Lincoln, his question was a very powerful one. It goes to the heart of what we mean by the notion of government "under" law. What are the consequences for any such notion of the ability of self-interested political officials—or, for that matter, the general electorate—to select the judges who give content to ostensible legal norms? It is thus appropriate to turn specifically to issues raised by the practice of judicial review.

13

On the Judiciary (and Supreme Court) as Guardian of the Constitution

There are many reasons to want courts as part of any political system, and there is no political system that lacks institutions that can be denominated "courts." Even the worst tyrants have found "courts" and "judges" useful as agents of the state. Perhaps they find courts useful as legitimation mechanisms; that is, they think that more of the populace—or perhaps outside observers—will give greater credit to criminal punishments and the like if handed out by people called judges rather than directly ordered by the tyrant. To the extent that this doesn't work, it is precisely because the judges are thought to be insufficiently *independent* of the tyrant.

But even in a tyranny, one might find courts performing a variety of agreed-upon useful functions, such as enforcing ordinary private contracts or handling divorces. Courts arise, anthropologists and political scientists both suggest, initially as an alternative to private revenge or other inefficient methods of "self-help." When *A* and *B* can turn to some ostensibly neutral party *C* to adjudicate the dispute, there is likely to be a greater degree of overall "domestic tranquility" than if *A* and *B* are left to their own devices. This obviously does not mean that all private disputes are settled in legal institutions. No society could operate that way. But, to use a phrase famous among lawyers, much private bargaining takes place "in the shadow of the law." Even if disputes are settled outside of courts, as the overwhelming majority are, it is nonetheless often important that at least one of the parties can convey a meaningful threat to seek formal legal redress and that the consequences of doing so are sufficiently predictable—otherwise,

why not simply flip a coin?—to lead to a settlement. In any event, one could find courts in Nazi Germany and Stalin's Soviet Union that, at least some of the time, were functionally providing a more or less neutral third party to resolve disputes. Perhaps a Jewish merchant, assuming any existed in Germany after around 1936, could expect no "justice" from a German court, but a Nazi merchant suing another Nazi merchant had no reason to reject the legitimacy of the decision handed down.

So one thing that courts do is adjudicate disputes between private parties. But they also adjudicate disputes where the two parties involved are the state and private individuals. Most commonly, the state will claim authorization to make its demands on the citizen by reference to legislative statute. This, after all, is the principal function of legislatures—to make laws. And the executive then "enforces" them. But what if the law passed by the legislature is less than self-evident in its meaning, as is usually the case? Does the executive branch get *carte blanche* to interpret statutes however it likes? Generally speaking, the answer is no. The state and the private party turn to a third party for a decision as to how the statute in question is best interpreted. To quote again the preamble to the 1780 Massachusetts Constitution, which is still in operation, "It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them." Why not rely on the executive for "impartial interpretation"? Or should one even rely with confidence on judges who are not only appointed by the executive, but also serve at his pleasure (as was the case with British judges in the American colonies)?[x]

The answer that most people would give, plausibly enough, is that this would lead to inevitable overreaching by the executive. A standard maxim is that we don't allow people to be judges in their own cases. This applies not only to private parties *A* or *B*, but also to suits between the state and *A*. These rather banal points help to explain why no political theorists who accept the legitimacy of the state advise doing without courts. Everyone seems to benefit, at least to some extent. But, obviously, the decision to have courts in the first place does not begin to answer the question about the scope of their power. Are courts good for *some* things or for *every* thing? And to what extent do one's answers depend on a variety of background

assumptions relating to the issues examined in the last chapter: how are judges selected; what qualifications must they have; and for how long do they serve? Hovering over all of this remains the question of how much independence we really wish to accord judges. It is clear that one cannot understand governance in America (or many other countries) without paying attention to the role played by judges, so one must inevitably wonder also about the circumstances under which judges contribute to the governability of their societies. Perhaps, at least on occasion, they help instead to explain perceptions of "ungovernability."

As suggested in the last chapter, judicial independence is scarcely a "monolithic" notion.[2] It is possible to distinguish between, on the one hand, *institutional independence*, which relates to the degree to which nonjudges—whether presidents, legislators, police chiefs, or large campaign contributors—can directly affect the decisions made by judges and, on the other hand, *individual independence*, which refers to the extent to which any given judge is truly autonomous, unaccountable to any other decisionmaker. Even in systems that feature a high degree of institutional independence, there can be many limits on the individual independence of a judge. Every judge of an inferior court knows that his or her decisions can be appealed to a higher court. In the federal system, federal district courts are subordinate to courts of appeals, and courts of appeals must, at least in theory, worry about the Supreme Court. Yet well over 99 percent of all appellate decisions in fact receive no direct oversight from the Supreme Court. This leads many political scientists to wonder exactly how significant the Supreme Court is for most inferior judges if they do not in fact have to worry very much about being reviewed.

