WHY STUDYING THE CONSTITUTION IS IMPERATIVE FOR CONTEMPORARY LEADERS

by Bruce Fein

The Constitution of the United States is frequently misunderstood as a legal code for lawyers. It is not. The document is a charter of good government. Its provisions reflect a political philosophy dedicated to individual freedom, dispersed power, self-government and national survival. The architecture of the Constitution is informed by a perspicacious understanding of human nature that experience has verified.

"Justice is the end of government," James Madison explained in Federalist 51. "It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit," Madison added. The Constitution is a vehicle for achieving justice, both for the living and those yet to be born. Mastery of its structure and political insights would enlighten the exercise of government power in addressing a broad spectrum of contemporary contentious issues: national security and foreign affairs, the two-term limit on the presidency, independent regulatory agencies, the veto power, economic freedom and the promotion of commerce, federal intrusion on matters traditionally governed by the States, and interpretive theories employed by the United States Supreme Court to decide constitutional questions. A survey of how the Constitution informs discourse on these matters demonstrates its value to occupants of political office.

I. NATIONAL SECURITY AND FOREIGN POLICY

The Constitution is not a suicide pact. The Preamble identifies providing for the common defense as a primary constitutional mission. Justice for posterity would be ill-served if a flaccid national security and foreign policy eventuate in compromising the Nation's

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This is the first in a series of lectures observing the upcoming bicentennial of the U.S. Constitution.

ISSN 0272-1155.

independence; and contemporary generations suffer if national security or foreign policy interests are inefficaciously pursued.

The Constitution teaches the wisdom of entrusting to the president predominant power for making and executing national security and foreign policy. It denies to the House of Representatives any share in treaty-making. The reasons are simple. Large representative institutions are governed by influences inimical to a successful foreign policy. The latter requires a continuity of policy, patience, thorough intelligence of the politics of foreign nations, and a long-headed incentive to further the national as opposed to any parochial interest.

The fluctuating membership of the House of Representatives works against stability in foreign policy. Furthermore, Members of Congress are impatient for immediate results that can be touted during the election season. In addition, the vast majority of Members will be untutored in the affairs of foreign governments because committee assignments and the political interests of their constituents rivet their time and attention elsewhere. Finally, Representatives will naturally prefer the interests of their districts over the national interest because their longevity in office depends on satisfying a narrow electoral constituency.

Today, the Senate shares the same institutional infirmities that disqualify the House of Representatives from any constructive role in treaty-making. By virtue of the Seventeenth Amendment, direct election of Senators yields a fluctuating political and ideological complexion in the Senate. The original Constitution provided for election of Senators by state legislatures. The direct election of Senators also makes the Senate insistent on quick foreign policy agreements to market to the voters at election time. The multiple committee assignments of Senators deprives them of any opportunity to obtain a deep appreciation of the complexities of foreign politics. And representation of single States by Senators gives their outlook on foreign policy a parochial rather than a national orientation.

The ongoing arms control negotiations between the United States and the Soviet Union illuminates the hazards of congressional intrusion on treaty-making by the President. Students of the Soviet Union know that since its violent birth in 1917 iron resolution and raw military power are indispensable to containing its propensity for expansion and totalitarian dominance. Arkady N. Shevchenko, who frequently occupied the inner cloisters of the Kremlin before his defection, has verified that "what the men in the Kremlin understand best is military and economic might; energetic political conviction; strength of will. If the West cannot confront the Soviets with equal determination, Moscow will continue to play bully around the world."

Accordingly, any evidence of weakness the Soviets detect regarding President Reagan's stance on the Strategic Defense

Initiative, compliance with SALT II, testing anti-satellite weapons, and verification of nuclear testing agreements will be exploited in the negotiating process. And both the House and the Senate have provided ample evidence of such weakness.

The House has passed a defense spending bill that slashes SDI funds, requires compliance with the unratified, now expired, and oft Soviet-violated SALT II accord, prohibits testing ASAT weapons against a space target, and provides for a moratorium on nuclear testing by the United States. The Senate has also cut SDI monies and urged compliance with SALT II. With such strong evidence of congressional irresolution, Soviet General Secretary Mikhail Gorbachev will undoubtedly temporarize with Reagan until either a more malleable president is elected or Congress further undercuts a strong defense posture.

