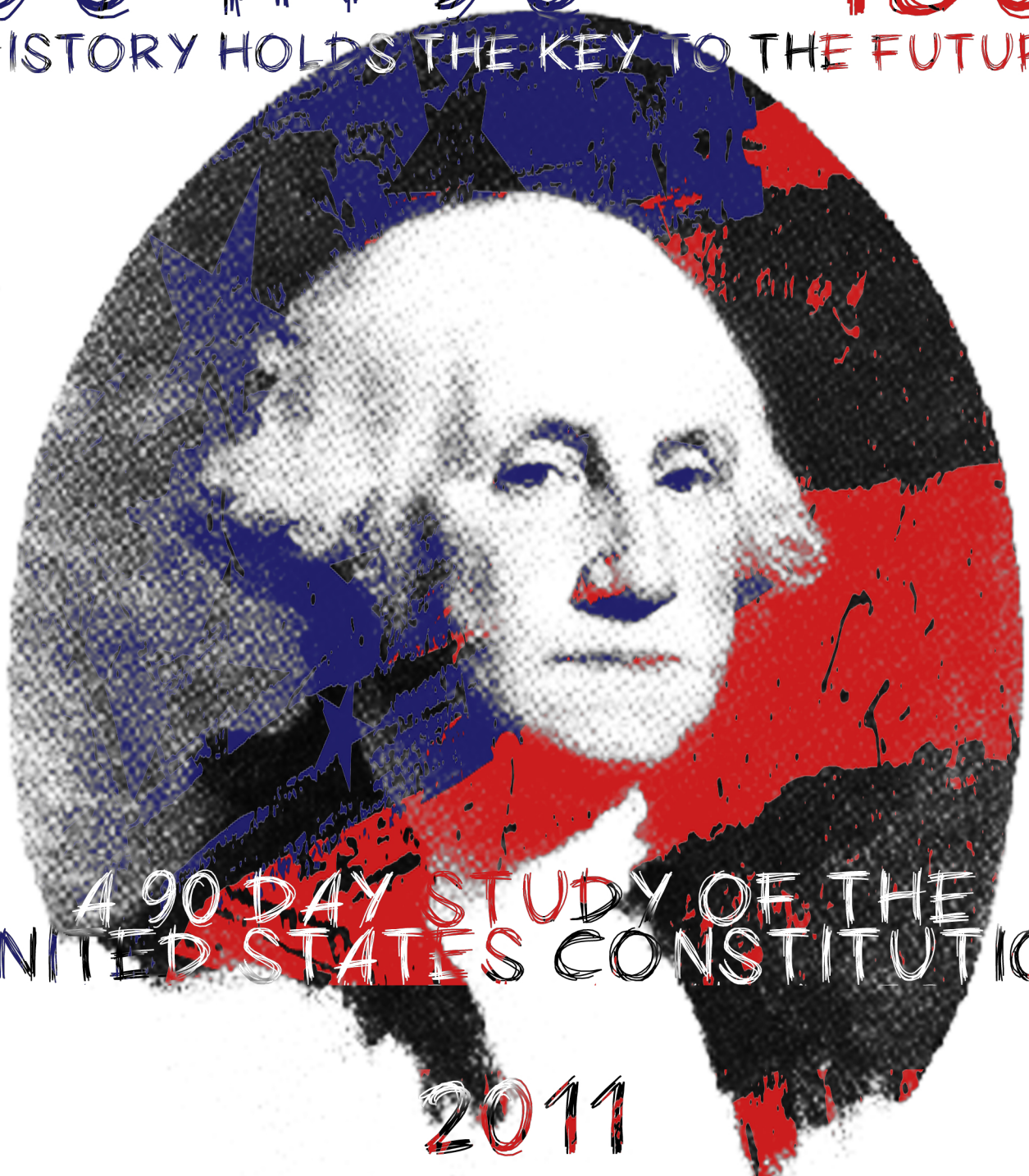
90 IN 90 = 180

HISTORY HOLDS THE KEY TO THE FUTURE



A 90 DAY STUDY OF THE UNITED STATES CONSTITUTION

2011

ESSAYS BY CONSTITUTING AMERICA
FOUNDER AND CO-CHAIR JANINE TURNER
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Constituting America

A 90 Day Study of the United States Constitution

February 21 – June 24, 2011 Featuring Essays by Guest Constitutional Scholars

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February 21, 2011 – Analyzing the Constitution for 90 Days – The Preamble to the United States Constitution – Guest Essayist: David Bobb, Ph.D., director of the Hillsdale College Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship, in Washington, D.C.

The Preamble to the United States 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.

The Preamble to the Constitution was added at the last minute by the Constitutional Convention, roundly criticized upon its announcement, and even today lacks any legal standing. So what does it mean, and why does it matter?

"We the People" was a powerful and even revolutionary way to announce the Americans' new form of government, for encapsulated in these three opening words was the argument for a new regime that is in keeping with the principles advanced in the Declaration of 1776, and defended in the War for Independence.

Whereas the previous compact of the United States, the Articles of Confederation, had been a "firm league of friendship" joined by states, the new Constitution was formed by the people as a whole. The national government was sovereign, not the states. To Anti-Federalists, the Constitution went awry from the outset, for in its first phrase, they held, it announced a form of government that would eliminate the power of the states and thereby destroy the liberties of the people. Nothing could be further from the truth, Federalists responded correctly, for unless the nation wished to continue in abject weakness, it needed to empower the national government to do what the states could not, thus ensuring that the liberties of the people would be secure.

Owing to the fluid style and incisive intellect of Pennsylvanian Gouverneur Morris, who despite being the most loquacious of the delegates to the Constitutional Convention was also among the most profound, the Preamble was his parting gift to the nation, drafted as he did the final edits to the document as a whole. Remedying the weaknesses of the Articles, the new Constitution would accomplish all of ends stated in its Preamble. Morris gave those ends concise expression, and despite his clarity, they were misunderstood in his day, and often, for very different reasons, continue to be misunderstood in ours. Take, for example, two of the six ends, or goals, adduced in the Preamble: the first, which is "to form a more perfect Union," and the fifth, to "promote the general Welfare."

To some Anti-Federalists, the phrase "to form a more perfect Union" was taken to entail a process of perfection whereby the states would be gradually crowded out, and more and more power would be given to the central government, so that when the evolution was complete all three main functions—legislative, executive, and judicial—would be held by one consolidated power. Such would not only be a violation of the Constitution's set-up, it would also trammel

everything the Declaration had stated against the King's own arrogation of authority. Publius and many other Federalists had a ready response for this erroneous reading.

There are many who today take the phrase, "to form a more perfect Union," to mean that the steady march of Progress must carry us closer and closer to perfection. Intent on leaving behind old, outdated ideas, and replacing them with a "new foundation" for our government, contemporary Progressives take the Preamble out of context in supposing it an endorsement of their agenda.

"To form a more perfect Union" meant nothing about the future, and everything about the past. It meant, simply, that the Constitution would be an improvement upon the Articles of Confederation, which left much to be desired in its anemic, nearly non-existent central government. The Constitution is the architecture of our equality and liberty not because of some supposed Progressivism in the Preamble, but rather because of its foundation in principles that are enduring.

While some Anti-Federalists wondered whether the fifth end, or purpose, of the Preamble, to "promote the general Welfare," would, along with its recapitulation later in the first article of the Constitution, create too broad a grant of power, the overwhelming consensus at the time of the Founding was that the word "general" precluded the kind of projects that today we know as "pork." Today the Preamble's "general Welfare" reference is occasionally cited in error as a constitutional grant of authority. The Preamble can confer no such legal boon, and even if it could, the phrase "general Welfare" would allow very little, if any, of the legislative activity that the frequent misreading of the first clause of the Constitution's Article I, Section 8, has permitted. In other words, to "promote the general Welfare" must be understood within the limited government context in which it was written.

Limited government for the Founders did not mean weak government. On the contrary, government had to be strong to secure the rights of the people. This is obvious when three other ends not examined in detail here are considered. To "establish Justice," "insure domestic Tranquility," and "provide for the common defence": How do each of these ends require strong government—stronger than provided under the Articles of Confederation?

The Constitution's Preamble states six ends of government, the sixth of which is, to "secure the Blessings of Liberty to ourselves and our Posterity." It is this phrase, especially, that might remind us of the president of the Constitutional Convention, and the "Father of our Country," George Washington, whose birthday should remind us how much we owe to him for the "blessings of liberty" that we so richly enjoy today.

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February 22, 2011 – Article I, Section 1 of the United States Constitution – Guest Essayist: Charles K. Rowley, Ph.D., Duncan Black Professor of Economics at George Mason University and General Director of The Locke Institute in Fairfax, Virginia

Article I, Section 1: All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives

The Constitution of the United States established three separate branches of the federal government, namely the legislative branch, the executive branch and the judicial branch. Superficially, therefore, one might think that it was a matter of chance as to the order in which each branch would be outlined and defined in this founding document. Such thinking, however, would be incorrect. The Founding Fathers did not write the Constitution without careful reference to the prior scholarship of Great Men, and without reference to the history of all prior republican forms of government. James Madison of Virginia, in particular, drawing heavily upon materials sent to him from Paris by Thomas Jefferson, made certain that the Constitution evolved from the past experience of all the republics that had failed, and would not be written out (as would later be the case with the disastrous French constitution) as an act of constructivist rationalism.

John Locke's seminal book, Two Treatises of Government – the book that provided the intellectual justification for England's Glorious Revolution of 1689 – provides the rationale for placing the legislative branch of government at the very beginning of the Constitution: 'The great end of Men's entering into Society, being the enjoyment of their Properties in Peace and Safety, and the great instrument and means of that being the Laws establish'd in that Society; the first and fundamental positive Law, which is to govern the Legislative it self, is the establishing of the Legislative Power;…This Legislative is not only the supream power of the Commonwealth, but sacred and unalterable in the hands where the Community have once placed it; nor can any Edict of any Body else, in what Form soever conceived, or by what Power soever backed have the force and obligation of a Law, which has not its Sanction from that Legislative, which the publick has chosen and appointed.' (Locke, II, para. 134)

The Founding Fathers wisely embraced Locke's argument establishing the legislature as the central pivot of any social contract through which individuals would consent to place their lives, liberties and properties under the protection of a civil or political society. It is no accident that Article I of the United States Constitution deals first with the legislature. Although commentators frequently describe the three branches of government as 'separate but equal', the Constitution is silent on that issue. Although the Founders designed the three branches to be inter-connected, each branch checking the power of the others, they surely relied on Locke's Second Treatise in recognizing the legislative branch as the fulcrum of the social contract.

The decision to separate the three branches, as defined in Articles I-III, by no means was set in stone when the Convention first assembled in Philadelphia. James Madison, in particular, was deeply impressed by the 1765 Commentaries of William Blackstone, who favored a single unified

branch system: 'It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislature. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them for the present, would in the end produce the same effects, by causing that union, against which it seems to provide. The legislature would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power.' (Blackstone, Commentaries, 1, 149)

Following up on this argument, James Madison while awaiting the arrival of other delegates, etched out a Virginia Plan that envisaged one branch only – the legislative branch. This branch would be responsible for appointing the executive and the judiciary, although these legislative agents jointly would be empowered to veto legislative decisions under certain circumstances. However, even such vetoes would be subject to legislative override by some unspecified super-majority.

According to the Virginia Plan, there were to be two chambers of the legislature (a bicameral legislature). Each state would be represented in each chamber in proportion either to its financial contributions or to its number of free inhabitants. The small states perceived such an arrangement to constitute an inordinate potential threat to their liberties by some effective coalition of the more populous states. In the Connecticut Compromise of June 29, 1787, the delegates abandoned the Virginia Plan in favor of a bicameral legislature in which the lower chamber (The House) would be based on state populations and the upper chamber (the Senate) would have equal representation. In reaction to this Compromise, James Madison etched out an ultimately successful case for separating the three branches of government as added checks and balances against the greatly-feared forces of faction.

The question whether the legislature should be composed of a single chamber (unicameral) or two chambers (bicameral) was far from fully resolved at the outset of the Convention. When George Mason proclaimed to the gathered delegates that 'the mind of the people of America' was 'well settled' in its attachment to the principle of having a legislature with more than one branch, he was not truly asserting that the matter was beyond contention. True, eleven of the thirteen states enjoyed bicameral legislatures. However, the Continental Congress consisted of but a single chamber and Pennsylvania, host to the Convention (and the home of the First American, Benjamin Franklin), operated with a unicameral legislature.

Ironically, the major forces in favor of bicameralism at the Convention were the example provided by Britain on the one side and the colonial experiences of the People on the other. On the one side
– and despite the War of Revolution – there lingered a long-standing admiration for the British constitution, at least in its mythic, uncorrupted, form. From this perspective, the vision of a truly balanced legislature, government, and society gave special authority to the British model. On the other side, most of the colonies had already developed an upper legislative chamber out of their governors' councils, which typically represented the concentrated power of great landlords and wealthy merchants.

For persons of property, as all the delegates to the Convention assuredly were, an upper chamber that might check the predations both of a covetous popular assembly and of an aggrandizing executive was especially attractive. For the populist-minded, the check provided by the upper chamber on executive powers was also not without its attractions. Thus, the case for bicameralism could be argued both from a quasi-aristocratic and from a profoundly-republican point of view.
Thus it came to pass that discussion of a second upper chamber presumed that its' membership would be smaller, that members would hold longer terms of office, and that members would be more select, than in the case of the lower chamber.

The lower chamber (the House of Representatives) thus came to be viewed as an embodiment of the popular will, an assembly of representatives who would come close to being reflexes of the people. Such a body was widely viewed as a necessary foundation of popular government based upon consent. Standing alone, however, the reflexes of such a body might become as passionate, tyrannical and arbitrary as those of the people that it represented. An upper chamber (the Senate), capable of checking the foolish or irrational impulses of the population at large, could be viewed as an essential safeguard to the lives, liberties and properties of those who otherwise might be exposed to the untrammeled excesses of the popular will. The later descent of the French Revolution – with its over-simplified constitutional settlement – into tyranny, bloodshed, and ultimately into the dictatorship of Napoleon Bonaparte, would amply justify these reservations advanced so serendipitously in 1787 by delegates to the Philadelphia Convention.

Eventually, the grand design fell into place in Philadelphia and, following a great national debate, was ratified into a magnificent social contract. Article I, Section 1 of the United States Constitution merely sets the stage. The full play unfolds in the remainder of this most precious of all constitutional documents.

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February 23, 2011 – Article I, Section 2, Clause 1-2 of the United States Constitution – Guest Essayist: Horace Cooper, Senior Fellow with the Heartland Institute

Article I, Section 2, Clause 1-2: The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

The House of Representatives or the people's house was created by design to be the most democratic body and the legislative chamber closest to the public. It is the larger of the two chambers and its elections the most frequent at the federal level.

In his essay on the "Original Contract" philosopher David Hume in 1752 said "The people, if we trace government to its first origin in the woods and deserts, are the source of all power and jurisdiction, and voluntarily, for the sake of peace and order, abandoned their native liberty and received laws from their equal and companion." The design and make up of the House reflects this view.

James Madison mentions in Federalist #52, the design and make up of the House of Representatives is predicated on the notion of a republican form of government. As Madison points out: "It is a

received and well-founded maxim, that where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration."

"…Members chosen every second year" ensures that House members will be appropriately responsive to the public. If the elections were more frequent there is the risk that House Members would stay in a perpetual election mode – constantly campaigning and less able to exercise their judgment and wisdom. On the other hand if the elections were held less frequently there was the risk that the House Members might exercise their personal judgments too and simultaneously the public might find it harder to hold them accountable due to the length of time between elections as passions and memories subside.

The two year cycle provides a happy medium that ensures accountability while also giving House members some limited ability to juxtapose their own judgment on policy matters.

The next provision establishes the Constitutional requirements for being a voter in a federal House election. The founders could have established an independent requirement or it could have authorized Congress to do so. Instead they took a third way – establishing that whatever voting requirements the states created for their own state assemblies would be used for the Federal House of Representatives election. The provision specifically requires that federal voters meet the same requirement needed to vote for the larger branch of the state legislature – typically the state House.

Thus, if a state required you to be a resident for 5 years and a property holder in order to vote in state legislative elections, that standard would apply in order to vote in federal House elections. Conversely if another state required voters merely to pay a fee in order to vote in state legislative races then there could be no additional restrictions for voting in the federal elections.

Instead of states being able to interfere with federal elections or vice-versa, the citizens in each state find that the requirements for voting for state and federal elections are identical.

The Constitution sets the age for House members at 25 years for a few reasons. The age of 25 recognizes that younger individuals have a natural right to influence the political process and participate in the decision making while ensuring that all of those serving in government possess the necessary maturity, experience, and competence to perform effectively.

The citizenship requirement is equally interesting. The Constitution does not require the individual to be a "natural born citizen" – only a citizen of the U.S. for 7 years. While Congress has the authority to define the requirements for U.S. Citizenship, the Constitution only requires that a House member meet that standard for at least 7 years.

At the same time that the individual must be a citizen of the U.S. for 7 years, the requirement to represent a district within a state is not 7 years as a state resident. Note that the standard for the candidate is that he or she must be "an inhabitant" of the state – i.e. a person who has established his domicile. Often disputes arise over whether a candidate actually lives in the district that he or she is running in. But there is no legal recourse at the federal level – the Constitution only requires that he or she live in the state not in the county or district where the federal election is being held.

This section endorses a notion that is replete within all parts of the Constitution – a republican form of government ensures the people's liberty is maintained. In this case the liberty of the people is safeguarded through clearly defined rules for holding elections and candidate requirements.

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February 24, 2011 – Article I, Section 2, Clause 3 of the United States Constitution – Guest Essayist: W. B. Allen, Havre de Grace, MD

Article 1, Section 2, Clause 3: Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

Amendment 14, Section 2: Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the

male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Amendment 26, Section1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

The so-called "three-fifths" clause of the U. S. Constitution is actually a provision for determining the number of representatives allotted to the several states in the Union. However, it provides the most frequently circulated charge against the Constitution. Simply put, for a long time almost everyone in America has misunderstood the three-fifths language in the Constitution. Here we speak directly and only to the origin of that language, in order to correct the record. We begin, however, by listing the Fourteenth Amendment and the Twenty-Sixth Amendment, because of their implications for the original text. Note that the Fourteenth Amendment supersedes the three-fifths clause, in particular directly tying the rule of representation to eligibility to participate in elections. That was not the case originally. Moreover, it ties eligibility to participate in elections (in relation to penalties for the denial of that privilege) to an age of majority listed as "twenty-one years of age." However, the Twenty-Sixth Amendment establishes the age of eligibility for voting at "eighteen years of age" without having altered the language of the Fourteenth Amendment. Thus, once again

the eligibility to vote has become disconnected from the rule of representation, as it was in the original constitution.

Now, regarding the three-fifths clause, the general account is that the Framers regarded black people as only three-fifths human (whatever that might mean). That, in turn, is supposed to prove that the Framers were bigots and that their opinion of black people was low indeed. The palpable surface of the framing documents reveals the truth. Consider what they did in fact mean, then judge how well the Framers confronted their moral dilemmas.

In April, 1783 (not 1787) in the Confederation Congress the three-fifths compromise emerged after six weeks of debate. An eighth article was proposed for the Articles of Confederation, apportioning expenses for the Confederation on the basis of land values as surveyed. There the discussion opened, only to reveal how difficult it was to assess land values 2

and, in the rude conditions of those times, to produce accurate surveys. Thus, they resorted to numbers instead, speaking of population as a rough approximation of wealth. Taking the numbers of people in the respective states, they hit upon the following language:

expenses shall be supplied by the several states in proportion to the whole number of white and other free inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes in each state.

What, then, does three-fifths apply to? Slaves, carefully and legally defined. But re-read the opening clause, delimiting "the whole number of white and other free inhabitants." To whom does that apply? Surely not whites only, nor only males, since "every age, sex, and condition" is further appended. Clearly, they aimed at every free human being, white and non-white. As is generally known, the only significant number of free non-whites in the United States in 1783 were American blacks (another 10,000 of whom were emancipated between 1776 and 1787). There were not in the United States of 1783, for example, any Asians. Thus, these legislators included American blacks among the free inhabitants; the following three-fifths clause applied not to blacks generically but rather to persons in the peculiar legal relation of slavery. Three-fifths of the number of slaves were counted, not in terms of their humanity but with respect to their legal status in the respective states.

The Confederation Congress fully affirmed the humanity of American blacks through the language of "white and other free inhabitants." Was that recognition of humanity withdrawn when this same language was taken up again in 1787 in the Constitutional Convention? Here is the provision:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

The lapse of four years has brought changes. But what are the changes? On the surface the changes are primarily editorial, introducing economy and exactness of language. As any composition teacher would point out, the first thing to notice is the elimination of redundancy. Why should it be necessary to say the "whole number of white and other free inhabitants, of every age, sex, and condition," when the "whole number of free persons" says the same thing? Further, "adding three fifths of all other persons" at the end is less awkward than the inclusion clause of 1783. Finally, the substitution of "Service" for "servitude" continues the liberal impulse of 1776. Moreover, this rule of representation says nothing about who gets the right to vote. Thus, 1787's freedom language includes women and blacks; it does not exclude them.

W. B. Allen

Havre de Grace, MD

February 25, 2011 – Article I, Section 2, Clause 4 of the United States Constitution – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation

Article 1, Section 2, Clause 4: When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The wisdom and foresight of the Framers of the U.S. Constitution is not manifested only in the substantive principles of constitutional design but also in the details of their plan of government. Thus, in the seemingly small matter of filling vacancies in the House of Representatives, we see manifestations of protection of state prerogatives, safeguarding the representative principle and flexibility for specific circumstances. See Joseph Story, 2 Commentaries on the Constitution §683 (1833).

The fourth clause of the section of Article I dealing with the House of Representatives provides: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such vacancies." Though the Framers might have provided for a national solution to the problem of a vacancy, they deferred to the state. They did not, however, leave to the state executive (it should be remembered that some states did not yet have governors at the time of the drafting, thus the use of "Executive Authority" which could include the presidents of

Delaware or Pennsylvania) the ability to appoint a successor to a Representative who had left a vacancy. Rather, in keeping with the principle of representation so central to the plan for a House of Representatives, the Framers specified that an election should be held to determine a replacement. Thus, no section of the country should be left without a popular representative for long. By contrast,
a vacancy in the Senate was to be filled by the Legislature or temporarily by the executive (until the 17th Amendment), reflecting the design of that branch as representative of the interests of states as states.

The only major controversy involving this provision seems to have occurred early on when William Pinkney, from Maryland, resigned as a member of the House of Representatives. Some members of Congress questioned the propriety of seating the man elected to fill the vacancy. Their concern was that perhaps a resignation ought not be allowed, following precedent from Britain's House of Commons. That argument was not accepted by the body and the successor was accepted as a member of the House. See Philip B. Kurland & Ralph Lerner, editors, 2 The Founders Constitution 146-147 (1987).

This clause is still operative. As of this writing, a vacancy has occurred in New York's 26th District due to the resignation of Representative Chris Lee. New York law gives the governor power to determine that a vacancy exists and then to provide for an election for the replacement. N.Y. Public Officers Law §42. Importantly, there seems to be no controversy over the constitutional provision at issue only at the expense of an election. See Evan Dawson, "How Much Will a Special Election Cost?" 13WHAM (Rochester), February 9, 2011 at http://www.13wham.com/content/blogs/story/Chris-Lee-Fallout-How-Much-Will-a-Special/qn57U3H1VkyesU0gu3cmoA.cspx.

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February 28, 2011 – Article I, Section 2, Clause 5 and Section 3, Clause 1 of the United States Constitution – Guest Essayist: Professor William Morrisey, William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College

Article 1, Section 2, Clause 5 "The House of Representatives shall chuse the Speaker and other Officers; and shall have the sole Power of Impeachment."

The Articles of Confederation had established a federal government in which all three powers—legislative, executive, and judicial—resided in one body, the Congress. This proved unwieldy and ineffectual. In principle, such an arrangement violated the Jeffersonian precept that any person or institution holding all of these powers constitutes a tyranny. The popular foundation of Congress under the Articles mitigated this danger but did not remove it, inasmuch as popular majorities might well tyrannize. The primary guard against Congressional tyranny thus consisted precisely in Congressional incompetence, an incompetence derived not from the incapacity of its members but from the structure of the institution itself. At Philadelphia, the Framers needed to remove the structural impediments to good government while simultaneously preventing governmental efficiency from malign use. Separated, balanced, but also interdependent branches of government, each exercising one of the three powers, could prevent tyrannical government without preventing firm government.

The House of Representatives chooses its own officers, including its chief officer, the Speaker of the House. This seems obvious to us now, but consider the other possibilities. The Framers might have empowered the President to choose these officers, selecting them from each newly-elected batch of Representatives. This quite obviously would have compromised the independence of the House from the Executive branch. In the most recent Congressional election (for example) it would have enabled President Obama to choose the officers of a House that had been elected in part as a popular rebuke to the president's party and its policies. Alternatively, the Framers could have

provided that the Speaker and perhaps some of the other officers might be elected by the Electoral College—i. e., by representatives of the people as a whole meeting prior to and independently of the first meeting of the newly-elected House. But this would elevate them to same status as the president and vice-president; separation and balance of powers requires that equal prestige be attached to the legislature as a branch of government and not to particular members within it.
Choice of the House officers by the House members ensures that those officers will be well known and esteemed by the majority of their colleagues. Other methods of selection could not guarantee this.

The power of impeachment bespeaks the character of the American regime, of republican government itself. In his 1791 Lectures on Law, James Wilson writes, "The doctrine of impeachments is of high import in the constitutions of free states. On one hand, the most powerful magistrates should be amenable to the law; on the other hand, elevated characters should not be sacrificed merely on account of their elevation. No one should be secure while he violates the Constitution and the laws; every one should be secure while he observes them." The

laws are the considered judgments of the elected representatives of the American people; to violate them while entrusted with a Constitutional office must deserve the swiftest punishment consistent with a fair trial. However, only a violation of the law can deserve such punishment, or else no sensible person would undertake the responsibilities of public office. To keep impeachment and trial within the bounds of the rule of the people's law, as distinguished from the envy, partisan rancor, or other passions of the hour must be a fundamental purpose of any just and reasonable constitution-maker.

The Framers assigned the power of impeachment to the House. That the House wields the sole power of impeachment speaks not only to the separation of powers but to their interdependence. The House alone can impeach an officer of the federal government. Impeachment means accusation or indictment, parallel to the power of a grand or petit jury. Under the British constitution the House of Commons was regarded as "the grand inquest of the nation"; as the most democratic branch, the one most frequently elected, the United States `house of commons' indicts officers in the name of the sovereign—namely, the American people, unencumbered by any dynasty or aristocracy. This provides for the independence of the House from all other branches, including the other legislative branch.

But, once impeached, the accused officer then has his day in court, so to speak, not in the House but in the Senate; further, presiding over that trial will not be any senator but the Chief Justice of the United States. This illustrates and provides for the interdependence of the three branches. Without interdependence, the American government would feature branches not merely separated but isolated from one another. Each branch would go its own way, leading to governmental incoherence—to what Publius calls, in another connection, a hydra or many-headed monster. The incompetence of the Articles of Confederation Congress would reappear, albeit in a more complex, interesting, and elegant form.

As intended by the Framers, impeachment and conviction of wayward federal officers has proven rightly difficult but possible in cases of clear malfeasance. Removal from office has remained mostly in the best hands—namely, the people themselves, who elect, re-elect or dismiss their representatives in free elections.

Article 1, Section 3, Clause 1: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."

Publius famously asserted that "the science of politics" had "received great improvement" in modern times. (Some fifty years later, Tocqueville rather more dramatically—he was French—called for "a new politics for a world altogether new"). The newness of American politics and of American political scientists consisted of two things: first, our freedom from rule by monarchic dynasties and titled aristocrats; second, our freedom from the already formidably centralized government of Europe. The "New World" that Europeans had `discovered' was new to them; what they had discovered was of course a very old world populated by Amerindian nations and tribes. It was new to the Europeans. The real newness of the New World arose from the politics of the European settlers, governing themselves largely unsupervised by European ruling classes and institutions.

Freedom from monarchs and aristocrats meant that Americans could found a regime not seen since antiquity, a republic in which the people were sovereign, with no admixture of any families or classes that claimed a superior right to rule. For example, although most states required property ownership of voters and of office-holders, nothing but ill luck or incapacity barred today's pauper from property ownership and full citizenship rights tomorrow. The socially egalitarian regime of the United States could better reflect the natural equality of human beings enunciated in the Declaration of Independence, vindicating in the revolutionary war for independence.

Political communities coalesce not only in the form of their regimes. They also form themselves as relatively large or small societies in terms of population and territory and as relatively centralized or decentralized with respect to their ruling structures. The polis of ancient Greece, small and centralized, contrasted sharply with the contemporary empires of Persia and of China—huge but decentralized entities which gave their provinces substantial latitude for self-government because it had to. In antiquity, no ruler commanded a ruling apparatus that could do much more than exact tribute from the peoples it conquered, quell uprisings, and defend imperial borders.

The modern state changed this. Envisioned in principle by the Italian Renaissance writer, Niccolò Machiavelli, and put into practice by the Tudor dynasty in England, the Bourbon dynasty in France, and many others, the state combined some of the size of an empire with the centralization of the polis or `city-state.' With their standing, professional armies funded by revenues collected by state employees or `bureaucrats' from societies whose energies were funneled into commercial acquisition, and industrial productivity spurred by the new, experimental science aiming at the conquest of nature—all guided by reformed financial institutions—states quickly became the most powerful polities ever seen.

The American founders needed to frame a modern state in order to defend American citizens from the statist empires of Europe that still bordered them to the north and south, and also from the still- powerful Amerindians in the west. As we know, they wanted a republican regime for this state. But could a centralized, modern state have a republican regime (and keep it, as Franklin pointedly remarked)? Did the centralized ruling apparatus of modern statism not lend itself to the rule of the one or of the few? European statesmen thought so; for the next century, they expected the new republic to implode. On occasion, it very nearly did.

The invention of statesmen devising a new political science for a new world, the United States Senate answers these questions, both with respect to the regime of republicanism and the polity of statist confederalism.

In the Philadelphia Convention, the framers eventually agreed that the unicameral legislature of the Articles of Confederation should be replaced by the bicameral legislature that had been most copiously advocated by John Adams in his treatise, Defence of the Constitutions of the United States. Gouverneur Morris of Pennsylvania argued for bicameralism as a pillar of what Aristotle and other classical political philosophers had called a `mixed regime'—one that balanced the rule of the few who are rich with the rule of the many who are poor. The Senate, Morris said, ought to represent the interests of the commercial oligarchies consisting of urban merchants and

financiers as well as country gentlemen. The House ought to represent everyone else—particularly the middling classes of small farmers and shopkeepers. "The two forces will controul each other," providing "a mutual check and a mutual security," Morris asserted. The British Constitution exemplified such a mixed regime, albeit with a House of Lords—titled aristocrats—not American-style commoners who happened to be wealthy. John Dickinson of Delaware hoped that the Senate would "bear as strong a resemblance to the British House of Lords as possible."

James Madison of Virginia saw the regime implications of the Senate more clearly. The Senators would represent no particular class or caste; they would represent the constituent states of the United States. Without titles of nobility (banned in the Constitution) or any set level of wealth, the Senators as such would have no interests separate from those of the people. The Senate therefore would fit easily into a pure or unmixed republic. At the same time, the six-year terms of office would lend the Senate some of the virtues of an aristocracy: steadiness of purpose, the tendency to take a longer view of things that that likely among the representatives in the more democratic House, with their biannual re-election worries.

The design of the Senate also addressed the dilemma of statism. Under the Articles of Confederation, the country had suffered from the inefficiencies, injustices, and dangerous of excessive decentralization. At the Convention, however, delegates from the smaller states in the Confederation feared relinquishing any more of their sovereignty, fearing domination by the large states. The Framers had already tied the House to the democratic principle of proportioning the number of representatives from each state to the size of its population. Large-state delegates advanced the Virginia Plan: a bicameral legislature, membership of both houses being determined by population. Small-state delegates countered with the New Jersey Plan, which would have retained the Articles of Confederation's unicameral legislature, with one vote per state. All accounts of the Convention emphasize that the debate between small-state and large-state delegates consumed more time and energy than any other item. How could the small states defend themselves in the new legislature without sacrificing the just, republican claims of the large states?

The answer—called the Connecticut Compromise because advanced by Roger Sherman of that state but also propounded by Dickinson—stipulated bicameralism but with two different modes of election that satisfied both sides and also guaranteed the independence of one house from the other. If the Senators were selected by the House, the Senate would have no independence and bicameralism would be nominal; if Senators were selected by voters in each state they might prove better demagogues than statesmen. The Compromise established that state legislators choose the senators. The legislators would have every reason to send their ablest men to defend the interests of their state in the national capital—men of "distinguished characters," as Dickinson put it. For his part, Sherman and George Mason of Virginia argued that confederal union must give each state— especially the small ones—the means of defending themselves within the national councils.

Setting the number of each state's senators at two accomplished all of these purposes. As John Randolph of Virginia argued, a Senate smaller than the House would be "exempt from the passionate proceedings to which numerous assemblies are liable"; the more intimate chamber

would conduce more to deliberation than to verbal pyrotechnics. This comported with the `aristocratic' character of the Senate. At the same time, delegations of two senators instead of one reduced the

risk of a state being disenfranchised by accident or illness; two senators voting individually and not as a bloc precluded the possibility of a deadlocked (1-1) vote, which also would effectively disenfranchise a state on those occasions when senators from the same state disagreed. Finally, giving every state an equal number of senators calmed the fears of the smaller states; confederalism would sustain them, not overwhelm them.

By designing the United States Senate, the Framers thus addressed both the `regime' question and the `polity' question. The Senate reinforces the republican regime by providing an institutional platform for deliberation and steadiness of purpose that a large, unicameral legislature might lack. The Senate also reinforced a confederal polity—a modern state sufficiently centralized and powerful to defend itself in a dangerous world, but sufficiently responsible to its constituent political parts to prevent that centralized power from usurping the right and duty of self- government.

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March 1, 2011 – Article I, Section 3, Clause 2 of the United States Constitution – Guest Essayist: Joe Postell, University of Colorado at Colorado Springs

Article 1, Section 3, Clause 2: Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

This seemingly-minor provision of the Constitution is in fact highly important. Although we rarely pause to consider it today, deciding that one-third of the members of the Senate would be up for re- election every two years is counter-intuitive. Why not just say that each senator has a six year term and hold elections for the entire Senate every six years? The House of Representatives does not have staggered terms, in which half of the Members are elected each year. Why is the Senate different?

The most important characteristic the Senate is supposed to provide is stability, as James Madison makes clear in Federalists 62 and 63. A huge problem during the 1780s was the

mutability, or constant changing, of state laws. The assumption of the Founders was that elections would tend to

oust a relatively large percentage of incumbents in each election cycle, which would produce mutability in the laws.

Today about 90% of incumbents are re-elected in an average election cycle. But at the time of the Founding, incumbents were not as safe. Joseph Story wrote in his Commentaries on the Constitution that "mutability in the public councils, arising from a rapid succession of new members" creates "serious mischiefs. It is a well known fact in the history of the states, that every new election changes nearly or quite one half of its representatives." And the more new members in a legislative assembly, the more changes will be made to the laws, producing greater instability. According to Story, "experience demonstrates, that a continual change, even of good measures, is inconsistent with every rule of prudence and every prospect of success."

Why is instability in the laws so bad? Madison gives five reasons in Federalist 62, all of which are highly relevant today.

First, instability is harmful because it undermines foreign policy. The Senate has an important role in foreign affairs. If the character of the Senate changes dramatically at one time, due to every member being elected, it could result in a dramatic shift in foreign policy. This would make us seem less trustworthy to other nations in the world, and make them less agreeable to our interests.

Second, instability in the laws "poisons the blessings of liberty itself." This is because it undermines the rule of law, which requires that laws be settled and known to everyone. But if the laws are constantly changing because the legislature is constantly changing, "It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood." Re-electing all senators at one time would undermine the stability in the laws necessary to preserve the rule of law.

Third, instability in the laws gives an "unreasonable advantage…to the sagacious, the enterprising, and the moneyed few, over the industrious" of the people. This is because changes in the laws will be known and tracked by the wealthy, who will be able to take advantage of the new laws. "Every new regulation concerning commerce," Madison explains, "presents a new harvest to those who can watch the change, and can trace its consequences." Joseph Story concurred, that "the instability of public councils gives an unreasonable advantage to the sagacious, the cunning, and the monied capitalists." Thus, instability in the laws, caused by volatility in the Senate, allows insiders to take advantage of all the new regulations.

Fourth, instability dampens entrepreneurship. Who will be willing to consider new business opportunities if there is a concern that the government's laws may change tomorrow? Economies succeed when laws are stable and not constantly changing. Madison writes, "What prudent merchant will hazard his fortunes in any new branch of commerce, when he knows not but that his plans may be rendered unlawful before they can be executed?" Stability in the

Senate ensures that entrepreneurs can create jobs without being afraid of what government might do in the near future.

But the fifth and "most deplorable effect" of constantly changing laws, Madison writes, "is that diminution of attachment and reverence" for the law which it produces in the people. When the laws are constantly changing, citizens' faith in their government and in their representatives is reduced. This is the worst effect of unstable laws produced by unstable legislatures.

The primary purpose of the Senate is to produce stability in the government and in the laws produced by the government. This provision of the Constitution promotes stability by ensuring that only one-third of all senators are up for re-election in a given election cycle.

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March 2, 2011 – Article I, Section 3, Clause 3 of the United States Constitution – Guest Essayist: Andrew Langer, President of the Institute for Liberty

Article 1, Section 3, Clause 3: No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

In setting out the framework for the fledgling government, the founders grappled with the most basic issue of creating a government that would not be so powerful as to overwhelm the citizenry, but still strong enough to withstand the test of time. The Senate, created as an analog to the upper house of Britain's parliament, was meant to be a more deliberative body than the House of Representatives.

As such, the qualifications are rather different than those set out for House members. House members need only be 25 years of age, American citizens for only seven years, and need not be actual residents of their congressional district at the time of the election.

In fact, the qualifications set out in this section are rather more proscriptive than those set out in other sections, and it begs the question, "why." Keeping in mind that this project will discuss the 17th Amendment at a later time, suffice it to say that initially United States Senators were to be selected by the legislatures of individual states. Because those doing the selection would be a narrower group in size and scope, the founders wanted to make certain that appropriate choices

would be made by these state legislators. While there is tremendous accountability in having legislators do that selecting, nevertheless the authors of the Constitution thought it best to place strict rules on those qualifications.

Digging deeply into those qualifications themselves, what first jumps out is that the age requirements are greater than those for the House. If we are to understand that the Senate was to be the more deliberative of the houses of the US Congress, then this makes perfect sense. The

founders recognized that the Senate ought to have a greater level of gravitas (given the limitations on size)—and such gravitas generally comes with age and experience. Even in the 18th Century, there was a tremendous leap in maturity between the ages of 25 and 30 (which, given life expectancies at the time was approaching middle age). Madison, in Federalist #62, referred to this as "stability of character."

This requirement also opens the possibility of potential Senators gaining federal legislative experience by first being members of the US House of Representatives.

Most people are surprised to learn that there are no actual "residency" requirements for US House members—they must merely inhabit the states whose districts they are supposed to represent. The Constitution's authors had tremendous faith in the people in terms of being able to decide the propriety of those they would directly elect. In both the requirements for House members and for Senators, they use the word "inhabit" to make it abundantly clear that they wanted these elected officials to live in their states—and again, the founders came down somewhat more strictly on potential Senators. According to various historical accounts, Convention Delegate (and member of the committee to author the Declaration of Independence) Roger Sherman moved specifically to substitute "inhabit" for "resident" for these reasons.

While there may have been adequate reasons for not requiring habitation in House districts in the 18th and early 19th centuries, given the finite number of Senators from each state the founders wanted to ensure that someone from that state would be representing that state's interests in the Senate. This was especially important when one considers that given the realities of travel and transportation at this time, as well as prevailing political perceptions (as evidenced later by the 9th and 10th Amendments), the states themselves were viewed as sovereign entities in their own right.