What one discovers, however, is that most discussions of judicial power focus on the U.S. Supreme Court or the highest courts in other political systems, inasmuch as a distinguishing feature of all high courts is that no appeal can be taken from their decisions to a yet higher court (or else *that* court would become the new high court). Moreover, most discussion of the Supreme Court—or of analogous high courts in the American states and in other countries—focus on the specific issue of *judicial review*, that is, the authority of a court to invalidate acts of the legislature when, according to the court, such acts violate the Constitution itself.

The U.S. Constitution nowhere explicitly grants the power of judicial review, and there has been a long and ultimately fruitless debate about whether the Supreme Court's exercise of judicial review is legitimate. Two things can be said with some confidence: First, it is quite easy to read the Constitution's text as implicitly authorizing judicial review. Consider Article VI:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

We can infer from this two important lessons. The first is that the Constitution is "the supreme Law of the land," which logically entails it trumps all laws that contradict its terms. The second is that "the Judges in every State" are obligated to enforce the Constitution even in the face of particular terms of the judge's own state constitutions or the laws passed by state legislatures. In case they fail to get the point, they have all taken the oath specified by a later clause of Article VI "to support the Constitution." This obviously refers only to state judges and the supremacy of the national Constitution over conflicting state constitutions or laws, but it is easy enough to suggest that this notion of constitutional supremacy applies to laws passed even by Congress.

But even if there were not such apparent textual authorization, a second thing that can be said with confidence is that, for better or worse, judicial review has become an accepted practice within the United States. There are occasional calls for abolishing judicial review, but these are exercises in futility. Even those persons who are furious at the Supreme Court for one exercise or another of judicial review usually present their criticisms in terms of "judges on a rampage" rather than assert that the moral of the story is to emulate the Dutch by adopting an analogue to Article 120 of the Constitution of the Netherlands stating that "the constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts." New Zealand, which does not have a formal written constitution, nonetheless passed a sweeping Bill of Rights Act in 1990 that also specified

that its terms did *not* authorize the judiciary to invalidate laws passed by the New Zealand House of Representatives that contradicted the Bill of Rights Act. Among the questions raised by such examples—and there are others—is whether judicial review is a necessary condition for a country that wishes to call itself a constitutional democracy. The answer seems to be no, unless we wish to exclude the Netherlands and New Zealand from the list of such countries. But even if one might advise another country to do without judicial review, there is no likelihood that the United States will eliminate the practice. So it is worth looking at what is undoubtedly the most famous and influential defense of judicial review, Alexander Hamilton's *Federalist* 78.

I. *FEDERALIST* 78 AND HAMILTON'S DEFENSE OF JUDICIAL REVIEW

A. Complete independence of the judiciary?

Hamilton writes that "the complete independence of the court of justice is peculiarly essential in a limited constitution." By this he means a constitution that in one way or another is designed to *limit* the power of government, and *Federalist* 78 is devoted to defending the importance of the judiciary in maintaining such a constitution.

Still, we have to ask if Hamilton, or anyone else, really supports the *complete independence* of the federal judiciary, including the Supreme Court. Does he endorse, for example, the French Academy model of self-perpetuation, which maximizes *institutional autonomy*? He does not. It is interesting to note, though, how quickly he passes over the first of his three concerns at the outset of the essay, "the mode of appointing the judges." He believes that it is sufficient to say that "this is the same with that of appointing the officers of the union in general," and he declares that it would be "useless" to repeat the arguments he has offered in *Federalists* 76–77 defending presidential selection of such officers. But there he was discussing the process by which presidents would pick their cabinets and staff the executive branch, and one can easily believe that it is altogether proper for politics to dominate those decisions. It is banal to say that the

president wants executives who share his or her view of sound public policy, not to mention executives whose appointments might curry favor with key political constituencies and voting blocs. Do we have a similar view with regard to judicial appointments?

One might say that Hamilton, like Madison, was writing in a pre-party world, so that he envisioned a wise and virtuous president standing "above politics" making appointments, which a similarly disinterested group of senators would then confirm. But we obviously do not occupy that world, though one might suggest that neither did Hamilton as a practical matter. One can be certain that he enthusiastically supported the appointments of the Federalist "midnight judges" in the waning days of the Adams Administration; their role would be to stymie, as much as possible, the Jeffersonian program. Turning to more contemporary times, is one disturbed or gratified to discover that since 1956—when President Eisenhower appointed William J. Brennan because he was looking for a northeastern Catholic to shore up his re-election—there has been a perfect correlation between the political commitments of an appointing president and the basic ideological commitments of those appointed to the Supreme Court?

Nor are the data strikingly different if one looks at appointments to inferior courts.

As of 2011, there is congressional authorization for 179 federal circuit judges and 678 federal district court judges (and, of course, 9 Supreme Court justices).[3] When Barack Obama took office in January 2009, most judges were Republican, reflecting the Republican domination of the presidency since 1980 (save for the eight years of the Clinton Administration). The Supreme Court, for example, contained seven Republicans and two Democrats. Republicans Stevens and Souter (admittedly perhaps not in synch with the contemporary Republican Party) have left the Court, replaced by Democrats Sonia Sotomayor and Elena Kagan.