The unmistakable tendency of Congress is to obey its feelings rather than its calculations, and to abandon long-term plans to satisfy momentary passions. The consequences impede the Chief Executive in the forging and execution of a successful foreign policy. The Chief Executive may abuse his foreign policy prerogatives. If so, he can be impeached and tried by the Senate. The Chief Executive also may err on occasion in the international arena in seeking to promote the national interest. But the short-term harm from such error is dwarfed by the institutional advantages that accrue in foreign policy to assigning power and responsibility to the president.

War-making powers should also be the exclusive prerogative of the president. The War Powers Resolution of 1973 demonstrates the hazards of permitting congressional incursions.

It prohibits the president from introducing the United States Armed Forces into actual or imminent hostilities unless Congress has either declared war or authorized the president to act by statute, or a national emergency has been created by attack upon the United States, its territories or possessions, or its armed forces.

The Resolution thus denies the president power unilaterally to take preemptive military action to avoid a national calamity or save countless American lives. It permits the president to engage the military in hostilities only after the United States has been attacked.

Israel won a grand victory with few lost lives during the celebrated Six-Day War with Egypt in 1967 by taking preemptive action to destroy the entire Egyptian air fleet. The War Powers Resolution prevents the president of the United States from accomplishing such brilliant victories.

The Resolution would have prevented President Franklin Roosevelt from launching a preemptive attack on Japan to forestall the Pearl Harbor disaster. It would have prevented President Eisenhower from deploying troops to calm unrest in Lebanon in 1958, and President Johnson's skillful use of the armed forces in the Dominican Republic in 1965. It would prevent President Reagan from committing U.S. troops deployed in Europe under NATO auspices to a preemptive allied attack on Warsaw Pact forces that were scheduled to invade West Germany. Reagan could not swiftly send troops to the Phillippines if Subic Naval Base or Clark Air Force Base seemed threatened by turbulence in domestic politics there. And, arguably, the President was compelled to violate the War Powers Act to execute the rescue of Americans in Grenada and bring democracy to that Caribbean nation. The importance of timing in influencing foreign developments clearly makes unhindered presidential war-making powers imperative.

The War Powers Resolution also obligates the president to terminate use of the armed forces within 60 days after their introduction into a hostile climate. The 60-day withdrawal mandate applies wherever the armed forces confront actual or imminent hostilities, enter the jurisdiction of a foreign nation equipped for combat, or substantially augment U.S. forces equipped for combat in a foreign country. The 60-day period can be extended for an additional month if the president finds the extension necessary to the safe removal of the armed forces. Congress may also extend the period by statute.

The Resolution telegraphs to all the Nation's enemies that military tactics of delay will be rewarding. Suppose, for instance, North Korea escalates its ever-truculent behavior towards South Korea along the DMZ. To provide reassurance to South Korea and to deter aggression, President Reagan substantially augments the 40,000 U.S. troops stationed there. North Korea need only await 60 days for the additional troops to depart, and then perhaps launch a lethal attack.

As applied in Lebanon recently, the War Powers Resolution advertised to our terrorist foes that the U.S. military committed to a multinational peacekeeping force would be withdrawn no later than 18 months after deployment. The Lebanese-based terrorists thus could plan on operating with impunity from American retaliation after that period.

The 60-day withdrawal rule also sharply circumscribes the tactics available to a military commander. Only plans that can be executed within that narrow time frame are viable. And this limitation substantially aids the enemy in anticipating the military plans of the United States, and thereby endangers our soldiers.

The War Powers Resolution is a blueprint for military or foreign policy setbacks in an unsentimental world. During the Constitutional

Convention, the delegates explicitly denied Congress the power to make war, leaving to the Executive at a minimum the power to repel sudden attacks. Congress retained the power to declare war, but not to interfere in military strategy or tactics.

In 1787, the idea of a quick preemptive military strike by the president as possibly indispensable to the national security had no practical significance. The United States was protected from its most dangerous enemies by vast oceans, and relatively primitive military technology made the likelihood of instantaneous and deadly assaults on the Nation improbable.