According to the Senate's official history, the 9-year citizenship requirement was a compromise— between those who believed that anything less would allow for people with a remaining "dangerous attachment" to their mother countries to gain undue influence in American affairs (especially given the Senate's role in ratifying treaties with foreign nations), and those who believed that anything more would hinder "positive immigration" and offend those nations in Europe who had lent support for our revolution.

It is interesting to note in this regard that this qualification differs greatly from that of the President's. The founders recognized that because the Senate's power was diffused among many members, the President, as Commander-in-chief and the Chief Executive of the United States, acts with a solitary and unilateral power (within limits). So while the President must be a natural-born citizen, the same does not hold true for Senators.

All in all, while relatively straightforward, once again the founders demonstrated their brilliance in laying out a strong yet simple framework for our nation's government.

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March 3, 2011 – Article I, Section 3, Clause 4-5 of the United States Constitution – Guest Essayist: David Addington, Vice President for Domestic and Economic Policy of The Heritage Foundation and a former chief of staff and counsel to the Vice President of the United States

Article 1, Section 3, Clause 4-5
4: The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.
5: The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

Article I of the Constitution creates the office of Vice President and assigns to it two legislative functions: to preside over the Senate and to vote in the Senate in case of ties. The legislative functions of the vice presidency are separate from the two executive functions the Constitution as amended assigns to the Vice President (succession to the Presidency and a role in determining presidential inability). The legislative functions of the vice presidency take little of a modern Vice President's time, but they may on occasion have a significant impact on public events.

The Constitution specifies that the Vice President "shall be President of the Senate," but does not specify what activities that senatorial presidency will entail, other than counting the electoral votes for President and Vice President every fourth year in the presence of both Houses of Congress.
Today, under the rules and precedents of the Senate, presiding over the Senate involves little beyond recognizing Senators to speak in debate, maintaining order in the Senate, occasionally ruling on a question of parliamentary procedure, administering the oath of office to Senators, and from time to time making an appointment to a legislative entity based on the advice of party leaders. A Vice President rarely presides over the Senate. Indeed, the Senate's elected President pro tempore rarely presides. Senate rules allow the President pro tempore to designate any Senator to preside over the Senate in his place and allows that designated Senator in turn to designate another Senator to preside; in practice the Senators of the majority party take turns presiding over the Senate for brief periods.

The Vice President's other legislative function — voting in case of ties among the Senators — can be of historical moment, depending upon the underlying legislative proposition on which Senators are evenly split. In his eight years as America's first Vice President, John Adams cast tie-breaking votes in the Senate 29 times, according to the Senate Historical Office (some authors claim 31 times). His tie-breaking votes defeated, among other things, legislation to give the Senate a role in the dismissal of executive officers and to delay the move of the Nation's capital from New York City to Philadelphia. At the other end of our Nation's constitutional history, in his eight years as Vice President, Richard B. Cheney cast tie-breaking votes 8 times. His tie-breaking votes organized a Republican majority in a Senate that had an equal number of Democratic Senators and Republican Senators and gave final passage to major tax cut legislation in 2003. Thus, it is clear that the constitutional authority of a Vice President to cast a tie-breaking vote in the Senate can have significant consequences.

In comparison to the authority the Constitution vests in the President, the Congress, and the Supreme Court, the Constitution vests very little authority in the Vice President. Indeed, Vice President John Adams, in a letter dated December 19, 1793, to his wife Abigail, gave his

experienced verdict on the vice presidency: "the most insignificant Office that ever the Invention of Man contrived or his Imagination conceived." Yet, in modern times, Vice Presidents have had significant influence. Although, as the U.S. Department of Justice said in a legal opinion on March 9, 1961, "the Vice President is an elective officer in no way answerable or subordinate to the President," modern Presidents have sought the advice and assistance of Vice Presidents, who have given it. Ultimately, a Vice President is influential within the executive branch as long as the President finds the Vice President's advice persuasive and assistance useful. For modern Vice Presidents, their influence within the executive branch resulting from their relationship with the President has far exceeded their influence flowing from their very limited constitutional authority.

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March 4, 2011 – Article I, Section 3, Clause 6-7 of the United States Constitution – Guest Essayist: The Honorable James E. Rogan, Judge of the Superior Court of California

Article 1, Section 3, Clause 6-7
6: The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.
7: Judgment in Cases of impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

During President Bill Clinton's administration, he became a defendant in a sexual harassment civil rights lawsuit filed against him by a subordinate state employee from his days as Arkansas governor. At the case proceeded toward trial, Clinton tried to conceal from the court a recent affair with another young subordinate employee. When the federal judge in the lawsuit ordered Clinton to answer questions about such relationships, Clinton denied the affair under oath. Thus, the president committed felony perjury, and later obstructed justice, to avoid paying damages to the plaintiff in the lawsuit, as well as to duck the embarrassment and political damage of disclosure. After a special prosecutor investigated and delivered an evidentiary report to Congress on Clinton's deceit, the House impeached Clinton, thereby triggering the constitutional obligation of an impeachment trial under Article 1, Section 3, Clauses 6 and 7. In 1998-1999, I

became intimately familiar with this obligation: I was one of the prosecutors in Clinton's Senate impeachment trial. Here are three brief thoughts about the experience:

First, the Constitution solemnly required Clinton, as a condition of becoming president, to swear an oath to "preserve, protect, and defend the Constitution," and to take care that he executed our laws faithfully. That obligation included defending laws that protect women in the workplace, just as it also required protecting our legal system from perjury, obstruction of justice, and abuse of power. Fidelity to the presidential oath is not dependent on any president's personal threshold of comfort or embarrassment.

Second, during Clinton's impeachment, we came under attack from many who accused us of using impeachment to unconstitutionally seek to "undo an election." Hillsdale College President Larry Arnn debunked this notion eloquently:

[E]lections have no higher standing under our Constitution than the impeachment process. Both stem from provisions of the Constitution. The people elect a president to do a constitutional job. They act under the Constitution when they do it. At the same time, they elect a Congress to do a different constitutional job…. If the President is guilty of acts justifying impeachment, then he, not the Congress, will have overturned the election. He will have acted in ways that betray the purpose of his election. He will have acted not as a constitutional representative, but as a monarch, subversive of, or above, the law. If the great powers given the president are abused, then to impeach him defends not only the results of elections, but that higher thing which elections are in service, namely, the preeminence of the Constitution[.]

Finally, I didn't vote to impeach Clinton or prosecute him in an effort to police his personal life. Whether he had one affair or a thousand of them was of no moment to me. (Besides, as an ex-bartender from Hollywood's Sunset Strip, I'm hardly a stranger to temptation myself). However, I did care deeply about the precedent his conduct set for future chief executives who might later commit the same felonies for reasons weightier than testosterone.

Why is this notion of precedent so important?

When the Founders wrote impeachment into the Constitution as the remedy against those who commit "high crimes and misdemeanors," they never defined that phrase. The definition comes from precedent, i.e., the previous House of Representatives impeachments. Whenever the House decides certain conduct is (or is not) impeachable, that becomes the precedent, or the standard, for future impeachments. Had the House failed to impeach Clinton just because of the tawdry subject matter underlying his crimes, any future president committing perjury or obstructing justice with far more destructive motives could point to the Clinton Precedent and claim his conduct was not impeachable.

The polls showed that most Americans at the time hated Clinton's impeachment, and also hated those of us involved in it. As a result of impeachment, my opponent in the next congressional election defeated me handily. Despite the loss, I take comfort in knowing that because we impeached Clinton, Americans today live in a country where every future president is on notice

that perjury and obstruction of justice is a one-way White House eviction notice—as long as a future members of Congress have the spine to stand up to him.

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March 7, 2011 – Article I, Section 4, Clauses 1-2 of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Article I, Section 4, Clauses 1-2
1: The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.
2: The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December,5 unless they shall by Law appoint a different Day.

Article I, Section 4, cl. 1, delegates to the state legislatures the authority to determine the time, place and manner of electing Senators and Representatives. However, with one qualification that has been rendered effectively moot by the 17th Amendment, Congress may supersede state law.

This is one of few clauses in the Constitution that affirmatively require the exercise of authority by the states. It raises interesting questions about the applicability of the traditional "default" view that all powers not affirmatively delegated to Congress or explicitly denied to the states, are reserved to the states or the people, as reflected in the 10th Amendment. Does this explicit provision "create" power for the states to act? Or, does the clause require the states to exercise a power they already have, but that they could ignore in the absence of this command?

Justice Stevens, writing for the majority, and Justice Thomas, writing for four dissenters, debated that issue in a fascinating case, U.S. Term Limits v. Thornton, in 1995. Term Limits addressed the constitutionality of an Arkansas state constitutional amendment that imposed term limits on its Senators and Representatives. Technically, the opinion involved the interpretation of the "qualifications" clause of Article I, Section 2, clause 2, whether term limits constituted an unconstitutional addition to the listed qualifications. But both sides (especially Justice Thomas) explored the applicability of Article I, Section 4, and the question of state power to act when the Constitution is silent.

The majority held that the states have no powers to act in matters that spring exclusively out of the existence of the national government created by the Constitution, unless the Constitution itself delegates that power to the states. Justice Stevens quoted the brilliant early-19th century nationalist Justice Joseph Story that, "No state can say, that it has reserved, what it never

possessed." He also noted that Alexander Hamilton, writing in Federalist 59, had warned of the danger to the Union's existence if the states had the exclusive power to regulate Congressional elections.

In Stevens's view, the Constitution created the national government ex nihilo, and the states had reserved powers only in those areas previously within their legislative discretion. Hence, since there was no affirmative grant to states to add qualifications for federal representatives, such power did not exist. Stevens viewed Article I, Section 4, as evidence for this proposition, as it (in his view)

delegated authority to the states to act that, in the clause's absence, would not have existed, while giving Congress ultimate control.

Stevens's position makes it unclear why the clause is needed at all. Presumably, if the states do not have the inherent power to control the manner of election of the national legislature, but such power rests instead in the federal government, Congress already has ultimate control over the manner of election. Also, if this was delegation to the states, there is no need to declare what the states "must" do, and what Congress "may" do.

Justice Thomas found Stevens's view to be exactly backwards. Since the states once had all powers, including the power to create whatever Union they wanted, or none at all, they also retained whatever authority they had not surrendered or that was not denied them in regards to the composition of the national government. Since the Constitution does not deny the states the power to add (but not subtract) from the listed qualifications, term limits are constitutional. Moreover, Article I, Section 4, does not detract from the general position that the states have all reserved powers. Thomas saw this provision not as a delegation to the states from the people, created by the Constitution. Rather, this is an imposition on the states of a duty to act, where otherwise none would exist.

Thomas pointed out that, without such a clause, the states could still determine the time, place, and manner of electing members of the national legislature. But they also might refuse to elect members of Congress, to cripple the federal government just as Hamilton warned. This clause, then, imposed a duty on the states ("must") to exercise that power, subject to the authorization to Congress ("may") to override the states' choices. As a corollary, if the clause did not exist, Congress would have no power to act.

Until 1842, Congress left regulation of such elections to the states. States did not adhere to a single standard of electing Representatives (Senators were still elected by state legislatures). Often, at least some Congressmen were elected at-large. In that year, Congress began to require that single- member districts be used. By 1911, federal law mandated that such districts be "composed of a compact and contiguous territory and containing as nearly as practicable an equal number of inhabitants."

When a later law eliminated that last requirement, substantial malapportionment occurred. Eventually, the Supreme Court waded into this "political thicket," using another related provision, Article I, Section 2, to strike down apportionment that resulted in districts of

disproportionate populations. A nearly absolute "one man-one vote" equality emerged to assure that, as nearly as practicable, "one man's vote in a congressional election is to be worth as much as another's."

Additional questions raised by this clause are whether Congress could regulate primaries that, after all, are an integral part of the election process (based on Supreme Court opinions, today it probably could) or financing of Congressional elections (yes, within the broad contours of the First Amendment). Congress can prescribe the mechanics of voting, as well.

State laws are still important. For example, states still control the requirements for recounts, as a number of candidates in various close races in November, 2010, discovered. As well, states have different rules (and interpretations by state courts) for replacing candidates who drop out shortly before the election. Frank Lautenberg of New Jersey was permitted to replace corruption-plagued Democratic Senator Robert Torricelli on the ballot when the latter withdrew a month before the election. On the other hand, Texas Republicans were not permitted to replace Tom DeLay's name on the ballot when he withdrew five months before the election.

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March 8, 2011 – Article I, Section 5, Clause 1 of the United States Constitution – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation

Article 1, Section 5, Clause 1: Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Article I, section 5, clause 1 of the Constitution gives to the branches of the Legislature power to "judge" or determine whether an election of one of its members is valid and whether the person elected meets the Constitutional requirements for service. Without such a check, Joseph Story explained, "any intruder, or a usurper, might claim a seat, and thus trample upon the rights and privileges, and liberties of the people." Joseph Story, 2 Commentaries on the Constitution §831 (1833).

The U.S. Supreme Court discussed this provision in a case challenging the House of Representatives' decision to exclude Adam Clayton Powell, Jr. over allegations of corruption. In that case, the Court ruled the House could not exclude Representative Powell unless he did not meet one of the qualifications in the Constitution (age, citizenship, etc.). In other words, his exclusion was unconstitutional because the House had added a qualification not in the Constitution. See Powell v. McCormack, 395 U.S. 486 (1969). As stated in a later case: "The decision as to whether a Member satisfied these qualifications [those in Article I, section 2] was placed with the House, but the decision as to what these qualifications consisted of was not." Nixon v. United States, 506 U.S. 224, 237 (1993).

The next part of the clause deals with the quorum required to do business. The challenge here was to ensure that the requirement was not too much or too little but just right.

In the Constitutional Convention, Oliver Ellsworth, succinctly made the case that a majority should be required for a quorum: "It would be a pleasing ground of confidence to the people that no law or burden could be imposed on them, by a few men." Philip B. Kurland & Ralph Lerner, editors, 2 The Founders Constitution 289 (1987); see also John Bryan Williams, "How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress"48 William & Mary Law Review 102 (2006).

On the other hand, a larger requirement might have had advantages but would have become unworkable. In Federalist 58, James Madison notes this and adds that if there were a more stringent requirement "In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority." This would happen because the minority could keep anything from being done.

As Congress now operates, the question of a quorum is not usually considered unless a member requests a quorum call, usually as a way of delaying the business of the body.

One very real threat to the quorum requirement would come if a number of members decided to flee or otherwise avoid attending the deliberations of Congress so as to prevent a quorum and keep business from being done. Of course this is occurring right now as members of the Wisconsin Senate have fled the state in order to prevent a quorum and thus the passage of legislation with which they disagree.

This behavior was anathema to the Framers. James Madison called it "the baneful practice of secessions . . . a practice which leads more directly to public convulsions, and the ruin of popular governments, than any other which has yet been displayed among us.". Federalist 58; see also William C. Marra, "What Would America's Founders Think About Fleeing Legislators?" Weekly Standard (February 28, 2011) at http://www.weeklystandard.com/blogs/what-would-americas- founders-think-about-fleeing-legislators_552632.html?page=2.

The Framers effectively countered such a threat by allowing a smaller number of legislators to compel their erstwhile colleagues to return. In the Philadelphia Convention, John Randolph and James Madison proposed adding this requirement on August 10, 1787, the day that the quorum

requirement was debated. Kurland & Lerner at 290. If effectively applied, it can prevent a minority takeover of the power of the national government through inaction.

Yet another example of how current developments help us to see the wisdom and foresight of the Constitution's drafters.

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March 9, 2011 – Article I, Section 5, Clause 2 of the United States Constitution – Guest Essayist: Paul S. Teller, Ph.D., Executive Director of the Republican Study Committee in the U.S. House of Representatives

Article 1, Section 5, Clause 2: Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Article 1, Section 5, Clause 2 of the U.S. Constitution states that, "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." This seems like a fairly straightforward clause, but it has ramifications that many folks often overlook.

The heart of this clause is with its first phrase, regarding each house of Congress determining its own rules. The most obvious implication (and purpose) of this clause is the prevention of one house from changing the culture of the other house. For example, it is common knowledge in Washington that the House is the faster, more reactive legislative body, and the Senate is the slower, more deliberative body. This difference was deliberately designed by the Founders and pervades even the pace of people's strides in the halls of Congress today. Walk from a House office building through the Capitol and into a Senate office building, and you'll feel as if you've just stepped from air into water into jelly.

Article 1, Section 5, Clause 2 prevents one house from making cultural changes to the other—from turning air into jelly or vice versa. For example, the Senate cannot force the House to spend four legislative days on one bill. Similarly, the House cannot force the Senate to abandon the filibuster. Thus, this clause of the Constitution has contributed to the relative stability of the culture of the two chambers over the centuries.

But perhaps more notably still, Article I, Section 5, Clause 2 also prevents a current Congress (and a current President, for that matter) from binding the procedural actions of a future Congress. This point is critical to understanding legislating in the American political system.

That is, no matter what any Congress and President enact into law, the fact that each house of Congress sets its own

rules will ALWAYS trump any law (because a provision in the Constitution always trumps a statute).

For example, say Congress passes and the President signs a law that says that all appropriations bills must be considered in Congress under an "open rule" that allows any germane amendment to be offered at any time without any pre-filing requirement. But then the following year, the House brings an appropriations bill to the floor under a "closed rule" allowing absolutely no amendments at all. Which rule wins? The closed rule wins, under Article I, Section 5, Clause 2, since the House is constitutionally guaranteed the right to set the rules of its own proceedings, irrespective of what any law, regulation, or common practice would supposedly require or suggest.

One big downside to this clause, however, is that it also guarantees the right of each house of Congress to ignore its own rules. For example, at the start of every Congress, the House enacts a revised rules package—a set of rules that will guide the consideration of legislation for the subsequent two years. However, it is common practice for the House, when considering "major" legislation, to enact "special rules" that provide for the consideration of just that major bill. Very often, a special rule states that some of the underlying House rules either do not apply or that a Member may not cite them on the floor to claim that a violation has occurred ("make a point of order"). Furthermore, the House frequently considers non-controversial legislation under a procedure called "suspension of the rules"—literally a setting aside of the underlying House rules in exchange for limited debate, a prohibition on amendments, and a two-thirds vote threshold required for passage.

Can anyone do anything about such avoidance of the rules? Not at all. There is neither check nor balance against either house of Congress ignoring its own rules and setting up new ones any time it wants to—either temporarily or permanently. Says who? Says Article I, Section 5, Clause 2.

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March 10, 2011 – Article I, Section 5, Clauses 3 & 4 of the United States Constitution – Guest Essayist: Scot Faulkner, Executive Director, The Dreyfuss Initiative on Civics

Article 1, Section 5, Clause 3: Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy;

and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Documenting public processes have been part of governing since the rise of early civilizations. From the Sumerians in 2500 BC, to ancient Egypt and Babylon, governments have kept journals of their actions and public meetings.

The Founding Fathers knew the importance of maintaining a Journal of Proceedings from the English House of Commons. James Wilson, a member of the Committee on Detail which compiled the provisions of the draft Constitution, was a follower of the great British parliamentary scholar Sir

William Blackstone. He quoted Blackstone's Oxford 1756 lectures, which underscored the importance of a public record for holding officials accountable, "In the House of Commons, the conduct of every member is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection."

The Constitution's "Journal of Proceedings" wording flows from the Articles of Confederation. In March 1781 the Continental Congress approved the following provision: "…and shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the Journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states."

But what is the Journal? Every day the Congress approves the "Journal" of the previous session. This is the official outline of actions taken during the previous meeting of each Chamber, like a set of minutes. It is codified in Section 49 of Thomas Jefferson's 1812 Parliamentary Manual that governs Congressional operations. Members of Congress do not approve the Congressional Record. That transcript of House and Senate proceedings has a colorful history.

The transcribing of Congressional debate was begun by private publishers. House and Senate proceedings, roll calls, debates, and other records were recorded and published in The Debates and Proceedings in the Congress of the United States (1789–1824), the Register of Debates in Congress (1824–1837), and the Congressional Globe (1833–1873).

During the 36th Congress [December 5, 1859 to March 3, 1861] it was decided that federal funds should be used for transcribing Congressional proceedings and that the Government Printing Office should publish the verbatim record. The Congressional Globe was contracted to provide stenographers in the House and Senate Chambers. In 1873, the Globe's contract was not renewed, and the Congressional Record was born. The Clerk of the House and the Secretary of the Senate now oversee documenting and transcribing the verbatim proceedings of their respective chambers.

The Congressional Record is still not an accurate verbatim transcript of the proceedings and debate for each Chamber. Members routinely insert remarks and documents after the fact. While these "revised and extended remarks" help Members explain their actions, they are considered "secondary authorities" when it comes to determining legislative intent. Secondary authorities are generally afforded less weight than the actual texts of primary authority during Judicial review.

The chronicling of Congress has come almost full circle. While the Congressional Record remains the official transcript of proceedings, CSPAN, a nonprofit private entity, provides live coverage of each Chamber. The cameras are owned and maintained by the Architect of the Capitol, while their operations and broadcasts are operated by staffs of the Chief Administrative Officer in the House and the Secretary of the Senate. CSPAN receives the signal and airs it on its various cable television channels. Live House broadcasting began on March 19, 1979 while Senate coverage commenced on June 2, 1986.

Article 1, Section 5, Clause 4: Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

The Constitutional Convention of 1787 made sure the two Congressional chambers had equity when it came of the operations of the Legislative Branch. Neither the House nor the Senate may adjourn for more than three days (excluding Saturdays, Sundays, and holidays) without the concurrence of the other Chamber. The formal end of a Congress is when the Legislative Branch adjourns "Sine Die" (from the Latin "without day") meaning "without assigning a day for a further meeting or hearing". The Constitution [Article 2, Section 3] also grants the President the authority to summon the Congress for a special session if circumstances require. The Twentieth Amendment to the Constitution also sets a formal start and end time for each Congress.

These various provisions have led to numerous unintended consequences.

One of the first instances was when the Southern states seceded from the Union. They deprived the sitting Congress of a quorum. In order to continue governing, President Abraham Lincoln issued the very first Presidential Order on April 15, 1861, Executive Order 1.

The most complex consequence of Clause 4 relates to when Congress takes a recess and when it adjourns. A recess is a temporary halt to activity on the floor. Everything stops, and when the recess ends, the chamber resumes from where it left off. A recess might last 10 minutes or it might last weeks. The length of time does not matter. An adjournment is a formal end to business in the chamber, and upon return the chamber does not resume from where it left off. Just like a recess an adjournment can be for one minute or for three weeks. However, unlike a recess, an adjournment creates a new legislative day (this is more relevant to Senate proceedings).

Certain things happen, under the standing rules of the House and Senate, precisely because it is a new legislative day. Much of it is routine business: the reading of the previous day's journal, filing of reports, delivery of messages from the House, etc., but there are also consequential

things. In the Senate, during the first two hours of each new legislative day, motions to proceed are not debatable, and therefore cannot be filibustered.

Any formal break in Legislative Branch activity also opens the door for a President to take certain actions. This includes making appointments which require Senate confirmation, and "pocket vetoing" legislation. A pocket veto means that the Congress cannot override the veto because it is not in session. An adjournment of the Legislative Branch also allows the President to reconvene Congress for a specific action [Article 2, Section 3]. Congressional leaders have devised ways to avoid inadvertently unleashing Presidential activism.

The Congress can take a break from legislative activity, and still avoid a formal recess or adjournment, by meeting in a "pro forma" session. Pro forma means "for the sake of formality". In recent years pro forma sessions have prevented Presidents from making recess appointments, and in the case of President George W. Bush in 2008, deprived him calling a special session to reauthorize the Protect America Act and the Foreign Intelligence Surveillance Act.

As long as a Member convenes either the House or Senate to formally open and close a session there is no recess or adjournment. Members sometimes compete to see how fast they can conduct a pro forma session. The record is currently held by Senate Jack Reed of Rhode Island who completed the task in 12 seconds.

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March 11, 2011 – Article I, Section 6, Clause 1 of the United States Constitution – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation

Article 1, Section 6, Clause 1: The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.6 They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Under the Articles of Confederation, members of Congress were paid by the State they represented. In the Philadelphia Convention, there was some support for continuing this practice but the delegates opted instead to have national legislators receive uniform pay from the federal government.

In the ratification debate, the example of Rhode Island was invoked because it had failed to pay its representative in the Confederation Congress, thus effectively recalling them from service and leaving the state unrepresented. Under the Confederation, this was perhaps not too risky since the

national government had so little power that it was unlikely to do much damage to the state's interests. Under the new, more robust, national government created by the Constitution, lack of representation would be more impactful. The very real possibility that states would be added from the Ohio territory; states which would likely be poor and unable to pay legislators much; was also a relevant consideration in determining to pay members of Congress from the public fisc.

In both cases, the plan of representation on the national government might be frustrated if states and citizens were left unrepresented for lack of state money to pay salaries or unwillingness to appropriate it. (Although, on the other hand, there might be some value in having less representation from states that have bankrupted themselves through financial mismanagement.)

The other salient question for the Constitutional Convention was what the pay would be. An early draft suggested "liberal" compensation and Benjamin Franklin proposed "moderate." The final decision was to proceed without a modifier. Congress could decide its own salary, though with the understanding that constituents would be watching. The check provided by voters was later strengthened by the adoption of the 27th Amendment which prevented any Congressional pay raise from going into effect before an intervening election allowed voters to weigh in on the vote for the raise.

The second part of the clause is referred to as the "Speech or Debate Clause." It has an honorable pedigree stretching back at least to the English Bill of Rights of 1689. The Articles of Confederation (article 5) contained a similar provision. The clause "provides legislators with absolute immunity for their legislative activities relieving them from defending those actions in court." United States v. Jefferson, 546 F.3d 300 (4th Cir. 2008).

The concern here is that the legislative branch of the new national government be protected from attempts to either intimidate or punish members for their expression in Congress. Thus, for instance, members cannot be sued for libel based on comments they make in debates in the House and Senate and are not subject to prosecution for those statements. This ensures not only a robust debate but the independence of the legislative branch.

The controversies related to this Clause have typically involved its scope. When a Senator placed classified government documents (the Pentagon Papers) into the public record and was reportedly trying to arrange private publication of the papers, a grand jury issued a subpoena to a member of the Senator's staff. In the resulting case, the U.S. Supreme Court said the actions of Congressional aides in pursuance of duties that would be protected by the Clause if done by members of Congress were also protected. The court did not prevent the grand jury from investigating the private publication question since such was outside the scope of legislative duties. See Gravel v. United States, 408 U.S. 66 (1972).

Criminal conduct, such as corruption or accepting bribes is not legislative work (one can only hope) and is also not protected by the Clause. See United States v. Brewster, 408 U.S. 501 (1972). In

another case, the Supreme Court said a defamation lawsuit based on statements in a Senator's press release was not protected by the Clause. See Hutchinson v. Proxmire, 443 U.S. 111 (1979). On the other hand, legislators are protected while "speaking on the House or Senate floor, introducing and voting on bills and resolutions, preparing and submitting committee reports, acting at committee meetings and hearings, and conducting investigations and issuing subpoenas." Tod B. Tatelman, "The Speech of Debate Clause: Recent Developments," CRS Report for Congress (2007) pp.2-3 at http://www.fas.org/sgp/crs/misc/RL33668.pdf.

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March 14, 2011 – Article I, Section 6, Clause 2 of the United States Constitution – Guest Essayist: Steven H. Aden, Senior Counsel, Alliance Defense Fund

Article I, Section 6, Clause 2: No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Philander Knox, Dick Nixon and the Saxbe Fix. For some quizzical reason, "X" marks the spot in the constitutional text where a tempest of teapot proportions persistently brews when Section 6 nixes Executive picks.

The pedestrian second clause of Section 6 provides two obscure but important checks on the power of both the Executive and the Legislative Branch, colloquially known as the "Emoluments Clause" and the "Incompatibility Clause," respectively. The second clause is as crystalline in meaning as a constitutional text can be, and has engendered virtually no historical dispute, except occasional quibbles over whether a trusteeship or a military commission constituted an "Office" for purposes of the clause. President George Washington and other Founders regarded the Incompatability Clause as an unbreachable bar to cabinet service. Washington withdrew his nomination of William Patterson to the Supreme Court because Patterson had been a senator when the office of Associate

Justice was created and the Senate term Patterson had been elected for had not expired. (Washington got his man nonetheless by subsequently re-nominating Patterson to the Court after his term expired.) Since then, the Incompatibility Clause has been largely respected, with an occasional deviation.

The Emoluments Clause, on the other hand, has been much abused and misused. The Clause, which applies when Congress has voted to raise the salary or benefits ("emoluments") attending the cabinet position during the nominated member's tenure in Congress, was regarded by James Madison and others as an important check on potential collusion over cabinet appointments between the two "most dangerous" branches. The clause would prevent the President from creating new cabinet positions for sitting members of Congress, thereby inhibiting vote-buying, and prevent Congress from raising the salary of a newly appointed cabinet minister as he or she is on the way out the door, inhibiting graft. The Emoluments Clause is a "pox on both their houses," in contrast to most of the other constitutional checks and balances that operate on a single branch of the federal government.

Philander C. Knox enters the story about a century ago, when President William Howard Taft in 1909 nominated Senator Knox to the post of Secretary of State. But Knox had been elected to a Senate term that would not expire until 1911, and during his term Congress had voted to increase the salary of cabinet officers to $12,000 annually. After much deliberation, Congress voted to revert the salary of the Secretary of State to $8,000, and Knox took office.

What could have been known as the "Knox Fix" (if that era had been as inclined to Seussian alliteratives as ours is) was employed by the administration of President Richard Nixon in 1973 in support of the nomination of Senator William Saxbe as Attorney General. Nixon's Acting Solicitor General, Robert Bork, defended the proposed "Saxbe fix" before Congress by arguing that the spirit of the Emoluments Clause would be met, if not the letter:

The purpose of the constitutional provision is clearly met if the salary of an office is lowered after having been raised during the Senator's or Representative's term of office…. So, with the bill lowering the salary of the office of Attorney General [from $60,000] to that level, $35,000, which it stood when Senator Saxbe became a Senator, you would have a situation where the rationale of the constitutional provision was met.[1]

This rather cynical interpretation of the Emoluments Clause has become au courant among Beltway sophisticates, and it is routinely invoked when the clause pops up like an uninvited uncle at Thanksgiving. President William Clinton, for example, invoked The Fix to appoint Senator Lloyd Bentsen as Treasury Secretary. Constitutional law professor Michael Stokes Paulsen explains how the "purpose" of the clause has vaulted over the actual rule it imposes:

By repealing the pay increase, the statute ensures that Lloyd Bentsen is not the personal financial beneficiary of any increase in emoluments. But the statute cannot repeal history; it cannot undo the fact that the emoluments of the office had been "encreased" during the period for which Bentsen had been elected to the Senate. And that is the constitutional rule provided by the Emoluments Clause. Congress can no more legislate away a violation of that rule than it can by

statute raise the chronological age of a thirty-two-year-old in order to make him eligible to serve as President.
Bentsen's appointment is unconstitutional regardless of the subsequent legislative "fix."[2]

Thus, as with many of those pesky "minor" constitutional provisions, the Emoluments Clause has been "more honour'd in the breach than the observance."[3] Musing about the apparent flexibility of this provision and similar castaways of "our Living Constitution," Professor Michael Stokes

Paulsen muses, "What gives? The answer is that the Constitution gives, at least most of the time, when the provision involved is one that people today regard as a nuisance and where the likelihood appears small that a lawsuit will be brought against the violators."[4] Still, one has to say that the clause has had a salutary effect on the separation of presidential and legislative powers by hitting those who breach it where it hurts career politicians the most – right in their wallets, in the form of a pay cut. Its letter may be dead, but its spirit is still kicking.

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[1] Letter from President Richard M. Nixon to Senator Gale McGee (Nov. 8, 1973), in To Insure that the Compensation and Other Emoluments Attached to the Office of Att'y Gen. Are Those Which Were in Effect on January 1st, 1969, Hearings on S. 26733 Before the Senate Comm. on Post Office and Civil Service, 93rd Cong., 1st Sess. 6 (1973) id. at 9 (testimony of Acting Attorney General Robert H. Bork).

[2] Michael Stokes Paulsen, Is Lloyd Bentsen Unconstitutional?, 46 Stan. L. Rev. 907, at 909 (April 1994). Professor Paulsen observes that the "other" Emoluments Clause, in Article I, Section 9, provides that "no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State," thus demonstrating that "where the framers intended that a disability be removable by subsequent legislation, they so specified…." Id., at 909 n.6.

[3] William ShakespeareHamlet Act I Scene 4.

[4] Paulsen, supra, n.2, at 907-08. In fact lawsuits have been brought to enforce the Emoluments Clause, notably challenging President Jimmy Carter's nomination of Abner Mikva to the D.C. Circuit Court of Appeals and President Obama's nomination of Senator Hillary Clinton as Secretary of State, but the courts have dismissed those bringing the challenges as lacking standing – the legal authority to bring a court suit.

March 15, 2011 – Article I, Section 7, Clause 1 of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Article I, Section 7, Clause 1: All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Article I, Section 7, addresses the process by which legislation is enacted. Before the general process itself is laid out, clause 1 of that section directs that all bills for raising revenue shall originate in the House of Representatives. The Senate is given the power to respond with amendments. Therein, as it turns out, lies a fatal flaw. The House has also frequently asserted that this provision applies as well to appropriations measures. Though not entirely persuasive based on the text, as a practical matter, most appropriations bills originate in the House.

There was virtually no discussion about this clause at the Philadelphia Convention. How could this be? The reason is that the belief that the power of taxation lies with the people was a key component of American republicanism. That article of faith, no, self-evident truth, was the culmination of centuries of evolution of English constitutional doctrine that meshed well with American colonial

practice and found expression in such Revolutionary War-era slogans as "no taxation without representation." The House of Representatives is the only institution of the general government for which the original Constitution made explicit provision of popular election. That fact, and the limited term of office and the frequent recourse to elections for members, made the House the natural repository of republican sentiment in the Framers' view. There was no need for extensive debate over the (to them) obvious.

The triumph of Parliament over King on the issue of taxation was a process centuries in evolution. The King had revenues from royal properties and various prerogatives, such as assessing import duties. Beyond that, general taxes of persons or wealth were seen as "gifts" from the commons to the crown. Otherwise, taxes would be nothing but exactions against will, backed only by superior force. There would be little difference, then, between such an exaction and one procured by a highwayman. To the English, taxes were dangerous devices by which a person's freedom was readily destroyed as he was reduced to penury.

But government still needed money, especially during war. The fiction used to get around the obstacles of the "taxes-as-gifts" theory was that the commons, represented in Parliament, could vote to assess themselves and offer such "gifts" to the crown. While this obviously did not please those who did not agree to the tax, it did provide a political tool to limit royal fiscal voraciousness that other monarchies of the time lacked. Once Parliament separated into Commons and Lords, this power fell to the former. By 1407, the Commons had sole power to originate money bills. Attempts by the Lords to have at least an amending or revisory power were rejected. By the end of the Glorious Revolution nearly three centuries later, not only did the House of Commons have plenary power over revenue bills, but it had also won the power to direct the appropriation thereof.

The colonies and, later, the states followed this model. The colonial assemblies saw the enactment of local revenue bills as their prerogative because of their connection to the people through a comparatively broad electoral franchise in many colonies. Pre-Revolutionary War rhetoric, from John Dickinson's "Letters from a Farmer in Pennsylvania" to the Stamp Act Congress Resolutions echoed this unquestioned dogma of the, frankly rather lightly-taxed, Americans. A similar sentiment prevailed, once the states declared independence. For example, the language of Article I, Section 7, cl. 1, appears almost verbatim in the Massachusetts constitution of 1780 (except for the cosmetic distinction that the state used "money bills" instead of "bills for raising revenue").

Why, then, are taxes today as high as they are? Historical experience (rather than dogma) provides an insight. In England, as well as in America, the application of constitutional principle resulted in legislatively dominant groups engaging in the entirely understandable practice of having someone other than themselves make these "gifts." In England, when the House of Commons was controlled by the landed gentry, taxes tended to fall on activities of commerce. When upper and upper-middle class commercial interests came to predominate, they sought to impose consumption taxes (excises) on a broad variety of items used by the (unrepresented) middle and lower economic strata. In the colonies and states, legislatures controlled by middle-class farmers and artisans saw great sense in wealth taxes that targeted the upper-middle and upper classes who were repeatedly being exhorted to pay their fair share based on their greater ability to do so. Thus operates human nature.

Taxation as a form of giving (by the people), not taking (by the government), is an idea that seems to have little currency in certain quarters. It often seems today that those in government, including our representatives, believe that the money is theirs, while the citizenry is at best a collection of tenants at sufferance of their own earnings and wealth. Thus, it comes as little surprise that the technicalities of Article I, Section 7, cl. 1, have not proven to be bulwarks against excessive taxes. The dynamic of the political system for decades has been to extract more and more money from some to fund more and more desires of others. The House still, on occasion, guards its formal pre-

eminence in money matters against the Senate and the President, though the current House will soon reveal the extent of its substantive effectiveness in curtailing a budget dominated by gargantuan programs of non-discretionary spending.

As well, there is little in the text to prevent a determined Senate from taking a House bill and "amending" it by deleting all language after "Be It Hereby Enacted" from a House bill. That has happened repeatedly, with Supreme Court approval of the practice over at least the last century. More recent examples of this include a Reagan-era tax law and the 2008 TARP bill. Most infamously, the "reconciliation" process involving ObamaCare began as a Senate gutting of a House revenue bill. The lesson to be remembered yet again is that the carefully drawn balance in the Constitution ultimately depends on the willingness of the citizenry to hold the government to its obligations.

An expert on constitutional law, **Prof. Joerg W. Knipprath** has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions

to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/ .

March 16, 2011 – Article I, Section 7, Clause 2 of the United States Constitution – Guest Essayist: George Schrader, Student of Political Science at Hillsdale College

Article 1, Section 7, Clause 2: Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. 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, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

The veto power contained in Article One, Section Seven, Paragraph Two of the Constitution is often trivialized as being a mere procedural formality. While the Preamble provides sweeping statements of the values of the document, and the Bill of Rights proclaims rights every citizen holds dear, the veto power is for many no more than a step in the lawmaking process, devoid of any deeper constitutional significance. Looking below the surface, however, reveals an important part of the philosophy and structure of the Constitution in this one procedural step.

Understanding the veto power means understanding the Founders' idea of the separation of powers. Born out of the Western European Enlightenment, this concept theorizes that government has very distinct powers, namely, the executive, legislative, and judicial. In the American Constitution, an independent governmental institution was created for each of these powers. Congress is granted the sole ability to legislate, the President the sole authority to execute the laws, and the courts the sole power to judge according to those laws. This represents a revolution in government structure, as most previous governments attempted to wed two or more of these powers into a single entity, often resulting in tyranny. By separating powers, the Founders hoped to dilute the powers of government and prevent any individual or branch from seizing control.

This is not to say, however, that the Founders believed that simply assigning each branch of government one political power would solve the problem of tyranny. James Madison cringed at the idea of granting all of any power, be it legislative, executive, or judicial, to any one body. He explains in Federalist Forty-Seven that the concentration of political power in any branch, "may justly be pronounced the very definition of tyranny." The Founders were therefore left with a dilemma. Failure to separate the powers of government between several hands would quickly lead to the collapse of the government into tyranny. However, allowing each branch to be miniature tyrants within their own power did not provide an acceptable alternative. The resulting compromise is quite ingenious, and is demonstrated perfectly by the veto power.

In an effort to mitigate the problem of concentrating power of any sort in one set of hands, the Founders chose to take small pieces of each general power of government, and entrust it to a branch whose primary purpose was not the execution of that power. This is perhaps best explained through the example of the veto power. Making law is a legislative function, and as such is held by Congress. The veto power puts the president, the chief officer of the executive power, in the law- making process, effectively rendering him a form of legislator. While he cannot constitutionally perform other legislative functions, such as propose laws or control revenue flow, his vote is still an integral part of any law's creation. While just one example, the veto power illustrates how the Founder's separation and redistribution of power work in practice.