At the level of intermediate courts of appeal, 56 percent of all circuit judges were Republican and 36 percent were Democrats (with an 8 percent vacancy rate).[4] There were dramatic differences among the thirteen intermediate appellate courts within the federal judiciary. Thus the Ninth Circuit, which comprises California and other West Coast states (plus Arizona) had a 16–11 Democratic majority (with two vacancies), while the Eighth Circuit,

which includes most of the upper Midwestern states, had a 9–2 Republican majority, and the Fifth Circuit (Texas, Louisiana, and Mississippi) had a 13–4 Republican majority. (Neither had any vacancies.) As of April, 2011, President Obama had successfully appointed (i.e., received Senate confirmation for) eighteen appellate judges, though seventeen vacancies remained.[5] Four of those appointees were to the Fourth Circuit (Maryland, Virginia, West Virginia, North Carolina, and South Carolina), which created a new Democratic majority. Similarly, the appointment of three new judges to the Second Circuit (New York, Connecticut, and Vermont) also affected a shift in party domination. However, the extraordinarily important District of Columbia Circuit, which handles a disproportionate number of administrative law and "war-on-terrorism" cases, had a 6–3 Republican majority with two vacancies, neither of them filled by President Obama two full years into his term.

At the beginning of the Obama Administration, 371 federal district judges had been appointed by Republican presidents and 264 by Democrats, with 41 vacancies. Because of deals made with Democratic senators, it was altogether likely that at least some Republican appointees were Democrats or that some of Clinton's fifty-five appointees were Republicans, even if one can be confident that appointees will generally be from the president's party. President Obama has made fifty-nine successful nominations to the district bench, but there are sixty-six vacancies as of January 2012. In recent years, as the importance of inferior federal courts has increasingly been recognized, confirmations have become more difficult, with both parties engaging in filibusters or other delay tactics regarding nominees who are viewed as too conservative or liberal for their tastes.

Hamilton also writes about the importance of the "good behavior" standard as a guarantor of judicial independence, but that topic was addressed in the last chapter. It is important to note that part of his argument involves a relatively modest view of the judiciary. It is, he tells us, "the least dangerous" of the branches of the national government, with regard to threatening popular liberty, because it possesses neither the power of the purse—it cannot levy taxes—nor of the sword. "It may truly be said to have neither FORCE nor WILL, but merely judgment: and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

B. Does judicial review entail judicial supremacy?

So let's take a deeper look at what Hamilton has just said. It's undoubtedly true that the judiciary does not possess its own police force. It does indeed depend on the decisions of other branches, whether in the national government or in the states, to *comply* with its judgments. What brings about this compliance?

Consider a key paragraph from what is probably the most famous veto message in our history, Andrew Jackson's July 10, 1832 announcement that he was vetoing the decision of the Whig Congress to renew the charter of the Bank of the United States. We need not review the fascinating history of the Bank. It is enough to know the following: George Washington signed the initial charter over the protests of James Madison, Thomas Jefferson, Edmund Randolph, and others that Congress was acting beyond its powers. The charter expired in 1811, during Madison's first term as President. Madison, however, signed an 1816 bill chartering the Second Bank of the United States, saying *not* that he was wrong in his initial arguments against the Bank in 1791 but that the country had clearly accepted its legitimacy and he therefore would no longer enforce his previous views. From one perspective, one can view this as an argument that the Constitution had in effect been *amended* by practice instead of by the passage of a formal Article V amendment, which Madison would have thought necessary in 1791.

The second charter was due to expire in 1836, but the Whigs mistakenly believed they had a winning issue and forced the renewal four years early, just before the 1832 election. Among the arrows in their quiver was the fact that the Supreme Court, in the 1819 decision *McCulloch v. Maryland*, unanimously held that Congress did indeed have the power to charter the Bank. This did not stop Jackson, who defended his veto on the grounds that not only was the Bank bad public policy but it was also—just as significantly—unconstitutional. But what about *McCulloch*? Jackson responded as follows:

> If the opinion of the Supreme Court covered the whole ground of this act, it [still] ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support

> the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. *The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.*[6] (emphasis added)

So now we see the central issue. Does the Supreme Court serve as the *definitive* interpreter of the Constitution, so that the discussions attached to the Constitution of Conversation simply come to an end once the Supreme Court speaks? Or, on the contrary, is the Supreme Court simply one conversational partner among many, with its particular opinions "hav[ing] only such influence as the force of their reasoning may deserve"?

This issue was at the center of the legendary debates between Senator Stephen A. Douglas and Abraham Lincoln during their heated struggle for the designation as Illinois's senator in Washington in 1858. For Douglas,

> the right and the province of expounding the Constitution, and construing the law, is vested in the judiciary established by the Constitution...When the decision is made, my private opinion, your opinion, all other opinions must yield to the majesty of that authoritative adjudication...What security have you for your property, for your reputation, and for your personal rights, if the courts are not upheld, and their decisions respected when once firmly rendered by the highest tribunal known to the Constitution?...I respect the decisions of that august tribunal; I shall always bow in deference to them.[7]

He was suggesting that Lincoln had insufficient respect for the Court. How would Lincoln respond?