No such military luxury obtains today. Soviet missiles and other weaponry confront the United States and its allies with imminent danger. To await actual hostilities before launching a military response is to invite defeat. To borrow from Alexander Hamilton in Federalist 25, the War Powers Resolution requires the presence of an enemy within our territory to create the legal warrant to protect the Nation. We must receive the blow before responding. All that kind of policy by which nations anticipate danger and meet the gathering storm must be abstained from.

The circumstances that endanger the safety of nations are infinite. Thus, no legal shackles can wisely be imposed on the president's authority to defend the national security. Of all the cares or concerns of government, the war making power most peculiarly demands its exercise by a single authority--the President--because the needs for intelligence and decisive action are at their zenith.

Political philosopher John Locke explained the need for executive prerogative to protect a Nation, even if defiance of law was required. Legislatures, he maintained, were too large, unwieldly, and slow to act in a crisis, or to foresee and to provide by law for all necessities. The Executive was entitled to act according to his discretion in the public good to preserve the community. If the emergency power were abused, the Executive was answerable to the people, through an impeachment process or otherwise.

John Locke's understanding guided President Lincoln during the Civil War. Defending his unilateral suspension of the writ of habeas corpus, Lincoln rhetorically asked: "are all laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"

The War Powers Resolution wrongly compels a president to choose between compliance with a statute and his constitutional oath to preserve, protect, and defend the Constitution. It mocks the elementary principle that self-preservation is the first law of national life.

II. TWENTY-SECOND AMENDMENT

The Constitution also teaches the folly of the Twenty-Second Amendment. It prohibits election to the office of the President more than twice. But to deny a president the opportunity for reeligibility diminishes the inducements to good behavior. The desire for reward or fame is one of the strongest incentives for human conduct. A president will be motivated to pursue the public good with zeal if his accomplishments might bring a continuance in office. In addition, a bar to reelection deprives the Nation of the wisdom gained by the Chief Executive in the exercise of his office. As Alexander Hamilton in Federalist 72 asked, "Can it be wise to put this desireable and essential quality under the ban of the Constitution, and to declare that the moment it is acquired, its possessor shall be compelled to abandon the station in which it was acquired and to which it is adapted?"

As we now know, arbitrarily limiting the tenure of the president is dangerous to the security of the Nation. Experience shows that in particular emergencies virtually all countries have needed the services of particular men to preserve their political independence. And it is manifest that a change in the Chief Magistrate at the breaking out of war, or similar crisis, would improvidently substitute inexperience for experience, and unsettle prevailing policies.

A major reason for President Franklin Roosevelt's third victory in November, 1940 was World War II and international turmoil menacing the United States. Great Britain declined to hold parliamentary elections during the War to insure stability of policy. In contrast, the revolving governments of the French Third Republic contributed to the calamitous defeat of France by Nazi Germany.

Since 1951 when the Twenty-Second Amendment was ratified, the Nation's political and economic security has grown progressively dependent on international agreements. Whether these agreements are advantageous or not pivot on the negotiating strength of the president. Under the Constitution, the Supreme Court declared 50 years ago, the president is "the sole organ of the federal government in the field of international relations." In an unfriendly world, what contemporary sense does it make to weaken the Nation's international profile by retaining a two-term limit on presidents?

Even with regard to domestic affairs, a constancy of presidential policy may be desirable. Predictability aids business planning, and avoids unfair disturbance of settled expectations among the citizenry. A president who has won the confidence of the people by forging successful domestic policies should not be ousted from office simply because two terms have expired. A change of men invariably brings a change in policy if only to establish an independent political profile. Such changes are appropriate when an incumbent

president has championed untoward laws or charted counterproductive policy initiatives disliked by the people. But a change in the presidency is inimical to the public interest when the voters applaud the incumbent and wish a continuation of his methods and objectives.

III. INDEPENDENT REGULATORY AGENCIES

Beginning with the Interstate Commerce Commission in 1887, independent federal regulatory agencies were romantically conceived as institutions headed by expert citizens who could not be removed by the president, and who could therefore exert public power with speed and disinterest.

Experience has discredited this myth that surrounds about 20 agencies now, including the Federal Reserve Board, the Federal Trade Commission, the Federal Communications Commission, and the Securities and Exchange Commission.