Having considered the rationale of mixing government's power, the question remains as to why this should prevent tyranny as the Founders intended. The answer comes in revisiting the idea of concentrated power. If tyranny grows out of too much power being in one place, two solutions seem likely. First, one could take away an essential power of government, such as the ability to make law, therefore rendering the government all but useless. Such a solution is akin to anarchy. The other option, and the one chosen by the Founders, is to spread powers out so that any one entity would find it impossible to gain sole control over any aspect of government. No matter how tyrannical the legislature's intent, it cannot constitutionally remove the president's role in the law- making process with his veto. While certainly not foolproof, this system of dividing power provides an important constitutional check on the growth of governmental power.

While certainly not the most glamorous aspect of constitutional philosophy, the presidential veto power provides in miniature a view into the Founders' hopes for governmental balance. By separating power generally between three branches, and separating that power again through these exceptions, the Founders provided an institutional protection for the freedoms they hoped to preserve.

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March 17, 2011 – Article I, Section 7, Clause 3 of the United States Constitution – Guest Essayist: Kyle Scott, Political Science Department and Honors College Professor at the University of Houston

Article I, Section 7, Clause 3: Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Within a single clause we see on display one of the most important components of the U.S. Constitution: a system of checks and balances. Within Article 1, Section 7, Clause 3 we see that not only must a bill pass through both houses of the bicameral legislature, but it must also be signed by the President, who resides in the executive branch, in order for it to become law.

The bicameral legislature is the result of what would become known as the Connecticut Compromise. At the Constitutional Convention of 1787 the large states proposed a bicameral legislature where the states would be represented in the national assembly in proportion to their state's population. Therefore, a state like Virginia would have more representatives than a small state like New Jersey. The small states countered with what would become known as the New Jersey Plan. In this plan there was to be a unicameral legislature in which the states would be represented equally. Roger Sherman from Connecticut proposed a bicameral legislature in which the membership in the lower house would be determined by state population and in the upper house each state would be represented equally. There were some modifications before it was put into the Constitution, but for the most part the Connecticut Compromise created our current legislative structure in which each state is represented in the House of Representatives in proportion to the state's population and each state is represented by two senators in the upper house, or Senate. In order to balance the interests of the small states and the large states, a bill must pass through both houses in identical form before it can be sent to the President for his signature or veto.

By instituting a system of checks and balances the Constitution introduces delay into the process in order stymie reactionary policies by allowing various interests to voice their support or opposition. This assuaged the concerns of those who feared the ability of the many to lead the country haphazardly down a path of ever changing public sentiment, and those who feared the capricious decision making of a monarchy or aristocracy that would strip the people of their liberty. Therefore, the Connecticut Compromise was not just a compromise between big states and small states, but between those who favored more democracy and those who favored less. The House was intended to be representative of the people's interests—as members of this chamber were elected directly by the people—and the Senate was intended to be representative of the entire state as determined by the state's political elite—as Senators were to be chosen by the state legislature, for it was not until
the ratification of the 17th Amendment in 1913 that Senators were directly elected by the people.

Once a bill satisfied the concerns of the people and the elite, and those from large states and small states, it was sent to the President who was supposed to represent the view of the whole nation.
Thus, it was yet another check introduced into the system. If the bill ran against the nation's best interests the President was supposed to veto it. But, the President could not single-handedly stop

legislation as Congress is given the ability to override a veto by a 2/3's vote in each chamber. In granting veto override authority to Congress the Framer's of the Constitution institutionalized distrust of a single executive, surely a by-product of their experience under King George III.

When a system of checks and balances is effectively implemented it is able to prevent the interests of some overwhelming the interests of others in a way that would threaten safety and liberty. When a group has the ability to protect its interests against the competing interests of another group, a compromise must be reached between the competing groups in order for the policy process to move forward. The compromise produces moderate policy, and change that is slow and incremental. The animating characteristic of this program is self-protection, which itself is spawned from the emphasis the Framer's placed on liberty. We cannot entrust others to protect our liberty, but we

must do it ourselves by being engaged, informed, and responsible in our political and private lives. It is our liberty that gives us the ability to do these things, and it is our liberty we protect when we do. Because liberty is an instrumental and intrinsic value, there is a symbiotic relationship between our political involvement and our liberty that the Constitution seeks to institutionalize.

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March 18, 2011 – Article I, Section 8, Clause 1 of the United States Constitution – Guest Essayist: John S. Baker, Jr., the Dale E. Bennett Professor of Law at Louisiana State University

Article 1, Section 8, Clause 1: The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Article 1, Section 8 enumerates the powers of Congress. Listing those powers indicates that the federal government is one of limited powers. Unlike a unitary sovereign which has all the general powers of government, the federal government has only limited sovereignty. At the same time, the federal government possesses the fullness of any power actually given to it. As Federalist #23 makes plain, on those matters for which the Constitution has delegated responsibility to the federal government, i.e., national defense, foreign relations, regulation of national and foreign commerce, and preserving the public peace against insurrection, the federal government's "powers ought to exist without limitation." All of which is to say that the powers

of the federal government are limited in number, not that a listed power itself is limited beyond what is stated in the text of the Constitution.

As a result, it becomes essential to determine the meaning of the text for each enumerated power. Improper interpretation through either expansion or contraction does damage to the legitimate role of the federal government. Giving the federal government a power not enumerated moves it closer to possessing full sovereignty. Limiting a given power enfeebles, at least partially, the ability of the federal government to carry out its legitimate responsibilities. Experience has also taught that the federal government can be enfeebled in the exercise of its legitimate powers because it expends resources illegitimately exercising powers not enumerated in the Constitution. The built-in efficiency of the Constitution's federal design is that it gave to the federal government, and left to the states, those responsibilities which each level of government was best able to perform.

The federal government has in large measure been able to exercise non-enumerated power through misconstruction of the first clause in Article 1, Section 8. This clause illustrates the interpretive challenge. To understand the challenge, it is necessary closely to inspect the text of this clause which reads as follows: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;"

Notice that after the word "Power" the word "To" is capitalized. Then notice that "to" before "pay" is not capitalized. Every enumerated power thereafter begins with "To," without repeating "The Congress shall have the Power." In other words, each clause beginning with a capitalized "To" states a separate, enumerated power. Nevertheless, books on Constitutional Law routinely treat this first clause as having two distinct powers: to tax and to spend. Textually, however, the clause states only one power which is the power to tax (in order) to pay debts and provide for the common defense and general welfare of the United States.

The Supreme Court has, at times, had to struggle with whether congressional legislation which purports to impose a tax is in fact a tax when its purpose appears to be regulatory, e.g., a tax on gambling which was illegal at the time. If the clause in fact grants a single power which ties taxes to paying debts and providing for the common defense and general welfare, then the issue changes.

Rather than an issue of whether the tax is really a tax, the question becomes whether – even if it is a tax — it meets the purpose language of the text. If so read, regulatory taxes that do not raise revenue to pay government expenses would become constitutionally questionable. In other words, a reading of only the taxing language of the text – I suggest – has resulted in giving Congress regulatory powers it does not possess under a reading of the language as a single power.

Incidentally, this kind of careful attention to the text is not "strict" or "narrow" construction. It is textualism of the kind that Justice Scalia writes and practices. As he says, he is not a "strict

constructionist." He attempts to give words in the Constitution their full meaning without either narrowing or broadening their legitimate sense.

Another mischaracterization of this clause refers to it as "the General Welfare Clause." If Congress had a power simply to legislate for the "general welfare," there would be no need to list any other powers. Under such a construction of the Constitution, the federal government would in no way be a limited one. Few, if any, students of the Constitution, however, would openly claim Congress has such unlimited power. Nevertheless, the spending language in the clause – viewed as distinct from the taxing language –can be distorted to achieve the same unlimited power.

As discussed in United States v. Butler (1936), one of the few Supreme Court cases to address the spending language of the clause, the clause has been a matter of dispute nearly since the beginning when Madison and Hamilton disagreed over its interpretation. (The legislation addressed in Butler also involved a tax collected to fund the spending.) Madison contended that the power to tax and spend for the general welfare had to be tied to one of the other enumerated powers. Hamilton, and later Justice Joseph Story, disagreed. They said the power was a separate power, limited only by the requirement that its exercise be for "the general welfare." Although Butler adopted the Hamilton- Story position, it declared the particular legislation unconstitutional.

If the discussion above regarding the use of "To" and "to" means that the clause does not contain two powers, it should also establish that the clause contains a power separate from those which follow, as Hamilton and Story contended. If then Madison was incorrect, does this clause create a power so broad that it makes the enumeration of other powers superfluous? Both Justice Story and the Butler opinion recognize that there must be some limits on spending for the general welfare, but Butler did not elaborate.

The Supreme Court has since ignored Butler's notion that the clause contains any justiciable limits. A year after Butler, the Court upheld the parts of the Social Security Act dealing with unemployment compensation, Steward Machine Co. v. Davis (1937), and old-age benefits, Helvering v. Davis (1937). In Buckley v. Valeo (1976), the Court rejected a challenge to federal spending that financed presidential campaigns, saying "[i]t is for Congress to decide which expenditures will promote the general welfare."

It may be that the term "general welfare" has acquired a meaning that, at least in Congress, extends well beyond the interpretation of Hamilton and Story. For Hamilton who promoted infrastructure spending on canals and bridges, the spending was not for local "pet projects" or so-called "earmarks." Rather, such spending was to promote economic development generally; it benefitted more than a single state. Underlying the term "general welfare" seemed to be the idea that the federal government could spend on matters that generally benefitted the whole country. It was assumed not only that state governments would tax and spend on projects that benefitted their own state, but that they would not and should not tax and spend on projects to benefit other states. As with the original understanding of the Commerce Clause and other provisions in the Constitution, Congress was given the taxing and spending power for the general welfare in order to do for the states as a whole what none of them individually could do.

Congress's idea of spending for the general welfare has often been used to "persuade" states to accept policy regulations which Congress lacks any power directly to impose. Congress achieves the regulatory end through conditioning receipt of the funds. Certain conditions attached to spending are not only reasonable, but required. Accordingly, the federal government ensures the proper use of funds by imposing accounting and reporting requirements and establishing other standards for spending the money. Congress, however, also manipulates conditions in what amounts to a form of "bait and switch;" it adds new conditions after states have become dependent on federal funding for such programs as highways and Medicaid. These new conditions are ones that a number of the states likely would not have accepted when the program began because they impose burdensome obligations or infringe on a state's legislative powers. States, nevertheless, almost always accept the new conditions because they claim to have "no choice" — that is, except to drop the program or pay for it with state funds.

Rather than raise their own state taxes, with no diminution in federal taxes, states take the money because other states do and/or they get some return on the federal taxes paid by their citizens. Thus, the states at least acquiesce in – if not lobby for – high levels of federal spending with the accompanying federal taxes and/or deficits to support that spending. With almost all states participating in those spending programs directed to the states, the Congress can claim that those programs address the "general welfare."

States have not been successful before the Supreme Court in claiming Congress's imposition of new conditions is unconstitutional because they "coerce" states which have "no choice" other than to agree to the new conditions. In South Carolina v. Dole (1987), the Court rejected a constitutional challenge to Congress's direction that the Transportation Department withhold 5% of the highway funds due to a state if the state did not prohibit persons under the age of 21 from purchasing or possessing alcoholic beverages. Congress certainly had no power under which it could directly establish a national drinking age. The Constitution left such police power issues with the states.
Nevertheless, the Court determined, inter alia, that drunk driving was a "national concern." Of course, it was not a concern that each state was incapable of addressing individually. Justice O'Connor argued in dissent that the condition was an unconstitutional infringement on state powers and noted that the Court's discussion of federal spending in United States v. Butler (as distinct from other reasoning in the case) remains valid.

The last part of the clause ("all Duties, Imposts and Excises shall be uniform throughout the United States;") guarantees that one region of the country having more voting power in Congress cannot use that power to disadvantage other states economically. This provision ties in with the prohibition on taxing exports (Art. 1, Sect. 9, cl. 5) and the power over commerce among the states and with foreign nations (Art. 1, Sect. 8, cl. 3). It represents one example of how the Constitution, as finally drafted, coordinates its different parts into a comprehensive and consistent plan of government.

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March 21, 2011 – Article I, Section 8, Clause 2 of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Article 1, Section 8, Clause 2: To borrow Money on the credit of the United States;

Article I, Section 8, clause 2, confers on Congress the power to borrow money on the credit of the United States. Borrowing is simply a means of raising revenue. One can glimpse the importance and ubiquity of this tool of public finance by the fact that the framers placed it as the second power granted to the new Congress. Right after the powers to tax and spend. Those powers, along with the coining of money and punishing counterfeiting, constitute the federal revenue powers.

Borrowing on the credit of the United States was of vital concern during the Founding Era. The difficulty that the U.S. had to finance the Revolutionary War impressed men such as Alexander Hamilton and his mentor in financial matters, Robert Morris. It was the eventual success of John Adams and others in convincing the Dutch bankers to loosen their purse strings that opened access for Americans to international financial markets and contributed much to independence. Hamilton's experience is reflected in Federalist 30, where he explains the importance of public credit to finance emergencies such as wars, and the connection between taxes (and, more broadly, responsible fiscal policies) and creditworthiness.

After the war, the economic plight of the United States worsened. The war debts of the states and the United States posed a long-term threat to the country's economic health. That condition, many feared, would inevitably turn into a political threat to the republican systems in the states and to the Confederation. The fiscal and monetary policies of the states exacerbated the situation, as, in the words of James Madison's in Federalist 10, a "rage for paper money, for an abolition of debts, for an equal division of property [and] for other improper [and] wicked projects" set in. During the

debates on the Constitution, Rhode Island was often (and not always entirely fairly) set up as a paradigm of bad economic policies run amok. That is what happens when a state declines to show up for the debate, as Rhode Island opted to do.

But the problem was national and systemic, with the country locked in an apparent long-term cycle, or perhaps a spiral, of economic woe. One problem, in the eyes of many, was the absence of banks. The British had strongly disabled the formation of banks in the colonies, correctly seeing them as potential threats to British dominance. During the war, the Confederation's Superintendent of Finance, Robert Morris, at the instigation of Alexander Hamilton, obtained a charter for the Bank of North America, an American prototype private national bank loosely patterned after the Bank of England. The charter was immediately suspect, since the Articles of Confederation did not allow Congress to charter banks or other corporations. As a precaution, the Bank eventually also obtained a state charter from Pennsylvania, a step that soon confirmed to Hamilton and other nationalists the folly of state control over public finance. The legislature of Pennsylvania, taking the position that it could, with impunity, take away vested property rights confirmed by a predecessor legislature, revoked the charter in 1785.

Though these constitutional weaknesses and political currents eventually caused the Bank of North America to fail as a national bank, the pattern was set. Indeed, Morris and Hamilton in their arguments to the Confederation Congress developed the constitutional arguments in favor of implied national powers that Hamilton would repeat in his push for the Bank of the United States in 1791, arguments the Supreme Court adopted in its landmark decision in McCulloch v. Maryland in 1819.

In the same vein, the economic and political arguments in favor of (and against) the Bank of North America would resonate in the political debates over the Bank of the United States and its successor until Andrew Jackson's veto of the re-charter of the Second Bank of the United States in 1832.

Those same arguments would be repeated in the debate over the establishment of the Federal Reserve system and continue today.

While the Federal Reserve remains controversial in many quarters, the original Hamiltonian program probably saved the Republic. Through the complex system Hamilton advanced as Secretary of the Treasury, the infirmities of the public debts of the United States and the states were eliminated by guaranteeing creditors payment on their previously depreciated securities. A crucial step to restore confidence was to have the United States assume the war debts of the states. The debt repayment was financed in part through an excise tax on whiskey that, while unpopular in certain quarters, was generally supported by the public. The Bank of the United States was the final piece in Hamilton's mosaic and would serve as a depository for government funds. The use of those funds as well as the profit from private loans to other (state-chartered) banks and to large commercial borrowers would provide a return on their investment to private investors and to the government. The latter could use those profits to help repay the war debts and to furnish internal public infrastructure improvements (later reflected in Henry Clay's "American system"). More significantly for the stability of public credit and the money supply was that the Bank could control the terms of credit it extended to borrowers. By selecting the interest rates for loans and having the option to demand repayment of loans in specie, it could temper the enthusiasm that state banks otherwise might have to overextend themselves through the issuance of bills of credit (paper bank notes).

As a result, the U.S. almost overnight gained access to the Amsterdam financial markets and, hence, to the world. Foreign capital flowed into the United States to help develop manufactures and commerce and put the United States on the road to a modern economy and prosperity. Hamilton was not naive. Despite what some of the agrarian anti-Bank theorists, such as Virginia's Senator

John Taylor of Caroline (a man who considered Jefferson and Madison sell-outs of the republican cause), claimed, neither the Bank nor Hamilton was bent on destroying American liberty. Hamilton feared a government-controlled bank, but thought that the private control of the bank would keep corrupt political forces at bay. Similarly, public and private tendencies towards credit bubbles would be constrained by two things. First, the interests of investors and directors in safety as well as profits would make them sufficiently conservative. Second, he proposed that repayment of long- term public debt be immediately secured through a commitment of

designated revenue to pay interest and principal ("sinking fund"). Hamilton insisted that the Latin root of credit, credere ("to believe"), reflected the true source of credit. "States, like individuals, who observe their engagements, are respected and trusted: while the reverse is the fate of those, who pursue an opposite conduct." While the states and the Confederation had abdicated their responsibilities and the country had suffered accordingly, Hamilton believed that his program lessened those dangers.

In practice, regrettably, Hamilton's cautious and balanced approach has been cast aside. The only measure today appears to be how much can be borrowed on the increasingly suspect credit of the United States, rated as it is on the perceived ability of Americans to pay and the country's status as the still safer haven for international funds than are the bonds of other countries. Debt is rolled over, not retired, as more debt is added.

I happened to come across a book written fewer than forty years ago. The author recounted in horror that the gross national debt (not the annual deficit) topped the stratospheric level of $450 billion. Even more scandalous to him was the explosion of the national debt from roughly $40 billion in 1940. Those are the kinds of numbers that today sound like unattainable frugality as a measure even of annual deficit, never mind as a measure of gross national debt. Even adjusted for inflation and population growth, the cumulative effect of the borrowing binge reflected in today's debt is staggering compared to that time not so long ago.

Today's questionable fiscal and monetary policies are not novel, of course. The Lincoln administration's massive borrowing and its manipulation of the currency is one stark early example. FDR's unilateral cancellation of gold clauses in public bonds (upheld by the Supreme Court in a stunning exercise of sophistry in Perry v. U.S. in 1935) and his comparatively massive, for that time, expansion of the debt, is another. But even those actions arguably were more defensible than today's deficit borrowing. There is no massive war; the economic recession is not of the same degree; the borrowing is used to fund entitlements, not infrastructure. Worse, the deficit is not a matter of a few years, but, by now, of generations. It is structural. Worst of all, there is a lack of seriousness and urgency on the part of the political branches. As Hamilton feared, that foundation of sound credit, the "belief" and confidence of creditors, is unlikely to be maintained in the teeth of such profligacy.

An expert on constitutional law, **Prof. Joerg W. Knipprath** has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/ .

March 22, 2011 – Article I, Section 8, Clause 3 of the United States Constitution – Guest Essayist: Dr. John S. Baker, Jr., Professor Emeritus, Louisiana State University Law School

Article 1, Section 8, Clause 3: To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

During the Ratification Debates, the power of Congress under Clause 3 of Article I, Section 8 "To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes" was not controversial. It was generally recognized that the lack of such a power in the Articles of Confederation had damaged trade and finance among the states. Moreover, without a power to superintend commerce moving from state-to-state, the United States as a confederation was hampered in negotiating trade treaties. Other nations, notably Great Britain, had experienced the inability of the Confederation to prevent States from violating treaty obligations of the United States.

Since the adoption of the Constitution, the Commerce Clause has been much more controversial. Two early foundational cases in the Supreme Court, McCulloch v. Maryland (1819) and Gibbons v. Ogden (1824, address the Commerce Clause in the context of the broad issues of constitutional structure. Later cases in the Nineteenth century, particularly following the Civil War, deal primarily with what is known as the "dormant commerce clause." This doctrine involves the limits implied by the Constitution on the ability of the states to affect commerce, e.g. Cooley v. Board of Wardens (1852). Since the beginning of the 20th Century, the Supreme Court's jurisprudence concerning both Congress's power under the Commerce Clause and the limits on the states' powers to affect interstate commerce has undergone occasional, significant shifts.

The political divide over the regulation of commerce came to the fore soon after the creation of the government under the Constitution. During the Presidency of George Washington, Treasury Secretary Alexander Hamilton promoted federal legislation designed to develop an active commerce built around manufacturing. His most controversial success was creation of the Bank of the United States, a corporation chartered by the federal government. Hamilton and Secretary of State Thomas Jefferson squared off over the authority of Congress to create a corporation.

The Hamilton-Jefferson debate was not simply one over a policy. The two men had radically different ideas about the role of commerce in the United States. Jefferson's vision of an agrarian America opposed Hamilton's promotion of a commercial republic, driven by finance as epitomized in the Bank of the United States. Jefferson favored a more passive commerce which served mainly as a means for selling agricultural production, especially abroad. This debate involved a fundamental disagreement about the nature and the extent of the federal government's powers under the Constitution.

Long before the Supreme Court had the opportunity of addressing the issue, these two great statesmen publicly debated the constitutionality of the Bank. Their positions rested on opposing views regarding interpretation of the Constitution. Jefferson focused on the fact that the Constitution contained no power to create a corporation. He employed "strict construction" of

the Constitution to argue that neither the Commerce Clause nor the "Necessary and Proper" Clause authorized creation of the Bank. Jefferson's position was that Congress could rely on the "Necessary and Proper" Clause only to do that which was "absolutely necessary" to carry out one of the listed powers. Hamilton, on the other hand, justified creation of the Bank as a legitimate exercise of the federal government's enumerated powers. His position coincided with his own explanation of federal powers laid out in Federalist #23. That is to say, the position of Hamilton and The Federalist, later embodied in McCulloch v. Maryland (to be analyzed later in the section addressing the "Necessary and Proper" Clause), was that the Constitution gives Congress a limited number of powers, but places no limit on the powers actually given.

The term "strict construction," as used by Jefferson, differs from what the public apparently understands to be the meaning of that term. By "strict construction," Jefferson means a narrow construction of the words in the Constitution. According to Jefferson, for example, the "Necessary and Proper" Clause only authorizes that which is "absolutely" necessary. The Constitution, however, does not include the word "absolutely" to modify "necessary."

Today, those who refer to "strict construction" do not necessarily adopt Jefferson's narrow construction. Generally, those who use the term mean simply this: following the text of the Constitution. For them, the term "strict construction" is the opposite of a "liberal" interpretation," which involves going beyond the words of the Constitution. Those, on the other hand, who support liberal construction justify doing so under the banner of "a living Constitution" which they contend must be "updated" by the Supreme Court. Justice Scalia, who opposes the notion of "the living Constitution," surprises many when he says he is not a "strict constructionist." Rather, the Justice describes himself both as an "Originalist" and a "textualist," a methodology he explains as one which gives to the words of the Constitution the original meaning of the particular text.

Chief Justice Marshall's opinion in Gibbons v. Ogden (often referred to as "the Steamboat case") definitely rejected the Jeffersonian version of "strict construction." Rather, Marshall's reading of the Commerce Clause involved what today could best be described as "originalist" and "textualist." The case addressed two issues: 1) whether, under the Commerce Clause, Congress had the power to enact legislation regulating river transportation; and 2) whether a New York statute granting a monopoly on steamboat traffic was constitutional.

On the first issue, the Court analyzed the text as follows: a) the federal law "regulates"; b) river transportation falls within the meaning of "commerce"; and c) the commerce, being between the states of New York and New Jersey is "among the states." The federal statute, thus, fell within Congress's power to "regulate Commerce … among the Several States." The Court accordingly held that the federal law to be constitutional. On the second issue of the state monopoly which conflicted with the federal statute, the state statute had to give way under the Constitution's Supremacy Clause.

The challenger to the New York monopoly argued the power over commerce given to Congress was an exclusive one which could not be exercised by the states. Gibbons found it unnecessary to decide that issue. A later Supreme Court opinion, Cooley v. Board of Wardens (1852),

addressing primarily the power of a state to regulate matters related to a harbor, decided that the Commerce power was

not exclusive to the federal government. Unfortunately, Cooley did not pay particular attention to the text of the Commerce Clause, which does not give Congress power to regulate all commerce, but "commerce among the States." Instead, the Court took it upon itself to divide commerce between what is "national" and what is "local," a distinction not grounded in the text. As a result of Cooley and later cases, the Court followed several theories to decide when a state could regulate commerce and when the federal government could do so.

In the course of things, the Court conflated the tests for what states could do and what the federal government could do. From cases involving state regulation, the Court looked to whether the law was "affecting" or "substantially affecting" interstate commerce. If what the state did was deemed to impede "interstate commerce," then the statute was held to be unconstitutional as a violation of the "dormant commerce clause." While the Court's authority to imply a "dormant commerce clause" is itself debatable in terms of an originalist or textualist interpretation, transferring that text to the Congress's power under the Commerce Clause clearly conflicts with an originalist or textualist interpretation of the clause, which nowhere mentions "interstate commerce."

The Court's departure from the text of the Commerce Clause has involved two wild swings. Prior to 1937, the Court declared certain pieces of federal legislation unconstitutional which it said did not actually regulate interstate commerce. In the view of the Court's majority, the unconstitutional law had the purpose of regulating something else, e.g., manufacturing, and therefore fell within the powers of the states to regulate. The extreme case on this side was Hammer v. Dagenhart (1918), a case which held Congress could not enact a child-labor law. During the early years of the presidency of Franklin Roosevelt, the Court declared unconstitutional several key pieces of New Deal legislation which created a serious constitutional conflict between the Court and the two political branches.

In 1937, however, a majority of the Court began to uphold New Deal legislation on the theory that Congress's purpose in enacting the law was to regulate some activity which "substantially affected," and eventually simply "affected," interstate commerce. The extreme example was Wickard v. Fillburn (1942), a case in which the Court upheld the power of the federal government to regulate how much wheat a farmer could grow. Even though some of the wheat was for self- consumption and specifically not for commerce, it was said to "affect interstate commerce" by with- holding wheat from the wheat market. Under this approach, Congress came to expect that the Court would uphold almost any legislation that simply claimed to regulate some activity which "affected interstate commerce."

Since the mid-1990s, and for the first time since the mid-1930s, the Supreme Court has declared unconstitutional two acts of Congress which were purportedly passed pursuant to the Commerce Clause. U.S. v. Lopez (1995) held that Congress could not enact a law prohibiting possession of a weapon within a school-zone because the activity regulated was not commerce. In U.S. v. Morrison (2000), the Court declared unconstitutional the "Violence Against Women Act." More recently, however, in Gonzales v. Raich (2005), the Court upheld the ability of the federal

government to punish the growing at home of marijuana for personal medical purposes. In doing so, the Court re- affirmed Wickard and the notion that, under the "Necessary and Proper" Clause, Congress can regulate activities otherwise beyond its power in order effectively to regulate a nationwide market.

As of this writing, the Supreme Court has not addressed the Healthcare Reform legislation enacted in 2010. When it does so, the federal government will rely on Wickard and Raich and the states and individuals challenging the law will rely on Lopez and Morrison.

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March 23, 2011 – Article I, Section 8, Clause 4 of the United States Constitution – Guest Essayist: Horace Cooper, legal commentator and a senior fellow with The Heartland Institute

Article 1, Section 8, Clause 4: To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Here are two special grants of authority to Congress that the framers of the Constitution agreed were necessary. The first power is Congress' authority "to establish an UNIFORM RULE of naturalization throughout the United States."

Naturalization is defined as the process of becoming a citizen or the establishment of citizenship rights. At the time of creation of our Constitution, naturalization was commonly recognized as "The act of investing aliens with the privileges of native subjects." It was also common among most of the European nations that the law draw a distinction between being a citizen and being an alien (a visitor or temporary resident). Arguably, this distinction, which we still observe today, existed at least as early as the foundation of the Roman Empire.

The power to establish "uniform" rules of naturalization is among only three that Alexander Hamilton identified in Federalist #32 as being exclusive powers of the federal government. The other two being setting rules and exercising jurisdiction over the District of Columbia and the right of Congress to exclusively "lay duties on imports and exports."

Prior to the adoption of the U.S. Constitution, the states had created their own individual rules for determining citizenship. As sovereigns, they could do so. However, with the ratification of the Constitution, Congress was given the authority to establish a uniform naturalization policy – one for the entire nation.

Here's an interesting side note: Modern readers may not be aware that throughout much of the early part of our nation's history policymakers were aggressively trying to encourage migration to the U.S. and it was felt that by granting central authority to the Federal Government barriers to immigration could be lowered.

The lack of a uniform immigration rule was — generally speaking — considered one of many defects in the Articles of Confederation. James Madison notes in Federalist #42 that "The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions." Madison and the other founders were concerned about the fact that now that the states were a nation, should Virginia be allowed to set the naturalization rules for South Carolina or vice versa? As long as states had this citizenship power, they would in essence interfere in the ability of people who happened to arrive in a given state to be able to migrate to another state. This would frustrate the notion that we were actually citizens of a nation.

Also in Federalist #42 Madison posits the potential that without a uniform rule for citizenship a person could become a resident of two different states – one with strict rules for admission and another with less strict. In the event this individual committed a crime that might lead to forfeiture of his citizenship rights in one state, he could potentially argue that his rights in the other state allow him to supersede the penalty. "The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States."

Now turning to the topic of bankruptcy. Notwithstanding Madison's view that "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question…." there is quite a bit of discussion that could be had on this topic.

Today the discussion of bankruptcy is fraught with disputes over the moral legitimacy of needing to give bankrupt individuals a second chance versus a system that allows scofflaws to walk away from their financial obligations. The American federal system of bankruptcy from its inception has erred on the side of the "second chance" perhaps because so many of the earliest U.S. residents were men and women who migrated for to America for a "second chance."

Bankruptcy or insolvency is a legal status of a person who cannot repay the debts he owes to his creditors. Note that unlike naturalization law, even though bankruptcy cases are filed in United States Bankruptcy Court (units of the United States District Courts), and there are federal laws which govern bankruptcy procedure, state laws have a significant impact on the outcome of disputes.

While the framers might have dismissed the need for a comprehensive discussion on the topic – the topic of bankruptcy is not only interesting, it is example where the U.S. was quite advanced in its attitudes – well ahead of other countries of its day.

The American system is in many ways a response to the history of Bankruptcy while being much more modernist. In England, the first official bankruptcy laws were passed in 1542, while Henry VIII ruled. Under its terms, a bankrupt individual was considered a criminal and was subject to criminal punishment, which could range from imprisonment in debtors' prison to hanging. By the early Eighteenth century, a significantly more enlightened attitude dawned. The British

adopted statutes that allowed the discharge of some debts as long as debtors agreed to pay what they could afford.

Under the Articles of confederation, most states were still throwing into jail individuals who could not pay their debts. Robert Morris, a signer of the Declaration of Independence was one of many prominent Americans subject to this indignity. However, because of Congress' grant of this power,

the U.S. was able to take the lead in the uniquely American practice of debtor's "relief." Under its terms, not only was prison ended for debtors, but also individuals could choose to initiate bankruptcy for themselves rather than wait for creditors to force them and the Court's involvement ensured a far more equitable accounting of the debts and the ability to discharge those that simply could not be paid.

As the process of examination unfolds throughout this 90 day cycle it becomes increasingly clear that the United Constitution is a remarkable document which addresses policy issues of the past and the present in very careful and well thought out ways.

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March 24, 2011 – Article I, Section 8, Clauses 5-6 of the United States Constitution – Guest Essayist: Troy Kickler, Founding Director of North Carolina History Project and Editor of northcarolinahistory.org

Article 1, Section 8, Clauses 5-6
5: To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
6: To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

When the U.S. Constitution was drafted at the Constitutional Convention of 1787 and then submitted to the states to ratify, convention delegates attempted to correct what they considered to be weaknesses in the Articles of Confederation. They worked to strengthen the national government's role in monetary policy and eliminate factors that might prevent a unified American economy, with the states working in concert. Three steps to achieve those goals included the clauses pertaining to the coinage of money, a standard of weights and measurements, and the punishment of counterfeiting

Under the Articles of Confederation, the national government and the states had the authority to coin money. But in Article 1, Section 8, the enumerative article that gives certain powers to the United States government, the Constitution specifies that Congress have the exclusive right to coin money.

During the Revolutionary War (1776-1783), states had accumulated much debt and some had difficulty paying for their war costs. As a result, state governments issued bills of credit to provide a form of debt repayment. Meanwhile during the 1780s, inflation started soaring. The issuance of paper money, North Carolina Founder Hugh Williamson writes in his 1788 essay, "Remarks on the New Plan of Government," contributed to a ruinous economy and a loss of honor on the global stage. Convention delegates, therefore, included the coinage clause as a means to stop inflationary measures and bills of credit that abounded across the states. (Another clause–Article 1, Section 10– prevents states from issuing bills of credit and paper money.)

Although paper money is commonplace in today's world, it is absent from Article 1, Section 8. The Founders were familiar with the practice of printing money and more than a few had definite opinions regarding the practice. Some scholars have suggested and even argued that its omission indicates that Congress does not have the authority to print paper money or issue bills of credit. A series of Supreme Court cases in the late 1800s, including Knox v. Lee (1871) and Julliard v. Greenman (1884), however, expanded the government's role in monetary policy; the Court ruled that the power was inherent in a sovereign government.

In 1787, convention delegates also included the weights and measurements clause to promote uniformity in trade. Allowing states to separately value foreign currency and create individual exchange rates, writes Joseph Story in Commentaries on the Constitution (1833), invited "infinite embarrassment and vexations in the course of trade." A uniform system ensured national honor and also lessened the chances that the innocent would be subjected to "the grossest frauds." Indeed, a fixed standard removes confusion in the market place and limits the efforts of the deceitful.

The Framers also believed that a Congressional authority to value foreign coin helped ensure uniformity in trade. In Federalist 42, James Madison feared that the "proposed uniformity in the value of the current coin might be destroyed by subjecting that of foreign coin to the different regulations of the different States." To Madison, the clause was a needed corrective. It reduced, if not eliminated, monetary confusion and bolstered the American economy.

In the essay, Madison also links the constitutional provision for giving the national government the authority to punish counterfeiting with the weights and measurements clause. Both were necessary to secure the value of American coin and eliminate confusion in trade.

Some scholars have contended that the counterfeiting clause is superfluous; the authority to punish counterfeiting is inherent in the power to regulate coinage, the argument goes. Legal scholar David F. Forte, however, points out that the Framers included it for three reasons: to distinguish counterfeiting from treason, as it had been considered in England; to ensure that Congress had authority over international incidents on American soil that involved counterfeiting of foreign currency; and to ensure national supremacy in monetary policy.

The coinage, weights and measurement, and counterfeiting clauses solved various commercial and monetary problems, and they eliminated confusion in market places by enumerating certain powers to the national government. They also were symbolic, buttressing federal supremacy in monetary policy.

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March 25, 2011 – Article I, Section 8, Clause 7-8 of the United States Constitution – Guest Essayist: Allison Hayward, Vice President of Policy at the Center for Competitive Politics

Article 1, Section 8, Clause 7-8
7: To establish Post Offices and post Roads;
8: To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Clauses 7 and 8 of Article 1, section 8 demonstrate both the interest the Founders had in facilitating economic growth and prosperity, and the belief they shared that such power had to be made explicit in the Constitution. They would not have been satisfied to hold, as we now do, that Congress's regulatory power is presumed unless constrained by a specific provision. Such a open-ended power would become tyrannical, they thought.

At the same time, they weren't opposed to governmental intervention if appropriate to serve the general welfare. The federal legislative power in particular could counterbalance provincialism in the states. Having just been through the disaster that was the state of things under the Articles of Confederation, many Framers understood that greater federal power was necessary.

The debate was over how much would be too much power.

The "Post offices and post roads" in clause 7 sound quaint, but in fact were an enormously important piece of infrastructure. Post roads were some of the first roadways built, and many former post roads remain today in our communities, whether we recognize them as such or not. But whenever the government provides such infrastructure, there is also the danger of waste, fraud, and corruption between the members with control over the funding, and their constituencies. Thomas Jefferson, for one, thought the power would prove "a source of boundless patronage in the Executive." and "a bottomless abyss of public money."

Jefferson wasn't entirely incorrect. Postmasters have been patronage appointments. The location and accessibility of post offices is a critical constituent issue, and employment in the Post Office is valued as a safe, reliable and well-compensated career. For shrinking communities, the potential they might lose "their" post office is a cruel final blow to civic pride. The Post Office monopoly on "mail" delivery has eroded as the private package delivery industry – and email – have taken over tasks once done by the post office. But these private communications are heavily dependent on a physical infrastructure that was built by government. Had it been left to local communities and individuals, no doubt roads would have been built, but with "local" priorities in mind, not national ones, with consequences for the nation's westward expansion and domestic cohesion.

Clause 8 provides Congress with the power to legislate in the areas of patents and copyrights. The founders believed the protection of intellectual property was important to the growth and prosperity of the nation. Also, the author's "copy right" was a right in English common law and was respected by the colonial America; and Parliament protected an investor's right to his invention for 14 years. Alexander Hamilton even advocated funding the emigration of "Artists and Manufacturers in particular branches of extraordinary importance." The Founders appreciated the good incentives these rights would create, by giving people with successful and popular ideas the ability to profit from them for a time.

The world of patents today is struggling with some extreme applications of these principles. Because a person can "patent" an invention without actually bringing the invention into existence, subsequent inventors who do make commercially beneficial use of an idea can be compelled to "lease" the unused patent, or pay damages for infringement. Rather than encourage industry and the useful arts, such patent litigation adds costs to the commercially active innovator, which are ultimately passed along to consumers.

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March 28, 2011 – Article I, Section 8, Clause 9 of the United States Constitution – Guest Essayist: Charles K. Rowley, Ph.D., Duncan Black Professor of Economics at George Mason University and General Director of The Locke Institute

Article I, Section 8, Clause 9: To constitute Tribunals inferior to the supreme Court;

There is much more to these seemingly simple words than meets the eye. Indeed, one cannot write meaningfully about them without first advancing to Article III, Section 1 of the Constitution: 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.

It is not my intent to deal with Article III, Section 1 more than is minimally necessary for making sense of Article I, Section 8, Clause 9. I ask the reader's indulgence to this end.

It is noteworthy that Article III, Section 1 of the Constitution establishes one federal Supreme Court only for the entire United States, and that it separates the powers of this court from those

of Congress and the executive. By establishing just one Supreme Court, the Founders provided for a uniformity of interpretation of the federal laws that otherwise might not have been forthcoming. By establishing the Supreme Court as separate from the Congress the Founders benefited from the genius of James Madison who built in checks and balances as a response to the Connecticut Compromise that provided equal representation to all the States in the Senate of the United States.

Prior to that Compromise, Madison's Virginia Plan had advocated subservience of the Supreme Court to the Congress.

Note, however, that the Constitution does not itself create judicial bodies other than the Supreme Court. The Congress alone – not the Supreme Court not the Executive – is empowered, should it so choose, to take responsibility for such matters. Exactly how it should do so and in what form would be subjected to close scrutiny of the precise meaning of the wording of the Constitution.

In one – and in my judgment convincing – interpretation, the power given to Congress in Article I, Section 8, Clause 9 'To constitute Tribunals inferior to the supreme court' plainly relates to the power given to Congress in Article III, Section 1 to ordain and establish inferior Courts. If such is the case, then Article I empowers Congress to establish inferior judicial bodies (tribunals and courts being viewed as synonyms). And Article III reaches out to the tenure conditions attached to all such judges.

Since, in practice, Article I tribunals have not been viewed as identical to Article III courts, however, a careful parsing of the relevant words becomes essential, even if only to explain unjustifiable error.

As always, in parsing the words of the Constitution, it is important to rely upon the meaning of words in 1787, not those of the early twenty-first century. To this end, I shall rely on the written records of the Founding Fathers and of the major dictionaries of that era, such as those of Samuel Johnson and Noah Webster.