The answer was given the next day.

> I have expressed heretofore, and I now repeat, my opposition to the *Dred Scott* decision, but I should be allowed to state the nature of that opposition...What

> is fairly implied by the term Judge Douglas has used "resistance to the decision"? I do not resist it. If I wanted to take Dred Scott from his master, I would be interfering with property...But I am doing no such thing as that, but all that I am doing is refusing to obey it as a political rule. If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that *Dred Scott* decision, I would vote that it should. [Applause; "good for you"; "we hope to see it"; "that's right."]
>
> We will try to reverse that decision...Somebody has to reverse that decision, since it is made, and we mean to reverse it, and we mean to do it peaceably.[8]

My first book, *Constitutional Faith*, set out a rather elaborate analogy between our constitutional "civil religion" and the various cleavages we see in our more traditional religions, especially Christianity. Just as Christianity can be divided, broadly speaking, into its "Catholic" and "Protestant" components, so can constitutional interpreters. The divisions lie along two quite different dimensions. Thus, Catholicism is distinguished first by its supplementing an emphasis on the Gospel with at least as great an emphasis on the traditions and teachings of the Church, and secondly by its possessing a clear institutional hierarchy with the Pope at the top, claiming (at least since 1870) the attribute of infallibility in matters of faith and morals when speaking *ex cathedra.* Dissenting Protestants are notable for emphasizing the importance of scripture alone—*sola scriptura*, in the words of Martin Luther—and, just as importantly, rejecting *any* institutional hierarchy. Another phrase associated with the Reformation is the "priesthood of all believers." So translate this into the terms of American constitutionalism. Along the first dimension we can distinguish between those who emphasize the *text* of the Constitution and those who give at least equal priority to the traditions, which include cases handed down by courts and even seminal speeches such as the Gettysburg Address. Along the second dimension, we can distinguish between those who emphasize the supremacy of the Supreme Court with regard to what the Constitution means and those who view the Court as simply one participant in a community in which *all* citizens can proclaim their status as "constitutional lawyers" in a non-trivial sense. One does not need to be a lawyer to have informed and creditable views about constitutional meaning.

Akhil Amar emphasizes the relevance to such discussions of the jury trial provisions in the Constitution. It is not simply that juries are an important way for ordinary citizens to participate in testing the state's allegations as to *facts*, so that no one is punished for doing something that he or she did not do. In addition, Amar argues, juries in the late eighteenth century had the freedom to come to their own decisions about the very laws under which people were being tried. They could say that someone did indeed do *X* and that *X* was "against the law," but that it was "unconstitutional" to criminalize *X* (say, criticizing the president) even if Congress had passed such a law and even if the judge presiding over the trial informed the jury that the law was perfectly acceptable and that it was ultimately up to the judges to decide questions of law. It should be clear that anyone accepting the propriety of what its opponents call "jury nullification" is very much a "protestant" along the second dimension. More to the point, it is equally obvious that Jackson and Lincoln were also protestants, at least so far as judicial supremacy was concerned. Neither rejected *constitutional supremacy*; rather, they rejected the proposition that the Constitution necessarily meant whatever the Court, even if unanimous (as was the case in *McCulloch*), said it did.

What of Hamilton? He writes that "interpretation of the laws is the proper *and peculiar* province of the courts" (emphasis added). Nobody denies that it is proper for courts to interpret the law. But does "peculiar," in this context, mean that *only* courts can interpret the laws—which makes little sense—or that courts necessarily prevail should there be a difference of opinion between them and other interpreters?

This book is structured around the difference between the Constitution of Settlement and the Constitution of Conversation. One can easily believe that judicial review inevitably relates almost exclusively to the latter. But one can still ask which of these "two Constitutions" is relevant to determining the ability of the Court to bring conversations to an end by asserting its own authority to say what the law is.

Readers should be aware that the Supreme Court itself, especially over the last half century, has articulated a highly "catholic" notion of its own supremacy as the "ultimate interpreter" of the Constitution, in a number of opinions written by both liberal and conservative justices. This is precisely what has led some scholars to credit the anti-Federalist "Brutus" with some

degree of prescience in describing the Court created by the Constitution as "invested with such immense powers, and yet placed in a situation so little responsible"—that is, *accountable* to the other branches—that there is reason to fear what we might today call a "runaway" judiciary. Recall from the previous chapter the stinging criticisms—and fears—expressed by "Brutus," which concluded that the Supreme Court as structured by the new Constitution would be "independent of the people, of the legislature, and of every power under heaven."[9] Needless to say, his full critique applies only to the Supreme Court, and political scientists and lawyers point to the various ways that Congress and the president might respond to a Court matching Brutus's worst fears. Still, a pervasive reality of American politics over the past half century is the charge that the Supreme Court—and the federal judiciary more generally—has made its own contribution to the perception of a political system that is, in important ways, increasingly beyond the control of electorates and their representatives and is instead in the hands of the judiciary. As one would expect, the sharpest anguish is felt by those who disagree with the decisions issued by the courts.