At the FCC, the fate of important agency policies such as the Fairness Doctrine, mutliple ownership of broadcast stations, rules limiting network investment in programming, and so-called "must-carry" rules for cable operators are decisively affected by importunings or threats from congressmen or committees. For instance, in 1983, an initiative to curb the application of the Fairness Doctrine was stymied by a Senate Appropriations Committee report threatening adverse action by Congress if any weakening were undertaken. And in 1986, Chairman John Danforth of the Senate Commerce Committee orchestrated a revision of FCC rules requiring uncompensated cable carriage of local broadcast programming.

The FTC's antitrust policies in fields such as agriculture or insurance are similarly guided by congressmen or committees. And Congress has attached riders to appropriations bills forbidding action attacking agricultural marketing orders, the funeral industry, and children's advertising. In lawsuits brought in New Orleans and Minneapolis against anti-competitive regulations in the taxi industry, Congress passed a rider forbidding any funds to carry on the cases. These examples have counterparts in all other independent agencies.

Congressional dominance of independent agencies violates the constitutional injunction against combining law-making powers with power to enforce the laws. In addition, many independent agencies combine legislative, executive, and judicial authority. For instance, the Securities and Exchange Commission, which sets out rules for the securities industry, enforces them and then acts as judge in the enforcement actions to which it is a party. The most primitive concepts of fairness would be offended by such a stacking of the legal deck. How likely is it that after spending large sums to bring an action for violations, the SEC would reject its own case, especially

since its future funding frequently depends on the number of successful prosecutions?

As James Madison explained in Federalist 47, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Though independent agency members were originally intended to be experts in their fields, the genuine agency expertise usually resides in staff employees. Commissioner after commissioner has arrived to steer an agency with little or no experience with the statutes to be administered, although many performed ably nonetheless. They may be competent but they aren't experts in that particular field--one thinks of Caspar Weinberger, director of finance for the State of California, going to the Federal Trade Commission, for instance.

Coupled with this lack of expertise at the executive level is the fact that independent agencies are thoroughly politicized by Congress. Agency commissioners and staff speak of themselves as "creatures of Congress." They often treat any request by a congressman or committee as an edict of the United States Supreme Court, even if it entails disclosing confidential communications or information, or re-writing, postponing, or altering an item on the agency's agenda. During examination of the Fairness Doctrine at the FCC, Representative John Dingell (D-MI) was given access to every scrap of internal communication bearing on the issue.

The congressional committee that is supposed to merely oversee each agency tends to act, in fact, as its master. Witness the relationship of the House Commerce Committee and the FCC, the FTC, and Consumer Product Safety Commission, or the various appropriations committees and almost all of the agencies. The reasons for such congressional dominance are simple. Independent agencies have no bargaining leverage with Congress, and they do not have the executive branch to protect them, the way the president protects his non-independent agencies by using executive privilege, the veto power, promises of executive or judicial appointments, and the power to direct billions of dollars of government expenditures or contracts.

For instance, the Department of Transportation, which is part of the executive branch, recently instituted rules for auctioning off landing rights at airports. Despite heated opposition from some congressmen, they have successfully warded off any attempts to scuttle this deregulatory measure. In contrast, the FCC has been intimidated by Congress from attempting flexible use of the broadcast spectrum to achieve deregulatory aims.

Meanwhile, in prosecuting violations of law, independent agencies wield executive power outside the control of the president. This

fragmentation of executive authority sometimes places the president in the awkward position of opposing them in court. Recently, for instance, the Department of Justice filed a brief in the U.S. Supreme Court opposing the efforts of the Federal Reserve Board to regulate non-bank banks.

A satisfying constitutional rationale for independent agencies has never been advanced by the Supreme Court. Justice Robert Jackson complained in 1952 that "[independent] agencies have been called quasi-legislative, quasi-executive or quasi-judicial...to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to qualifying 'quasi' is a smooth cover which we draw over our confusion as we might use a counter-pane to conceal a disordered bed."

Independent agencies mock the separation of powers by creating de facto a hydra-headed executive branch. The Founding Fathers explicitly rejected the idea of a plural executive, in which power is shared by more than one person, for good reasons. Among them are the potential for internecine squabbling, and concealment of fault and shirking of responsibility. In the aftermath of World War I, President Warren G. Harding ducked responsibility for high railroad rates assailed by farmers when he argued that the independent ICC had jurisdiction over the matter. President Franklin Roosevelt complained of his inability to manage the independent National Labor Relations Board or to influence the formulation of the Board's policies.