The term 'tribunal', to be sure, carries a distinctive historical connotation, derived from the Roman tribunate, a raised platform on which the seats of magistrates were placed. The term 'court', by contrast, derives from the judiciary's close association in England and France with the king.
However, by Blackstone's day, the terms were viewed as synonyms in all the major dictionaries. Throughout the early deliberations of the Philadelphia Convention, the Founding Fathers also used the two terms interchangeably, as does Hamilton in Federalist No. 81. Of course, such evidence does not guarantee that the Constitution itself deploys the term 'tribunal' under Article I as a synonym for the term 'court' under Article III.

There is some support from the drafting history for the view that the Constitution distinguishes between the two concepts. The distinction may have grown out of the mid-convention debates over the possibility of employing some non-life-tenured judges to adjudicate federal claims. Specifically, Congress might appoint state tribunals to act as courts of first instance in deciding questions of federal law. Madison's notes from the debates offer support for such a change in

emphasis once the New Jersey Plan and the Virginia Plan were jettisoned following the Connecticut Compromise. For the Compromise eliminated an early provision that mandated the creation of lower federal courts and substituted a regime of congressional discretion (as confirmed by Articles I and III). At this point, the Committee of Detail dropped the usage of the term 'tribunals' to describe the federal courts in Article III, and it required life-tenured judges in Article III courts, while refusing to impose any such requirement for Article 1 tribunals.

Further support for distinguishing between Article I tribunals and Article III courts may be discerned in the empowerment provisions themselves. Article I empowers Congress to 'constitute tribunals interior to the supreme court', whereas Article III empowers Congress to ordain and establish courts. This difference in description of congressional powers is suggestive that the two adjudicative bodies might arise in different ways and with different degrees of permanence.

Specifically, Congress might 'constitute' tribunals either by creating new bodies from scratch, or by designating existing bodies as inferior tribunals. To 'ordain and establish' inferior courts, by contrast, seems to contemplate the creation of new courts established in accordance with Article III. Such a fine distinction is in accordance with the major dictionaries of the late eighteenth century.

In any event, Congress has exploited such parsing opportunities in order to distinguish clearly between Article I tribunals and Article III courts (A fairly good guide to congressional behavior in general is that if you give it an inch it will take a kilometer). From the outset, Congress has established some (but not all) Article I tribunals without the Article III safeguards of life-tenure and remuneration. These tribunals consist of certain federal courts and other forms of adjudicative bodies, endowed with differing levels of independence from the legislative and executive branches. Some take the form of legislative courts set up by Congress to review agency decisions; others take the form of military courts-martial appeal courts, ancillary courts with judges appointed by Article III and administrative judges.

As one would predict, Congress (and the Executive) does not always relish the idea that Article I tribunals should be inferior to the Supreme Court. Yet that is an inescapable reading of the Constitution. The specification that tribunals and lower courts must remain inferior cements the requirement of the Supreme Court's ultimate supremacy. The requirement of inferiority precludes Congress (and by clear implication, the executive branch) from creating free-standing courts, investing them with some portion of judicial power, and giving them freedom from oversight and control of the Supreme Court. In this regard, the Founders were only too mindful of such abuses of executive power by the Stuart kings in England's not-so-far-distant past.

This portrait of Article I tribunals as acting outside of the judicial power, while remaining subject to oversight and control by Article III courts is reflected in modern jurisprudence. However much it would like to do so, Congress (and the Executive) cannot create tribunals and place them entirely beyond the supervisory authority of the federal courts.

The most pressing recent variant of this logic effectively deals with the decision by President George W. Bush to create military tribunals for the adjudication of criminal claims against

individuals designated as enemy combatants. Although the government has argued for an exceedingly restricted judicial role in overseeing such tribunals, the Constitution clearly requires that they must remain inferior to the Supreme Court and subject to judicial review, at least when such tribunals operate within the jurisdiction of the United States.

Americans should be eternally thankful to the Founders for providing us with such protections, both under Article I and under Article III of the Constitution. Unless the parchment unravels completely, there will be no Court of the Star Chamber, no Court of High Commission, and no Bloody Assize in the Unites States of America.

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March 29, 2011 – Article I, Section 8, Clause 10-13 of the United States Constitution – Guest Essayist: Horace Cooper, legal commentator and a senior fellow with The Heartland Institute

Article 1, Section 8, Clause 10-13

10: To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
11: To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
12: To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
13: To provide and maintain a Navy;

It is especially timely to discuss the so-called "war" powers of Congress in light of recent events internationally. Although much focus at present is directed at the issue of the President's authority, this essay will focus exclusively on the United States Congress.

- To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
- To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
- To provide and maintain a Navy;

Pointedly Congress does not have specific authority to carry out the prosecution of a military engagement, but it does have significant authority to participate in the decision and continuation of that military engagement. In that sense, the "War Power" is divided between the President and Congress.

Many Americans forget that the "War Powers" under the Articles of Confederation ostensibly rested with the national government but was far more attenuated in reality because it relied upon an enthusiastic acquiescence of the several states: Article III of the Articles of Confederation. The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

The Founders sought to address this matter. Not unlike the present debates over the President's authority to carry out military actions, the Founders feared the ability of the monarch to enter into war without the consent of the people as they had witnessed the royal wars for centuries in Europe. At the same time, they had learned that they should not take the principle of diffusion of war power too far. In their mind, the Articles of Confederation had in fact gone too far and it represented a major national security threat for the newly independent United States of America.

As James Madison would explain to Thomas Jefferson in a letter in 1798, "The constitution supposes, what the History of all [Governments] demonstrates, that the [Executive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the [Legislature]."

Thus, specific war powers are granted to the Congress – not the least of which is the actual power to declare war.

During the existence of the Articles of Confederation, the national government had the sole authority to create courts for the trials of piracy and related felonies committed on the high seas. However, the national government did not have any authority to address the issue of compliance with the existing international rules against piracies and other crimes on the high seas. Prior to the

Revolution, all of the European nations had entered into agreements but the U.S. did not have authority to enforce these rules or to reject them. The Constitution specifically addresses that limitation and gave the Federal government the ability to choose to comply, reject or modify international agreements regarding piracy.

First, Congress has the specific power to "declare war." A declaration of war is a formal declaration issued by at least one national government indicating that a state of war exists between that nation and another. Congress has officially declared war five times. In Federalist 69 Hamilton reminds readers that the power to declare war was an important one since the President of the U.S. did not have it. Under the Constitution, Hamilton explains, the president's authority was:

". . . in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the land and naval forces . . . while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies; all of which by the Constitution would appertain of the legislature."

Next, let us look at the power of Congress to grant letters of Marque and Reprisal. This power grant a far more unusual and yet clearly lawful means for Congress to carry out its international and/or national security interests. Here's the essence of the power: Congress can authorize a private person or private army – not a part of the United States armed forces – to conduct reprisal military- like operations outside the borders of the U.S.

Not unlike the powers exercised by the French Foreign legion, our Constitution authorizes Congress to grant such a right presumably with payment or a bounty in any instance in which the citizens of the U.S. are injured by individuals or armies of another country whenever the other country denies justice to the American(s) who have been harmed.

Additionally there is the rarely examined "capture clause" – the power of Congress to establish the rules for the distribution of spoils of captured enemy ships or captured territories. In the modern war era, military victims publicly eschew the capturing or claiming of the goods and property of the conquered parties. However, this was not always so. In fact, the so-called "capture clause" was considered extremely important to the fledgling nation of America.

Often times the federal government could not afford to pay soldiers or obtain credit to buy armaments. By being able to set up a means for disposing of the goods and other spoils that were captured in battle, the U.S. had an alternative way to address this issue. General George Washington declared during the Revolutionary War that a centralized and standardized system for the handling of prizes was vital to the war effort. In fact, one of the first federal courts created by the United States government under the Articles of Confederation was the Federal Appellate Court of Prize – which existed to adjudicate disputes over spoils captured in war.

The final war power of Congress involves the authority to raise and support armies and to provide and maintain a navy. While most of the early residents of America recognized that the federal government should have authority to "raise and support" armies, ultimately there was some disagreement over how that power should be dispersed. Under the crowns of Europe, kings could not only declare war, they also had individual power to "raise and support" armies without needing the input of their subjects. Even when Kings co-existed with Parliaments, their ability to exercise their war powers nearly carte-blanche stymied the ability of their subjects to exercise any significant influence – not just in war – in nearly all matters of national interest since wars sapped resources, finances, and labor in a way that Parliament couldn't readily counteract.

Additionally the standing army operated as a direct threat not just on the purse strings of the nation but a clear threat was aimed at the citizenry as well especially when these forces concentrated themselves within the home territories in large numbers. Instead of giving this power to the President, our system specifically requires that Congress approve the creation and timing of all rules involving the establishment of an army and navy. In fact, this grant of

authority is the basis for Congress' power to establish the Uniform Code of Military Justice as well as selective service requirements. With regard to the army in particular, the Constitution included the appropriations limitation as a means to quell fears that a standing army might be used to threaten American citizens.

Indeed Congress has broad power when it comes to war making. But it is noteworthy that this power is divided in many ways with the President – not as a point of confusion or a result of a lack of trust in either the executive or the legislature, but instead as part of a precise calculation that if both the President and Congress must collaborate in order to carry out war, war would not be entered into easily or for long.

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March 30, 2011 – Article I, Section 8, Clause 14-16 of the United States Constitution – Guest Essayist: George Schrader, Student of Political Science at Hillsdale College

Article 1, Section 8, Clause 14-16
14: To make Rules for the Government and Regulation of the land and naval Forces;
15: To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

16: To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

In discussions of the constitutional interaction between the federal government and the military, much of the conversation centers on the office of the president. This is logical, as the president is declared the, "commander in chief of the army and navy of the United States" in Article Two of the Constitution. What should not be overlooked, however, is the important role the legislature plays in how America's armed forces operate. While the president may have greater direct control over the military, especially in times of war, Congress's powers under Article One, Section Eight provide both an important check on presidential power, as well as a means for maintaining security within the nation.

Perhaps the most prominent theme throughout this section of Article One is the intent of removing some control of the military from the president and placing it in the hands of Congress. Examples of this are seen in Clause Fourteen's allowance for Congress to, "make rules for the government and regulation," of the army and Clause Fifteen's reliance on the legislature to summon, "the militia to execute the laws of the Union." One may reasonably ask why the Founders, who spoke often in the Federalist Papers of having an independent and energetic

executive, would make such enormous cessions of executive power to the legislature. The answer appears to be rooted primarily in a fear of tyranny.

When one considers the concerns of average citizens during the time of the Founding, one of the most common fears was that America would slide into a tyrannical monarchy. The most likely origin for such a monarch was the president, a suspicion supported by history. Most popular forms of government, from the democracy of Athens to the republic of Rome, had collapsed into a tyranny once a sufficiently devious dictator found a weakness in the government's structure. Furthermore, these tyrants often obtained and secured their power through the use of the executive's military control. Examples of this abound, from Caesar in ancient Rome to Napoleon in France. If America's army were to overthrow the popular government it would most likely be at the behest of the president.

This fear of a powerful military president led to some problems for the Founders. Legislatures, by their nature, make laws and do not independently enforce them. Furthermore, it was generally understood that foreign diplomacy was best carried out by an entity separate from the legislature for reasons too nuanced to explore here. Congress was therefore unfit to control the military by itself. The military could also not be entirely entrusted to the states in the form of completely independent militias, as the nation's experience under the Articles of Confederation proved that this system was too unorganized to react quickly to an emergency. A president was literally the only solution.

Regardless of the necessity of independent executive control over the military, the Founders were still not comfortable simply allowing the president to wield unchecked control over the nation's armed forces. The limitations described in these clauses, along with Congress's power over the budget, provide precisely these checks by creating situations in which the president's normally supreme role in the military is eclipsed by the legislature. It is interesting here to note that the limitations, particularly Clause Fourteen's call for the legislature to create rules for the military, were carefully selected so as to only grant Congress powers that fit within its typical duties of creating law. In this manner, the Founders reduced the threat of a military dictatorship led by an over-ambitious president without gravely distorting the purpose of the American legislature.

While not an issue which is frequently considered today, at the time of the Founding the threat of a military coup weighed heavily upon the minds of many Americans. Though weakening the authority of the president over the military has its disadvantages, the Founders' decision to do so in ways consistent with the purpose of Congress created perhaps the best possible compromise between presidential power and civic security.

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March 31, 2011 – Article I, Section 8, Clause 17 of the United States Constitution – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation

Article 1, Section 8, Clause 17: To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;–And

At the time of the Constitutional Convention, conventional wisdom identified the two prime candidates for the seat of the new national government as Philadelphia and New York City. In fact, during the Convention, when one delegate proposed forbidding the placement of the national capitol in the capitol of any state, Gouverneur Morris "did not dislike the idea but was apprehensive that such a clause might make enemies of Philda. & N. York which had expectations of becoming the Seat of the Genl. Govt." Records of the Federal Convention 2:127 (July 26, 1787).

The Framer's primary concern was to ensure that the new national government was not dependent on the state in the management of the capitol or of other federal property. During the Revolution, mutinous soldiers had forced Congress to leave Philadelphia for Princeton because the former city could not protect them from the insult. (Of course this lack of dependence did not prevent the sacking of the new national capitol during the war of 1812 but no state could be blamed.)

Debate over this provision was fierce in the Virginia ratifying convention. George Mason thought it one of the most dangerous clauses because a district without any State supervision would be subject to the tyranny of the new national government. Others thought the new district could become a haven for bad actors fleeing from other states. James Madison dismissed this concern, noting that the objections "are extremely improbable; nay, almost impossible." Henry Lee asked: "Were the place crowded with rogues, he asked if it would be an agreeable place of residence for, the members of the general government, who were freely chosen by the people and the state governments. Would the people be so lost to honor and virtue, as to select men who would willingly associate with the most abandoned characters?" Philip B. Kurland & Ralph Lerner, editors, 2 The Founders Constitution 220-222 (1987). The solution to the problem of creating a haven (or havens in the other

possessions of the national government) was eventually settled by express reservations of the states when ceding land to the national government.

In 1790, Congress provided for a new capitol on the Potomac and delegated to George Washington the authority to select the site. Land was ceded by Virginia and Maryland for the purpose of creating a capitol but Virginia's land has since been returned. Congress began meeting in the District of Columbia in 1800.

The Framers understood that people would live in the new capitol and James Madison noted that "a municipal Legislature for local purposes, derived from their own suffrages, will of course be allowed them." Federalist 43. Currently, under the Home Rule Act of 1973, D.C. is governed by an elected mayor and District Council. Consistent with the Constitution, however, the national Congress still exercises oversight over District affairs. Congress may overturn acts of the District Council and has refused to fund certain Council decisions (like a domestic partnership registry) and has even ordered a referendum to be held on a Council decision to prohibit the death penalty. From 1995 to 2001, District finances were overseen by the Congressionally-created District of Columbia Financial Review Board to prevent the District from financial collapse due to mismanagement.

Another concern raised by this clause, however, was that the national government not become unduly acquisitive in taking lands for national purposes from the States. The solution was to require that the national government purchase land "by the Consent of the Legislature of the State in which the same shall be." Western states often wonder how the federal government can control such large portions of the States as public lands. Typically, as a condition of admission to the Union, these States allowed the national government to retain ownership of public lands gained during the Territorial existence of the new State. The U.S. Supreme Court seems to have approved this practice in 1885. Ft. Leavenworth R. Co. v. Lowe, 114 U.S. 525 (1885). It still seems inconsistent with the Framer's concern to prevent national takeover of state land without express consent of the Legislature, however.

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April 1, 2011 – Article I, Section 8, Clause 18 of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Article 1, Section 8, Clause 18: To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

In a letter to Edward Livingston in 1800, Thomas Jefferson addressed the potential of infinite expansion of national power through the "necessary and proper clause" (Article I, Section 8, clause 18) after Congress chartered a mining company. Jefferson derided the exercise by comparing the constitutional claims of the law's supporters to a popular nursery rhyme:

"Congress are authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines, necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at 'This is the House that Jack Built'? Under such a process of filiation of necessities the sweeping clause makes clean work.."

Who can doubt this, indeed? Especially when, just last year, in U.S. v. Comstock, Justice Breyer led the Supreme Court in finding that the necessary and proper clause permits the national government to remit into federal civil commitment persons deemed to be sexually dangerous, even though the federal government could no longer hold them on a federal criminal charge. After applying one of the malleable multi-factor balancing tests he so favors, Justice Breyer determined that the necessary and proper clause permits Congress to enact laws that criminalize conduct that threatens the beneficial exercise of its enumerated powers; and that, therefore, Congress can imprison those who engage in that conduct; and that, therefore, Congress can pass laws to govern those prisons; and that, therefore, Congress can act as custodian of its prisoners; and that, therefore, Congress can pass a law that allows the federal government to keep those former prisoners "to protect the public from dangers created by the federal criminal justice and prison systems." Besides, Breyer averred, the new law was only a "modest expansion" of Congress's power. Indeed. Were he alive, Jefferson would recognize the game.

The necessary and proper clause is the Constitution's version of the "implied powers" theory. Congress is the American people's legislative agent. As such, the people gave Congress certain objectives to achieve. It is a basic principle of agency law that the agent has not only the powers expressly assigned by the principal but, by implication, also those powers necessary to carry them out. But there is no need for application of "implied powers" because the people, as Congress's principal, themselves provided the means to carry out Congress's assigned objectives. The necessary and proper clause specifies that Congress has the power to make laws "necessary and proper for carrying into execution" the powers conferred by the Constitution on the federal government.

The clause has long been hotly debated. Opponents of the Constitution, especially New York's Robert Yates ("Brutus"), repeatedly warned of the dangers from an expansive interpretation of "necessary and proper." They predicted that an unrestrained power to accomplish formally limited powers itself effectively created an unlimited power to legislate through pretext. Madison, responding to Yates in Federalist 44, sought to tie the clause to the other powers in a luke-warm argument that made the clause sound like the least worst alternative the Framers faced. Moreover, he attempted to narrow the meaning of the clause to those means that were "indispensably necessary" and "required." Ultimately, however, Madison threw up his hands, effectively conceded the argument about the dangers, but urged the people to remain alert to usurpations by Congress.

The Supreme Court weighed in with McCulloch v. Maryland in 1819. Chief Justice Marshall rejected the restrictive interpretation of "necessary" urged by the old anti-Federalist warhorse, Maryland's wily attorney general Luther Martin. Martin's interpretation had support both in the dictionary meaning of the word at the time and Madison's slips-of-the-pen in Federalist 44. Although this decision is correctly read as providing the constitutional material for the 20th century's "Big Bang" expansion of federal power, Marshall apparently believed he was much

more restrained and cautious. He even took the unprecedented step of defending that view in a pseudonymous battle of editorials in the Richmond papers with Virginia's chief justice, his cousin Spencer Roane. Marshall insisted that, while the reading of "necessary" was to accommodate the needs of the times, the clause had to be tied to the other enumerated powers. Any such law had to comply with both the letter and the spirit of the Constitution. It was not enough that Congress could somehow connect a law to the form of one of its other powers. Pretextual uses of the necessary and proper, or any other clause, would be unconstitutional.

In his almost flawless dissent in Comstock, Justice Thomas takes Justice Breyer to task for abandoning the Constitution's text and Chief Justice Marshall's boundaries. Thomas points out that the Comstock majority makes no attempt to show that the law itself directly carries into effect any enumerated power of Congress. At best, it does so through an attenuated chain, exactly as Jefferson criticized in his letter to Livingston. The only objective that the Comstock Court mentions that the law directly advances is "to protect the public from dangers created by the federal criminal justice and prison systems." And that is not an enumerated power.

The necessary and proper clause is not an isolated provision. It is part of the delicate balance of national and state powers the Framers established in the American version of federalism. That balance is made concrete in several other provisions, beginning with Article I, Section 1, which declares that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representative." That premise, along with the very fact of a limited enumeration of Congressional powers, is evidence that the letter, and certainly, the spirit of the Constitution argue against so expansive an interpretation of the necessary and proper clause that Congress is given an unrestricted power to legislate through a constitutional back door.

The Court's expansive and unfounded reading of necessary and proper reflects the dominant Washington credo. One has heard over and over from certain partisans in the debate over the current administration's programs that Congress has the power to do whatever it wants and that the Constitution has no part to play in the debate. Indeed, judging by the distaste, indeed hostility, shown by some Congressmen to the reading of the Constitution in that chamber at the opening of the current session, raising constitutional questions about Congress' actions may represent some novel mutation of hate speech. Of course, indicting the Constitution (especially its formal restraints on legislative power) as an obstacle to "social advancement" is not new. Then-professor Woodrow Wilson and similarly-inclined academics charged that central tenet of Progressivism a century ago. How little has changed in the progressive world-view.

At the same time, it is undeniable that, over the years, the doctrine of enumerated powers has suffered severe erosion, an erosion that could not have occurred over so long without the tacit complicity of the American people. They have not been alert to Congressional usurpations, as

Madison urged. It is inevitable, as people intuit, and as writers from Plato to Machiavelli to Yates and Madison have explained, rulers seek first to maintain and then to expand their power. Over time, there occurs an institutional accretion of power at the expense of personal liberty, as each precedent gives rise to an incremental expansion. Again, the contest over ObamaCare now

playing out in the federal courts is the latest (and perhaps final) step in the enfeeblement of the doctrine.

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April 4, 2011 – Article I, Section 9, Clause 1 of the United States Constitution – Guest Essayist: W. B. Allen, Havre de Grace, MD

Article 1, Section 9, Clause 1: The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

At the Constitutional Convention of 1787 the debate that produced this provision came to a head on August 21 and sustained tense development until its resolution on August 25 in a unanimous vote (nem contradicente) that succeeded several divided votes that preceded the eventual compromise.
This short narration, however, conceals a tortured and tense struggle that emerged from the debates over democratic representation, permissible forms and apportionment of taxation, and the wisdom and morality of slavery itself. What occurred, in short, is that the Convention elected to affirm national authority to prohibit the importation of slaves but to limit any tax on this particular import to a modest sum, in recognition of strenuous and unyielding objections especially from South Carolina and Georgia to the exercise of any limit upon their discretion in the matter of slavery, even after having been granted a bonus effect by the counting of three-fifths of the total number of slaves in the calculation of representation in the House of Representatives.

This essay is too limited in space to permit unfolding the full dimensions of the debate in the Constitutional Convention. We urge readers to recur to the Notes of Debates in the Federal Convention of 1787 Reported by James Madison for a thorough review of the debate in order to place in context the sometimes surprising positions of delegates as varied as Oliver Ellsworth, Luther Martin, and Roger Sherman as well as those of James Wilson, Gouverneur Morris, James Madison, and Alexander Hamilton. A more general view of the question of slavery is at the following link: http://www.williambarclayallen.com/chapters/new_birth_of_freedom.pdf.

As for the meaning of the constitution's limitation on the power to import slaves, the most efficient way to comprehend it is to review the story of its implementation under the new government.

The first major debate over constitutional interpretation within the Congress took place in the House of Representatives on May 13, 1789. The subject was slavery, and it carried with it all of the ambiguous assumptions which freighted the several compromise provisions on the subject in the Constitution. It is to be remembered that the slave trade clause (Art. I, sec. 9), by which slavery could not be prohibited by Congress until the year 1808, but by which the Congress could impose an import tax on slaves, produced contrary interpretations even at the time, ranging from the more familiar southern claims that "we got all that we could" on behalf of slavery, to the less well known but extraordinary claim by James Wilson, that I will tell you what was done, and it gives me high pleasure, that so much was done. . . [B]y this article after the year 1808, the congress will have the power to prohibit such importation, notwithstanding the disposition of any state to the contrary. I consider this as laying the foundation for banishing slavery out of this country; and though the period is more distant than I could wish, yet it will produce the same kind of gradual change which was pursued in Pennsylvania.i

The debate that occurred within the House of Representatives shows how far the hopeful interpretation prevailed over the shameful interpretation. On the surface it seems that the shameful interpretation prevailed, for the House voted by a large majority not to impose the constitutionally permitted impost on slaves. Further investigation reveals, however, that the vote was carried primarily by the northern and eastern antislavery votes, cast by those acting on the principle enunciated by men such as Fisher Ames and Roger Sherman that "no one appeared to be prepared for the discussion."

Josiah Parker of Virginia introduced and pushed the measure, even to the point of eliciting a momentary attempt at a positive good argument for slavery from Jackson of Georgia. It was James Madison, however, who was most prepared to discuss the matter and most reluctant to yield to counsels of caution on a matter which others feared could abort the Union. His comments in this debate underscore his prior resort to slavery in order to move the Convention toward a Constitution almost two years earlier, for in 1789 the very existence of the Union weighs heavily in his reflections and promises the opportunity to act upon the question.

I cannot concur with gentlemen who think the present an improper time or place to enter into a discussion of the proposed motion . . . There may be some inconsistency in combining the ideas which gentlemen have expressed, that is, considering the human race as a species of property; but the evil does not arise from adopting the clause now proposed; it is from the importation to which it relates. Our object in enumerating persons on paper with merchandise, is to prevent the practice of treating them as such . . .

The dictates of humanity, the principles of the people, the national safety and happiness, and prudent policy, require it of us . . . I conceive the Constitution, in this particular, was formed in order that the Government, whilst it was restrained from laying a total prohibition, might be able to give some testimony of the sense of America with respect to the African trade. . .

It is to be hoped, that by expressing a national disapprobation of this trade, we may destroy it, and save ourselves from reproaches, and our posterity the imbecility ever attendant on a country filled with slaves . . . [I]f there is any one point in which it is clearly the policy of this nation, so far as we constitutionally can, to vary the practice obtaining under some of the state governments, it is this.

To Madison, it appears, the slavery option was such that it could, and should, be subject to calculated disincentives. An analysis of the vote on this measure, in a House of 59 representatives, ten of whom were present in the Constitutional Convention, reveals a preponderant disposition to treat slavery as an option to be discouraged but nevertheless a matter sufficiently sensitive as to make that difficult.

The next implementation event of the Founding era is the manner in which, when the constitutional prohibition had expired, the international slave trade was prohibited. The President and his Secretary of State initiated the process in 1807 with some apparent pleasure. They encountered a difficulty, however, which no one had anticipated. It centered on the question of what to do with any contraband (that is, ships and slave cargo) that may be apprehended. Jefferson's original proposal envisioned a traditional disposal in the interest of the government. But other parties, especially Quakers, pointed to the grand paradox that would involve the United States in selling Africans as a means of denying that privilege to American citizens in the name of the rights of humanity. Madison's speech of 1789—we treat persons as property in law in order to be able to prevent their being treated as property in practice—resonated loudly. It quickly became clear that Jefferson's proposal involved a mere oversight. Yet, it was immensely difficult to discern what else might be done.

The counterproposal, that the Africans be freed rather than sold, was the immediate cause which touched off heated debate in 1807, but that debate, above all in the House of Representatives, produced the first compromise on slavery admitting the existence of irreconcilable differences between north and south. Here, for the first time, there was an explicit threat of civil war over the institution of slavery, and an accommodation which recognized that "Easterners" must not be asked to turn their backs on the Founding and principles of humanity, while "Southerners" must not be asked to condemn their own way of life. Therefore, the northern proposal to free the cargo within the United States and even within the slave states, was amended, first, to freeing them only in the north (i.e., indenturing them for a term of years at a stipulated wage), and ultimately, to remanding them on such provisions as the states might make, with only a tacit understanding that they were not to be dealt with as property.

It is interesting to speculate about what might have eventuated had Jefferson and Madison reflected initially on the impropriety of proposing legislation to handle the Africans as contraband. They may well have discovered the key whereby to unlock the door to the interstate commerce power as a device for regulating slavery. Not only did they not envision such a debate in 1807, however, but more importantly no one else did. Not even the Quakers, whose sharp-sightedness prevented a moral catastrophe, applied their principles in this way. It seemed in 1807 that no one at all, whether defender of slavery or abolitionist, looked at the "migration" language of Article I, section 9 as a probable means to resolve this difficulty.

This lends powerful credence to Madison's 1819 claim that the language of the migration portion of the slave trade clause did not apply to slaves, though it may have regarded free blacks.ii His further remark, to the effect that any attempt so to construe it would have caused a brouhaha, helps explain the absence of recourse to it in 1807. As noted, the mild debate which did eventuate in 1807 produced threats of secession and war. Accordingly, Madison simply maintained that public opinion would not have abided such a turn, pointing to the one theme he consistently enunciated throughout his career, namely, the necessity of consent, not only to institute the government but to institute the fundamental change envisioned. This Madison explained repeatedly, as he did to Robert Evans in 1819.iii For Madison, the key to this progressive regime was consent, the index of which was public opinion. Whatever was to be accomplished had to be accomplished by that medium. So fervently did he believe this that he not only subordinated abolition to it, but, as he expressly recounted, all his labors to form the Democratic-Republican Party were predicated on that premise.

While public opinion in 1807 countenanced the prohibition of the slave trade, it did not countenance federal abolition of slavery. In the end, for Madison, the theory of republicanism is not a theory about institutional relations; it is a theory about the dependence of power on opinion. "Changes" in his views all took place at the surface, because, like planets, ideas about constitutionality wander about a fixed sun.iv

Efforts to implement Article I, Section 9, Clause 1, therefore, reveal a mosaic that captures all of the dimensions of the role of slavery and race in American politics. That role must be considered against the backdrop of the principles of the regime, because actions touching upon slavery and race bear heavy implications for those principles, and vice versa. This does not result from any cultural or traditional pattern so much as from the conscious choices with which Americans wrestled at every turn in our nation's history, up to and including the decisions of the present generation.

It is especially obvious in the 1807 struggle over the prohibition of the slave trade: From the moment that slavery was in any degree limited, there arose to replace it the problem of how to handle the question of race. The answer to that question rests, in turn, not only on the fact that the consciously chosen principles of the regime entail equality and liberty for all humans but, far more importantly, on the question whether they require an open, heterogeneous society. The decisions that were made on this question in the aftermath of the War of American Union, in the form of the post-war amendments and civil rights legislation, indicate a positive response to the latter. But how far was that also true at the time of the Founding itself?

While it is inaccurate to assert that no one prior to the last half of the nineteenth century imagined an interracial society founded on the principles of the Declaration of Independence, that question is of minimal concern here. First, it is of minimal concern because it is subordinate to the question of whether the Declaration was understood to include all human beings without regard to the practical social implications of that principle. Second, it is of minimal concern because the status of slavery and race under the Constitution or regime—and how to legislate in regard to it—is and has been a single question. Madison's concern to avoid the "imbecility" of a country filled with slaves does not require the corollary of turning slaves into free citizens in the republic. As the 1807 slave trade debate reveals, however, that is the very question which arises

the moment the freedom of the African is conceded. Hence, the debate was in fact a debate about whether and how to integrate Africans within the United States. The fact that Americans posed the same kind of question then and now points the way to an understanding of the dilemma we now face.

i Pennsylvania State Ratifying Convention, December 3, 1787.

ii Letter to Robert Walsh,, November 27, 1819, printed in Max Farrand, Records. op. cit., vol. III, p. 436.

iii Letter to Robert Evans,, June 15, 1819,, in The Writings of James Madison, ed. by Gaillard Hunt (New York: G. P. Putnam I s Sons, 1908), vol. VIII, pp. 439-441.

iv See especially Madison's account of his "different" opinions on the constitutionality of a national bank, in the letter to President Monroe, December 27, 1817. Works, vol. III, pp. 55-56

W. B. Allen

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April 5, 2011 – Article I, Section 9, Clause 2 and 3 of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Article 1, Section 9, Clause 2 and 3
2: The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. 3: No Bill of Attainder or ex post facto Law shall be passed.

The Great Writ. The writ of habeas corpus, protected in Article I, Section 9, clause 2, is often regarded as the cornerstone of the rule of law in Anglo-American jurisprudence. Alexander Hamilton, writing in Federalist 84, approvingly quotes Blackstone that habeas corpus is the " bulwark of the British constitution," in that it prevents the "dangerous engine of arbitrary government" that comes from "confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten."

Some historians trace the writ back to Magna Charta, although more definitive evidence shows a gradual emergence under the common law, culminating in the Habeas Corpus Act of 1679, during the reign of Charles II. As Hamilton's comment shows, the Framers were well aware of the writ. Note that the Constitution does not "create" the writ; rather, Article I, Section 9, assumes the existence of the writ, but provides for its limited suspension.

Congress early confirmed the federal courts' jurisdiction to issue the writ in the Judiciary Act of 1789, though the scope of the jurisdiction has changed over time. It is even plausible, though not without doubt in light of 19th century precedent, that the power to issue writs of habeas corpus is so tied to the essential role of the federal courts that they could issue writs of habeas corpus even if Congress had not affirmatively recognized that power.

The writ is commonly said to be an instrument only to test the constitutionality of the detention, not to adjudicate the guilt or innocence of a detainee. In other words, it is not the same as a right to appeal a conviction, but a "collateral attack" on the right of the government to detain the prisoner at all. In some fashion, though, habeas corpus is broader than an appeal. Rights of appeal are usually limited in time. Petitions for habeas corpus traditionally were not so limited and could be brought repeatedly, years after trial.

There are two areas where the use of habeas corpus has become controversial in the last few decades. One is the use of federal courts to challenge state criminal proceedings, especially in death penalty cases. The other is the applicability of the writ to detainees in military custody.

As to state criminal proceedings, the problem began with the Supreme Court's "incorporation" into the 14th Amendment of criminal procedure protections in the Bill of Rights. This process, principally during the Warren Court, extended the federal courts' supervisory powers over state court proceedings. Justice Frankfurter as early as 1953 warned of the writ's "possibilities for evil as well as good," in light of the roughly 400 to 500 habeas petitions brought in federal court by persons in state custody. By the end of the Warren Court, that number increased to 12,000 per year. It continued to climb until the Rehnquist Court in the 1990s began to stem the deluge.

Today, habeas petitions are still a favorite pastime of "jailhouse lawyers," as well as of attorneys who represent inmates with various complaints, from prison overcrowding or medical care to more individualized concerns about ineffective assistance of counsel in capital cases. But federal laws and Supreme Court decisions now require petitioners to meet stiffer tests for such collateral review. In part these restrictions have been justified by the perceived greater due process protections in state criminal proceedings compared to 50 years ago. In part it is the conscious institutional desire of the Rehnquist and Roberts Court majorities to shift more business out of the federal courts into the state courts. It is the latter, after all, who are the courts of "general jurisdiction" in our federal system. In part it is simply the federal judges' impatience with the sheer volume of repeated and frivolous petitions. Even before the floodgates opened, only a very small percentage (6%) of petitions were found to have merit. As so frequently happens, the increase in quantity over the years led to a further decrease in quality.

Regarding jurisdiction over people detained by the military, the writ has a checkered past. Early in the Civil War, President Lincoln suspended the writ in a portion of Maryland (a de facto imposition of martial law). In 1861, Chief Justice Taney issued the writ to the military jailer of a Maryland secessionist arrested for destroying railroad bridges. When the military commander ignored the writ, the Chief Justice, in Ex parte Merryman, denounced Lincoln's action, arguing that Article I, Section 9, dealt with limitations on Congress's powers. Therefore, only Congress could suspend the writ.

In classic implied executive powers fashion, Lincoln responded that the Constitution did not specify which branch could suspend the writ, only the conditions under which it could be suspended.

Moreover, the President could act due to the emergency involved. Both Lincoln and his attorney general, Edward Bates, declared that the judiciary was incapable of dealing adequately with organized rebellion. Bates, in his more detailed opinion, pointedly reminded the Court that the executive was not subordinate to the judiciary, but one of three coordinate branches of government. The President took an oath to "preserve, protect, and defend the Constitution," Bates asserted, and the courts were too weak to accomplish that task.

In 2008, the Supreme Court decided Boumediene v. Bush. There, Justice Kennedy, in a 5-4 opinion, declared portions of the Military Commissions Act of 2006 unconstitutional, most significantly the portion that denied habeas corpus review to Guantanamo detainees. Aside from a host of constitutional and practical problems with the Court's opinion, particularly troubling was the Court's extension of the writ to people outside the sovereignty of the U.S. To do so, the Court had to distort the traditional Anglo-American understanding that the writ applied only within the nation's territory.

While the writ has long applied to procedures of military courts, the Court previously made clear that it did not apply to acts of such courts outside the U.S. Thus, in Johnson v. Eisentrager in 1950, the Court, speaking through Justice Jackson, rejected a habeas petition from German prisoners who had been convicted of war crimes by an American military commission and were held at an American military prison in the American occupation zone in postwar Germany. The Eisentrager Court found "no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy, who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction."

Where Justice Jackson and others feared to tread, Justice Kennedy rushed in. As Justice Scalia wrote in dissent in Boumediene, what drove the Court's opinion was "neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated sense of judicial supremacy." Precisely the attitude that President Lincoln and Attorney General Bates had emphatically rejected in their response to Chief Justice Taney.

Whether the Boumediene opinion has precedential virility, or whether it is merely judicial posturing, remains to be seen. Justice Scalia feared that it is likely to be the former. Early indications from the circuit courts suggest the latter. Those courts have read Boumediene narrowly as applying only to Guantanamo, not, for example, to detainees at Bagram Air Base in Afghanistan. If that interpretation prevails before the Supreme Court, Boumediene is mere institutional chest-beating.

More troubling, in the long run, is the possibility that Justice Scalia's concerns are well-founded, and that the Court's use of habeas corpus in Boumediene is part of the expanding notion of "lawfare" that threatens to tie down the President's commander-in-chief powers through a web of legal regulations and procedures, an American military Gulliver tied down by legal Lilliputians.

As Justice Frankfurter warned, the writ has "possibilities for evil as well as good."

Note: Professor Knipprath will address Article I, Section 9, Clause 3 of the United States Constitution in his upcoming essay on: Article 1, Section 10, Clause 1, Scheduled for publication on April 11: 1: No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

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April 6, 2011 – Article I, Section 9, Clause 4-6 of the United States Constitution – Guest Essayist: Allison Hayward, Vice President of Policy at the Center for Competitive Politics

Article 1, Section 9, Clause 4-6
4: No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.7
5: No Tax or Duty shall be laid on Articles exported from any State.
6: No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

Benjamin Franklin is credited with observing that nothing is certain except death and taxes. In clauses 4-6 of Article I, the Founders were attempting to assuage concerns Americans had over the ability of the national government to levy taxes. The power to raise revenue was essential – the national government would be moribund without finances. But the national government could come under the sway of parochial interests, and the taxing authority could unfairly burden certain regions.

With clause 4 "Congress might not have the power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another" noted Hugh Williamson, a North Carolina delegate to the constitutional convention. Delegates from Southern colonies were especially sensitive to this issue.

Thus in Clause 4, the Constitution requires that direct taxes only be assessed in proportion to population, as determined by the census that apportions members of Congress. (Recall that the census apportioned representation according to the number of free persons and three/fifths of the slaves). A capitation tax, or "poll" tax, was nothing more than a tax on individuals. Poll taxes were most commonly assessed at the local level, for goods like roads and schools. Here, the Founders believed that commerce would ordinarily provide tax revenue, and that a direct tax would seldom be used at the national level. But the Founders also knew that urgent situations, like war, might exceed the nation's capacity to raise revenue through tariffs and excise taxes.

As an aside, the poll tax roll was also a means to evaluate who lived in a jurisdiction, and so were also used to identify eligible voters. This is the context most people today think of when they hear the phrase "poll taxes" so the mistake is often made of thinking that "poll" means the place where votes are cast. The Founders would have ben using "poll" on the older sense, that is, a tax on individuals.

Southern delegates were also sensitive to the potential harm arising from Congress's taxation of exports. in the debate over Clause 5, advocates argued that, were Congress given this power, it could unfairly burden the exports of some states and not others. Different states had vastly different export profiles – think of how an export tax on cotton would have applied in practice. Yet the solution incorporated in the Constitution remained controversial, given the economic advantages Northerners believed that the South derived from slavery. Thus, even as anodyne as this clause may appear today, it passed by only a vote of 7-4, with New Hampshire, Pennsylvania and Delaware voting no, and Massachusetts abstaining.

In Clause 6 the constitution yet again limits congressional power to favor one region over another. Under clause 6, Congress would lack the power to regulate a disfavored state's maritime commerce out of existence. This issue was of special concern in Maryland, because Maryland-bound shipping would pass ports in Virginia. A few delegates believed this clause would impose inconveniences in some situations, but relented in favor of those states with strong interests in these limits.