The most important decision in generating such accusations is surely *Roe v. Wade*, the Court's 1973 decision striking down the abortion laws of all fifty states insofar as they unduly limited a woman's right of reproductive choice. Although later decisions modified *Roe* in important respects, the basic right remains on the books and continues to structure much American political conversation (and animosity). It is not my aim in this book to offer any evaluation of *Roe* and successor cases. Presumably both proponents and opponents of the decision—whether they define themselves as "pro-choice" or "pro-life"—can easily agree that the Court has *not* brought that conversation to an end. Justices Souter, Kennedy, and O'Connor famously wrote, in a 1992 opinion justifying the refusal to overrule *Roe*, that "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the [the Court's interpretation of the] Constitution."[10] But, as with Lincoln's rejection of the Court's authority to end the conversation about the legitimacy of slavery in its *Dred Scott* decision, opponents of *Roe* are uninterested in ending our "national division" until they prevail. The debate over slavery triggered the ultimate in ungovernability: civil war. Though no one suggests that is a possibility with

regard to the "abortion wars," it reminds us of the limits on any and all courts when faced with fundamental cleavages in which any compromise appears "rotten" rather than "prudent."

C. The scope of judicial review

Let it be agreed, though, that the other branches have no authority to violate the Constitution and that all judges, both state and federal, are authorized to enforce the supreme commands of the Constitution when public officials transgress them. "No legislative act...contrary to the constitution can be valid." Hamilton states. "To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are above the people themselves." That is, "We the People" have ordained *this* constitution, which is a limited one; it is a given that those we elect as our representatives have only the same powers *we* have; and we have agreed to limit our own collective power at least in the absence of formal amendment under Article V. To allow representatives to judge the scope of their own power would be to allow "the most dangerous branch" to make self-serving decisions. The only feasible alternative, asserts Hamilton, is judicial review and reliance on the judiciary to keep the legislature (even if supported by the president) in check.

This leaves open the question as to the *clarity* of the Constitution. After all, one basis for distinguishing between the Constitution of Settlement and the Constitution of Conversation is that certain clauses of the Constitution speak so clearly that good-faith conversation about meaning—though not about wisdom—appears impossible. This is altogether different from the situation presented when we readily concede the availability of even two reasonable views as to what the Constitution means.

Consider Hamilton's own examples of a Congress that passes bills of attainder or ex post facto laws in violation of the clear prohibition of Article I, Section 9. Bills of attainder are legislative pronouncements of the guilt of persons; in addition, Parliament had often "tainted" the bloodline of the ostensibly guilty party by prohibiting his descendants from enjoying certain rights or owning property. Ex post facto laws declare criminal

what one did in the past, at a time when the behavior was legal. It is one thing for the state to say that you can't smoke after January 1, 2014. It's another to say that you committed a criminal offense by smoking on January 1, 2009, even though there was no law then prohibiting smoking. Most lawyers would say that the meanings of the two clauses are relatively clear. They are, in that sense, far closer to the Inauguration Day Clause, unequivocally part of the Constitution of Settlement, than to the Equal Protection Clause, which is just as unequivocally part of the Constitution of Conversation.

The "problem," though, is that Congress has rarely attempted to violate those parts of the Constitution that come under the Constitution of Settlement, though there are several significant cases that invalidate congressional actions as violations of the Bill of Attainder Clause. Still, the controversy about judicial review concerns not the enforcement of those provisions but rather who is entitled to give authoritative pronouncements concerning what is undoubtedly within the Constitution of Conversation.

Hamilton is concerned that the judiciary be available to "guard...the rights of individuals from the effects of those ill humours which the arts of designing men...sometimes dissemble among the people themselves," including the "oppression of the minor party in the community." The judiciary, he suggests, will consist of "virtuous and disinterested" judges, whose "moderate" opinions presumably enforcing the Constitution against those who would ignore it would gain the applause of similarly "virtuous and disinterested" citizens. Once more we see significant reservations expressed about the actual operations of representative government and the professed need for further methods of reining it in. Nothing could be more dangerous, Hamilton suggests, than judges who might be concerned with "popularity"; it is precisely to prevent such concerns that he so applauds life tenure. So why does the role of the American Supreme Court continue to generate such controversy and, on occasion, elicit criticism even from those who might be described as "virtuous and disinterested"?

Part of the answer comes from the fact that sharply different examples can be offered of the "minor party in the community" that has reason to fear what later generations learned to call "tyranny of the majority." Today we are most inclined to think of racial or religious minorities, though many

readers would properly add those whose sexual orientation differs from the heterosexual majority. Gender could also be added, though one difficulty is that one has to adopt a special definition of "minority," inasmuch as women constitute a majority of the population. One would focus on the fact that until relatively recently, men could be said to exercise hegemonic power and that even today men occupy positions of power far in excess of their percentage of the population. If this were a different book, we could profitably explore at great length the extent to which the Supreme Court, over the past 220 years, has in fact been receptive to the claims of these groups regarding alleged denial of constitutional rights. Among other things, one would have to explain why one would expect judges nominated by presidents and confirmed by the Senate to hold significantly different views from those two bodies with regard to protecting what are by definition unpopular minorities. In fact, we only sporadically find the Supreme Court willing to reach out and protect genuinely unpopular minorities. As Lucas Powe and Barry Friedman have argued in recent overviews of its history,[11] the Court has served, generally speaking, either as the relatively faithful agent of the political coalition able to establish a measure of hegemony over the national political order (Powe) or as a reasonably accurate mirror of the so-called median voter within the national electorate (Friedman). Neither presents a picture of a Court that will be likely to reach out to protect beleaguered minorities.