The electorate has no ballot box recourse against mischief caused by independent agencies because no elected official is responsible for their activities. In many cases, long terms of office conferred on independent agency members prevents a president from appointing an agency majority. And even when that occurs, the president's inability to remove Commissioners for disagreement over policy makes it impossible to hold him responsible for agency activity.

Independent agencies also raise troublesome questions about the extent of Congress' power. If Congress can carve away at the president's executive power to administer the nation's communication laws by creating an independent Federal Communications Commission, then what constitutional theory could stop the legislature from making independent the Departments of Justice, State, Defense and other Cabinet authorities?

Some argue that independent agencies yield more enlightened policies than agencies controlled by the president. The Federal Reserve Board and monetary policy is often cited as an example. If independence does genuinely result in better decision-making, then the President can be expected to grant the same through executive order. This tactic was employed during the Watergate investigation to confer independence on the Special Prosecutor acting under the Department of Justice.

Moreover, the Constitution is devoted to accountable government, even if untoward policies occasionally result. Independent agencies thus cannot justify their constitutionality simply by pointing to wise decisions. If that were true, benevolent despotism might also receive constitutional benediction.

IV. THE VETO POWER

The veto power of the president expresses a constitutional bias against legislation. It reflects suspicion of the ability of government to fashion laws that do more good than harm.

Alexander Hamilton explained in Federalist 73 that the veto power "furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body."

Political ambition, party factions, and transient community passions frequently cause Congress to pass ill-advised laws. The veto power reduces the likelihood that laws will be enacted without due deliberation or because of some short-term public prejudice.

The power of preventing bad laws includes the power of preventing good ones. But prudence favors a bias in favor of the legal status quo. As Hamilton observed, inconstancy and mutability of the laws are a bane to democratic government. Institutions "calculated to restrain the excess of lawmaking...[are] much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."

The veto power thus should remind the president and Congress that those who champion any new law should be required to shoulder a heavy burden.

V. ECONOMIC FREEDOM AND THE PROMOTION OF COMMERCE

An impressive constellation of constitutional provisions are intended to safeguard individual economic freedoms and to promote economic efficiency. They recognize several political truths: that citizens enjoying economic independence are least likely to submit to abuses of government power; that economic factions will be inclined to exploit political power to effectuate wealth transfers that could not

be achieved by individual merit in a free market economy; that economic efficiency is a pillar of national and international strength; and that a citizenry avidly pursuing commercial endeavors will avoid the incendiary political strife that historically plagued Nations preoccupied with religion or other issues incapable of compromise.

The Commerce Clause of the Constitution prohibits States from discriminating against interstate commerce in order to protect local business from the winds of economic competition. And States are enjoined from regulating interstate enterprises to advance non-economic objectives if the effects unduly burden efficient interstate operations.

The Constitution fosters intellectual property by empowering Congress to secure for "limited times to authors and inventors the exclusive right to their respective writings and discoveries." The Nation's copyright and patent laws rest on this authority.

Trade is facilitated by constitutional injunctions against federal export taxes or preferences to the ports of one State over another, or the payment of multiple duties. States are constitutionally prohibited from levying either import or export taxes or discriminating against foreign commerce.

A stable commercial environment conducive to investment and shielded from political manipulation is a paramount goal of Article I, Section 10 of the Constitution. It prohibits any State statute that impairs the obligation of contracts. Further, States are barred from coining money, emitting bills of credit, or making anything but gold and silver coins a tender in payment of debt.

The Comity Clause of Article IV, Section 2 of the Constitution guarantees the citizens of each State entitlement to all privileges and immunities of citizens in the several States. The Clause protects the right of individuals to pursue a livelihood in any State without discrimination based on non-residency.

The Fifth Amendment prohibits government from taking private property for a public use without payment of just compensation. And the Fourteenth Amendment circumscribes State power to tax interstate commerce. A State may neither levy a tax whose effects impair the ability of interstate business to compete with local rivals, nor expose interstate commerce to multiple tax burdens that do not burden wholly in-state enterprises. In addition, the equal protection clause of the Fourteenth Amendment denounces State laws that discriminate against an out-of-state enterprise because of its foreign domicile.