The revenue profile of our nation today is quite different from what the Constitutional Convention anticipated. Indirect taxes, like excise taxes and tariffs, account today for only about 3% of the federal government's revenue, while about half comes from individual income taxes – a direct tax that could only come into existence by amendment to the Constitution, in Amendment XVI, ratified in 1913. That change came quickly – by 1930, 60% of the federal government's receipts were from the income tax.

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April 7, 2011 – Article I, Section 9, Clause 7 of the United States Constitution – Guest Essayist: Dan Morenoff, Attorney

Article 1, Section 9, Clause 7: No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

This clause of the Constitution seems utterly unremarkable today. It reads like an accounting textbook, never hinting at the long history of struggle summed up in the first sixteen (16) words. Nor do the remaining twenty-two (22) words indicate, on their face, the antiquity of the ethical judgment they imply. Yet, if you scratch the surface, the Appropriations Clause holds wonders.

For centuries before the Constitution's ratification, English-speaking legislatures had contended with the executive for control over the power to spend. Beginning with Runnymeade and the Magna Carta, what would become Parliament had striven to limit the King's control over money raised and spent. While religious and commercial differences played a role in the conflict, the English Civil War began as a battle over Parliament's exercise of independent judgment in refusing to support a King's call for greater taxes. By 1689 at the end of the Glorious Revolution, Parliament had written into law through the English Bill of Rights legislative control over the raising of money, asserting "[t]hat levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament … in other manner than the same is or shall be granted, is illegal." Parliamentary control over how Kings spent the funds Parliament helped raise began with the insertion of instructional language into a grant of funding in the 14th Century. While Parliament's control over spending remained incomplete in the 1780s, English-speaking legislatures had been trying to control how funds they raised were spent for 400 years before the founding.

On the West side of the Atlantic, these efforts were accelerated by the distaste the Colonials often had for the Crown's appointed Colonial Governors. So firmly had Colonial legislatures established control over what funds were taxed, borrowed, and spent by Governors that Madison could define the "power of the purse" in the Federalist Papers as the power "to propose the supplies requisite for the support of government" and safely assume that his readers would know exactly what he meant. Indeed, in Federalist 58, Madison went further, explaining the power, not entirely accurately in terms of British practice, but consistent with the Colonial experience of annual, line-item appropriations, as:

that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activities and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining redress of every grievance, and for carrying into effect every just and salutary measure.

The Appropriations Clause wrote this Colonial practice into stone. In America, no money would leave the treasury without the passage of an appropriations bill passed by Congress. The

intervening centuries under the Constitution have seen further conflict over the contours of the Appropriations Clause – for example, battles over Presidential discretion to "impound" appropriated funds (meaning, to refuse to spend them). But the bedrock principle of the Appropriations Clause has almost never been called into question.

Ancient as the story hidden within the first half of the Appropriations Clause is, the second half of the clause, that requiring "a regular Statement and Account of the Receipts and Expenditures[,]" has it beat by thousands of years.

The core, ethical requirement of the clause is that any one entrusted by law to spend the people's money has a duty to show that he has done so as a faithful steward. That requirement has its roots in the book of Exodus. Moses himself came back after the construction of the Ark of the Covenant with a report on how the funds raised were actually spent.

The Founders expected their Presidents to be no more ethical people then Moses had been. Accordingly, they wrote into the Constitution a requirement of the same kind of reporting Moses had provided.

As a result, the clause is one of the clearest examples of biblical influence on the Constitution.

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April 8, 2011 – Article I, Section 9, Clause 8 of the United States Constitution – Guest Essayist: Kyle Scott, Political Science Department and Honors College Professor at the University of Houston

Article 1, Section 9, Clause 8: No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Following Section 8, in which the powers of Congress are enumerated, Section 9 enumerates the restrictions that the Constitution places on Congress. The final clause of Section 9 states that Congress cannot grant titles of nobility nor anyone holding any state or federal office can accept a title from a foreign state unless first approved by Congress.

The first part of Clause 8 is perhaps the most cited and directly applicable to contemporary concerns. Think of all the czars who have been appointed recently by the President. It can be argued that being a czar is not noble, nor is the title one of British nobility, but that would construe the term and the intent far too narrowly. The Founders did not want an aristocratic ruling class who were insulated from the public. That seems to be the very definition of the

recently appointed czars who usually have close personal ties with the appointing President or one of his officials. Furthermore, theses czars are insulated from the influence of the public and congressional oversight.

This is the obvious interpretation of the Clause. What usually goes unnoticed is the second part.

The first thing that strikes me when reading this Clause is the phrase "no Person holding any Office of Profit or Trust under them," specifically the use of the term "them". It is uncommon for most of us to use the pronoun "them" instead of "it" when referring to the United States. Reading this sentence in conjunction with the Preamble, we can better understand what the Founders meant when they wrote, "We the People, of the United States of America." If their view held consistent between the Preamble and Article I, which it surely did, then We the People would seem to mean the people of the states rather than a single national people. This is more than just a pedantic discussion of constitutional interpretation however, but instead one more instance of how a close reading of the Constitution can provide solutions to contemporary political debates.

Here is how.

The national government overshadows our states which is partially due to, or has at least led to, our viewing the United States as a singular rather than a plural. In viewing the United States as a plural we can understand it as a compact between the states, and their citizens, rather than between the people of a national, single United States. This understanding is quite consistent with the view expressed by Madison and Jefferson in the Virginia and Kentucky Resolutions respectively. If we were to adopt this reading of the American Constitutional tradition, and its implications as articulated by Madison and Jefferson, we would have a more decentralized regime, and the national government would be more limited as a result. If national action required the consent of the states, and the people of the states as citizens of their respective states rather than national citizens, there would be a more significant check on the national government's ability to push through controversial legislation or for the growing bureaucracy to implement plans inconsistent with the will of the people. If we had maintained this view of the Constitution, chances are the recent health care reform would have been blocked, or at least restricted to only those states that supported the reform. It would also be unlikely that federal agencies like the EPA would be able to force states to abide by their administrative rules without the consent of the states.

The common thread that runs through the first and second parts of Clause 8 is an aspiration towards limited government, which then makes this Clause thematically consistent with all of Section 9 as it is here that the limitations on Congress are enumerated.

It is no surprise to anyone that the Founders wanted limited government, but it is important to understand why and how they went about trying to achieve it. And while it is easy to cite specific sections and clauses to this effect, it is more important to explain what those citations mean. The Constitution demands a reading that searches for a political theory for it is only then that we can formulate a coherent argument about what the Founders would have to say about contemporary matters.

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April 11, 2011 – Article I, Section 10, Clause 1 of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Article 1, Section 10, Clause 1: No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

What if a state, laboring under a significant budget deficit, decided to repudiate its general obligation bonds? What if that state, further, enacted an increase in the income tax, retroactive to the beginning of the year? Would Article I, Section 10, clause 1 permit such actions?

The first part of that clause, along with clause 3 of the section, restricts the states to only a very limited capacity at international law, and states may exercise even that residue only with permission of Congress. The Articles of Confederation restricted these powers already, as the exercise of them by the states would undermine national sovereignty. The new Constitution simply tightened them and made them more concise, in recognition of the fact that these restrictions were an integral part of the establishment of a stronger Union.

The second part of that clause, dealing with money, bills of credit, and gold and silver as legal tender, addressed the pestilence of paper money issued by the states. Many of the Framers saw this as a particular problem that contributed to the insecurity of property in various states and the economic turbulence that, in turn, produced political turbulence and threatened the republican experiment. It had been the practice even of colonial assemblies to fund the costs of military campaigns by quasi-confiscatory practices of issuing bills of credit (paper money on the credit of the colony) to merchants and suppliers of war materiel. After the war, those bills of credit rapidly depreciated, as the colonists declined to vote the taxes necessary to pay them. Once the bills reached a sufficiently low level, they could be taxed out of existence relatively painlessly.

It was hardly surprising, then, that the states (and the Continental Congress) would resort to that same hoary practice on declaring independence. By war's end, Congress had issued $226 million in bills of credit, for which it had received $45 million in goods and services, as Americans increasingly took into account this species of public finance fraud. However, the paper currency itself had depreciated essentially to nothing, a massive (and conscious) expropriation of private property by inflation, engineered by a body that lacked the formal

constitutional powers to do so. "Not worth a Continental" was not a metaphor. Benjamin Franklin defended this confiscatory practice as an equitable form of taxation as these bills were held more by the upper-middle and upper segments of society than by the poor. John Adams dismissed critics of the devaluation with a curt, "The public has its rights as well as individuals." In the end, Congress never redeemed the paper currency.

If the Congress was bad, in some ways the states were worse. Not only were there problems with the emission of bills of credit (though that was less significant than for Congress), but with other, broader confiscatory and debt cancellation laws. To the extent that such laws injured the interests of Loyalists and British creditors, they violated the peace treaty with Great Britain and threatened to reignite the war. To the extent they hit their own citizens, the states were flirting with class warfare. At best, even in the absence of a specter of violence, state politics circled around the vortex of the depreciated bills, as holders, speculators, and debtors (who were not always different persons) jockeyed for political and economic advantage. This contributed to the instability of state politics and prevented establishing a basis for long-term social peace and material prosperity.

Historians, including conservatives such as Forrest McDonald, indict this period after independence for making Americans less secure in their property rights than they had been under King George.

To an increasing number of Americans, especially younger figures such as Hamilton and Madison who were not as tied to the "revolutionary spirit," the reason was that "governments were now committing unprecedented excesses, even though–or precisely because–governments now derived their powers from compacts amongst the people." The period was a vivid illustration that democratic self-rule does not, without more, set a society on the path to the security of property and long-term well-being. Even more alarming was the fact that those same state governments were acting under constitutions that nominally protected individuals' liberty and property from just such majoritarian muggings.

It is no wonder then, that many of those who gathered at the convention in Philadelphia, viewed the levelling tendencies of such fiscal and redistributionist laws with consternation and as evidence of the irresponsibility of popular majorities. There was no opposition to the portions of Article I, Section 10, that negated the states' abilities to coin money, issue paper currency, or make anything but gold and silver legal tender. Some delegates wanted that prohibition extended to Congress, but the majority demurred. The need for paper money during emergencies, combined with the Madisonian faith that a more effective balance between debtor and creditor interests would produce better political checks against excesses at the national level than within the states, gave the majority pause about tying the hands of Congress.

In hindsight, both sides can claim vindication. Certainly, the issuance of fiat money during the Civil War helped the Union's war effort. On the other hand, the flood of trillions of dollars sloshing around today during peacetime can easily become a tsunami that destroys the economic well-being of large numbers of Americans. And, contrary to Franklin, devaluation and inflation typically hit the lower and middle classes more than it does the wealthy. Inflation is a brutally regressive tax.

One tool of the Framers was to ban retrospective laws. The first was the prohibition on ex post facto laws, one that also applied to the national government under Article I, Section 9. Apparently many of the Convention (including Madison) thought that ex post facto laws covered all retrospective laws. This produced a moment that demonstrates that the Framers were ordinary humans, finding their way through the constitutional fog, not infallible divine creators. The day after the vote, John Dickinson sheepishly announced that he had looked up "ex post facto" in Blackstone and found (correctly) that this only prohibited retroactive criminal laws.

Similarly, bills of attainder (legislative decrees of punishment of individuals used expansively during the English Civil War, but not unknown even in the newly-independent states) were prohibited for the states and the national government, primarily because of their retroactive application to acts already committed. Bills of attainder and ex post facto laws were viewed as such outrageous infringements of liberty that they were denounced as contrary to the protections of the social contract and the very nature of a republican government of free men.

But that still left the issue of retrospective civil laws. The contract clause of Article I apparently was the vehicle to deal with the vexatious laws that, in tandem with the paper currency policies, cancelled debts or otherwise interfered with existing contracts. Although the origin of the clause is obscure, it is similar to one found in the Northwest Ordinance of 1787, passed by the Confederation Congress. The author at the Convention probably was Hamilton, who, after his personal experience with Pennsylvania's capricious revocation of the charter of the Bank of North America, also saw the potential of the clause to protect banks and other corporations from state harassment.

The contracts clause was an early vehicle for the Supreme Court to promote the rule of law and the stability of rights in property. Chief Justice Marshall, in particular, read the clause broadly to

protect individual rights in contracts. Indeed, his interpretation went so far as to prevent the states from interfering with the obligations of contracts even prospectively, a view that was probably beyond that envisioned by the Framers and which led to Marshall's only dissent in a constitutional case in 34 years on the Court.

Much has changed since then. Today, the Supreme Court has reinterpreted the categorical language of the clause to prohibit only laws "unreasonably" impairing the obligation of contracts. This has effectively eviscerated the clause's protections against most state laws that interfere with purely private contractual relations, even those that are retrospective. States, and the federal government (to which the contracts clause does not apply directly), are relatively free to force creditors to revise terms of existing debt instruments, such as mortgages) when debtor interests gain enough political traction.

Neither of our hypothetical state laws would be unconstitutional under the ex post facto clause, as they do not deal with crimes. There being no "contract," the only limitation on the retroactive tax increase would be vague notions of "notice" to the taxpayers under the due process clause of the 14th Amendment. The repudiation of state bonds would be a closer case, and states well may run into difficulties under the contracts clause if they were to try to repudiate their bonds (or to curtail vested public employee pensions).

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April 12, 2011 – Article I, Section 10, Clause 2 of the United States Constitution – Guest Essayist: Justin Butterfield, Constitutional Attorney, Liberty Institute

Article 1, Section 10, Clause 2: No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

One of the primary difficulties in the establishment of the United States' government was striking the right balance between states' rights and the need for a national government that could present one face towards the rest of the world while maximizing the strengths of uniting the states. Under the Articles of Confederation, the first attempt at a government for the United States of America, power was so decentralized that each state almost operated as an independent nation. States were entering into their own treaties with foreign nations; states were coining their own money; and states were setting their own tariffs, both for goods from other nations and from other states. Article 1, Section 10, Clause 2 of the U.S. Constitution was a response to the economic and political disunity and inefficiency that existed because of each state's ability to set its own tariffs under the Article of Confederation. These tariffs were damaging both economically and politically.

Economically, the protectionism of the states and the corresponding tariffs eliminated the trade advantages that would otherwise have come from the union of the states. In 1776, Adam Smith's Wealth of Nations set forth the principles that would ultimately replace the economic policy of mercantilism with capitalism and free trade. Among these principles were that one should "never attempt to make at home what it will cost him more to make than to buy." Associated with this principle is the idea that goods should be produced where it is most efficient to produce that type of good and traded for other goods that can more efficiently be produced elsewhere. Because of the diverse geographies and climates of the states, the union of the states within the United States of America should have resulted in great efficiency of trade, increasing the wealth of all of the states. Cotton, better produced in the southern states, could have been traded for manufactured goods produced in the northern states. Instead, under the Articles of Confederation, one state would set tariffs against another state so high that the benefits of trade were lost. Trade wars broke out between the states. New York imposed high tariffs on products from New Jersey and

Connecticut, which responded in kind. States with major ports were also able to set high import and export duties, hurting neighboring states that did not have their own ports. This protectionism among the states fueled rivalries among the states and encouraged each state to be as self-sufficient as possible to avoid having to pay high tariffs to other states. These tariffs thus prevented both free trade and the benefits that Adam Smith's Wealth of Nations predicted would be brought about by that trade.

In 1827, the Supreme Court, in Brown v. Maryland, looked back on the tariff wars between the states and the establishment of Article 1, Section 10 Clause 2 of the U.S. Constitution:

From the vast inequality between the different states of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several states exercised, or seemed disposed to exercise, the power of laying duties on imports. …

A duty on imports is a tax on the article, which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports.

This would necessarily produce countervailing measures on the part of those states whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the states.

The ability of states to set their own tariff levels also led to political problems for the United States as a whole. Although the Articles of Confederation sought to present the union of the states to the world as a unified whole, foreign nations could not trade with the United States as one nation because each state had its own tariffs. Additionally, because each state could set its own tariffs, foreign nations refused to negotiate trade agreements with the United States. The inability of the confederate government to regulate tariffs illustrated its fundamental weakness to the governments of other nations.

In the late eighteenth century, tariffs and economic protectionism were no less a major economic and political factor than they are today. With each state able to set its own tariffs, many of the benefits of being one nation were lost, and economic and political warfare and chaos ensued.

Through Article 1, Section 10, Clause 2 of the U.S. Constitution, many of the economic issues facing the states under the Articles of Confederation were corrected.

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April 13, 2011 – Article I, Section 10, Clause 3 of the United States Constitution – Guest Essayist: Julia Shaw, Research Associate and Program Manager at the B. Kenneth Simon Center for American Studies, The Heritage Foundation

Article 1, Section 10, Clause 3: No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

The Founders understood that the federal government can threaten individual liberty, but so can the state governments. The Constitution recognizes threats from both actors and, therefore, contains specific limitations on both. Article 1, Section 9 limits the federal government; Article 1, Section 10 limits state governments.

Section 10 consists of absolute prohibitions on the states (e.g., prohibitions relating to military and monetary powers) and qualified prohibitions on the states (i.e., prohibitions that Congress may suspend).

Section 10, Clause 3 contains qualified prohibitions on a variety of activities. The prohibition on states charging duties of tonnage prevents state-specific protectionism and protects Congress's commerce power. Because standing armies were a grave threat to the new republic, the constitution prohibits them at the state level. States may maintain militias, but not standing armies. But, the most significant portion of the clause concerns the ability of states to enter into agreements with foreign nations or other states. As Michael S. Greve notes in Compacts, Cartels and Congressional Consent, "For a federal republic, and especially for a nascent federal republic, the prospect of separate, unsupervised agreements among its member-states and between a member-state and a foreign nation must constitute a cause for alarm."[1]

The Articles of Confederation forbade the states from entering into an agreement with foreign powers. Additionally, any "treaty, confederation, or alliance whatever" among the states required congressional consent, and Congress would settle any disputes arising between the states. But the Articles of Confederation proved ineffective. The Constitution supplied a remedy. The Constitution created a new apparatus for the federal government to engage foreign nations: the president would be the chief actor in foreign affairs. He would negotiate treaties and, in turn, the Senate had to ratify treaties before they went into effect. Individual states could not enter into agreements or treaties with foreign nations. But, in the event of foreign invasion, an individual state could respond.

Agreements between the states pose threats to federal powers, to states not party to the agreement, and even to individual rights. By requiring such agreements to have the consent of Congress, other states would be informed of the agreement and able to protect their interests and the rights of their citizens. In many ways, congressional approval on state compacts was a compromise. James Madison wanted to give the federal government a much broader power over the state governments: specifically, he advocated a congressional negative on state laws. Delegates at the Convention compacts clause rejected Madison's proposal—three times—as

overly nationalist and unnecessarily broad. The Convention instead opted for federal supremacy over certain categories of activity, blanket prohibition of some activity, and congressional approval for any agreement between the states. Together these prohibitions mollified Madison's concerns and protected against state governments' encroachments on liberty.

Though the Compacts Clause makes clear that forming compacts is prohibited without the consent of Congress, it is not clear what form that consent must take. Does it require a law be passed and signed by the president? Or can Congress accomplish it without presentment? Nor does the clause specify whether Congress must consent prior to the formation of the compact. There is also debate about the scope of these compacts. Compacts prior to 1921 primarily concerned boundary disputes. Compacts in the later 20th century include complex regulatory schemes that may present separate constitutional problems. These ambiguities will likely be tested as states become more creative with the scope and substance of their agreements.

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[1] Michael S. Greve, Compacts, Cartels, and Congressional Consent, 68 M.L.Rev. 285, 296 (2003).

April 14, 2011 – Article II, Section 1, Clause 1 of the United States Constitution – Guest Essayist: Lawrence J. Spiwak, President of the Phoenix Center for Advanced Legal and Economic Public Policy Studies

Article II, Section 1, Clause 1: The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Under Article II Section 1, Clause 1 of the Constitution, the "executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected…" By establishing the then-radical concept of an elected Chief Executive with a fixed term, the Founding Fathers made a bold statement to the world that the newly-formed United States of America was rejecting outright any notion that it would tolerate a new American monarchy (and, with it, presumably an accompanying peerage of Lords made up of selected landed gentry).

Without question, time has proved that the concept of an elected chief executive with a fixed term has served the American people well. Yet, when this idea was first proposed, the citizens of a post- Revolutionary War America were skeptical. As a result, Alexander Hamilton was forced in Federalist No. 69 to sell the Founder's vision to a wary public.

Hamilton began his essay by reiterating the point that one simply could not compare the position of President to the King of England, for if one did, "there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York." Indeed, explained Hamilton, while the President is "re-eligible [only] as often as the people of the United States shall think him worthy of their confidence," the King of England was a "hereditary monarch, possessing the crown as a patrimony descendible to his heirs forever." (Emphasis in original.) As Hamilton so elegantly summarized the issue: "The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable."

But Hamilton did not stop there.

For example, Hamilton explained that while a President could be impeached, "there is no constitutional tribunal to which [the King] he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution."

Similarly, Hamilton pointed out that while a President can veto a piece of legislation, the Congress can nonetheless override this veto by two-thirds votes in both houses. In contrast, the King of England had "an absolute negative upon the acts of the two houses of Parliament."

Moreover, while a President may "nominate, and, with the advice and consent of the Senate, to appoint ambassadors and other public ministers, judges of the Supreme Court, and in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the Constitution", Hamilton argued that there were no such constraints on the King. (Emphasis in original.) To the contrary, Hamilton forcefully argued that the King of England was "emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure; and has the disposal of an immense number of church preferments. There is evidently a great inferiority in the power of the President, in this particular, to that of the British king…."

And what about issues of foreign policy? Again, in Hamilton's view, the powers of President and King stood in stark contrast.

Under the Constitution, while the President is the "commander in chief", only Congress may formally declare war. On the other hand, Hamilton pointed out that the power of the British King went beyond commander-in chief and extended to "the declaring of war and to the raising and regulating of fleets and armies…." (Emphasis in original.)

Moreover, while the President has the power to make treaties only with the advice and consent of the Senate, Hamilton demonstrated that the King was "the sole and absolute representative of the nation in all foreign transactions" and could "of his own accord make treaties of peace, commerce, alliance, and of every other description."

So, viewing Hamilton's arguments with the benefit of over two hundred years of history, what can we learn about Article II Section 1, Clause 1 of the Constitution? In my view, the lesson is simple and obvious: no matter how much we may disagree with the policies of a particular President, there are (fortunately) significant Constitutional checks and balances to curtail

potential abuses of his authority. Indeed, to paraphrase Hamilton, so long as the power of the government remains "in the hands of the elective and periodical servants of the people", the United States is no danger of being characterized as "an aristocracy, a monarchy, and a despotism."

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April 15, 2011 – Article II, Section 1, Clause 2 of the United States Constitution – Guest Essayist: Tara Ross, Author, Enlightened Democracy: The Case for the Electoral College

Article II, Section 1, Clause 2: Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Each State shall appoint . . . a Number of Electors . . . .

On November 4, 2008, Americans went to the polls and expressed their preferences among Barack Obama, John McCain, or other candidates. Many Americans probably thought that they were actually casting ballots for one of these men: We have gotten used to thinking of presidential elections as ones in which we vote directly for the candidates. Yet that is not really how American elections work. In reality, the only people elected on Election Day are representatives, called electors, whose sole duty is to represent their states in a subsequent election among states. This latter election—the real presidential election—determines the identity of the President of the United States.

Article II, Section 1, Clause 2 provides the boundaries for the appointment of these electors.

The Constitution provides that each state is to decide, for itself, how its electors will be chosen. During the first presidential election, states relied upon a wide range of methods. Several state legislatures appointed electors directly, on behalf of their citizens. No presidential election, as we think of it, was ever held in those states. Other states relied upon popular votes, but in different ways. For instance, Maryland directed that certain numbers of electors were to be elected from designated parts of the state. Virginia created 12 districts specifically for the election of electors; these districts were separate from the ten districts created for the election of Congressmen.

Today, every state relies upon a popular election among its own citizens. Most states then allocate their electors in a winner-take-all fashion based upon the outcome of these elections. So, for instance, when a majority of Californians expressed their preference for Obama in 2008, these votes were translated into votes for a slate of 55 Democratic electors. If McCain had won the election, an alternate slate of 55 Republican electors, committed to McCain, would have been appointed to represent California instead.

The state's authority to choose its own method for appointing electors is not in doubt. However, a few other issues remain unresolved:

First, may Congress step in if there is controversy regarding which of two slates of electors rightfully represents a state? Congress has taken such action in the past, and it claimed authority to act in the Electoral Count Act of 1887 and subsequent measures. However, some scholars argue that such federal laws impinge on the states' authority, as outlined in Article II, Section 1, Clause 2.

Second, is a state's discretion truly unlimited? An anti-Electoral College movement (National Popular Vote) hopes so. This group asks states to change their manner of elector allocation: Instead of allocating electors to the winner of state popular votes, participating states would allocate their electors to the winner of the national popular vote. These states would sign an interstate compact (a contract) to this effect. If enough states sign, the Electoral College would be effectively eliminated. NPV supporters reject the claim that their compact is an end run around the Constitution, but the question will ultimately be tested in court: NPV could be enacted with as few as 11 states, whereas 38 states are required for a constitutional amendment. Such a process seems questionable, to say the least. Justice Thomas once observed, "States may establish qualifications for their delegates to the electoral college, as long as those qualifications pass muster under other constitutional provisions." NPV may not satisfy this test.

In such Manner as the Legislature thereof may direct. . . .

Another open legal question exists regarding the meaning of the word "Legislature" in Article II, Section 1, Clause 2. Does this use of "Legislature" refer specifically to the lawmaking body or does it refer to a state's entire lawmaking process? In the latter case, the legislature and governor must act together to determine the manner for appointing electors. Also, voter referendums would be able to trump the legislature in some circumstances. The Supreme Court has not directly addressed the question, but it has come down on both sides of the issue in other contexts.

The question may seem purely academic, but it has particular importance today because of NPV. In three states, NPV's legislation has been approved by the legislature, only to be vetoed by the state's governor. Will these vetoes stand or will they be deemed irrelevant?

Equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .

States are allocated one elector for each of their representatives in Congress—both Senators and Congressmen. Each state therefore automatically receives a minimum of three votes, as it is

entitled to at least two Senators and one Congressman in the Congress, regardless of population. Puerto Rico and the Island Areas are not given electors, as they are not states. The District of Columbia did not initially receive votes because it is not a state; however, adoption of the 23rd Amendment in 1961 provided it with at least three electoral votes.

This method of allocation is consistent with the rest of the Constitution and echoes the states' representation in Congress. A portion of a state's congressional representation is based on

population (the House of Representatives; one person, one vote), and a portion is based on a one state, one vote philosophy (the Senate).

But no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Some scholars believe that electors were meant to independently deliberate: The Founders wanted a body of wise men, entrusted with the power to select the President at a time when communication was slow and unreliable. Other scholars maintain that the role of elector was created only because the delegates to the Constitutional Convention left it to states to determine how their electors were to be chosen. Either way, creation of an independent electoral body was thought to provide special benefits in the presidential selection process.

In Federalist No. 68, Alexander Hamilton wrote that the election process should minimize the opportunity for "cabal, intrigue, and corruption" in the selection of the President. Article II, he believed, accomplished this. Electors could not be bribed or corrupted because their identities would not be known in advance. Presidents would not be indebted to (potentially biased) legislators for their elections, thus reinforcing the separation among the branches of government. Separating the meetings of the electors (one in each state) would make these individuals less susceptible to a mob mentality. Finally, the selection of electors was tied to the people of a state, reminding the President that he owed his office and his duty to the people themselves.

Some of Hamilton's logic has perhaps become less applicable, given the advent of mass communication and decreasing expectations that electors are to independently deliberate. But the state-by-state presidential election system created by Article II continues to provide many benefits for a country as large and diverse as America. The White House can only be won by a candidate who wins simultaneous victories across many states; thus, candidates must appeal to a broad range of voters in order to succeed. Successful candidates bring a diverse citizenry together, building national coalitions that span regional and state lines. Such a system is as healthy now as it was in 1787.

Tara Ross is the author of Enlightened Democracy: The Case for the Electoral College

April 18, 2011 – Article II, Section 1, Clause 3 of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Article II, Section 1, Clause 3: The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not lie an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

When determining the mode for selecting the President, the Framers were faced with a conundrum. The President was to be a leader who could act with energy and dispatch. Yet he was to maintain his constitutional pedigree as a republican, and he must exercise wisdom and judgment. It was hoped that the President would be, as Henry Lee said in his eulogy of George Washington, "first in war, first in peace, and first in the hearts of his countrymen." But the president was not to gain that position as an American Caesar, a man whose immense talents and genius also proved to be fatal to that ancient republic that Revolutionary War-era Americans so admired.

Perhaps even worse, because so much more likely in the ordinary case, would be the man who, lacking the genius of a Caesar, would gain office through "talents for low intrigue, and the little arts of popularity," as Hamilton sneered in Federalist 68. To Americans of the time, "popular" suggested a certain cravenness and lack of principle. Such a person would do what advanced his political standing, rather than what was best for the country. As Plato long ago warned in his description of the demagogue (Greek for "leader of the people"), this was a particular flaw of democracy. Such a man was most likely to emerge in a system that placed no electoral barrier between the mass of the people and him.

Hamilton's response during the Philadelphia Convention was a complex multi-layered proposal of election by electors selected by regional electors themselves elected by some class of voters. Such a convoluted system resembles an electoral Rube Goldberg-contraption. However, the historically well-read Framers had the experience of other republics from which to draw, and Hamilton's system was a simplified (if that can be imagined) variant of the election of the Doge

of Venice. A system of electors avoids the democratic pitfalls of election of unqualified flatterers by a people corrupted by promises of favors or bedazzled by a façade of handsome features and soaring, but empty, rhetoric. But, without more, election by a council of the few does not avoid the oligarchic pitfalls and factionalism inherent in any cohesive and organized group, characteristics Madison warned against in The Federalist. Hamilton's proposal would increase the number of participants and disperse their decisions. This made it more difficult for a candidate to gain office by corruption and intrigue through a small and cohesive faction.

The Framers did not go along with the particulars of Hamilton's proposal. But, after making the easy call against direct popular election and rejecting, as well, election by Congress or by the state legislatures, they settled on a system similar to the one proposed by Hamilton. In the process, they resolved several practical problems. Every efficient electoral system has to provide for a means of nominating and then electing candidates. Moreover, civil disturbances over what is often a politically heated process must be avoided. There must be no taint of corruption. The candidate elected must be qualified.

As to the first, the Electoral College would, in many cases, nominate multiple candidates. Electors would be chosen as the legislatures of the states would direct. Though the practice of popular voting for electors spread, not until South Carolina seceded from the Union in 1860 did appointment by the legislatures end everywhere. Once selected, the electors' strong loyalties to their respective states likely would cause the electors to select a "favorite son" candidate. To prevent a multiplicity of candidates based on state residency, electors had to cast one of the two votes allotted to each for someone from another state. It was expected that several regional candidates would emerge under that process. There likely would be no single majority electoral vote recipient, at least not after George Washington. In effect, the Electoral College would nominate the candidates. The actual election of the President then would devolve to the House of Representatives, fostering the blending and overlapping of powers that Madison extolled in Federalist 51. The winner of the House vote would be President, the runner-up would be Vice-President.

That last step corresponded to the Framers' experience with the election of the British prime minister and cabinet, and with the practice of several states. However, consistent with the state-oriented structure of American federalism, such election in the House had to come through a majority of state delegations, not individual Congressmen. Though modified slightly by the Twelfth Amendment as a result of the deadlock of 1800, this process is still in place.

As John Jay writes in Federalist 64, the Constitution's system would likely select those most qualified to be President. Augmented by the Constitution's age requirement for President, the electors are not "liable to be deceived by those brilliant appearances of genius and patriotism, which, like transient meteors, sometimes mislead as well as dazzle."

Having the voters select a group of electors, rather than the President directly, would also calm the political waters. By making that election something other than an immediate vote about particular candidates, the process would encourage reflection and deliberation by voters about the capacity for reasoned judgment of the electors chosen. The smaller number of wise electors, in turn, would exercise that judgment free from popular passion.

Hamilton and others assured Americans that corruption and the influence of faction would be avoided by the temporary and limited duty of the electors, the disqualification of federal office holders to serve, the large number of electors, and the fact that they would meet in separate states at the same time rather than in one grand national body. Presumably, those protections fall away when the House elects the President. But Congressmen have to worry about re-election and, thus, want to avoid corrupt bargains that are odious to the voters.

The system never quite worked as intended. After Washington's election, the nomination of Presidents was informally taken over by factions in Congress, in a process dubbed the Congressional caucus system. That system immediately caused the untenable situation of a President (Adams) and a Vice-President (Jefferson) from opposing factions. The debacle of the House-controlled election of 1800 brought about by the intra-factional rivalry of Jefferson and Burr placed the young American experiment in self-government in mortal danger. That, in turn, brought limited reform through the 12th Amendment.

Though the constitutional shell remains, much of the system operates differently than the Framers thought. The reason is the evolution of the modern programmatic party, that bane of good republicans, which has replaced state loyalties with party loyalties. The Framers thought they had dealt adequately with the influence of factions (political groups that focus on a particular issue or coalesce around a charismatic leader) in their finely-tuned system. As modern party government was just emerging in Britain and—in contrast to temporary and shifting political factions— unknown in the states, the Framers designed the election process unprepared for such parties.

Today, the nominating function is performed by political parties, while election is, in practice, by the voters. Elections by the House are still possible, if there is a strong regional third-party candidate. But the dominance of the two parties (which are, in part, coalitions of factions) suppresses competition, and the last time there was a reasonable possibility of electoral deadlock was in 1968, when Alabama Governor George C. Wallace took 46 electoral votes. Mere independent national candidacies, such as that of Ross Perot in 1992, have roughly similar levels of support in all states and are unlikely to siphon electoral votes and block the usual process.

An expert on constitutional law, **Prof. Joerg W. Knipprath** has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/ .

April 19, 2011 – Article II, Section 1, Clause 4 of the United States Constitution – Guest Essayist: Gary S. McCaleb, Senior Counsel, Alliance Defense Fund

Article II, Section 1, Clause 4: The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

"Chusing the Electors," or "Interstices and the Constitution"

"Interstice" is a word that has long bemused me for some long-forgotten reason. Interstice refers to the space between things; usually small gaps within a larger framework. You can't escape interstices—you will find interstices even between the most precisely machined and measured surfaces.

The language of our Constitution might be thought of as being precisely machined—each part fits "just so" with the next part, and the whole has worked so well that it has been amended just 17 times since the it and the Bill of Rights became effective over 200 years ago. Having so few gaps that have had to be plugged by amendments over the years suggests that the Constitution's interstices are pretty darn small.

The clause of which I speak today reinforces that notion, as it exemplifies the Founders' attention to detail in their drafting. It reads, "The Congress may determine the Time of chusing the Electors,

and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."

This was originally numbered as Clause 4 of Article II, Section I, but, well, an excessively large interstitial gap showed up in the original Clause 3, which dealt with how votes were counted in the Electoral College. The election of 1796 revealed that under the original Clause 3 vote-counting scheme, the nation could wind up with a president from one party and a vice-president from the opposition party. And the election of 1800 further exposed the flaw, as it became evident then that a straight party-line vote by the electors would result in just that scenario: a president and vice- president from different parties. That was scarcely a recipe for smooth government.

So the 12th amendment was enacted to solve that problem; the original Clause 3 was thus superseded, and voilá, the original Clause 4 was renumbered to Clause 3 with its original text unchanged.

Of course, this short Clause does not stand alone in the great legal scheme of things; Congress had to act to set the date, and it did; 3 U.S.C. § 7 reads, "The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct." So despite the great hullabaloo about the popular elections in November, the "real" election takes place in December, when the Electoral College votes.

By deferring to Congress to set the exact date for the electors to vote, the Framers built flexibility into the Constitutional system so that minor procedural adjustments could be made without

invoking the cumbersome amendment process. That approach reflects great wisdom, when you consider that these men who drafted with quill pens created a document that functions effectively in an age of near-instantaneous communication. So even a humble, small procedural clause in the end demonstrates just how finely crafted this document is…!

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He has litigated religious liberty and free speech cases in federal and state trial and appellate courts throughout the United States. McCaleb graduated with honors from Regent University School of Law in 1997 and is admitted to the Arizona state bar.

April 20, 2011 – Article II, Section 1, Clause 5 of the United States Constitution – Guest Essayist: James D. Best, author of Tempest at Dawn

Article II, Section 1, Clause 5: No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

The president of the United States must meet three eligibility requirements. He or she must be a natural born citizen, be at least thirty-five years old, and have resided within the United States for fourteen years.

The first eligibility requirement is that the president be a natural born citizen.

There is an obsolete way to meet the citizenship requirement. The office seeker could have achieved citizenship before nine states ratified the Constitution. With this proviso, the eight foreign-born delegates to the Federal Convention would be eligible. Before ratification could become a possibility, the Constitution had to make it out of the statehouse, so it was tactful to make every delegate eligible for the executive position.

If a modern candidate is less than two-hundred and twenty years old, he must be a natural born citizen. Someone born inside the United States is a natural born citizen. Although some disagree, persons born outside the United States to United States citizens are considered natural born citizens. The first Congress in 1790 declared that "the children of citizens of the United States, that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural born citizens." The only reason this did not close the argument is that a Congressional statute cannot alter or clarify the supreme law of the land, but it certainly can be used to determine intent of the framers.

What was the intent of the framers? It actually varied by individual, as it did on many issues. When they debated this clause, Benjamin Franklin said, "When foreigners after looking about for some other country in which they can obtain more happiness, give a preference to ours it is a proof of attachment which ought to excite our confidence and affection."1

Gouverneur Morris disagreed. "As for those philosophical 'citizens of the world,' I don't want them in public councils. I do not trust them. A man who shakes off attachment to his country can never love any other."1

(The debates can enlighten on original intent, but in the end, it was the votes that determined what the Constitution meant.)

The president must also be at least thirty-five years old upon taking the oath of office. Today, thirty- five seems young. Theodore Roosevelt was the youngest president at forty-two, and John F. Kennedy was the youngest elected president at forty-three. In 1787, thirty-five was not young. Alexander Hamilton was still five years away from eligibility. His fellow delegates Jonathon Dayton, John Mercer, Richard Dobbs Spaight, and Charles Pinckney were all younger. Even the Father of the Constitution, James Madison, was only thirty-six.

The last eligibility requirement is that the president must have resided within the United States for fourteen years. Justice Story opined that "residence in the constitution, is to be understood, not an absolute inhabitancy within the United States during the whole period; but such an inhabitancy, as includes a permanent domicil in the United States." Due to draft wording of this clause and the precedent-setting election of Herbert Hoover, it is generally accepted that the fourteen years can be cumulative.

It is also interesting what is not included in this clause. There are no religious, property, hereditary, or military service requirements. Also, Fifty-five men framed a constitution that requires no amendment for a woman president.

1 The Franklin and Morris quotes have been changed to first person from the third person used by James Madison in his notes.

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April 21, 2011 – Article II, Section 1, Clause 6 of the United States Constitution – Guest Essayist: Joe Postell, University of Colorado at Colorado Springs

Article II, Section 1, Clause 6: In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office,9 the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case

of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

This clause is the presidential succession clause, establishing procedures for dealing with the death, disability, resignation or removal of the President.

At first the clause appears rather straightforward. It declares that the Vice President is next in the line of succession, and that Congress can, by law, establish the remaining line of succession. However, upon further inspection, there are a few important issues that are not clearly resolved.

The Convention originally provided that the president of the Senate (which had not yet been determined to be the Vice President) would replace the President in the case of death, disability, resignation or removal. In late August Gouvernor Morris suggested replacing the president of the Senate with the Chief Justice. In early September the Convention settled on the Vice President.

The first issue is whether the Vice President becomes the President in such cases, or whether the Vice President merely becomes the acting President. This issue is important because if the VP merely becomes the acting President, he would be a temporary placeholder while a new President is selected. In fact, the clause suggests that a special election for President be called in the case of the President's death, disability, resignation or removal, rather than the automatic ascension of the VP to the office. James Madison actually insisted upon the possibility of a special election for the President at the Convention.