Hamilton, however, was not defining "minority rights" the way we may be inclined to today. For him, the central "minority" comprised property owners and persons of means. Recall Madison's expression, in *Federalist* 10, that property is the most pervasive dividing force in any given society. One of the things we can be confident of is that there will *always* be more (relative) "have-nots" than "haves" in any given social order. This means that as a political system develops ever greater sensitivity to the political preferences of majorities, perhaps by extending the franchise or by shifting the selection of senators from state legislators to popular majorities within the states, there will be ever more inclination to pass laws that redistribute property from the well-off to the less well-off. This is obviously one of the ways of understanding the great debates provoked by the Obama presidency and the Democratic Congress of 2009–2010. Whether or not the President's proposals were "socialistic," they were certainly "redistributive"

in a variety of ways, but this is no different from much other legislation since the triumph of the New Deal in the 1930s.

The Constitution clearly includes protection of property among its delineated rights. The most specific protection is found in the Fifth Amendment, which states not only that no one shall be "deprived of life, liberty, or property, without due process of law," but also that "private property be taken [only] for public use [and with] just compensation." The original Constitution, in Article I, Section 10, states that no state shall pass any law "impair[ing] the obligation of contracts," which means that states can't emulate Rhode Island and pass debtor relief laws that stipulate, for example, that a contract in which the debtor agreed to pay 6 percent interest is now reduced to 4 percent or that a sum of money due on January 1, 1788, would now not be due until two years later.

As a matter of fact, the Contracts Clause was the most heavily litigated clause throughout the nineteenth century, given recurrent political pressures to aid deserving debtors by rewriting existing contracts. That might well be the case even now if the Supreme Court had not decided in a 1934 decision (by a 5–4 vote) that "reasonable" impairments were acceptable and that the legislature was the best judge of when they were in fact reasonable. It would take us far afield to examine what the Court has been willing to deem "reasonable." The major point is that the apparently unequivocal language of the Constitution, which contains no modifier and invites the question "what part of 'no law' do you not understand?" was modified by the Court. What *is* relevant to this book is that the 1934 case arose during the Great Depression and challenged a so-called moratorium on mortgages imposed by the Minnesota legislature to prevent further public disorder generated by banks foreclosing on homes. In some states, aroused farmers had threatened judges enforcing foreclosures with lynchings. Chapter 16, on emergency powers, discusses this case further.

So, inevitably, the greatest questions about judicial review concern controversial issues within the United States at a given time. It is just as inevitable that skillful lawyers will be found on both sides of any controversy (assuming there are only two sides). And it is also inevitable that the many of these controversies will involve basic (and conflicting) visions of what Justice Robert Jackson called the "majestic generalities" of the Constitution,[12] including the aspirational goals enunciated by the

Preamble. And the final inevitability is that judges themselves will have been selected on the basis of what particular vision of high politics they are likely to possess.

D. An excursus into explaining why courts are special

Consider what precisely is thought to make courts "special," as well as the ramifications of any particular answer for *designing* judicial systems within given constitutional orders. As we have already seen, there are dramatic variations in such design among the American states and foreign countries. So how might we assess these various systems? Surely the answer would depend on what we think constitutes the special attributes of judges.

1. Judges as "experts" (or "legal scientists")

One response is that judges are special because they have distinct expertise in discerning what the law "really" means or requires. Whether or not law is the equivalent of "rocket science" (it is not), it is a highly technical domain that requires specialized education and a high level of competence in discerning and applying what "legal science" requires. Among other things, this view amply justifies according a monopoly to lawyers with regard to becoming judges, just as we would easily assign a monopoly to rocket scientists in designing trajectories for astronauts to reach the moon.

Formal legal education is highly relevant to performing well as a lawyer or judge. However, it is less than clear whether "legal science" offers a satisfying explanation of the power we grant to judges on the *highest* courts of state or national judiciaries. At the very least, one is forced to confront the fact that members of the U.S. Supreme Court, for example, often disagree with one another, sometimes in very harsh language. It is difficult to adhere to the "rocket science" conception of judging in the face of repeated 5–4 decisions, unless one possess the happily self-serving belief that the judges one agrees with are simply more competent than the judges one disagrees with.