In sum, the Constitution is a reminder to all public officials that the promotion of economic freedom and efficiency in unregulated markets should be an ascendent concern in fashioning public policy.

To ignore this understanding is to risk both political freedom, economic equity, and material prosperity.

VI. FEDERALISM

The Constitution intended to divide power between the federal and state governments both to safeguard liberty and to foster enlightened public policy. The federal government was conceived as possessing limited powers--namely, those explicitly or by implication derived from the text of the Constitution. States were understood to retain general authority not prohibited by the Constitution nor preempted by federal action. The distribution of power was an additional safeguard against usurpations by government. As James Madison explained in Federalist 51, "[t]he different governments will control each other, at the same time that each will be controlled by itself."

Madison further elaborated in Federalist 45 on the limited number of issues the federal government was expected to address, and the large number to be controlled by the States.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Madisonian vision of the respective powers of the federal and State governments was informed by an understanding that institutionally States are ordinarily better equipped than Congress to evolve public policies that best serve the people. The reasons are several.

1) The science of government is the science of experiment. The vexing problems that confront government--seeking to upgrade education, for instance--can be addressed most intelligently by drawing upon the experience of 50 different States, in lieu of woolly theories trumpeted before Congress. In recent years, States have embraced a rich variety of education reforms: merit pay for teachers, teacher certification through testing, minimum competency standards for student high school graduation, and so-called "no-pass, no play" rules for student high school extracurricular eligibility. These varying approaches can be studied and tailored to fit unique facets of local education.

In contrast, the federal Elementary and Secondary Education Act and its progeny showered billions of dollars in seeking to upgrade the education of children with low-income parents. The Act generally failed in its purpose, and yielded little knowledge of what alternative steps might promise success.

Varying state approaches to no-fault auto insurance is another example of the wisdom of resisting nationwide policy.

In addition, risky, exotic, or untested State policies are unthreatening to the Nation as a whole. President Franklin Roosevelt complacently viewed the candidacy of Upton Sinclair for Governor of California and his End Poverty in California program that allegedly would ruin the State's banking system. Roosevelt explained:

> The beauty of our state-federal system is that the people can experiment. If it has fatal consequences in one place, it has little effect on the rest of the country. If a new, apparently fanatical, program works well, it will be copied. If it doesn't, you won't hear of it again.

2) States are engaged in public policy competition among themselves. Ill-conceived public policy over the long-run provokes an exodus of business and talented individuals; the state tax base erodes and its infrastructure deteriorates.

States are strongly encouraged to rectify poor public policy in order to regain fiscal health and to upgrade the composition of their residents. At present, education reforms, business enterprise zones, and state deregulatory measures are blossoming among the States spurred by the desire to attract business and educated individuals.

In contrast to States, Congress lacks a strong political incentive to correct misconceived public policy that is fastened on all individuals or businesses of the Nation. Injurious national public policy cannot be escaped by flight to a different State, and the absence of a competitive disadvantage caused by the policy stifles constituent calls for reform by Congress.

3) Generally speaking, state legislative bodies are more responsive to constituents than is Congress. State legislatures generally contain fewer members, are more knowledgeable of local conditions, and are less crowded for time than Congress. And malfunctioning state laws that burden all state residents are likely to evoke swift statutory reform

Members of Congress are frequently ignorant of local conditions or needs because they are preoccupied with major national questions: balanced budget laws, tax reform, defense spending, sanctions against

South Africa, or aid to "Contra" forces fighting the Sandinistas in Nicaragua.

In addition, federal statutes that malfunction in only a minority of States will not engender a nationwide constituency needed for statutory reform. In the States where the statute operates satisfactorily, their congressman and senators will be complacent about devoting time or energy for change. And if the statute operates well in the States where powerful Committee chairman reside, then the likelihood of statutory amendment is further diminished.

Finally, Congress is too busy with budget, tax, and foreign policy matters to reexamine other types of laws on a timely basis. Ordinarily, 50 years or more elapse before Congress comprehensively reviews and revises laws in such fields as patents, copyright, bankruptcy, communications, railroads, motor carriers, airlines, or otherwise.