The other ambiguity of the clause had to do with the issue of the President's "disability." As John Dickinson noted at the Constitutional Convention, "what is the extent of the term 'disability' & who is to be the judge of it?" If the Congress can declare the President to be disabled, the Constitution's separation of powers would be subverted by basically giving the Congress the power to choose the President.

Both ambiguities were resolved by the Twenty---Fifth amendment, with an assist from John Tyler. When President William Henry Harrison passed away in 1841, Tyler boldly claimed that he was not merely the VP acting as President, but was the President for the remainder of Harrison's elected term. By doing so he prevented the possibility that an election would be called to establish a new President (Harrison passed away very early in his term, a result of contracting pneumonia at his unusually long Inaugural Address.)

Tyler was criticized for this action, but his precedent has stood the test of time. The Twenty---Fifth Amendment, passed in 1967, codifies the Tyler precedent by stating that "the Vice President shall become President" if the President is removed from office, resigns, or passes away. However, in the case of presidential disability (formally communicated to the Speaker of the House and the President pro tempore of the Senate), the Vice President merely becomes "Acting President."

Amendment XXV also cleared up the issue of presidential disability by creating a procedure for establishing the president's disability. While the Tyler precedent helped ease the transition of

power from President to VP in cases of death, resignation, or removal of the President, it also made VPs hesitate before assuming the presidency in the case of disability. This is because the Tyler precedent suggested that whenever a VP assumed the presidency, he became President in full, not just Acting President. Thus, if the President's disability were cured, there would be a question whether the VP needed to revert back to his earlier position.

After President Garfield was shot in 1881, for example, he was incapacitated for eighty days, while his VP hesitated to assume the office in case Garfield would recover. The same issue occurred following Woodrow Wilson's stroke in 1919.

The Twenty---Fifth Amendment established a protocol for determining whether a disability existed, and how the President could be restored to power after the disability is gone. It allows the President to declare himself disabled, and to resume the office when he formally declares that the disability has ended.

In situations where the President is unable (or unwilling) to declare himself disabled, the Vice President, along with a majority of the cabinet, is authorized to declare the disability. If the President disagrees with the decision of the VP and the cabinet, Congress has to resolve the disagreement.

The succession of the chief executive of the country is, thankfully, an issue that has not caused great discord in American politics. But the Framers were well aware that succession to the chief executive power, which was usually the throne, was an issue that had fractured societies for centuries. As with so many other important constitutional questions, the Framers refused to allow these issues to be settled by appeals to the sword. Rather, they established a framework for such contentious issues to be resolved by law, rather than arbitrary force or will.

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April 22, 2011 – Article II, Section 1, Clause 7 of the United States Constitution – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation

Article II, Section 1, Clause 7: The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

The recent news of a precipitous drop in the president's income (from $5.5 million in 2009 to $1.73 million last year) might give occasion to look at how the president is compensated. The Constitution provides for compensation that can't be increased or decreased during a president's

term. So, a pay raise is out of the question to make up for the shortfall the president has experienced in book sales.

The Massachusetts Constitution of 1780 provided for a compensated executive and gave reasons for doing so. The provision specifies that a paid executive would not be unduly dependent on benefactors, would not be distracted from his duties by the need to earn money and would be able to maintain the dignity fitting such an officer of government. See Massachusetts Constitution, part 2, chapter 2, section 1, article 13.

When the attention of the Philadelphia Convention turned to the question of paying the executive created by the Constitution on June 2, 1787, Benjamin Franklin objected with a written statement. His objection was that the combination of the desire for the prestige of the office and the desire for money would attract the wrong kinds of candidates. He also feared that the president's salary might become so great that he would be tempted to use the power of the government to collect increasing tax revenue and that resistance to the high taxes would require more oppression in a spiraling cycle. Franklin thought the president ought not to be paid at all, and invoked the example of George Washington's unpaid service as a general during the War for Independence as precedent.

Franklin had been an architect of the ill---fated Pennsylvania Constitution of 1776 with its unicameral legislature, thirteen---person executive and no upper house in the legislature. This Constitution was copied by the French, ironically the same year Pennsylvania finally decided to replace it. Perhaps this ill---fated endeavor led the other delegates to mistrust Franklin's advice on compensating the executive of the new national government. On July 20, the vote in favor of compensation was unanimous.

Franklin still had an important role to play in drafting the clause as one of the delegates (with John Rutledge) who proposed adding the portion prohibiting the president from receiving additional emoluments from either one of the states or from the national government.

Noah Webster's 1828 Dictionary defines "emolument" as: "The profit arising from office or employment that which is received as a compensation for services, or which is annexed to the possession of office, as salary, fees and perquisites." Thus, this clause helps to preserve the system of federalism by preventing one state from seeking undue favor through payments to the president (which would, of course, look like, if indeed they were not, bribes). Prohibiting emoluments from the national government also precludes an end run around the requirement of a fixed salary that does not change during the presidential term.

As an aside, it seems arguable that any fringe benefits in addition to salary might be constitutionally suspect depending on how strictly we understand the term "emoluments." This simple and clear clause has not been the subject either of much commentary or controversy. The first Congress did discuss the clause but only to ask whether it was appropriate to pay the Vice President since pay for that office was not specified in Article II. See Annals 1:646---651 (July 16, 1789). Congress eventually decided to pay the vice president $5,000 a year. The first compensation for the president set by Congress was $25,000. The president's current salary was set by Congress in 2001 at $400,000.

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April 25, 2011 – Article II, Section 1, Clause 8 of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Article II, Section 1, Clause 8: Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:– "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

When a new duke was installed in the old Republic of Venice, he took a prescribed oath of office that included a list of limitations on his power. Just in case his memory conveniently weakened as his fondness for office grew, the oath and its limitations were read to him in a formal ceremony every two months. Remembering the horrified reaction in some quarters in Congress when the new leadership read the Constitution at just the opening of this session, one is inclined to believe the Venetians were on to something.

Although the Constitution requires other officials to take an oath of office, the President's is the only one expressly prescribed. One question that arose is whether the oath is a precondition to the assumption of office. George Washington took office March 4, 1792, yet did not take the oath until April 30 of that year. Similarly, the practice of the British constitution, with which the Framers were intimately familiar, was that the coronation oath might not be administered until some time after the heir's succession to the vacant throne. The President assumes his office when the constitutionally-designated day, January 20, arrives. However, before the President can execute the functions of his office, he must take the oath. Under the current practice of inauguration (which increasingly does resemble a coronation) and the demands of office, the matter has ceased to have practical significance.

Of more continuing relevance is the question of the scope of independent power the oath gives the President. Just as the effectiveness of the periodic recitation of the Venetian oath on restraining executive excess depended largely on the confluence of political events and the duke's personality, the use of the oath as a source of executive power by the President has been similarly shaped.

President Lincoln cited his duty to "preserve, protect, and defend" the Constitution as ample authority for his initial steps to combat organized secession, though he sometimes also referred to the three other sources of broad implied executive powers, the "executive power" clause, the commander-in-chief clause, and the clause that requires him to "take care that the laws be

faithfully executed." In a defense of his actions made to Congress in July, 1861, Lincoln declared that he was acting under his oath to "preserve the Constitution" and the Union, when he called forth the militia to suppress the rebellion, proclaimed a blockade of Southern ports (an act of war), directed large increases of the Army and Navy, ordered $2 million (yes, that was a lot of money then) of unappropriated funds paid out of the Treasury, pledged the unprecedented and astronomical sum of $250 million of the government's credit, and ordered the military detention and suspension of the writ of habeas corpus for those engaged in or "contemplating" "treasonable practices."

Laying aside the emergency of the Civil War, the oath has been used by Presidents in more pedestrian ways to assert independent authority. The issue has come up in disputes between the Supreme Court and the President, and the Congress and the President. Early in our history, the "departmental theory" of judicial review dominated. That theory held that each branch was the final and independent interpreter of the powers entrusted to it under the Constitution. Jefferson wrote in 1801 that each of the branches of the federal government "must have a right in cases which arise within the line of its proper functions, where, equally with the others, it acts in the last resort and without appeal, to decide on the validity of an act according to its own judgment, and uncontrolled by the opinions of any other department." Chief Justice Marshall in the Marbury Case used the oath he took as providing constitutional legitimacy for judicial review.

Madison echoed Jefferson. So did Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and others. The attorneys representing President Andrew Johnson during his Senate trial in 1868 on impeachment charges relied on the President's independent constitutional position, validated by his oath of office, to defy the Tenure of Office Act of 1867. Johnson claimed that the act, adopted over his veto, deprived him of his constitutional powers to remove executive department officers by requiring him to obtain Senatorial consent before firing Secretary of War Edwin Stanton.

The issue continues to resonate. The President's first duty, as so many incumbents have argued, is to the Constitution as the Supreme Law. Moreover, the President is an independent actor in that regard. Hence, the President can veto a bill from Congress if he believes it to be unconstitutional, even if the Congress and an existing Supreme Court precedent point to its constitutionality.

Questions of greater constitutional difficulty and shadowiness arise about Presidential signing statements and the President's refusal to enforce a law that has been duly enacted, the latter of which also implicates the President's Article II duty of faithful execution of the laws.

Both issues are live political matters. Just as his predecessors did, President Obama has resorted to the very signing statements whose use by George W. Bush he vocally decried. The latest is a statement that he would continue to employ "czars" (presidential policy directors not subject to Senatorial confirmation) despite the fact that the budget he was signing after the deal reached with Congress prohibited funding for 4 such officials (out of 39). The President has claimed that the budget restriction violates his constitutional authority. Such statements are not given legal significance by the courts when interpreting the constitutionality of a statute, in part because they tend to be rather vague and thin on constitutional analysis. But they certainly are a measure of

the President's willingness to claim that his constitutional powers are not subject to Congressional limitation. At the same time, the statute is now the law of the land, and the President's proper choice should have been to veto the bill, not to refuse to enforce parts, in effect signing a bill into law that was not the same as presented to him.

Not enforcing an already-existing and properly enacted law is the most troubling. For instance, the Obama administration has announced that it will not defend the constitutionality of the federal Defense of Marriage Act (DOMA), because the President believes the law to be unconstitutional. Yet, the law was adopted by a Congress and signed by a President (Bill Clinton) who must have believed the law to be constitutional. Moreover, there is no Supreme Court opinion that the law is unconstitutional, and there has been no great change in social conditions or political composition of the voters. While a President's oath to support the Constitution gives him some leeway in administering law, and while a predecessor's acts cannot inflexibly bind a President, in this matter the President's position is at odds with the actions of Congress and two Presidents, of different parties. There is a tension between the President's claim that the oath directs his first duty to the Constitution, and the Constitution's own command that he faithfully enforce the laws.

These issues are not easily resolved. It is clear, however, that the oath is far more than mere formality. History has shown it to be another factor in the Constitution's separation of powers and blending and overlapping of functions, swirling in the murky vortex where constitutional law and politics lose their distinctness.

An expert on constitutional law, **Prof. Joerg W. Knipprath** has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

April 26, 2011 – Article II, Section 2, Clause 1 of the United States Constitution – Guest Essayist: Andrew Baskin, ConSource Researcher

Article II, Section 2, Clause 1: The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

The President of the United States may choose to be addressed merely as "Mr. President," but another title more accurately conveys the tremendous power and prestige associated with the

modern position; that of "Commander in Chief." This fact might have surprised the nation's founders. They did not intend for the position of military leader to be the most important function of the chief executive. The title itself is grouped in a clause which also instructs the President to form a cabinet and issue pardons. Congress, not the President, received the more substantial powers of declaring war and raising an army. Yet in modern times, it is the President who firmly controls the strongest standing military in the world, with the ability to act on a global scale without consulting the legislative branch of government. Congress has not declared war since the 1940s, but U.S. Presidents have deployed millions of soldiers into dozens of military engagements. The meaning of Article II, Section 2, Clause 1 has not changed, but its broad mandate and the increased military might of the United States has resulted in the development of a powerful executive that the framers of the Constitution could scarcely have envisioned.

During the drafting of the Constitution, few objected to giving the President supreme command over the military, especially once the principle of creating a unitary executive had been agreed upon. The bloody struggle for independence from Britain and the problems involved in coordinating

the efforts of independent-minded States had taught America's founders the importance of having at times a single decision-maker, able to marshal the resources of the entire country in its common defense. Many of the existing State constitutions already placed their governor or chief executive in charge of the militia. John Jay, writing in Federalist No. 4, argued that the separate armies of the States, "in a proper line of subordination to the Chief Magistrate," would perform far more effectively than a divided military. However, in keeping with the principle of checks and balances, the unquestioned military authority of the executive branch was mitigated by legislature. Crucially, the Commander in Chief only performed his duties "when called into the actual Service of the United States." Alexander Hamilton believed that this provision, coupled with the lack of any significant standing army or navy, meant the President would serve merely as "first General and Admiral of the confederacy." Except in cases of national defense, Congress would have to declare war and provide funds in order for the President to effectively exercise his authority as Commander in Chief. Civilian control of the military was thus firmly established and divided between the executive and the legislature, while also establishing a clear chain of command. The President would have very strong powers as Commander in Chief during wartime, but otherwise would depend on the approval and cooperation of Congress.

In upholding the Constitution, the President of the United States, in his capacity as Commander in Chief, swears to provide for the "common defense." While it would appear at first glance that the framers intended for the President to act in this capacity only when the United States was attacked or when authorized by Congress, the intricacies of international conflict and diplomacy often complicated which branch of government held the edge in war powers. When pirates attacked American merchant ships in the early 1800s, President Jefferson responded by arming merchant ships and invading Tripoli. Congress authorized the measure, but did not declare war. Hamilton insisted that "when a foreign nation declares…war upon the United States…any declaration on the part of Congress is nugatory; it is at least unnecessary." Such an interpretation suggested that the Commander in Chief could deploy the military in any way he saw fit, if America had been attacked first. Nearly fifty years later, the creation of a standing army allowed

President Polk to initiate the Mexican-American War. American forces ordered close to the disputed boundary with Mexico fought a border skirmish, and Congress was forced to support the actions of United States troops already committed to battle. The position of Commander in Chief proved to be the decisive foreign policy tool for a President willing to wield it.

The balance of power would continue to shift back and forth between Congress and the President, until decidedly moving in favor of the executive branch during the Cold War. In order to compete with the Soviet Union, Congress approved huge increases in military spending while simultaneously differing to a series of strong Presidents on foreign and military policy. The United States, now with military commitments around the world, needed a Commander in Chief willing to exercise American power swiftly, without constant consultation with Congress. During the Korean War, President Truman created a precedent by specifically citing his position as Commander in Chief as sufficient authority for deploying troops to the Korean peninsula. By further classifying the deployment as a "police action," Truman avoided seeking the permission of Congress. Like the Congress of Polk's day, the legislature was thus faced with the uncomfortable decision of either supporting the President or cutting funding for troops already in combat. In most subsequent military actions, including Vietnam and the wars in Iraq and Afghanistan, Congress has passed bills authorizing the use of military force. Other times, such as President Reagan's invasion of Lebanon or President Obama's bombing of Libya, the executive branch has relied solely on the Commander and Chief clause. Under this interpretation, which continues to hold sway, the President can unilaterally use the military as he or she sees fit when American interests are at stake.

The framers rightly predicted that the country would need an executive strong enough to respond to the volatile emergencies of war, but they could not have foreseen the future success and growth of their fragile republic. The powers of the President thus expanded exponentially along with America's military and international commitments. At the same time, Congress diminished its own war making powers, first by creating a standing military force and then by passing resolutions authorizing indefinite and nearly unlimited military action. The American people should be grateful that the framers designed a flexible system which allowed for a strong Commander in Chief in times of crisis, but they should also be mindful of the restrictions originally placed on the President, and the vital war-time responsibilities given to Congress.

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April 27, 2011 – Article II, Section 2, Clause 2 of the United States Constitution – Guest Essayist: Professor William Morrisey, William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College

Article 2, Section 2, Clause 2: He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall

nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, 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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

As Publius reminded his readers in the forty-seventh Federalist, Montesquieu called the Constitution of England "the mirror of liberty"—so esteemed for its separation of governmental powers. So long as no one person or set of persons can exercise legislative, executive and judicial powers, neither king nor aristocrats nor commoners can dominate the country. In the United States, where everyone is a commoner, separation of powers remains relevant to the sustenance of liberty. If "the accumulation of all powers" in "the same hands" can "justly be pronounced the very definition of tyranny," then even a cabal of commoners might so empower themselves, serving as lawgivers, judges, jurors and executioners over their fellow citizens.

But if separation of powers serves as an indispensable bulwark of political liberty (Publius continues), one must understand it rightly, as Montesquieu did. Montesquieu "did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other." He only meant that no one department may "possess the whole power of another department." To make the three branches of government entirely independent of one another would amount to making three distinct governments—uncoordinated, ineffective, hardly able to govern at all. No person or persons could be held responsible for government action or, more likely, inaction.

The president's power to make treaties and nominations exemplifies these principles of liberty and responsibility. Under the Articles of Confederation, Congress negotiated treaties. This required the dispatch of one or more delegates, thus depriving one or more states of representation. On the other hand, a treaty, once ratified, is a law—indeed, a supreme law. The executive branch must not legislate. Further, if treaties are laws disputes will arise requiring judicial attention—the province of neither legislature nor executive. If neither the Congress nor the president alone can assume the responsibility of treaty making, the only remedy can be to divide treaty-making into two parts, assigning each part to a different branch.

Then there is the matter of federalism. Treaties are the nation's business, but do the states not want their interests represented, as well?

The Framers' solution: the executive branch will negotiate treaties; the Senate will ratify them; the Supreme Court will adjudicate case arising under them. But this separation of powers and duties does not and cannot imply isolation of powers and duties. Senators can advise the president on the treaty (before and after negotiations); although negotiations themselves ought to be confidential; they can then consent or ratify the treaty resulting from those negotiations. Thus both branches exercise mutual control over treaties without interfering with or encroaching upon one another.

The same goes for presidential appointments. Who will control the apparatus, the administration, of the American national state? Not Congress directly: as James Wilson argued at the

Convention, "a principal reason for unity in the Executive was that officers might be appointed by a single, responsible person," thus avoiding "intrigue, partiality, and concealment." At the same time, complete presidential control over appointments could allow a president to create offices and fill them with his favorites—the very definition of "corruption" as the term was used in the eighteenth century, and one of the most frequent complaints against monarchy. (Recall the words of the Declaration of Independence: King George "has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance.") Again, the solution was to divide and correlate two powers, giving nomination to the president and appointment to the Senate. The sovereign people can clearly observe both of these governing actions and finally hold their representatives responsible for them.

The construction of the presidential powers of treaty-making and of nomination thus addresses the crucial issues of the character of the American regime and the structure of the American state. The people retain their sovereignty through their elected representatives. No one set of representatives governs without restraint from other sets of representatives. Through the Senate, the states have a decisive `say' in both international lawmaking and the composition of the national administration. Both republicanism and federalism are preserved.

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April 28, 2011 – Article II, Section 2, Clause 3 of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Article II, Section 2, Clause 3: The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The National Labor Relations Board is a federal agency established under Franklin Roosevelt whose assigned duty it is to protect employees, while balancing the rights of unions and management. In an unprecedented move, it has recently moved to bar Boeing from opening a second aircraft assembly line in South Carolina rather than Washington state. In a second unprecedented move, the agency is about to reverse decades-old policy and allow unions to organize small groups of employees to gain a toehold in the company, rather than the entire company workforce at once (a more difficult project).

The agency currently is dominated by union lawyers, and one of the main advocates for these changes is Craig Becker, a controversial former lawyer for the SEIU, who has written that management should have no say whatever in unionizing activities. After his nomination was

rejected by the Senate (on the failure of a cloture vote), President Obama nevertheless appointed Mr. Becker to the board a month later, while the Senate was in recess.

Recess appointments have been practiced since the Constitution went into effect. Initially, Congress was very much a part-time legislature, so there was an obvious need to allow the President to appoint officers to posts that might become vacant while the Senate was not in session. Indeed, that was precisely the early understanding. Vacancies might "happen" (in the terminology of Article II, Section 2, cl. 3) if they arise during the recess.

It may be asked why there is any need for recess appointments now that the Senate meets regularly during the course of the year. Surely, there is no need to have recess appointments just because the Senate is on a brief Easter recess or President's Day long weekend. Even if the recess is longer, say during the month of August, it is unlikely that the President would even be able to gear up for an appointment until the recess is almost over. In the unlikely event of a government crisis, the Congress almost certainly would reconvene quickly. That said, recess appointments are useful for lower-level appointments on which the Senate has failed to act for some time. Moreover, they can protect the President's constitutional prerogatives, if the Senate purposely seeks to weaken the President by failing to act on his nominations made while the Senate is in session.

Presidents have long interpreted the clause to give them a writ to make recess appointments for vacancies as long as those vacancies exist during the recess, even if they arose earlier. This interpretation has been upheld judicially. But even though it may be constitutionally justifiable, it raises serious political issues. Presidential appointments for vacancies that arise while the Senate is in session, but are not filled until the President can do so unilaterally when the Senate is in recess are delicate matters. Such appointments can easily be seen as end-runs around the constitutional blending and overlapping of functions.

Now add to that if the recess appointment is of an individual who was previously rejected by the Senate. The politics of such a move clearly invite Senatorial rebuke, and President Obama's appointment of Craig Becker was lambasted by a number of Republican Senators.

As early as 1863, Congress tried to rein in recess appointments, by prohibiting payment of salary to anyone appointed during the Senate's recess, until the Senate confirms. Today, the Pay Act, 5 U.S.C. 5503, prohibits such payments only if the vacancy already existed while the Senate was in session. The act also provides certain exceptions. For example, it does not restrict salaries of recess appointees if the nomination was pending when the Senate recessed. Neither does the salary restriction apply if the Senate, within 30 days before the end of a session, rejected a nominee of the President to the office. However, that exception, in turn, does not apply if the President during the recess appoints the rejected nominee. It should be noted that the end of a "session" is the end of the annual term. Thus, when Congress adjourns this December, it will be the end of the first session of the 112th Congress. Merely rejecting a nominee before a holiday recess is not the end of a session.

One wonders, therefore, whether President Obama's NLRB man, Craig Becker, is entitled to payment of salary. One argument he might make is that the nomination technically was not

formally rejected because it was filibustered and never came up for a vote on the merits. Since it was not withdrawn, the nomination technically was still pending when the recess occurred.

By statute, if a recess appointment is made, the appointee's name must be submitted to the Senate soon after its next session begins. President Obama has done so with Mr. Becker. If the appointment is not confirmed, the officer may continue to serve, but must step down at the end of that next session. Thus, Mr. Becker's term will end in December of this year, as he was appointed by the President in March, 2010. If Mr. Becker is rejected, he will not be permitted to draw a salary, if a routine provision to that effect in funding bills continues to be used.

Finally, the political virtuosity of the recess appointment device is shown by the fact that, even if the Senate rejects Mr. Becker, there will be new vacancies on the NLRB, and the President can wait for the next recess to appoint his ideological fellow to the agency once more. Mr. Becker could then serve until the end of 2012, again without Senate confirmation.

Unlike appointments to administrative or executive positions, recess appointments of judges are uncommon. Bill Clinton made one; George W. Bush made two; Barack Obama has made none so far. No President has made a recess appointment to the Supreme Court since Dwight Eisenhower, who appointed Chief Justice Warren, Justice Brennan, and Justice Stewart in that manner.

An expert on constitutional law, **Prof. Joerg W. Knipprath** has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

April 29, 2011 – Article II, Section 3, Clause 1 of the United States Constitution – Guest Essayist: Charles K. Rowley, Ph.D., Duncan Black Professor of Economics at George Mason University and General Director of The Locke Institute

Article II, Section 3, Clause 1: He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with respect to the Time of Adjournment, he may adjourn them to such Time as he think proper; he shall receive Ambassadors and other public Ministers; he shall take care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

"Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men." Lord Acton, 1887

Mitch Ohnstad (reporter): "Why do you rob banks, Willie?" Willie Sutton (bank robber): "Because that's where the money is."

In Worcester v. Georgia (1832) The United States Supreme Court vacated the conviction of Samuel Worcester, holding that the Georgia statute prohibiting non-Indians from being present on Indian lands without a license from the state was unconstitutional:
Response of President Andrew Jackson: "John Marshall has made his decision; now let him enforce it!"

The above quotations constitute the texts for today's essay. Readers will understand their relevance for a new century in which the United States President exercises unprecedented personal power, controls unprecedented national wealth and bestrides the separation of powers like a mighty colossus. Such a situation, unconceivable to the Founding Fathers in 1787, places the seemingly innocuous words that I here address into a significantly more worrying perspective.

So let me begin with state of the union addresses. The Founders naturally were concerned to protect the United States from the abuses associated with European monarchs, most especially, of course, King George III. One perceived abuse was the British monarch's ritual of addressing the opening of each new Parliament with a list of policy 'mandates' rather than 'recommendations. So the word 'recommendations' is truly significant as written into the Constitution, as are the words 'from time to time'. Both insertions are designed to downplay the importance of the occasion.

The first president, George Washington, defined the meaning of 'from time to time'. Since 1790, the state of the union message has been delivered regularly at an approximately one year interval. Whether such messages would be delivered orally or in writing, however, would depend, until FDR, on each president's perceived role. The Federalists, Washington and Adams, personally addressed the Congress. The Republican, Jefferson strongly objected to this ritual and initiated the written address. This was continued until 1913 when America's first Imperial President, Woodrow Wilson, reverted to the oral address, an approach followed by Harding and by Coolidge in his first address. Thereafter Coolidge and Hoover, as strict constructionists, reverted to the written model.

From FDR onwards, U.S. presidents have strutted across the stage making expansive oral addresses designed to project an image of presidential authority across an increasingly credulous national audience. Fortunately, the United States Congress has not (yet) abandoned its legislative authority. Many a presidential state of the union aspiration turns out to be dead-on-arrival once it enters the doors of the Capitol.

Section 3, Clause 1 – which imposes a duty rather than confers a power – is the formal basis of the President's legislative leadership, which has attained enormous proportions since 1900. This development owes a lot to the rise of political parties, and to an accompanying recognition of the

President as party leader, and to the introduction of the spoils system as a means of exerting presidential influence over Congress. Presidents frequently summon both Houses of Congress into special sessions for legislative purposes, and the Senate alone, for consideration of nominations and treatises. The power to adjourn the Houses has never been exercised.

The 'right of reception' has been interpreted to reinforce presidential authority most especially in the area of foreign affairs. The term 'Ambassadors and other public ministers' embraces not only any possible diplomatic agent that any foreign power may accredit to the United States, but also all foreign consular agents, who, therefore, may not exercise their functions in the United States without an exequatur from the President. The power to receive includes the right not to receive, to request their recall, to dismiss them and to determine their eligibility. These powers have the unfortunate consequence of making the President the predominant mouthpiece of the nation in its dealings with other nations, surely not something that the Founders (Hamilton was an exception) ever anticipated.

The President must 'take care that the laws be faithfully executed.' This duty has been used as an 'open sesame' opportunity for unscrupulous presidents to transgress the separation of powers. Some presidents have claimed an authority under this provision to impound monies appropriated by Congress. President Jefferson, for example, delayed for over a year the expenditure of monies appropriated for the purchase of U.S. gunboats. FDR and several of his successors from time to time refused outright to expend appropriated monies. In response to such an attempt by President Nixon, the United States Supreme Court finally ruled that such attempts are unconstitutional.

Presidents have also asserted, from time to time, that 'faithful execution of the laws' empowers them to suspend the writ of habeas corpus – that most precious legal protection of individual liberty against the state. Article I provides that this privilege may not be suspended except during times of rebellion or invasion. The Supreme Court has determined that such suspensions fall within the jurisdiction of Congress. Yet President Lincoln regularly suspended the privilege during the civil war, albeit eventually and reluctantly succumbing to union-opposition pressures to seek congressional approval.

The Supreme Court subsequently would specifically weaken its own supervisory role in this regard. In Mississippi v Johnson 1867, the Supreme Court ruled that the judiciary may not restrain the President in the execution of laws. In so doing, the Court denied an injunction preventing President Andrew Johnson from executing the Reconstruction Acts, which were claimed to be unconstitutional. Executive acts, when performed, remain subject to judicial scrutiny.

The President's right to commission 'all the Officers of the United States' is also open to serious abuse by unscrupulous incumbents. One of the most famous legal cases in early United States history was induced by such abusive behavior. John Adams, the outgoing Federalist President signed many commissions to the judiciary on his final day in office, hoping as incoming Republican President Thomas Jefferson put it 'to retire into the judiciary as a stronghold.' Fortunately, in his haste to complete the coup d'etat, Adams neglected to have all the commissions delivered.

President Jefferson and his Secretary of State, James Madison – who knew more than a little about the nature of the Constitution – refused to deliver the remaining commissions.

William Marbury had been appointed by Adams as Justice of the Peace in the District of Columbia; but his commission had not been delivered. So, Marbury petitioned the Supreme Court to force Secretary of State Madison to deliver the documents. However, in its famous 1803 Marbury v Madison judgment, the Supreme Court, with John Marshall as Chief Justice, denied Marbury's petition, holding that the part of the statute upon which he based his claim – the Judiciary Act of 1789 – was unconstitutional.

It is good to end this essay with an early example where a serious abuse of presidential discretion was reined in. Unfortunately, this would be a rare victory in the battle to constrain America's increasingly imperial presidency, as the executive branch fairly systematically elbowed its way through the separation of powers in order to impose its own brand of absolutism on the American Republic.

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May 2, 2011 – Article II, Section 4 of the United States Constitution – Guest Essayist: Julia Shaw, Research Associate and Program Manager of the B. Kenneth Simon Center for American Studies, The Heritage Foundation

Article II, Section 4: The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Impeachment is the only constitutional way to remove a President (or another official or a judge) for misconduct. Publius notes in Federalist 64 that the "fear of punishment and disgrace" will encourage good behavior in the executive. Impeachment is an integral part of maintaining the separation of powers and the republican form of government.

To understand the impeachment process, we must look to the related clauses in Article I. Unlike the Rules and Expulsion Clause, by which the house to which a Member of Congress belongs may expel that member, the legislature and the judiciary participate in the impeachment of a president. A vote for impeachment is not equivalent to a vote for immediate removal. Impeachment refers to the House's vote to bring charges against an officer, and that vote begins a particular process. After the House impeaches a president, the Senate tries him with the Chief

Justice presiding over the proceedings. In Federalist 65, Publius notes that the Senate would have the requisite independence needed to try impeachments: "What other body would be likely to feel confidence enough in its own situation to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused and the representatives of the people, his accusers?" The supermajority requirement guards against impeachments brought by the House for purely political reasons. The president may not pardon a person who has been impeached.

Impeachment disciplines a President who abused his constitutional responsibilities. As Stephen Presser suggests in his essay on Article I, Section 2, Clause 5 in the Heritage Guide to the Constitution, when the President commits an impeachable offense, the Members of the House are obligated by their oath to preserve the Constitution to deal with the offense. But, what constitutes an impeachable offense? At the Constitutional Convention, the delegates initially proposed "mal- practice and neglect of duty" as grounds for impeachment, but the Committee of Detail narrowed the basis to treason, bribery, and corruption. George Mason suggested "high Crimes and

Misdemeanors" as another grounds for impeachment when his previous suggestion of "maladministration" was rejected for rendering the President's too dependent upon Congress. Impeachment was meant to encompass serious offenses, but not to be a political tool to block a president from exercising his authority.

Impeachment is a remedy to be used in extreme situations, and Congress has used this device sparingly over the past two hundred twenty years. Only two Presidents have been impeached (Richard Nixon resigned before the House voted to impeach), and only a handful of judges have been impeached and subsequently removed from office. No president has been successfully removed from office.

In Federalist 77, Publius explains that "being at all times liable to impeachment" would prevent the president from abusing his power. Impeachment is not equivalent to a simple majority vote of no confidence, as is sufficient to remove a prime minister in parliamentary system. Rather, it is a process that engages the legislature and the judiciary in a grave constitutional act to remove the head of state. Perhaps it is so rarely used, and so rarely needed, because the stakes are so high.

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May 3, 2011 – Article III, Section 1 of the United States Constitution – Guest Essayist: Kyle Scott, Political Science Department and Honors College Professor at the University of Houston

Article III, Section 1: 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.

Building on the political theory of John Locke and Baron de Montesquieu, the Founders established an independent judiciary, more specifically, a Supreme Court. While the Constitution only establishes a Supreme Court, it was not long after the ratification of the Constitution that the first Congress passed the Judiciary Act of 1789 which established the U.S. Federal Judiciary. The act created a Supreme Court in which there were five associate justices and one chief justice. The first chief justice was John Jay—one of the three authors of the Federalist Papers.

The act also established circuit courts and district courts. The district courts had original jurisdiction while the circuit courts had appellate jurisdiction. The first Supreme Court justices had to 'ride circuit', meaning they served on the Supreme Court and the circuit courts. This practice ended with the passage of the Judiciary Act of 1891.

The number of judges, justices, and courts has varied over the years—usually expanded at a time of one party dominance when the party in power looks to increase its influence within the judiciary by expanding the number of available slots to which they can appoint judges of a similar ideological disposition. This is but one consequence of being vague, but the Founders had their reasons for not being overly specific about the structure of the judiciary.

First, the judiciary—while important for maintaining the rule of law and a system of checks and balances—was thought peripheral to the political process. This is not surprising given that the Founders' intellectual influences—particularly Locke and Montesquieu—treated the judicial branch in a similar manner. Now they recognized, particularly Hamilton who expanded Lord Coke's theory of judicial oversight, the importance of the judiciary, but it wasn't seen in the same esteem as the other two branches. Even after the ratification of the Constitution the Supreme Court was thought less important as evidenced by the fact that Washington had a tough time filling all the seats as most would-be appointees chose to stay judges or legislators in their home state where they thought more important work was being done. Let us not forget that the Supreme Court's first chambers were in the basement of the Merchant Exchange Building in New York City—then the capital of the U.S.

Second, the justices recognized that a growing nation would need a court to grow with it. This is not the same as saying we need a living Constitution, or that the Founders favored a loose construction of the Constitution, it simply means that the Founders understood the workload of the early courts would be relatively light given the length of time it takes to work through the appeals process from the state level up, and the fact that there were very few national laws meaning most cases of original jurisdiction would be heard at the state level as disputes over laws were more likely to occur over state laws.

Third, they knew the inherent dangers of an appointed judiciary. Appointing judges was preferable to electing them in order to insulate them from the effects of politics and public pressure, but it also put them in an advantageous position to control the path of the country relative to Congress and the Executive who had to be elected and had shorter tenures. Therefore,

the size and structure of the judiciary was made dependent upon Congress as one way to curb the power of the judiciary.

What we should remember is that when the Founders were vague they were intentionally so, and when they were specific they were intentionally so. And the same goes for silence—such as with judicial review which is nowhere found in the Constitution except through the most creative jurisprudence. This flies in the face of those who would argue for a loose—or broad—interpretation of the Constitution. To assume otherwise is to deny the Founders wrote intentionally or were aware of what they were writing. While they could not foresee all issues or problems, they chose their words carefully and we should treat them as though they did.

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May 4, 2011 – Article III, Section 2, Clause 1 of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Article III, Section 2, Clause 1: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;10 – between Citizens of different States, –between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article III, Section 2 defines the universe of federal jurisdiction ("shall extend to"). The kinds of issues included are defined either by the nature of the cause or the character of the parties. An example of the first is "federal question" jurisdiction, i.e., cases "arising under this Constitution, the laws of the United States and treaties …." The second might be a dispute "between two or more States."

This is not necessarily federal court jurisdiction. As some other provisions of the Constitution also underscore, the Framers expected that state courts would be significant, if not the principal, forums for federal jurisdiction. In that vein, the federal courts have never exercised the full federal jurisdiction available under Article III, Section 2. Moreover, unless Congress expressly requires that federal courts exercise exclusive jurisdiction over a matter, state courts have concurrent jurisdiction to hear "federal" issues. Congress rarely imposes such "exclusive"

jurisdiction outside bankruptcy, patents, federal taxes, and immigration, and cases involving the United States as a party.

The focus of federal jurisdiction can change. During the early years of the Republic, there were few federal statutes, but much attachment to one's state, with potential local prejudice against outsiders. Therefore, "diversity" jurisdiction (suits between citizens of different states) was more significant than "federal question" jurisdiction. Today, with the increased homogenization of Americans across states, and the explosion of federal law, the relative importance of the types of jurisdiction is reversed.

Federal courts, then, are courts of limited jurisdiction. The jurisdiction, indeed the very existence, of lower federal courts depends on affirmative grants from Congress. Only the original jurisdiction of the Supreme Court is guaranteed under the Constitution, though academics have argued (and Supreme Court opinions have strongly implied) that the Supreme Court also has the inherent power to review at least those lower court opinions that interpret the Constitution.

Once a federal court is authorized to hear a certain type of issue, it can exercise the full "judicial power," a somewhat amorphous term that describes what courts "do" (e.g, resolve disputes between parties, issue final relief). However, the judicial power requires "cases" and "controversies." A "controversy" in this context refers to a civil action or suit. A "case" can be either civil or criminal. The Supreme Court has declared that there is no functional significance from the use of one term or the other in the Constitution.

The "case or controversy" requirement limits the exercise of federal jurisdiction. There must be a concrete matter that involves a "live" dispute between adversaries. About a dozen states, such as Massachusetts, allow designated courts to issue "advisory opinions" on the constitutionality of laws at the request of certain parties, such as the state legislature. This is a common feature in foreign constitutional systems, preeminently the German Constitutional Court, which has emerged as the dominant alternative to the American approach. That system is "centralized" judicial review by a specialized court. The American system is "decentralized" judicial review, as any federal "Article III" court, as well as state courts, can decide constitutional questions. Such American courts also are not specialized, as they decide a host of other legal questions.

In a decentralized system of judicial review, the case or controversy requirement represents an important restraint on the inclination of a vast array of courts to inject themselves into constitutional matters. That said, the judiciary has often found ways to hear cases that appear collusive and to avoid hearing disputes it finds impolitic to decide. Related doctrines, such as the "standing" of a plaintiff to sue (has he suffered a clear enough injury) or the "ripeness" or "mootness" of a dispute (is there yet–or still–enough of a dispute), are very much driven by the facts of the particular case and do not lend themselves to neat and readily-applied tests.

Moreover, the Supreme Court as an institution may expand or contract these doctrines based on the attitudes of the justices towards the role of courts. Thus, the Warren Court greatly expanded the "standing" doctrine and made it easier in a number of ways for litigants to bring their disputes to federal courts. That judicial philosophy changed during the Burger and Rehnquist Courts, beginning in the mid-1970s, as Warren Court-era justices began to be replaced. The

latest "standing" cases, decided by the Roberts Court concerning establishment clause claims, continue that trend.

More amorphous and less defined even than standing is the "non-justiciable political questions" doctrine. As early as Marbury v. Madison, the Supreme Court emphasized that there are certain kinds of cases beyond judicial review, even if all other particulars are met that would allow a court to hear the matter. Such cases may involve suits to enjoin the other departments from making discretionary political decisions, or attempts to review decisions by the other branches in military or diplomatic matters.

But the application of the doctrine is unpredictable, as a review of the federal courts' recent approach regarding executive power in the conduct of the fight against terrorists shows. On the one hand, the Supreme Court injected itself into the executive's domain by recognizing, for the first time (and implicitly overruling a contrary precedent), a right to habeas corpus for enemy combatant detainees not held in the U.S. On the other hand, the Court has not injected itself in other related matters, such as the admission of former detainees into the U.S. contrary to federal law and executive decision. Lower courts have cited the non-justiciable political questions doctrine to that end.

Article III, Section 2, clause 1, is also a pillar for the legitimacy of constitutional judicial review itself. It authorizes the courts to hear cases arising under the Constitution. Though the clause does not conclusively settle the question whether courts are free to disregard unconstitutional laws or must let the legislature repeal such laws (as some state courts determined), the federal judges early took the position that they are not bound by unconstitutional actions. During the 1790s, federal courts in several cases declared their power to exercise judicial review over state laws. More significant, one can identify four cases in which the Supreme Court explicitly or implicitly assumed a power to review the constitutionality of acts of Congress. All arose before Marbury.