Few serious students of the judiciary adopt the "legal science" view. There is general agreement that judges bring with them to the bench ideological

presuppositions that are reflected in the decisions they make and the opinions they write. Yale law professor Jack Balkin and I have described such presuppositions as constituting the "high politics" of judges, in contrast to a "low politics" that might focus simply on whether one's favorite political party or candidate prevails in a given lawsuit. Though the latter can surely be found among some judges—even a decade after the Supreme Court's decision in the 2000 case of *Bush v. Gore*, many analysts are inclined to describe it simply as a decision in which five conservative Republican justices decided to make sure that their personal favorite, George W. Bush, would become the forty-third president of the United States—such episodes are relatively rare at the highest level of the judiciary. Drawing on "high politics," however, is not only not rare, it is also difficult to imagine how one can even participate in the Constitution of Conversation without drawing on deep ideological pre-commitments that necessarily implicate one's definition of a "majestic generality" like "equal protection of the law." During a program honoring former justice Lewis Powell, Chief Justice William Rehnquist noted that "a judge's background might have as much to do with the way he went about deciding a case as would his legal education."[13] Rehnquist echoed what then Harvard law professor, later Justice, Felix Frankfurter wrote in a 1930 essay on the Supreme Court. Commenting on the admonition by many that judges should not "read their economic and social views into the neutral language of the constitution," Frankfurter observed that "the process of constitutional interpretation compels the translations of policy into judgment," and what generates these judgments are the judges' "'idealized political pictures' of the existing social order."[14] These "pictures"—which function as ideological templates used to organize complex realities—constitute the "high politics" that all judges necessarily bring with them to the consideration of any significant constitutional dispute. Any justification of judicial independence and power must confront such realities and offer justifications that do not depend on the analogy between "legal" and "rocket" science.

2. Judges as possessors of wisdom

The picture of the judge as "legal scientist" depends on specialized *expertise*. But one could defend a special role on the basis that they are simply

likely to be *wiser* with regard to resolving the complex social and political issues that come before them. Many of the eighteenth-century debates are rife with skepticism about the capacities for such wise judgment among ordinary people, including, for that matter, those likely to be elected to office. So might it not be better to have the equivalent of wise "Platonic guardians" to make important judgments in circumstances where we would doubt the capacities of elected leaders?

The most obvious problem with this rationale is simply that there is no reason to believe that judges, whether appointed or elected, as a group possess superior wisdom with regard to the issues of public policy that come before them. One can easily agree with Justice Oliver Wendell Holmes, one of the chief critics of "legal science," who famously proclaimed that "the life of the law is not logic, but experience," but still question whether judges necessarily have the kinds of experiences that bring wisdom in their wake. Or, at the very least, one might want to make sure that there is adequate *diversity* of experiences on any given court to which we would extend our own confidence regarding the wisdom of their judgments.

3. Judges as liberated from "political" constraints

There is one other possible justification for treating judges as special. Most high-ranking public officials are politically accountable, often concerned with facing the electorate in relatively short order. Again, one of the recurrent themes of the debates during the founding era was the potential danger of having leaders with insufficient virtue to prefer the public good over the particular demands of constituents susceptible either to the passions of the moment or by the general propensity to prefer their own selfish interests over the public interest. Federal judges, on the other hand, because of their presumptively lifetime tenure, are liberated from any such considerations and therefore can be trusted to decide in the public interest.

One should not confuse this last justification with the second one, which emphasized the wisdom of the judiciary. Wisdom is a cognitive capacity, whereas the disposition to decide in the public interest is a matter of *character*. But Madison and other Framers accurately recognized that character could be effectively molded by given institutional designs that would generate all-important incentives to follow one set of judgments

rather than another. Life tenure and the liberation from political accountability would remove certain incentives that lead ordinary leaders to betray the public good. There is certainly a plausibility to such arguments, though one should note two consequences. The first is that it casts a certain pall over *all* politics precisely inasmuch as it causes one to fear that any and all politically accountable leaders will, at the end of the day, be exposed as panderers to private interests rather than adherents of the public good. The second is that it calls into question the practices in most states of making judges politically accountable through various election scheme. In any event, it should be clear that one's view of how best to organize the judiciary—and therefore to pick with confidence among the many different models available within the United States—is a function of how one imagines the defining strengths and weaknesses of judges as a group.

E. Access to the judiciary

But let's assume that courts do (and *should*) play a special role in enforcing constitutional norms, for whatever reason. Then, an important question is how easy it is for ordinary people, including people possessing unpopular political views, to actually gain access to courts. People with popular views may not really need judicial access; they can depend on legislatures to be sympathetic, though it is still necessary to gain access to enforce legislation. But, with regard to judicial review, what we are really talking about is the ability to mount an *attack* on popular legislation or executive actions.