4) States can make policy tailored to their unique circumstances, whereas Congress generally enacts policy nationwide. State policy is thus more likely to satisfy constituent desires. As Woodrow Wilson observed: "We know that we still have a singularly various country, that it would be folly to apply uniform rules of development to all parts of the country, that our strength has been in the elasticity of our institutions, in the almost infinite adaptability of our laws, that our vitality has consisted largely in the dispersal of political authority, in the necessity that communities should take care of themselves and work out their own order and progress."

The federal 55 mile per hour speed rule as a condition for full State participation in federal highway funds nicely illustrates the imprudence of nationwide policy. The limit may be desireable and wanted in urban States and substantially reduce accidents there, but in rural States such as Idaho or Wyoming limiting speed to 55 miles per hour may be unwanted and counterproductive.

Similarly, the nationwide minimum wage and overtime provisions of the Fair Labor Standards Act overlook the large local differences in the cost of living and labor markets.

5) Local media are equipped to inform constituents of political developments within the States, but ordinarily lack the resources and money to report on the many activities of Congress. Thus, most voters would be more informed about an issue if addressed by their State legislature than if the same issue was addressed by Congress. And informed voters are indispensable to political accountability by elected representatives.

6) State sovereignty is an important safeguard against political oppression. Thomas Hobbes lectured that "freedom is political power divided into small fragments." Thomas Jefferson maintained that "the

true barriers of our liberty in this country are our State governments." And Woodrow Wilson pointed out that the "concentration of power is what always precedes the destruction of human liberties."

All of the arguments for a rebirth of States' Rights might readily be discarded if the massive congressional intrusion on areas of traditional state law since the New Deal yielded manifest benefits that individual States would not have accomplished. Matters of health, education, welfare, housing, child support, employment training, juvenile delinquency, runaway children, battered spouses, and drug abuse, for instance, have all been the object of congressional statutes without any heralded success stories. On the other hand, federal statutes denouncing racial discrimination and regulating air, water, and other environmental pollution seem demonstrably superior to what States were achieving or could achieve. Thus, nationwide, policymaking by Congress in domestic affairs should not be rejected in principle, but should be saddled with a burden of persuasive justification for preempting State prerogatives.

VII. INTERPRETING THE CONSTITUTION

At present, two competing theories for interpreting the Constitution are vying for ascendency within the courts and legal community. One theory maintains that the Constitution should be interpreted to vindicate the intent of its architects. A rival theory asserts that the Constitution is a so-called "living document" that should be construed in light of contemporary needs or conditions even if the result contradicts the intent of the framers. The Constitution's history, structure, and suspicion of unchecked power persuasively supports the intent standard as the sole legitimate theory of constitutional interpretation.

Chief Justice John Marshall explained in Marbury v. Madison that an essential purpose of a written Constitution is to limit the powers of government; the United States Constitution achieves this goal by delineating the powers and responsibilities of the Congress, the Executive, and the Judiciary in language to be interpreted in accord with the intent of the constitutional framers. As Marshall elaborated in Gibbons v. Ogden: "[T]he enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said....[W]e know of no rules for construing [the Constitution] other than is given by the language of the instrument...taken in connection with the purpose for which [federal powers] were conferred."

To depart from the intent of the Founding Fathers in constitutional interpretation endangers the restraints on government power that a written Constitution is designed to impose. James

Madison instructed that if "the sense in which the Constitution was accepted and ratified by the Nation...be not the guide in expounding it, there can be no security...for a faithful exercise of its powers." Thomas Jefferson further elaborated the hazards of infidelity to constitutional intent:

> I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction....Let us go then perfecting it, by adding, by way of amendment to the Constitution, those powers which time and trial show are still wanting.

Chief Justice Taney remonstrated against any departure from the intent of the framers in constitutional adjudication: "If in this Court we are at liberty to give the old words new meanings when we find them in the Constitution, there is no power which may not by this mode of construction, be conferred on the general government and denied to the states." In 1872, Senators who had voted in favor of the Fourteenth Amendment signed a unanimous Judiciary Committee Report which admonished: "A construction which should give the phrase...a meaning different from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution." And Justice Harlan protested that "when the court disregards the express intent and understanding of the framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which is its highest duty to protect."