Marbury v. Madison, decided in 1803, is the iconic case for judicial review. It has often been portrayed as revolutionary in that it "established" judicial review. It is more accurate to say that it is a political manifesto that provided a coherent defense of judicial review, but one that had already been made in other venues, such as Hamilton's Federalist 78.

With one qualification, Chief Justice Marshall's opinion is very cautious. As his wont was to avoid conflict with Jefferson, Marshall gave the President the specific result the latter wanted. Striking down the federal law was not novel, and the Jeffersonians' criticism of the opinion was generally not directed at that part. The critics, instead, complained about Marshall's implicit (and novel) claim that the Court could even issue direct orders to the President, an idea the Chief Justice tried to implement later, with mixed results, in a subpoena to Jefferson during the Burr treason trial.

Marbury, and Article III, also do not resolve whether the Supreme Court is the final arbiter of constitutional decisions. Presidents Jefferson, Jackson, Lincoln, Franklin Roosevelt, among others, asserted a "departmental theory," that each branch is supreme within its own functions, lest one become "more equal" than the others. Marbury is best seen as a declaration of

independence of the judicial branch from the others in a matter that directly involved the courts' function. Extravagant notions of courts roaming far and wide as "final" or "ultimate" deciders of constitutional matters embody a more recent judicial conceit. While there are practical reasons that the judges' views are entitled to respect from the other branches and the people, it is a blow against republican principles to declare that the opinions of judges are the Constitution itself.

An expert on constitutional law, **Prof. Joerg W. Knipprath** has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

May 5, 2011 – Article III, Section 2, Clause 2 of the United States Constitution – Guest Essayist: Charles E. Rice, Professor Emeritus of Law at the University of Notre Dame

Article III, Section 2, Clause 2: In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Exceptions Clause of Article III, Section 2, provides that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." This was intended, according to Alexander Hamilton, to give "the national legislature… ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove [the] inconveniences" which might arise from the powers given in the Constitution to the federal judiciary." The Federalist, no. 80.

Prior to 1868, the Supreme Court had no occasion to rule on an act of Congress making an exception to its appellate jurisdiction. But when William McCardle, a Mississippi editor, was imprisoned by the federal reconstruction authorities, he sought a writ of habeas corpus from the federal circuit court, asking that court to rule that his detention was invalid. When this petition was denied he appealed to the Supreme Court under an 1867 statute permitting such appeals. After the Supreme Court heard arguments on the case, Congress repealed that part of the statute which had given the Court jurisdiction to hear such appeals.

The Court dismissed the appeal: "We are not at liberty to inquire into the motives of the legislature," said the Court. "We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words… without jurisdiction the court cannot proceed at all in any case. Jurisdiction is power to declare

the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case. And this is not less clear upon authority than upon principle." Ex parte McCardle, 74 U.S. (7 Wall.) 506, 513-14 (1868).

The 1868 statute upheld in McCardle barred review only under the 1867 statute. In Ex parte Yerger 75 U.S. (8 Wall.) 85 (1868), the Court held that the 1868 statute left untouched the Supreme Court's power to issue its own writ of habeas corpus to a lower court as provided in the Judiciary Act of 1789. But neither in McCardle nor in Yerger is there any indication that the Court would not have upheld an act withdrawing from the Court appellate jurisdiction in all habeas corpus cases.

In U.S. v. Klein, 80 U.S. (13 Wall.) 128, 145-46 (1872), the only Supreme Court decision striking down a statute enacted under the Exceptions Clause, the Court spelled out one limitation of that clause. Klein, a former Confederate, sued in the Court of Claims to recover for the seizure and sale of his property by Union forces. He had received a presidential pardon for his Confederate activities. If he had not received a pardon, the law would have prevented his recovery. While the appeal of his case was pending before the Supreme Court, a statute was enacted which provided that, whenever a judgment was founded on such presidential pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case. The statute further declared that every pardon granted to a suitor in the Court of Claims which recited that he had been guilty of rebellion or disloyalty, shall, if accepted by him in writing without disclaimer of those recitals, be taken as conclusive evidence of such act of rebellion or disloyalty and his suit shall be dismissed.

While declaring the statute unconstitutional, the Supreme Court stated that Congress has power to deny appellate jurisdiction "in a particular class of cases:"

If this act … simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient.

The statute in Klein attempted to dictate to the Court how it should decide a class of cases under the guise of limiting its jurisdiction. The Court lost jurisdiction only when the Court of Claims judgment was founded on a particular type of evidence, a pardon. The statute further prescribed that the recitals in the pardon of acts of rebellion would be conclusive proof of those acts. "What is this," said the Court, "but to prescribe a rule for the decision of a cause in a particular way?" The Klein statute intruded also upon the President's pardoning power by attempting "to deny to pardons… the effect which this court had adjudged them to have." In these respects the statute in Klein was different from a statute withdrawing appellate jurisdiction over a class of cases.

Since Klein, the Supreme Court has not defined any further limits to the Exceptions Clause. But there are limits. Congress, for example, could not withdraw from the Supreme Court appellate jurisdiction, "in any case where a Baptist shall be" appellant. This would be unconstitutional, not because of a limitation in the Exceptions Clause, but because of a prohibition in the First Amendment. The religion of the appellant has nothing to do with the authentic nature of the case. The fact that Congress is forbidden by the First Amendment to prohibit appeals by Baptists,

Jews, etc., does not mean that there is a restriction on Congress' power to exclude classes of cases, as determined by the nature of the case, from the appellate jurisdiction of the Supreme Court as well as from the jurisdiction of the lower federal courts.

If a statute removed appellate jurisdiction from the Supreme Court, in, for example, "all cases but patent cases," such would not be an exception but rather a wholesale obliteration of appellate jurisdiction. On the other hand a surgical removal of appellate jurisdiction in a class of cases, such as prayer in public schools, would be permitted under the Exceptions Clause. Such a withdrawal of jurisdiction would not change the Constitution, as would a constitutional amendment. Unlike a constitutional amendment, a withdrawal of appellate jurisdiction in school prayer cases would not reverse the Supreme Court's rulings on school prayer. Some state courts might follow those decisions as the last authoritative Supreme Court expression on the subject. Other state courts might disregard the Supreme Court precedents and decide in favor of school prayer once the prospect of reversal by the Supreme Court had been removed.

An argument that fundamental rights should not vary from state to state begs the question of whether there is a fundamental right to uniformity of interpretation by the Supreme Court on every issue involving fundamental rights. The Exceptions Clause, an important element of the system of checks and balances, grants a wide discretion to Congress. There is, in short, a fundamental right to have the system of checks and balances maintained in working order. Without that system, other rights, such as speech, privacy, and free exercise of religion, could be reduced to nullities. This right to a preservation of the system of checks and balances is itself one of the most important constitutional rights.

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May 6, 2011 – Article III, Section 2, Clause 3 of the United States Constitution – Guest Essayist: Kyle Scott, Political Science Department and Honors College Professor at the University of Houston

Article III, Section 2, Clause 3: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

There are two current political issues whose resolution hinges on the interpretation of this clause: plea bargaining and the treatment of suspected terrorists.

Plea bargaining is the manner in which criminal cases are resolved without the benefit of trial. Rather than facing the full charge or the maximum penalty, the accused can plead guilty to a lesser charge in exchange for a lighter penalty. These agreements are reached without the benefit

of a bench or jury trial. Plea bargains are quite common, and in fact have become more common than trials, due to the heavy workload of the courts. Courts could not function without relying on plea bargains and therefore plea bargains are often encouraged by prosecutors and judges. So while the need for plea bargains is real, the lingering question remains as to whether they are Constitutional according to Article III, Section 1, Clause 3. The act of plea bargaining has not been found to be unconstitutional, but that does not mean we should accept the practice.

No defendant can be coerced into a plea deal and therefore remains able to choose a trial and reject a plea deal. This supports the constitutionality of the plea bargain; but my reservations over the practice still remain. I begin with the assumption that the Founders established a Constitution aimed at establishing justice and that the institutions and practices in the Constitution can lead to justice if followed as the Founders had intended. Therefore, if read literally, the Founders can be said to have believed, as consistent with the excerpt under consideration, that the best pathway to justice is through a jury trial in criminal cases. If this is so, then we are left to wonder whether plea bargains abandon the Founders' goal of justice or whether plea bargains abandon those institutions and processes the Founders thought would lead us to justice. In accepting plea bargains as a valid way to resolve criminal cases, have we replaced our justice system with a mere legal system?

No one will doubt that the eradication of terrorists is necessary and that playing by the rules severely hamstrings America's ability to protect itself. For this reason we have found it necessary to not offer jury trials to many of those in custody. But the same questions that were raised above can be raised here: If the Constitution sets up a system that can achieve justice when literally followed then does abandoning that process compromise the search for a just resolution? Or, should we say, that abandoning this part of the Constitution in our fight against terrorism is the only means to achieve justice?

The two most popular responses are that those we have been arrested are enemy combatants and should therefore be dealt with in a military setting or that the rights guaranteed in the Constitution only apply to citizens. The first of these is the most defensible although it is still in question who determines if someone is an enemy combatant, how the term is defined, and if the who and how are done through means consistent with Constitutional principles. The second is more difficult to defend simply because in Article III, Section 2 the Constitution gives jurisdiction to federal courts in cases involving a state, or the citizens thereof, and "foreign states, citizens, or subjects."

So now it is time to disappoint the reader I am afraid. I have taken this clause of the Constitution as far as I am capable and thus do not have a definitive answer to the questions I have raised. I do lean towards particular answers, but because I cannot be for certain what the Founders would have said on the matters, I must remain humble and not express those inclinations until more searching has been done. But, Article III, Section 3 should provide additional insight.

My intention for this essay was to show how this clause applies to current political events and uncover the fundamental questions that must be answered in order to reach some resolution. So let me repeat the most fundamental questions I see for this clause: If the Constitution sets up a system that can achieve justice when literally followed then does abandoning that system

compromise the search for justice? Or, should we say, that abandoning this part of the Constitution in our fight against terrorism or overworked courts is the only means by which we can achieve justice? And, if we answer in the affirmative to the second question, must we say that the Constitution, if strictly followed, cannot lead us to justice in all situations?

Raising and pursuing these fundamental questions in a slow, deliberate manner within the confines of care, reason, and logic—without employing clichés or rhetoric—is the true intention of the Founders. Our Founders were deep and original thinkers who understood the fundamental questions and the importance of asking them. Their search for truth was more important to them than the personal attachment they felt to a particular position. We too should be so brave!

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May 9, 2011 – Article III, Section 3, Clause 1-2 of the United States Constitution – Guest Essayist: Horace Cooper, legal commentator and a senior fellow with The Heartland Institute

Article III, Section 3, Clause 1-2
1: Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
2: The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

The issue of role of loyalty to one's own country isn't nearly as simple a matter as it might appear. Of course, most people have a natural affinity for the country where they were born or at least spent most of their life in. Moreover, should the government actually have the authority to compel you to love your country? Finally, what does it mean to be disloyal? There are crucial distinctions between the right to exercise dissent, criticism and disagreement and the actual disloyalty to one's own country.

Merriam-Webster defines treason as "the offense of attempting by overt acts to overthrow the government of the state to which the offender owes allegiance or to kill or personally injure the sovereign or the sovereign's family"

Throughout history, many rulers have used the issue of loyalty to the country or sovereign as a tool to oppress their critics or even as a pretext for mistreating unpopular individuals in the

country. At the same time, treason is considered perhaps the worst possible crime both because the victims aren't individuals but all of the society that live in a given country.

Depending on the nature of the treasonous activity engaged in, the citizens of the entire nation may suffer financial harm or in extreme circumstances face loss of life or limb. Unlike the laws of many nations which can be changed at will, the U.S. Constitution specifically defines treason and does so in a way that seems obvious in impact.

"Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

In fact, this is the only crime that is specially outlined in the Constitution. Recognizing the severity of the threat that treason posed to the new nation, one of the first acts of the United States Congress made treason a capital offense:

"If any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States, or elsewhere, and shall be thereof convicted on confession in open Court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and SHALL SUFFER DEATH;

The language tracked the Constitution and gave clear guidance to every American that dissent and political debate were not to be considered in any way an example of disloyalty to the nation. At the same time, the new statute made it clear that the new nation would deal severely with those convicted.

Most readers quickly understand that joining others to levy war against our country would constitute treason, but what of "adhering to their Enemies, giving them Aid and Comfort." The founders recognized that there were some actions that were so uniquely inimical to loyalty that they could be punished even if they didn't involve actual war-making against America. Examples of "adhering to their enemies" might include selling the designs for a subterranean entry into the White House or making and providing false identification cards to foreign agents to allow them to enter the Pentagon. "Aid and comfort" refers to counseling, abetting, plotting, assenting, consenting, and encouraging any act against the United States being carried out by an enemy of America.

While treason charges have most often been used in the context of war between nations there is no specific provision limiting treason charges to actions by a person on behalf of an enemy country. In other words, the Constitution does not limit a treason charge to an individual supporting an enemy nation such as Cuba or the former Soviet Union. Support for terrorists such as Al Qaeda, which have no specific nationality, can just as easily result in a charge of treason.

In addition, it's no coincidence that the standard of proof for a conviction for treason in the Constitution was rigorous. This provision tracked the "English Treason Act of 1695" which

precisely required a treason trial to require evidence of at least two witnesses to whatever act of treason was charged as a way to minimize the ability of the sovereign to accuse his political enemies of treason and have him or her executed.

The second provision is straightforward:

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Like most countries, the United States Congress has for nearly 200 years consistently insisted that the maximum punishment that could be levied against those convicted of treason would be execution. While our Congress has that authority, they are not unlimited in this area. Congress is not allowed to pass a statute that works a "corruption of blood" – a law that would interfere with the transfer of property from father to son – unless the property is confiscated prior to the death of the treasonous person.

Treason is insidious and truly dangerous because it involves crimes in which people who should owe a degree of loyalty abuse that trust in a way that endangers all of society. Cicero explains, "A nation can survive its fools, and even the ambitious. But it cannot survive treason from within."

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May 10, 2011 – Article IV, Section 1 of the United States Constitution – Guest Essayist: Cynthia Dunbar, attorney, author, speaker and Assistant Professor of Law at Liberty University

Article IV, Section 1: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The desires to both strengthen and unify their new country beyond what the Articles of the Confederation had accomplished and at the same time preserve the sovereignty of the individual states motivated the Framers in their drafting the Constitution. This principle of federalism, or the governmental structure of coexistent sovereigns, necessitated the creation of the Full Faith and Credit Clause. Since each state would be an independent sovereign with its own laws and polices there would obviously need to be a method of guaranteeing that judgments rendered in one state would be recognized by the courts of all other states within the union. The Supreme Court of the United States (SCOTUS) in Milwaukee County v. M. E. White Co., 296 U.S. 268, 56 S. Ct. 229, 80

L. Ed. 220 (1935) reaffirmed this intent of the Framers that the individual states be "integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."

Consequently, we see that the real essence of the Full Faith and Credit Clause is to ensure that valid judgments rendered in one jurisdiction can be uniformly enforced within alternate jurisdictions.

This prevents parties from having to litigate the same claim numerous times prior to execution of the judgment being recognized. For example, if a court of competent jurisdiction in Alabama enters a judgment against John Doe for $25,000.00 to Jane Doe, and John Doe later moves to Arizona, Jane Doe would be able to execute the judgment against John Doe in Arizona without having to relitigate the entire case in Arizona.

The SCOTUS in Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438, 64 S. Ct. 208, 213, 88 L. Ed. 149 (1943) said "we assume . . . that the command of the Constitution and the statute is not all- embracing, and that there may be exceptional cases in which the judgment of one state may not override the laws and policy of another." The court has referred repeatedly to "well-established" exceptions; however, they have never delineated a list of what constitutes a well-established exception. For a judgment to be enforceable in a sister jurisdiction, it would have to have been a valid judgment in the original jurisdiction, one which would have withstood all valid legal defenses. In other words, one could not enforce a judgment in an alternate jurisdiction on the basis of "Full Faith and Credit" where the judgment would have been unenforceable in the original jurisdiction.

During the constitutional convention the basic structure of the Full Faith and Credit Clause was borrowed from the Articles of Confederation and then expanded. However, the ultimate source for this principle came from the uncodified common law, as did most constitutional and statutory provisions at the inception of our nation. The reality of the importance and impact of the common law was reaffirmed by Justice Cardozo's statement that most constitutional provisions were "built upon a substratum of common law, modifying, in details only, the common law foundation." CARDOZO, THE GROWTH OF THE LAW (1924) 136

According to Justice Story, the specific details of the underlying principles in the common law had, unfortunately, not been definitively ascertained. He lamented this overall ignorance of this area of the law in his Conflict of Laws treatise of 1834. "There exists no treatise upon it in the English language; and not the slightest effort has been made, except by Mr. Chancellor Kent, to arrange in any general order even the more familiar maxims of the common law in regard to it."

What is pivotally important from a historical aspect is that the Full Faith and Credit Clause in no way created a uniform framework of laws. It was merely a vehicle for enforcement of judgments, not a means of usurping state legislative authority and policy making decisions. An obvious example of this is seen by our acceptance of differing laws within differing jurisdictions. Nobody would ever contend that the Full Faith and Credit Clause allows a citizen of Texas to avoid criminal prosecution in Missouri for driving 75 mph on an interstate that has a speed limit

of 60 mph simply because the same interstate has a 75 mph speed limit in Texas. The distinctions between state laws are numerous and many as is their right and prerogative.

Consequently, the more recent push to utilize the Full Faith and Credit Clause to force policy issues on dissenting states is constitutionally and historically unfounded. In 1993 The Supreme Court of Hawaii alluded to the fact of an equal protection challenge to a state not recognizing a same-sex marriage. The fact that states historically recognized marriages that were contracted within another state should not have been legally relevant or determinative for two simple reasons. First, this issue deals purely with a clear conflict of laws, not recognition of a court's ruling or judgment through analysis of its laws. Second, the states uniformly recognized the marriages of other states because they did not present blatant opposing public policy issues pertaining to how marriage was defined that would serve to override their own laws.

In response to the dicta in the 1993 case, the United States Congress passed the Defense of Marriage Act, better known as DOMA, which not only defined marriage, it also granted to the states the express right to not recognize a same-sex union performed outside of its jurisdiction. This Act has continuously been under attack and the current administration's Department of Justice is even refusing to fulfill its obligation to enforce it. In response, Congress has been forced to acquire special counsel at additional expense to taxpayers in an attempt to see the DOJ's obligations fulfilled. Had there been a clearer and more historically accurate understanding of the scope and extent of the Full Faith and Credit Clause, this entire issue could have been avoided.

Unquestionably, Full Faith and Credit was never intended to impose legislative policy onto a competing jurisdiction beyond that expressed within an actual court ruling or judgment for execution and enforcement.

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May 11, 2011 – Article IV, Section 2 of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Article IV, Section 2, Clause 1-3
1: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.
2: A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

3: No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Of these clauses in Article IV, Section 2, the last, the Fugitive Slave Clause, similar to one adopted by the Confederation Congress in the Northwest Ordinance contemporaneous with the drafting of the Constitution, is now a dead letter. Another, the Extradition Clause, imposes a theoretical duty ("shall…be delivered") on the state governors. But the Supreme Court ruled in 1861 that judicial compulsion, by writ of mandamus, was unavailable. As a result, governors have considered themselves at liberty to refuse requests for extradition when, in their opinions, justice so demands. Rather, the clause is enforced (more or less) politically through interstate compacts, uniform state laws, and (indirectly) federal fugitive-from-justice legislation.

The first clause, the ("Interstate") Privileges and Immunities Clause, has a long pedigree, yet remains murky in meaning and ambiguous in scope. It is derived from Article IV of the Articles of Confederation (as are the Constitution's Extradition and Full Faith and Credit Clauses). The existence of these clauses in both charters is evidence of the continuity reflected in the Constitution's Preamble "to form a more perfect [not a new] Union." These clauses also are one more manifestation of the bedrock federalism principle of union among states (rather than simply creation of a national government over the states) that runs through both charters.

The Constitution's version of the P&I Clause is a redaction of the more compendious version in the Articles. Unfortunately, concision did not bestow clarity. Four different meanings have been advanced. The first is that the clause is actually a restriction on Congress not to pass laws that discriminate among different states and the citizens thereof. This interpretation received support from Justice Catron in his concurring opinion in the Dred Scott Case. It is constitutionally obsolete today.

Another interpretation is that the clause guarantees the citizens of each state various rights that are enjoyed by citizens in any other state. That view was specifically rejected by the Supreme Court a century ago. It would have given the Supreme Court the kind of power of review over state laws that it came to acquire more gradually through judicial expansion of the 14th Amendment by the "incorporation" of various Bill of Rights guarantees into the due process clause and the creation of new categories of unconstitutional discrimination under the equal protection clause.

A third interpretation is that the clause guarantees the right of a citizen of a state to exercise the rights that he has in his own state even when visiting another state, that is, to carry his rights of state citizenship throughout the Union. That view, as well, has been rejected by the Supreme Court, albeit implicitly, well over a hundred years.

The fourth, and constitutionally accepted, understanding is that the clause prohibits certain forms of discrimination by a state against citizens from other states who are sojourning within its borders.

This creates a kind of equal protection principle. The Constitution had no clause that prohibited discrimination against (some) individuals overtly as the 14th Amendment's Equal Protection Clause does today. But there were some clauses that operated through a limited and implied non-discrimination principle. The P&I Clause is one.

The P&I clause does not apply to corporations or other merely "legal" persons. Nor does it apply to aliens. Neither of those limits is significant today, in light of the Court's expansive reading of the 14th Amendment. The P&I Clause also provides no minimum protections of rights. To the extent the state limits the exercise of rights of its own citizens, it may do so for outsiders coming into the state, at least under this provision. Outsiders have the right not to be treated unfavorably due to their status as visitors, but have no right to be treated more favorably.

Not all rights are protected. The exact definition has always been elusive. The seminal opinion in this area is a circuit court opinion by Justice Bushrod Washington from 1823, Corfield v. Coryell. He wrote: "We have no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."

Such flourishes, while rhetorically satisfying, do not provide concrete guidance. Justice Washington carries on, but does little to penetrate the verbal fog; "What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."

He finally delivers himself of some examples of protected rights, privileges, and immunities. "The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise;…to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state….These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.'"

Such rights, deemed fundamental to the concept of a single nation, do not include the right to hunt game, to fish, or to engage in certain "quasi-public" businesses, such as insurance. Nor does it include a right to vote or to attend college at in-state rates, though, oddly, it includes the right not only to receive welfare payments without residency requirements, but to receive the same level of payment as those who have lived in the state for many years. To curtail even marginally the opportunities of welfare recipients to spend their "down time" in a state with higher benefits than their current domicile by having to meet the new state's residency requirement is an intolerable burden on the right to travel. To be sure, the Supreme Court's decisions on the matter

rest on uncertain constitutional foundations, that eminent tribunal having referred to Article IV, to the Commerce Clause, to the 14th Amendment's Equal Protection and (most recently) Privileges or Immunities Clauses as havens for a right to travel. Since states would like these welfare recipients to keep traveling, the Court has also re-characterized the right as "moving to another state."

The P&I Clause of Article IV apparently was intended as a significant part of the constitutional edifice. With the Supreme Court's inflation of the 14th Amendment, and Congress' frequent resort to legislation under the commerce clause, it has become virtually redundant. Still, every decade or so, a case comes along to remind us that there is "still some life left in the carcass."

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May 12, 2011 – Article IV, Section 3 of the United States Constitution – Guest Essayist: Dan Morenoff, Attorney

Article IV, Section 3, Clause 1-2
1: New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.
2: The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Marge Simpson: "There are only 49 stars on that flag."
Abe Simpson: "I'll be deep in the cold, cold ground before I recognize Missouri."

Abe Simpson got it partly right. Article IV, Section 3 leaves one state Constitutionally suspect; it's just not Missouri. It also highlights that, under irrevocable actions taken by Congress, there could be 54 states at any time one state chooses.

Congress first admitted states to the Union while Washington was still President. In 1791, it admitted Vermont (a territory previously claimed by both New York and New Hampshire, which had governed itself for 14 years). Within months, it admitted Kentucky (formerly, the disgruntled, Western counties of Virginia).

The pairing indicated the great dividing line in American political life for the next 70 years. Congress admitted the states together to preserve the balance in the Senate between states allowing human slavery and those abhorring it. Also noteworthy, Virginia consented to the independence of Kentucky only after negotiating an interstate compact that Congress contemporaneously approved.*

By 1820, the tradition of admitting states in free and slave pairs (Indiana and Mississippi, Illinois and Alabama) was so engrained that it required the Missouri Compromise. Congress contemporaneously admitted Missouri (formerly a territory) as a slave state and the northern district of Massachusetts as a newly separate, free State of Maine, while drawing a line through the West beyond which slavery would not be allowed in the remaining Federal territories. Unlike the Virginia of 1790, Massachusetts, happy to preserve the balance of power for free states, demanded no concessions from Maine on consenting to the separation.

The events that followed, including the eventual repeal of the Missouri Compromise's Western-land provisions in 1854, directly precipitated the Civil War.

Notice that, already, Congress had twice exercised the power to carve a state out of another state, with the consent of the severed state's legislature. During the Civil War, it did again, this time in a Constitutionally suspect manner. After Virginia seceded from the Union, its loyalist, mountain counties seized the chance to free themselves from the richer, more heavily populated lowlands. Deeming the rebellious state legislature in Richmond illegitimate, these counties' representatives gathered in Wheeling, Virginia (in their midst) and declared themselves the legitimate government of all of Virginia. It was this "loyal" government of Virginia which consented to the carving of the same counties represented within it into the new state of West Virginia.

When the Civil War concluded and Virginia returned to the Union, Virginia's government predictably challenged the legitimacy of the Wheeling convention's actions during the war. In 1865, the Virginia General Assembly repealed the Wheeling convention's act, nominally in Virginia's name, of consenting to the split. Litigation followed, in which the United States Supreme Court implicitly recognized the Wheeling convention as having spoken both for the seceding counties and for the State of Virginia as a whole, despite the fact that this put the same people on both sides of the table in a negotiation.** Nonetheless, since 1871, West Virginia's questionable legitimacy has been set aside, apparently in the interest of finality.

Finally, it is worth noting that while no new state has been admitted to the Union since 1959, Congress has bindingly consented to further admissions.

Alone among America's states, Texas was an independent republic before statehood, which joined the Union not through the usual process of Congressional admission, but through the contemporaneous action of two, equal sovereigns. On February 26, 1845, the U.S. Congress passed a joint resolution offering Texas statehood. Texas then convened an Annexation Convention that approved annexation and submitted an Annexation Ordinance to popular referendum in October 1845. After the people of Texas authorized ascension, both the U.S. House and Senate approved the Annexation Ordinance and President Polk signed it into law on December 29, 1845.

Both the initial U.S. Congressional joint resolution and the Annexation Ordinance included the following provision:

New States of convenient size not exceeding four in number, in addition to said State of Texas and having sufficient population, may, hereafter by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal Constitution.

An affirmative part of the deal between sovereigns, enshrined in the law of the United States, was that Texas, at its discretion, may self-divide into up to five (5) states at any time. While Texas has, to date, never exercised this option, it has the legal right, should it so choose, to sub-divide and claim an additional 8 seats in the United States Senate at its pleasure.

* The Compact bore on the preservation of land-titles held on paper by Virginians before Kentucky's independence. The conflicts that Compact's terms set in motion between Virginians that had never seen the lands in question but held papers properly filed in Richmond and the frontier woodsmen who settled Kentucky and developed its lands would only be resolved 140 years later through the Kentucky Supreme Court's resort to legal fiction. Green v. Biddle, 21 U.S. 1 (1823).

** Virginia v. West Virginia, 78 U.S. 39 (1871).

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May 13, 2011 – Article IV, Section 4 of the United States Constitution – Guest Essayist: Professor William Morrisey, William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College

Article IV, Section 4: The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Here the Framers speak the heart of their intentions for America.

In the Declaration of Independence, they had objected to George III's actions because he had violated the laws of nature and of nature's God. One might suppose that the Americans' complaints amounted to no more than an accusation that this king had turned tyrant—that some other, more just, monarch (a Queen Anne, a Henry IV) might have appeased them. Indeed she, or he, might have done—for a time.

But a more careful reading of the Declaration shows that not only the king but also Parliament had angered the colonists. Americans judged that the whole British regime, and the structure of the British empire, deserved to be overthrown—replaced with a new regime and a new imperial structure. The new regime was republican—republicanism as they, not the Europeans, understood it—and federal—a federalism informed but not simply as defined by the great French political philosopher, Montesquieu.

What danger did this clause address? The highly respected Massachusetts delegate, Nathaniel Gorham, joined John Randolph and George Mason of Virginia and James Wilson of Pennsylvania in issuing the warning: "an enterprising Citizen might erect the standard of Monarchy in a particular State, might gather together partisans from all quarters, might extend his views from State to State, and threaten to establish a tyranny over the whole and the General Government be compelled to remain an inactive witness of its own destruction." That is, these Framers anticipated the kind of career undertaken by Napoleon in France a decade before the fact, and they moved decisively to prevent it from happening here.

As usual, James Madison (writing in the forty-third Federalist) provides the clearest overview. "In a confederacy founded on republican principles and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations." Why so? Because the United States is not only a republic but a federal union: "The more intimate the nature of such a Union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into, should be substantially maintained" (emphasis in original). What is more, "Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature," he writes, citing Montesquieu's research as proof. Not only the federal government but the constituent states of the federal union must be republican. Only this can stand as what Jefferson called "an empire of liberty."

"But a right implies a remedy," Madison continues. What power within the United States can safely prevent an anti-republican faction from seizing control of a state? "What better umpires could be desired by two violent factions, flying to arms and tearing a State to pieces, than the representatives of confederate States not heated by the local flame? To the impartiality of Judges they would unite the affection of friends." And even more ambitiously: "Happy would it be if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual could be established for the universal peace of all mankind." This would require that republican regimes achieve a sort of `critical mass' throughout the world; in 1787, they had achieved such a critical mass only in the United States. If republicanism failed here, when and where would it revive? When and where would a general civil peace obtain—the condition for securing unalienable human rights?

Protection against invasion includes not only invasion by foreigners—the United States was bordered by the non-republican empires of Spain and Great Britain, as well as by the non-republican (and still formidable) Amerindian nations to the west—but also by other states of the Union. Although (as Montesquieu had remarked) commercial-republican regimes had not fought one another in the past, the Framers were taking no chances.

The Constitution guarantees federal intervention in times of anti-republican rebellion and of invasion foreign or domestic. Intra-state violence that is not anti-republican raised another problem. Massachusetts had suppressed Shays' Rebellion only a few months before the Convention convened. Daniel Shays and his men had rebelled out of desperate indebtedness; far from being anti-republican, many had served in the war on the Patriot side. Convention delegates Elbridge Gerry and Luther Martin objected that intervention in such cases could be dangerous and unnecessary unless the afflicted state consented to it. At the same time, whatever Jefferson may have thought about a little rebellion now and then, armed rebellion does tend to throw cold water on the rule of law, and republics normally operate according to the rule of law. The delegates therefore agreed to require the federal government to obtain consent from the state government before intervening in such disputes. On balance, the local authorities will judge best when a republican rebellion requires the heavy hand of federal intervention.

In his Federalist essay, Madison did not hesitate to notice a force that might intervene in any disorder, whether anti-republican or republican, foreign or interstate or domestic. An "unhappy species of population abound[s] in some of the States, who during the calm of regular government are sunk below the level of men; but who in the tempestuous scenes of civil violence may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves." The presence of slaves in the United States raised the harshest questions about both the American regime and the American federal union. By nature, the slaves were men; by law, they were a self-contradictory mixture of personhood and property. Civil disorder of any kind might induce them to rise up and claim their natural rights, perhaps at the expense of the natural rights of their masters; slave revolts had occurred in New York during the colonial period, and of course the freeman Toussaint Louverture would lead a (temporarily) successful insurrection in Haiti beginning in 1791. "We have seen the mere distinction of color made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man," Madison declared. Would a slave revolt be an attack on republicanism or a vindication of it? Madison and the other founders sought some way to avoid such a revolt, which might overturn republicanism in the name of republicanism or perhaps install some other regime as a remedy for evils of slaveholding republicanism.

Put in a somewhat different way, the dilemma was as simple as it was stark. As Madison wrote in Federalist 43, the republican guarantee clause "supposes a pre-existing government of the form which is to be guaranteed." That is, the basis of the federal union—the new empire of liberty replacing the old empire of tyranny—is the republican regime of each constituent state. Each state entered the union acknowledged as a republic by all of the others. But how `republican' were those states in which slaves "abounded"? Madison knew the answer, which he would write down in an unpublished note a few years later: "In proportion as slavery prevails in a State, the Government, however democratic in name, must be aristocratic in fact. The power lies in the part instead of the whole, in property instead of numbers. All the ancient popular governments were, for this reason, aristocracies. The majority were slaves…. The Southern States of America, are on the same principle aristocracies." In his own Virginia, he observed, the population of non-freeholding whites and black slaves amounted to three-quarters of the population (Papers of James Madison, vol. xiii, p. 163).

Such regimes were republics in Montesquieu's sense—"aristocratic" rather than "democratic" republics. For Montesquieu, "republic" meant simply that the regime did not amount to the `private' possession of one person—a despotism. This definition derived from the Latin root of the word: res publica or "public thing." But to Madison and rest of the founders "republic" meant the "democratic" republic, only; in the words of Federalist 39, "it is essential" to republican government "that it be derived from the great body of society, not from an inconsiderable proportion or favored class of it." And "it is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people—i. e., the representative principle. Representatives represent the people at large, not some "favored class." In his 1787 critique of the Articles of Confederation, "Vices of the Political System of the United States," Madison went so far as to publish the sentence: "Where slavery exists the republican theory [namely, that right and power are co-extensive because the majority rules] becomes still more fallacious" than it does under conditions whereby there is a large number of disenfranchised paupers.

All of this being so, the republican regime and the federal union—the unity of the United States— began its life on a knife edge. The Framers hoped that their new Constitution would provide a framework for the peaceful resolution of the problem of popular self-government under conditions in some ways favorable—remoteness from Europe, commercial interdependence of the states, and all the other features described in the first Federalist—and in some ways ominous—the existence of anti-republican regimes on the borders and of anti-republican "domestic institutions" within the states themselves. They inserted the republican guarantee clause as one way of strengthening that framework. In a way, it did—but its enforcement came at horrible cost, decades later.

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May 16, 2011 – Article V of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Article V: The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article V, which provides the methods for formal amendment is, arguably, the most important provision in the Constitution outside the creation of the structure of government. That article embodies a compromise over a very contentious issue that was grounded in conflicting doctrines of republicanism and higher law theory swirling during the Revolutionary War period.

On the one hand, 17th and 18th century republican theory called for decisions by majority vote, albeit under a restricted franchise. This was a proposition that manifested itself in the post-Glorious Revolution English constitutional system in which a majority of the Parliament (effectively, the House of Commons) not only enacted "ordinary" legislation but controlled constitutional change, as well. Under the English system, there was no categorical distinction between ordinary laws and those of a foundational, i.e., constitutional, nature. For example, the Charter of Rights did not become politically binding until passed in 1689 as a parliamentary bill. This was a manifestation of a "constitution" that, being unwritten, was considered solely a fundamental political ordering, rather than also a fundamental law. Hence, there was no formal constitutional amendment process outside an appeal to Parliament to pass or repeal laws that were "constitutional" in the operative sense.

This English Whig republicanism had many adherents in the United States among leaders of the Revolution. For them, the problem was not the theory but the practitioners. Not surprising, then, some early state constitutions, too, placed the amending power with the legislatures. Even if a state constitution contained a bill of rights that was immune from legislative tinkering, any violation of that command was to be resolved through political action. Moreover, anything outside that bill of rights was left to legislative change.

Yet, by the 1780s, an entirely different conception became dominant. To be sure, reaction against the entrenched constitutional order arose from the experience of Americans with the militant republicanism of the day embodied in legislative majorities that, in too many states, contributed to political and economic turmoil exacerbated by class warfare rumblings and the trampling of rights in property. Experience may have sufficed to cause disenchantment with the existing constitutional structure, but it was not enough to explain the emergence of the alternative.

Enter the "higher law" conception of constitutions. Americans had lived in colonies governed, directly or indirectly, by royal charters. By their thinking, Americans were in a contractual, and therefore "legal," relationship with their proprietors and the Crown through these charters and patents, and Parliament simply had no control over them. Local laws were valid, as long as they conformed to the charter.

This emergent "higher law" constitutionalism also had religious and political roots. Focusing on the latter, it was a component of social contract theory. The republican version of the legitimacy of governmental action under the social contract focused on the political mechanism to be used after the commonwealth was formed, namely, legislative majorities. The higher law doctrine focused on the relationship of the majority's act to the qualitatively superior action of creating the commonwealth. In a strict version of that view, unanimous consent was required to form the social contract. In the American experience, the Mayflower Compact provided one such example. At the same time, looking at disparate social contract theorists, such as Thomas Hobbes

and John Locke, one finds much ambiguity and question-begging assumptions about how exactly the social contract's obligations arise.

The colonial experience with royal charters fairly early suggested that such documents were first, law; second, fundamental; and third, not amendable as ordinary legislation. They were law because written and, being in the nature of contracts, binding on all signatories (and, perhaps, their successors). They were fundamental because they dealt with matters that went to the very organization of the political commonwealth. They were not amendable as ordinary laws because each free person had to consent to the changing of the deal that created the basis of political obligation and made the acts of government different from those of a brigand. If unanimity was impractical, at least a supermajority ought to be required. Thus, the charter for Pennsylvania as early as 1701 called for amendments to be adopted only upon 6/7 vote of the assembly.

A pure form of this approach was found in the Articles of Confederation. As the Articles can be considered the formal basis for the formation of a political commonwealth, the United States of America, and in light of the fact that the document repeatedly refers to that commonwealth as a "perpetual union," it is a social contract. As such, it could only be amended by the consent of all signatories to the compact, though, of course, a state might provide that a majority within its legislature sufficed to bind the state.

That unanimity requirement was quickly perceived as a parlyzing defect of the Articles. When the Framers of the Constitution considered the matter, they believed that they had to find a way that avoided the potential for constitutional turbulence from radical republican majoritarianism as well as for constitutional sclerosis from rigid social contract-based unanimity. They urged that the supermajority requirements of Article V appropriately split the difference. This is not a matter readily settled. The procedure has only been invoked successfully 18 times (the original ten amendments having been adopted at one time). What is clear, though, is that the relative difficulty of the procedure has allowed the unelected judiciary to take on the role of de facto constitutional amendment to a much greater extent than the Framers likely anticipated and than what is consistent with classic republican ideals.

Judging by early state experimentation, constitutional change was to occur, if anything, more directly through the people than Article V allows. Constitutions were typically the job of special conventions whose work would be ratified by popular vote. Actions by such special bodies and by the people themselves were more immediate realizations of popular sovereignty than actions by legislatures, even by legislative supermajorities. George Washington characterized them as "explicit and authentic acts of the whole people." It was impractical, however, at the national level, to have all people gather at town halls. Nor was it deemed practical — or wise — to have a national vote on amendments.

In Article V, the mechanism of popular participation is the convention. That mechanism is available for the proposal of amendments emanating from the states and the adoption of the amendments by the states. It is interesting, and perhaps disappointing from the republican perspective, that the first has never been used and the second has been used only to repeal another constitutional amendment, regarding alcohol prohibition. Instead, Congress typically proposes, and state legislatures dispose.

There is, however, an institutional reason why no constitutional convention has been called to draft amendments. Plainly put, Congress and the political elites fear that a convention could ignore any specific charge from Congress and draft a whole new constitution. That is, after all, what happened in Philadelphia in 1787. If a matter came close to receiving the requisite number of petitions from states, it is likely that the Congress would itself adopt an amendment and submit it to the states.

That is precisely how Congress got around to proposing the 17th Amendment for the direct election of Senators after enough states submitted petitions to put them one short of the required 2/3.

Currently, the proposed balanced budget amendment is just two states short.