Again, it is instructive to realize that there are many answers to this question as we look at courts around the world or in the United States. Apparently one can initiate a case in the Indian Supreme Court by sending in a postcard outlining one's complaint.[15] The Israeli Supreme Court is also notable for granting almost everyone what lawyers call "standing" to raise legal complaints against the state. The Israeli judges have declared that "closing this Court's doors before [any] petitioner...who sounds the alarm concerning an unlawful government action, does damage to the rule of law. Access to the courts is the cornerstone of the rule of law."[16] In an article contrasting the United States and Israeli high courts, Professor

Kaufmann notes, the U.S. Supreme Court has adopted ever more restrictive "standing" restrictions with regard to those who would challenge American conduct during the now decade-long military and clandestine response to those suspected of terrorism. Moreover, because the Supreme Court can establish standing rules for the entire federal judiciary, it can in effect limit access, not only to itself, but also to any of the federal courts. That has been the ramification of several decisions over the past two decades, in which conservative justices have tried to cut back the greatly enhanced standing established during the far more liberal "Warren Court" era of the 1960s. Standing limitations, which are often regarded as "technical" and thus rarely receive extensive press coverage, are often especially important with regard to such substantive areas as environmental litigation and to claims that the state is violating the Religious Establishment Clause of the First Amendment.

In addition, the Supreme Court has almost complete authority to decide which among the six thousand or so petitions for review it receives each year it will actually grant. It hears extremely few cases each year; the current number is around seventy-five. This refusal to take many seemingly important cases, among other things, puts the lie to the model of the Court as in fact providing answers to vital legal questions. It frequently adopts what the late Alexander Bickel famously labeled the "passive virtues" to refrain from engaging with political hot potatoes that might prove damaging to the Court's own institutional interests.[17]

Finally, there is the question of the *timing* of access. Many courts worldwide—and about eight within the United States, including the Massachusetts supreme court—will issue so-called advisory opinions concerning proposals currently before a legislature. Usually legislators themselves petition the court for a declaration as to the constitutionality or unconstitutionality of the legislation in question. Federal courts within the United States will not accept such petitions. Instead, those who object to legislation are forced to pay often significant costs to challenge it, which itself may lead to the "under-enforcement" of constitutional norms. And even if one could predict that a court would strike down one's conviction for violating a given federal law, one would still have to be willing to bear the cost of a criminal trial and to pay the legal costs involved in defending oneself.

II. A LAST COMMENT ABOUT JUDICIAL "VOICE"

The last chapter concluded with a brief discussion of whether courts will (or should) speak with a single voice or with multiple voices. But one can also ask about the *strength* of that voice. The governing rule in all multimember federal courts, including the Supreme Court, is "majority rule." That's why 5–4 decisions are often so dramatic. But consider that North Dakota requires four out of five justices to agree before they can apply the North Dakota state constitution against a legislative statute, and Nebraska requires five out of seven. One might regard it is as odd that a majority of justices would agree that a given statute is unconstitutional, but it would be of no effect because they comprise *only* a majority and not the requisite supermajority.

No doubt this seems extraordinarily odd, perhaps because only two small, relatively ignored, states have chosen this supermajoritarian option. Perhaps we might be less dismissive had Ohio retained at least some version of a clause adopted as part of the new 1912 state constitution drafted during the Progressive Era.[18] The convention rejected an appeal by former president Theodore Roosevelt to allow the overruling by popular referenda of unpopular judicial decisions. But a judge, interestingly enough, "introduced a proposal that would have required an unanimous vote of supreme court justices to declare an act unconstitutional." This proposal was triggered in part by the fact that the Ohio supreme court "had a reputation of striking down legislation that protected workers' rights." A compromise, proposed by the convention and approved by the electorate, "required the concurrence of all but one supreme court justice to reverse an appellate court judgment upholding a law as constitutional. However, if the appellate court found the law unconstitutional," a majority of supreme court justices could uphold *that* decision. This might have been designed by the cartoonist Rube Goldberg, famous for his fanciful inventions, inasmuch as it created the possibility (and reality) that the very "same law could survive a constitutional challenge in one case and be found unconstitutional on another by the same court voting the same way," depending on what the court below had ruled. It can come as no surprise that Ohio ultimately changed its constitution and reverted to ordinary majority rule.

The Ohio procedure might be thought to be bizarre rather than simply odd, but it, like those of North Dakota and Nebraska, forces us to wonder

if they are any less defensible than the other anti-majoritarian features in the U.S. Constitution we have seen so far in this book. These include not only the two-thirds rules regarding overriding presidential vetoes, convictions for impeachment, or ratifying treaties, but also the anti-majoritarian aspects of the American form of bicameralism, given the allocation of power in the Senate or the ability of the electoral college to generate minority presidents. Recall as well that the original size of the Supreme Court in 1789—six—meant that two-thirds of the judges would have to agree on an outcome in order to prevent a tie vote. At the very least, one might believe that deviations from the principle of majority rule require some special justification that adoption of majoritarianism does not, at least in a society that professes to be democratic (instead of republican). Some of these deviations may be easily defensible; others, as I have argued in earlier chapters and in my earlier book *Our Undemocratic Constitution,* are not. The central question is what presuppositions underlie either conclusion, and North Dakota and Nebraska provide good test cases for understanding our own idealized political pictures and their implications for assessing any given structure of judicial power.

One of these pictures, idealized or not, involves federalism and the opportunity a federal structure provides for quite different solutions to a given issue. Much of this book has been devoted to setting out the sometimes dramatic differences between the national government and particular states with regard to some quite basic issues of government and, possibly, the prospects for governability when faced with special challenges. Thus we now turn to some of the specific issues raised by federalism.