Constitutional language or history is not invariably unambiguous. Thus, the interpretation of the Constitution by federal judges informed by an intent standard still leaves room for modest discretion or policy choices. But such circumscribed discretion or policymaking is generally inconsequential.

In Federalist No. 78, Hamilton characterized the federal judiciary as the least dangerous branch because of the nature of its functions. This classic characterization is apt if--and only if--federal judges execute their interpretive powers as the Constitution envisioned. As Hamilton further explained in Federalist No. 78, the judiciary is obliged to employ constitutional intent in reviewing the validity of legislation. He understood that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." The little time or debate devoted to the powers of the federal judiciary at the Constitutional Convention fortifies the conclusion that expansive authority was not intended.

To depart from constitutional intent invariably injects the policy preferences of the Justices into the task of interpretation. The fundamental illegitimacy of such judicial usurpations of policymaking is frequently obscured by debating whether the substantive results are acceptable--in short, whether the ends justify the means. Thus, columnist Anthony Lewis described Chief Justice Earl Warren as "the closest thing the United States had to a Platonic Guardian, dispensing law from a throne without any sensed limits of power except what was seen as the good of society. Fortunately, he was a decent, humane, honorable, democratic Guardian." Whether such a glowing depiction of Warren is justified is problematic. In any event, Lewis profoundly erred in suggesting that illegitimate judicial policymaking practiced by a virtuous Justice is tolerable.

That same misconception plagued venerated liberal Senator George Norris of Nebraska during his seven years as a state judge. In his memoirs, Norris recounts how he invented law to protect distressed farmers from mortgage foreclosures based on his personal evaluation of a farmer's economic future. The legal rule he adopted was that "if in my judgment the farmer was going to be able, under ordinary circumstances, to meet his indebtedness, I would postpone confirmation of the sheriff's sale and give the farmer an opportunity to pay it." Norris defended his scheme of personalized justice by asserting its benevolent results. He boasted that:

> In the end, hundreds of farmers paid off their mortgages, and hundreds of farms that otherwise would have become vacant under absentee ownership, remained in the hands of those who settled upon the soil....And that seemed to me a rule of justice that could be inspired...by humane consideration of facts; and by recognition both on the part of the borrower and on that of the lender that national welfare and progress are stimulated by any system of capitalism which provides for the widest distribution of the natural resources of soil and its use by the largest member of legal owners.

The exercise of judicial power according to personal standards of fairness or justice, however, is lawless. As Justice Benjamin N. Cardozo explained, benevolent judges empowered to adjudicate according to their individual sense of justice might produce a benevolent despotism, but such a regime would put an end to the reign of law.

Moreover, the Constitution was not designed on the assumption that angels would occupy government offices. As James Madison noted in Federalist No. 51, if men were angels no government would be necessary. The Founding Fathers assumed unchecked power would be abused; a constitutional system of separated powers and checks and balances was erected to forestall government abuses. One of the checks and balances was erected to forestall government abuses. One

of the checks on judicial usurpation of policymaking was the obligation to interpret the Constitution in accord with the intent of its authors. Otherwise, as Jefferson, Madison, and others have understood, the judiciary could readily arrogate or misuse power through creative, inventive, or idiosyncratic constructions of constitutional provisions. The history of the Supreme Court confirms these fears.

The intent theory of interpretation does not make the Constitution anachronistic. The power of amendment and the necessary and proper clause endow the people with authority to adjust legal rules in light of changed conditions. Twenty-six amendments have been added to the Constitution, and several were ratified within months. And modern Congresses invoke the necessary and proper clause in conjunction with enumerated powers to address virtually every actual or perceived evil brought to its attention. Accordingly, unbounded judicial authority to interpret the Constitution is emphatically not necessary to make the Nation's legal network responsive to conditions unforeseen by our constitutional architects.

CONCLUSION

The Constitution is not self-executing. It can and has malfunctioned when administered without understanding. The parchment barriers against abuses of government authority in the Constitution must be fortified by an adherence to the political philosophy underlying the Nation's charter document. Only then does the Constitution warrant the fulsome accolade of Lord Gladstone: "The most wonderful work ever struck off at a given time by the brain and purpose of man."

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