More troubling to some is whether the people could go outside Article V to form a convention. That was an issue raised, but not resolved, before the Supreme Court in 1849 in a case involving an insurrection in Rhode Island under the guise of adoption of a "popular constitution." Traditionalists point to Article V as providing the means the people have chosen to limit themselves, lest constitutional instability be the order of the day. In response, republicans assert that American bedrock principles of popular sovereignty (found, among other places in the Federalist Papers) do not admit of so limiting the people's power. The people ultimately control their constitution, not vice versa. James Wilson, no wide-eyed radical, speaking in the Pennsylvania ratifying convention, defended the Framers' alleged departure from their charge by the Confederation Congress by declaring what was a self-evident truth to most Americans at the time, that "the people may change the constitutions whenever and however they please."

An expert on constitutional law, **Prof. Joerg W. Knipprath** has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

May 17, 2011 – Article VI of the United States Constitution – Guest Essayist: Nathaniel Stewart, Attorney

Article VI
1: All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.
2: 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. 3: The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VI concerns the debts of the United States, the supremacy of the Constitution and federal law, and the sworn obligation of office holders to uphold the Constitution.

America's War for Independence was an expensive war – and most of it had been financed. Tens of millions of dollars had been borrowed from foreign governments and wealthy financiers – some of them even English – who were understandably concerned that their debtors might try to use the country's new-found independence to avoid repaying their loans. Indeed, the 1783 Treaty of Paris, which brokered the peace between Britain and the United States, expressly provided that lawfully- contracted debts were to be paid to creditors on either side.

This concern resurfaced as the fledgling country traded in the relatively weak Articles of Confederation for a more authoritative Constitution. Article VI, clause one, of the new document reassured unpaid creditors that "All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." The ratification of the new Constitution then could not be used to shirk paying those who were rightfully owed under the old system. It was well understood at the time that good credit must be established and maintained if the country would have any hope of survival or longevity.

The second clause, commonly known as the "Supremacy Clause," makes clear that the Constitution is the binding legal authority on which the country was founded: "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." This may seem axiomatic to us today, but the issue was far from settled and "the source of much virulent invective and petulant declamation against the proposed Constitution," (Federalist No. 33) for it was widely feared that the formation of the federal government would intrude upon the rights and liberties enjoyed by the states and the people.

Richard Henry Lee, a prominent anti-federalist, expressed this fear in the alliterative "Federal Farmer IV" when he warned, "It is to be observed that when the people shall adopt the proposed constitution it will be their last and supreme act; it will be adopted not by the people of New Hampshire, Massachusetts, &c., but by the people of the United States; and wherever this constitution, or any part of it, shall be incompatible with the ancient customs, rights, the laws or the constitutions heretofore established in the United States, it will entirely abolish them and do

them away: And not only this, but the laws of the United States which shall be made in pursuance of the federal constitution will be also supreme laws, and wherever they shall be incompatible with those customs, rights, laws or constitutions heretofore established, they will also entirely abolish them and do them away."

Both Alexander Hamilton and James Madison took up the debate and defended the clause. Hamilton first explained, "If individuals enter into a state of society the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted [sic] to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for Political Power And Supremacy" (Federalist No. 33). But Hamilton, perhaps attempting to assuage the fears of men like Richard Henry Lee, insisted that the "acts of the larger society which are not pursuant to its constitutional powers" must then be held "invasions of the residuary authorities of the smaller societies" and will not become the supreme law of the land. "These," Hamilton argued, "will be merely acts of usurpation, and will deserve to be treated as such." Thus, although a supreme law was required for any proper government to function, the federal government would be limited in its scope to those laws pursuant to the Constitution.

James Madison's Federalist No. 44 echoed Hamilton's argument and contended that any Constitution without a Supremacy Clause "would have been evidently and radically defective." Madison warned in Federalist No. 44 that, were the state constitutions to exert supremacy over the federal Constitution, "the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society every where subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members."

It didn't take long for the question of legal supremacy to find its way to the Supreme Court. Coincidentally, both the Supremacy Clause and the issue of pre-Treaty debt were taken up in the same case in 1796. In 1779, during the War for Independence, Virginia had passed a law whereby all property within the state belonging to any British subject or which did belong to any British subject at the time of forfeiture was deemed to be the property of Virginia. Not only did the statute confiscate British-owned property, it arguably nullified private debts owed by Virginians to British subjects. In Ware v. Hylton, a British creditor sued an American debtor to recoup the money owed under a pre-war bond. Virginia's statute seemed to prevent the creditor from collecting his debt, and the Court was asked to decide: did Virginia's law or the Treaty of Paris control the collection of the debt?

Making his only appearance as a lawyer before the Supreme Court, John Marshall argued brilliantly on behalf of the American debtor. Justice Iredell, in the controlling opinion of the Court, ruled against the future Chief Justice: "Under this constitution, therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also, by the vigor of its own authority, to be executed in fact. It would not otherwise be the supreme law, in the new sense provided for, and it was so before, in a moral sense." The Treaty of Paris thus superseded Virginia's contrary law, and the Court declined to give effect to the state statute.

Later, Chief Justice Marshall would pen the landmark decision in McCulloch v. Maryland (1819), ruling that Maryland's tax on the Second Bank of the United States ran afoul of the Constitution. Nullifying the state's tax on the federal government, Marshall observed: "If any one proposition could command the universal assent of mankind, we might expect it would be this— that the government of the Union, though limited in its power, is supreme within its sphere of action."

A barrage of new federal laws from Capitol Hill and a long line of Supremacy Clause cases marched across the legal landscape in the twentieth century, leaving a blotted trail of nullified state statutes. Today, "A state statute is void to the extent that it actually conflicts with a valid Federal statute," (Edgar v. Mite Corporation (1982)), and such a conflict exists wherever compliance with both federal and state law is impossible; or where the state law stands as an obstacle to accomplishing the full purposes and objectives of Congress.

Thus, for example, the Supreme Court held in Raich v. Gonzales (2005) that California's law permitting doctor-prescribed medical marijuana would frustrate Congress's efforts to regulate the interstate marijuana market under the federal Controlled Substances Act. And, as Justice Stevens' majority opinion casually reminds us, "The Supremacy Clause unambiguously proves that if there is any conflict between federal and state law, federal law shall prevail," because, as the Court had previously opined, "'no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.'" (quoting Wickard v. Filburn (1942)). We might now wonder whether – in the Court's view – there remain any regulatory "acts of the larger society which are not "pursuant to its constitutional powers" or which might still invade "the residuary authorities of the smaller societies."

The third clause of Article VI establishes two important and related principles. First, its "Oath Clause" requires that "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ." Once again, the Constitution is supreme, and a conscious effort was made for it to be supported and upheld not only by federal officers and judges, but by state officials as well. As Hamilton explained in Federalist No. 27, the "Oath Clause" would help ensure that "the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and it will be rendered auxiliary to the enforcement of its laws."

Second, the "No Religious Test" clause guarantees that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." In the founding era, much of Europe and many of the new American states used religious tests to protect their preferred churches and religions. In England, the Test Act of 1672 required all public officers to swear a conspicuously anti-Catholic oath declaring disbelief in "any transubstantiation in the sacrament of the Lord's Supper." In 1789, Delaware, Maryland, Massachusetts, North Carolina, and Pennsylvania all had constitutions requiring that their public officials to swear belief in tenets of Christianity. The "No Religious Test" clause prevented such requirements for holding federal office, but left any such qualifications for state officers untouched.

Perhaps surprising to us today, this clause received a fair amount of debate and resistance from anti- federalists during ratification. In Massachusetts, for example, one "principal objection" to the Constitution was its lack of a religious test – "rulers ought to believe in God or Christ," it was argued. Federalist Oliver Ellsworth defended the constitutional ban on religious tests, believing them to be "utterly ineffectual," and arguing that "If we mean to have those appointed to public offices, who are sincere friends to religion, we, the people who appoint them, must take care to choose such characters; and not rely upon such cob-web barriers as test-laws are." Ellsworth's view won out, of course – although it remains a rather open question whether we, the people who appoint our public officers, have taken much care to choose those predicted "sincere friends to religion."

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May 18, 2011 – Article VII of the United States Constitution – Guest Essayist: Dan Morenoff, Attorney

Article VII
The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

We often conflate the history of our country and our constitution, as if the United States of America burst forth, full-grown, from the head of Zeus at ratification in 1789. To understand what's important about Article VII of the Constitution, though, you need to think about the government that existed before and authorized the convening of the Constitutional Convention. Article VII is how the Founders changed the rules in the middle of the game to overstep their authority and remake the nation in ways the Articles of Confederation were designed to prevent.

The United States of America had existed as an independent nation for 13 years before ratification; even before that, the Continental Congress had convened for an additional 3 years – had it not, there would have been no organ of the United States capable of declaring our independence. We had 14 Presidents before George Washington, 7 of whom were President under the nation's first written Constitution, the Articles of Confederation. And, throughout those years, the body that met, with the power to act for America, was the united States in Congress assembled.

It was this Congress that called what became the Constitutional Convention in Philadelphia. It did so through a resolution calling for states to send delegates "for the sole purpose of revising the articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the federal Constitution adequate to the exigencies of government and the preservation of the Union." This was consistent with the Articles themselves, which provided a mechanism for their own amendment. Article XIII provided that "the Articles of this confederation shall be inviolably observed by every State, and the union shall be perpetual; nor

shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united States, and be afterwards confirmed by the legislatures of every State."

But not all the states complied with Congress's request that they send delegates to the Grand Convention to negotiate proposed amendments to the Articles of Confederation. Rhode Island, happy with a system in which it often exercised effective veto-authority despite its miniscule size, flatly refused. New York sent three (3) delegates, the incomparable Alexander Hamilton (a long- time supporter of amending the Articles to create a viable national government) and two staunch defenders of state autonomy included by George Clinton, New York's soon-to-be-Anti-federalist Governor, for the all-but-stated purpose of voting against anything Hamilton supported.

So when the Founders met in Philadelphia, they faced a seemingly insoluble puzzle. They met as delegates of states bound by a "perpetual" confederation amendable only by unanimous action.

They met with the task of proposing amendments sufficient to "render the federal Constitution adequate" to preserve that "perpetual" union. And one of the states whose unanimous support they needed to amend the Articles sufficiently to preserve the Union had already announced through its refusal to participate that it would support absolutely nothing they suggested.

Article VII was how the Founders cut this Gordian Knot.

They would not abide by the Articles' rules in proposing a replacement for the Articles. Knowing that they could not meet the Articles' requirements, they made up their own. Rather than allow little Rhode Island's intransigence to doom the convention (and the Union), they replaced the Articles' unanimous-consent requirement with Article VII's rule that the new Constitution would take effect for the ratifying states whenever nine (9) states agreed.

And their rule change was decisive. As implicitly threatened, Rhode Island voted down the Constitution's ratification in March 1788.* Without Article VII, that would have been the end of the Constitution. Because of Article VII, the ratification process continued, though, and the Constitution won its ninth (9th) and decisive state ratification from New Hampshire on June 21, 1788. Virginia and New York followed by the end of July. An election then followed, allowing Washington's inauguration (along with a new Congress under the Constitution) on April 30, 1789, despite the fact that neither North Carolina nor Rhode Island had yet consented to the new regime.

* Rhode Island's version of this history asserts that the state rejected the Constitution because it lacked a Bill of Rights. http://www.visitrhodeisland.com/make-plans/facts-and-history/. This is self-justification masquerading as history and ignores the state's refusal to send delegates to the Convention at a time when no national government was contemplated and no need for a Bill of Rights even imaginable. Even the U.S. Archives admits that Rhode Island only narrowly ratified after the ratification of the Bill of Rights when "[f]aced with threatened

treatment as a foreign government." http://www.archives.gov/education/lessons/constitution-day/ratification.html.

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May 19, 2011 – Amendment I of the United States Constitution – Guest Essayists: Mr. Kelly Shackelford, President and CEO for Liberty Institute, and Justin Butterfield, Constitutional Attorney, Liberty Institute

Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

First Amendment to the U.S. Constitution

Perhaps the most important and the most contentious portion of the United States Constitution, the First Amendment to the U.S. Constitution—the first of the Bill of Rights—was instrumental in ensuring that the new Constitution would be accepted by citizens of the fledgling United States at the end of the eighteenth century. The Constitution set up a government of limited, enumerated powers. "Enumerated powers" meant that the federal government, as originally envisioned, could take no action unless the Constitution explicitly granted the government the power to take that action. In theory, then, the federal government could not restrict freedom of speech because the Constitution did not give Congress permission to restrict freedom of speech. Many American citizens, however, having just fought a war resulting from Britain's disregard for their rights, were leery of entrusting their newly-won freedom to a government with no explicit protections for individual rights. They did not believe that the "lack of permission" for Congress to act was strong enough protection. To address these concerns, twelve articles, known as the Bill of Rights, were submitted to the states for ratification as amendments to the Constitution. Of these twelve articles, the last ten were ratified in the eighteenth century (the second article of the Bill of Rights was ratified in 1992 as the 27th Amendment to the U.S. Constitution). Unlike the main text of the Constitution, the articles of the Bill of Rights are explicit prohibitions on the government, designed to prevent the federal government from being able to trample on the rights of states and citizens.

The First Amendment famously begins, "Congress shall make no law…." The First Amendment originally limited only Congress and, thus, the federal government. State and local governments were not limited by this (or any other) amendment to the Constitution. The First Amendment was considered to only apply to the federal government until 1925 when the Supreme Court, in Gitlow v. New York, held that the Fourteenth Amendment, which applies to the states, "incorporated" the First Amendment.

Following the statement that the First Amendment applies to Congress are five clauses, each protecting one aspect of the flow of ideas. These five clauses are the Establishment Clause ("…respecting an establishment of religion"), the Free Exercise Clause ("or prohibiting the free exercise thereof"), the Free Speech Clause ("or abridging the freedom of speech"), the Free Press Clause ("or of the press"), and the Assembly and Petition Clause ("or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

The first two clauses of the First Amendment protect religious liberty. The Establishment Clause, a reaction against the abuses of the Church of England, was originally intended to prohibit the government from establishing an official national religion or supporting one religious denomination over another. This clause has since been re-interpreted to say that government may not favor religion in general, thus leading to increased attempts to secularize society, including banning any possibly perceived "endorsement" of religion by the government. The Free Exercise Clause is the counterpoint to the Establishment Clause. While the Establishment Clause prevents the government from establishing a religion, the Free Exercise Clause prohibits the government from interfering with individuals' religious expression.

The Free Speech Clause of the First Amendment protects the expression of ideas. Not all speech is equally protected, however. Political speech is afforded the greatest protection under the First Amendment. Commercial speech—speech done to make a profit—is given less protection. The guaranty of freedom of speech does not extend to certain types of speech, such as obscenity or speech that incites immediate violence. The government is also allowed to place some reasonable limits on when, where, and how speech can take place, but these limits cannot be used to favor one viewpoint over another. For example, a government can prohibit the use of megaphones at night near residential areas, or a government can prohibit a demonstration from walking through a secured military base. If, however, the government allows one group to use a megaphone at night near a residential area, then the government cannot prohibit another group from doing so based on the viewpoint that the second group espouses.

The Free Press Clause is closely related to the Free Speech Clause, but applies to printed communications. This clause has also been used to strike down taxes that specifically target newspapers and laws that require "fairness" in reporting.

Finally, the Assembly and Petition Clause protects the right of people to assemble together and to petition the government. This clause is important in a republic because petitioning the government is one of the main ways the citizenry exercises its sovereignty. While this clause protects the right of the people to petition the government, it does not require that government officials actually listen to or respond to any petition attempt.

Ultimately, a true republican form of government cannot exist apart from the free flow of ideas. Additionally, this amendment ensures that the government cannot impose a state orthodoxy, violating the conscience of those who hold unpopular views or forcing them into intellectual submission. This amendment also ensures that open debate is not thwarted, for as John Milton said, "Though all the winds of doctrine were let loose to play on the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter."

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May 20, 2011 – Amendment II of the United States Constitution – Guest Essayist: David B. Kopel, Research Director at the Independence Institute, and Adjunct Professor of Advanced Constitutional Law at Denver University, Sturm College of Law

Amendment II: A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Like most of the Bill of Rights, the Second Amendment was part of a conciliatory program by the Federalists, as promised by James Madison at the Virginia ratifying convention. For the most part, the Bill of Rights consisted of assurances that the new federal government could not do things which the Federalists never wanted to do anyway, and which the Federalists believed were not within the powers which had been granted to the new government.

For example, the Federalists had no wish to establish a national religion, and they believed that Congress's enumerated powers (e.g., to establish post offices, to regulate interstate commerce) could not possibly be construed so as to give Congress the power to establish a religion.

Accordingly, Madison and the other Federalists were perfectly happy to add a constitutional amendment plainly stating that Congress could not establish a religion.

The Second Amendment was of a similar character. Based on knowledge of history from ancient times to the present, the Federalists and the Anti-Federalists agreed that disarmament was a direct path to slavery. Indeed, the heavy-handed English government of King George III had precipitated the American Revolution through an aggressive gun control program in 1774-76: embargoing the import of guns and gunpowder by the American colonies, confiscating the guns and gunpowder which some towns stored in central repositories (the repositories kept guns for militiamen who could not afford their own gun, and provided merchants a place to keep reserve quantities of gunpowder in a fireproof building), putting Boston under military occupation and confiscating the firearms of the Bostonians, using the military to conduct house-to-house searches for firearms at Lexington and Concord, and then naval bombardment and destruction of coastal New England towns which refused to surrender all their arms.

Accordingly, the Second Amendment's assurance that the federal government could never disarm the people was uncontroversial.

Where Madison had refused to budge was on the subject of federal powers over the militia. The original Constitution, in clauses 15-16 of Article I, section 8, had given Congress broad authority to summon the militia into federal service, and to provide for the organization, arming, and disciplining of the militia. At the state ratifying conventions, Anti-Federalists had strongly objected to these new federal powers. But Madison refused to limit federal militia powers, just as he refused all other proposals to constrict the federal powers granted by the new Constitution.

When U.S. Representative James Madison introduced his proposed Bill of Rights into the first session of the United States House of Representatives in 1789, he proposed that the right to arms language be inserted into Article I, Section 9, after Clause 3. Clauses 2 and 3 protect individuals against suspension of the writ of habeas corpus, bills of attainder, and ex post facto laws. Madison also suggested that what were to become the First, Third, Fourth, Eighth, and Ninth Amendments, portions of the Fifth Amendment (double jeopardy, self-incrimination, due process, just compensation), and portions of the Sixth Amendment (speedy public trial, right to confront witnesses, right to be informed of charges, right to favorable witnesses, right to counsel) also be inserted there.

Madison proposed that the remainder of the Fifth (grand jury), Sixth (jury trial, in the form of a declaration that "trial by jury as one of the best securities to the rights of the people, ought to remain inviolate"), and the Seventh Amendment (civil jury trial) be inserted into Article III, which deals with the judiciary. He recommended that what would become the Tenth Amendment be inserted as a new article between Articles VI and VII. His proposed limitation on congressional pay raises was to be inserted into Article I, Section 6, which governs congressional pay. (This was eventually ratified as the Twenty-seventh Amendment in 1992.)

If Madison had seen the proposed Second Amendment as a limitation on federal militia powers, then he would have placed the Amendment in the part of the Constitution which defines federal militia powers. (Article I, § 8, clauses 15-16.) Instead, he placed the proposed language in the portion of the original Constitution which guaranteed individual rights.

However, the House objected that interpolating changes into the original Constitution would imply that the original Constitution had been defective. So Madison's changes were eventually appended to the Constitution, as amendments following the main text.

For the speech introducing the Bill of Rights into the House of Representatives, Madison's notes contain the following: "They relate first to private rights—fallacy on both sides—espec as to English Decln. Of Rights—1. mere act of parl[iamen]t. 2. no freedom of press—Conscience…attaineders—arms to protest[an]ts." James Madison, "Notes for Speech in Congress Supporting Amendments," June 8, 1789, in 12 Madison Papers 193-94 (Robert Rutland ed., 1979) (bracketed letters not in original).

The English Declaration of Rights, enacted by Parliament in 1689, had declared that "The subjects which are protestants may have arms for their defence suitable to their conditions as and allowed by law."

So Madison believed that the English Declaration of Rights was defective because it was a mere act of Parliament, and thus could be over-ridden by a future Parliament. Further, the English Declaration of Rights did not go far enough, in part because its arms guarantee protected only Protestants (98% of the English population at the time).

As introduced by Madison, the Second Amendment read: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."

After approval by the House, the Second Amendment was considered by the Senate. The Senate (1) removed the religiously scrupulous clause and the phrase "composed of the body of the people," (2) replaced "the best" with "necessary to the," and (3) rejected a proposal to add the words "for the common defence" after "the right of the people to keep and bear arms." 1 Journal of the First Session of the Senate 71, 77 (1820).

The rejection of the "common defence" language made it clear that the Second Amendment right to arms was not solely for militia service.

The middle clause, about a well-regulated militia, was moved so that it became the introductory clause. As enacted, the Second Amendment had a form typical in state constitutions of 18th and 19th centuries: an introductory, purpose clause announced an important political principle, and then an operative clause declared the legal rule.

For example, Rhode Island's 1842 Constitution declared: "The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments on any subject, being responsible for the abuse of that liberty . . . ." Eugene Volokh, "The Commonplace Second Amendment," 73 NYU Law Review 793 (1998).

The right which is guaranteed in the operative clause is not limited by the purpose clause. In Rhode Island, the purpose clause refers to "the press," but the operative clause protects the speech rights of "any person," not just journalists. Likewise, the Second Amendment right does not belong only to the militia; it belongs to "the People," just as the First Amendment right to assemble and the Fourth Amendment right to freedom from unreasonable searches and seizures, are rights of "the People," and therefore rights belonging to all individual Americans.

Tench Coxe, a political ally of Madison who would later serve in Madison's sub-cabinet, penned the most comprehensive section-by-section exposition on the Bill of Rights published during its ratification period. Regarding Madison's proposed right to arms amendment, Coxe wrote: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert

their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms." Federal Gazette, June 18, 1789, p. 2.

After Coxe, the best evidence of the original public meaning of the Second Amendment comes from the most influential and widely used legal treatise of the early Republic, the five-volume, 1803 American edition of William Blackstone's Commentaries on the Common Law of England, edited and annotated by the Virginia jurist St. George Tucker (1752-1827). Tucker was a militia colonel during the Revolutionary War, a Virginia Court of Appeals judge, a federal district judge, and professor of law at the College of William & Mary. Regarding the Second Amendment, Tucker's 1803 treatise was essentially verbatim from his 1791-92 lecture notes at the College of William & Mary, almost immediately after the Second Amendment had been ratified.

Tucker's Blackstone was not merely a reproduction of the famous English text. It contained numerous annotations and other material suggesting that the English legal tradition had undergone development in its transmission across the Atlantic, generally in the direction of greater individual liberty. Tucker's treatment of Blackstone's discussion of the right to arms was typical. According to Tucker: "The right of the people to keep and bear arms shall not be infringed. Amendments to [Constitution], and this without any qualification as to their condition or degree, as is the case in the British government." St. George Tucker, 1 Blackstone's Commentaries, with Notes of Reference to the Constitution and Laws of the Federal Government of the United States, and of the Commonwealth of Virginia 143-44 (1803) (reprinted 1996 by The Lawbook Exchange).

Tucker's Blackstone also included a lengthy appendix on the new American constitution. This appendix was the first scholarly treatise on American constitutional law and has been frequently relied upon by the United States Supreme Court and scholars. Tucker's primary treatment of the Second Amendment appeared in the appendix's discussion of the Bill of Rights:

A well regulated militia being necessary to the security of a free state, the right of the people to keep, and bear arms, shall not be infringed.

. . .This may be considered as the true palladium of liberty . . . . The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.

Appendix to Vol. 1, Part D, p. 300.

Tucker's appendix also mentioned the right to arms in the context of Congressional power over the militia. Noting that the Constitution gives Congress the power of organizing, arming, and disciplining the militia, while reserving to the states the power to train the militia and appoint its officers, Tucker asked whether the states could act to arm and organize the militia if Congress did not. He argued that the language of the Second Amendment supported the states' claim to concurrent authority over the militia:

The objects of [the Militia Clauses in Article I] of the constitution, . . . were thought to be dangerous to the state governments. The convention of Virginia, therefore, proposed the following amendment to the constitution; "that each state respectively should have the power to provide for organizing, arming, and disciplining it's own militia, whenever congress should neglect to provide for the same." . . . [A]ll room for doubt, or uneasiness upon the subject, seems to be completely removed, by the [second] article of amendments to the constitution, since ratified, viz. 'That a militia [sic] being necessary to the security of a free state, the right of the people to keep, and hear arms, shall not be infringed.' To which we may add, that the power of arming the militia, not being prohibited to the states, respectively, by the constitution, is, consequently, reserved to them, concurrently with the federal government.

Id., pp. 272-73.

Tucker's treatise was studded with other references to the right to arms. For example, Tucker contended that Congress's power to enact statutes that are "necessary and proper" for carrying into effect its other enumerated powers, U.S. Const. art. I, sec. 10, cl. 8, did not include the power to make laws that violated important individual liberties. Such laws could not be deemed "necessary and proper" in the constitutional sense, argued Tucker; therefore, they were invalid and could be struck down by a federal court. Tucker chose as an illustration a hypothetical law prohibiting the bearing of arms:

If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, under the construction of the words necessary and proper, here contended for, would be able to pronounce decidedly upon the constitutionality of those means.

Id., p. 289.

Similarly, Tucker observed that the English law of treason applied a rebuttable presumption that a gathering of men was motivated by treason and insurrection, if weapons were present at the gathering. Tucker, however, was skeptical that the simple fact of being armed "ought … of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself." Vol. 5 Appendix, at 9, note B. He added: "In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side." Id. For more on Tucker and the Second Amendment, see David T. Hardy, "The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights," 103 Northwestern University Law

Review Colloquy 1527 (2009); Stephen P. Halbrook, "St. George Tucker's Second Amendment: Deconstructing the True Palladium of Liberty," 3 Tennessee Journal of Law & Policy 114 (2007).

From Madison, Coxe, and Tucker to the present, the large majority of Americans have always understood the Second Amendment as guaranteeing a right to own and carry guns for all legitimate purposes.

This view was re-affirmed after the Civil War. Specifically invoking the "the constitutional right to bear arms," Congress enacted the Second Freedmen's Bureau Bill to stop the South from interfering with gun ownership and carrying by the former slaves. Similarly, the Fourteenth Amendment was passed by Congress, and ratified by the states, for, among other things, preventing the Southern states from interfering with the Second Amendment rights of the Freedmen to keep and bear arms to defend themselves against the Ku Klux Klan and similar racial terrorists. , Stephen P. Halbrook, Securing Civil Rights: Freedmen, the Fourteenth Amendment, and the Right to Bear Arms (Oakland: Independent Institute, 2010).

The U.S. Supreme Court relied on this original meaning in the 2010 case McDonald v. Chicago, holding that the Fourteenth Amendment prohibits state and local governments from infringing Second Amendment rights.

During part of the 20th century, a theory was created that the Second Amendment was not an individual right, but was instead a "state's right" or a "collective right." Although lacking in historical support, these anti-individual theories were for a time popular among some elites. However, in District of Columbia v. Heller (2008), all nine Justices of the Supreme Court agreed that non-individual interpretations of the Second Amendment were supported neither by history nor by the Court's precedents.

The Heller Court split 5-4 on whether the individual right was only for militia purposes (the four dissenters led by Justice Stevens) or was for all legitimate purposes (the five-Justice majority led by Justice Scalia). The majority result had strong support not only in the original meaning of the Second Amendment, but also in more than two centuries of history and evolving tradition of the Second Amendment, in which the American people had repeatedly affirmed the right to own and carry firearms for personal defense, hunting, and all other legitimate purposes. David B. Kopel, "The Right to Arms in the Living Constitution," 2010 Cardozo Law Review de Novo 99.

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May 23, 2011 – Amendment III of the United States Constitution – Guest Essayist: Robert Chapman-Smith, Instructional Design Associate at the Bill of Rights Institute

Amendment III: No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

In the realm of constitutional law, obscurity knows no better companion than the Third Amendment of the U.S. Constitution. No direct explication of the Amendment appears in the reams of opinions the Supreme Court has issued since 1789. In fact, save for Engblom v. Carey (1982), no explication offered by the whole of America's judicial branch directly engages the tenets of the Amendment.

And yet, the significance of the Third Amendment lives on as a jewel that has an inherent value which cannot be augmented or diminished by present-day utility.[1]

The common law lineage of the Third Amendment stretches deep into history. Early Anglo-Saxon legal systems held the rights of homeowners in high regard—viewing firth (or peace) to be not a general thing encompassing the entire community, but rather a specific thing comprised of "thousands of islands . . . which surround the roof tree of every householder . . . ."[2] But Saxon- era legal institutions never had to contend with quartering issues. This is due primarily to the absence of standing armies and the reliance on fyrd—a militia to which all abled bodied men owed service for a period normally not to exceed forty days in a given year. Not until the Norman Conquests of 1066 did popular grievances against quartering (also known as billeting) begin to manifest.[3]

Attempts to codify provisions against quartering predate the Magna Carta—most notably appearing in 12th century charters like Henry I's London Charter of 1131 and Henry II's London Charter of 1155.[4] But early attempts to prevent involuntary quartering by law proved inadequate, especially as armed conflicts transitioned from feudal Saxon-era fyrds to monarchs hiring professional soldiers. Men of questionable character comprised the bulk of these mercenary armies. Kings pressed criminals into service in exchange for having crimes and misconduct forgiven. Though they fought well, these men would draw little distinction between friend and foe and would continually mistreat civilians.[5]

As time drew on, other efforts to quell quartering fell well short of success.[6] The problem compounded exponentially under Charles I, who engaged in expensive and wasteful wars that spanned across Europe. Charles I conducted these wars without receiving approval from Parliament. Parliament balked at the idea of financing Charles' wars—forcing the soldiers in Charles' army to seek refuge in private homes.[7] By 1627, the problem became severe enough that Parliament lodged a formal complaint against quartering in its "Petition of Right."

But the "Petition of Right" did nothing to change quartering practices. During the English Civil War, both Royalists and Roundhead armies frequently abused citizens through quartering—despite the official proclamations that damned the practice. During the Third Anglo-Dutch war, conflicts between soldiers and citizens erupted over forced quartering.[8] In 1679, Parliament

attempt to squelch concerns by passing the Anti-Quartering Act, which stated, "noe officer military or civil nor any other person whatever shall from henceforth presume to place quarter or billet any souldier or souldiers upon any subject or inhabitant of this realme . . . without his consent . . . ."[9] James II ignored the Act and the continued grievance over billeting helped propel England's Glorious Revolution. Upon William II's ascension to the throne, Parliament formulated a Declaration of Rights that accused James II of "quartering troops contrary to law." Parliament also passed the Mutiny Act, which forbade soldiers from quartering in private homes without the consent of the owner. Parliament extended none of these limited protections to the colonies.[10]

In America, complaints against quartering began surfacing in the late 17th century. The 1683 Charter of Libertyes and Privileges passed by the New York Assembly demanded that "noe freeman shall be compelled to receive any marriners or souldiers into his house . . . provided always it be not in time of actuall warr in the province."[11] The quartering problem in the colonies grew exponentially during the mid-18th century. The onset of the French-Indian War brought thousands of British soldiers onto American shores. Throughout much of Europe, the quartering issue had dwindled due to the construction of permanent barracks. Colonial legislatures recoiled at the thought of British soldiers having such accommodations and repeatedly denied British requests for lodging.

The close of the French-Indian War brought about even more challenges. In an attempt to push the cost of defending the colonial frontier onto the colonists, Parliament passed the Quartering Act of 1765. The Act stipulated that the colonies bear all the costs of housing troops. It also legalized troop use of private buildings if barracks and inns proved to be insufficient quarters. In an attempt to secure the necessary funding for maintaining the army, Parliament passed the Stamp Act—"as a result, the problems related to the quartering of soldiers became entwined with the volatile political issue of taxation without representation."[12]

Quartering issues continued to surface, worsening gradually with each occurrence. In 1774, Paliament passed a second Quartering Act that was more arduous than the first. Due to its specific legalization of quartering in private homes, the second Quartering Act would become one of the "Intolerable Acts" lodged against the King and Parliament. Grievances against British quartering practices appeared in a series of declarations issued by the Continental Congress: the Declaration of Resolves, the Declaration of Causes and Necessities, and the Declaration of Independence.[13]

After successfully gaining independence from Britain, many states enacted new constitutions or bills of rights that offered protection against involuntary quartering. As had been the case in England, the quartering issue was entwined with the maintenance of a standing army. The 1787 Constitutional Convention, and the Constitution that arose from it, gave Congress the power to raise and support armies. The Constitution focused little attention on individual rights. That omission troubled many delegates both at the Convention in Philadelphia and at the ratification debates throughout the states.

Chief among the concerns pertaining to the military provisions of the Constitution was a fear that the new American government might be as oppressive as the British one it aimed to replace. As Patrick Henry noted:

"one of our first complaints, under the former government, was the quartering of troops upon us. This was one of the principal reasons for dissolving the connection with Great Britain. Here we may have troops in time of peace. They may be billeted in any manner—to tyrannize, oppress, and crush us."[14]

The Anti-Federalists routinely stressed the Constitution's lack of protection against standing armies and involuntary quartering. Many states echoed the concerns of the Anti-Federalists. Of the ninety types of provisions submitted to Congress, only seven appeared more frequently than provisions addressing quartering.

But James Madison and the Federalists viewed such provisions as unnecessary. Any Constitution that provides a democratic process for the maintenance of a standing army will, by consequence, solve any quartering issues that may arise. As Madison noted during the Virginia ratification debates:

"He says that one ground of complaint, at the beginning of the revolution, was, that a standing army was quartered upon us. This is not the whole complaint. We complained because it was done without the local authority of this country—without the consent of the people of America."[15]

Madison also expressed skepticism about the need for a bill of rights. In a letter to Thomas Jefferson, Madison eschewed bills of rights as "parchment barriers" easily trampled by an overwhelming majority in a respective state.[16] Nevertheless, Madison took up the challenge of constructing a federal bill of rights and among his proposed amendments, which he derived from the previously mentioned state proposals, was an amendment addressing quartering.

The House debate on the Amendment was short. A few members wished to edit the text of the Amendment, imbuing in it a stronger protection of the homeowner, but all such measures were defeated and the Amendment became one of the ten enshrined in the Bill of Rights.[17]

As mentioned before, the Third Amendment is one of the least litigated provisions of the Constitution. Perhaps this lack of legal cases is due to the self-evident nature of the Amendment. As Justice Joseph Story notes, "this provision speaks for itself. Its plain object is to secure the prefect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion."[18] Yet the absence of litigation does not itself entail that the Amendment has at all times existed without violation.

Involuntary quartering on the part of United States soldiers appears to have happened during the War of 1812. While Congress did declare war on England, thus giving itself the authority to regulate quartering, it failed to provide any regulations governing the practice of billeting.[19] After the war, Congress did provide payment to those whose property was used "as a place of deposit for military or naval stores, or as barracks . . ."[20]

The Civil War brought about another instance of quartering under the Third Amendment—though its case is substantially more complicated than the War of 1812. Congress did not declare war on the Confederacy and it is unclear how periods of insurrection affect the Third Amendment's distinction of peace and war. Regardless, even if a de facto state of war existed, Congress never issued any regulations governing the practice of quartering. Yet instances of the Union Army quartering in private homes appear in both loyal and rebel states.[21] The question of whether this action violated the Third Amendment is unsolved and is likely to remain so, as no Third Amendment case ever arose out of the Civil War era.

The lack of litigation and judicial action has left open some interesting questions about the applicability of the "self-evident" Third Amendment. One of these questions involves the Amendment's applicability to the states. Today, America's troops enjoy barracks and accommodations so sufficient that it seems unlikely that troops would ever need to be garrisoned in a private home. Yet the question remains that, if an issue did somehow arise, would a state's National Guard regimen be obligated to follow the Third Amendment (if no such provision existed in a state's Constitution)? That question arose in 1982 with Engblom[22], yet the question still lacks a definitive answer.

Though it is sometimes ridiculed and is rarely discussed, the Third Amendment enshrines a right with a common law history as rich as any. Quartering abuses committed against the colonists propelled America into the Revolutionary War. After victory, the Founders worked to protect the public against any future abuses. The onset of the modern military tactics has seemingly thrown the usefulness of the Third Amendment into doubt, yet the Amendment still provides interesting and unanswered questions about federalism and the interaction of overlapping constitutional protections.

[1] This sentence paraphrases a metaphor from Grounding for the Metaphysics of Morals in which Immanuel Kant describes a good will as "a jewel … which has its full value in itself. Its usefulness or fruitlessness can neither augment nor diminish this value."

[2] Bell, Tom W.. "The Third Amendment: Forgotten but not Gone." William and Mary Bill of Right's Journal 1, no. (1993): 117-118.

[3] Fields, William S., Hardy, David T., "The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History ." American Journal of Legal History 35, no. (1991): 395-397.

[4] English Historical Documents: 1042-1189, at 945 (David C. Douglas & George W. Greenway eds., 1953) ("Let no one be billeted within the walls of the city, either [a soldier of the King's household] or by the force of anyone else.")

[5] Fields & Hardy supra note 3 at 403

[6] The late Tudors had a bit of success expanding and improving the traditional militia system, but this system collapsed under James I, a pacifist who favored the repeal of militia statutes.

[7] Hardy, B. Camron. “A Free People’s Intolerable Grievance: The Quartering of Troops and the Third Amendment.” Virginia Calvacade 33, no. 3 (1984): 127

[8] Fields & Hardy supra note 3 at 403 – 405

[9] Great Britain. Statutes of Great Britain. London: , 1950. Print. [10] Bell supra note 2 at 123
[11] Schwartz,Bernard. Roots of the Bill of Rights. Bernard Schwartz. 1980 [12] Fields & Hardy supra note 3 at 417
[13] Id at 417-18

[14] The Founder’s Constitution. 1 ed. 5, Amendments I-XII. Philip B. Kurland and Ralph Lerner.
Indianapolis: Liberty Fund, Inc., 217 [15] Id
[16] Fields & Hardy supra note 2 at 424

[17] Kurland & Lerner supra note 14 at 217-18

[18] Id at 218

[19] Bell supra note 2 at 136

[20] Little, Charles. “Statues at Large Vol. 3.” A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 – 1875 . Available
from http://memory.loc.gov/ammem/amlaw/lwsllink.html. Internet; accessed 22 May 2011. [21] Bell supra note 2 at 137
[22] Id at 141-142

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May 24, 2011 – Amendment IV of the United States Constitution – Guest Essayist: Jeffrey Reed, a professional orchestra conductor, holds a degree from the Louis B. Brandeis School of Law, and has taught constitutional law at Western Kentucky University in Bowling Green, Kentucky

Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment to the United States Constitution is the part of the Bill of Rights which guards against unreasonable searches and seizures. It also requires warrants issued by courts to be supported by probable cause.

Debates surrounding Fourth Amendment law involve balancing an individual's right to privacy against law enforcement's need to aggressively investigate crime. As crime rates soar, the legal trend has been to give police more leeway under the amendment. However, it has not been without debate. One only need point to the controversy surrounding the Patriot Act, where police were granted expanded powers to wiretap phone conversations, intercept emails, etc., without a warrant. No doubt, the Fourth Amendment has created a growing body of law, affecting all Americans.

The text says:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The framers of the Constitution adopted the amendment in response to the writs of assistance (a type of blanket search warrant) that were used during the American Revolution.

Before one can answer whether a search is reasonable, it must be established that there was, indeed, a search under the meaning of the Fourth Amendment. In Katz v. United States, the Supreme Court ruled that there is a search if a party has a "reasonable expectation of privacy" in the area searched.

In Katz, the government wiretapped a telephone booth. The court found that it was an unreasonable search because the defendant expected his phone conversation to be private. The court used a "reasonable man" standard. Would society believe that Katz's expectation of privacy was reasonable? The court held that the government should have obtained permission from a court, via a search warrant, before wiretapping the phone booth.

In order to obtain a warrant, an investigating officer must state, under oath, that he has reason to believe that the search will uncover criminal activity or evidence of a crime. A judge must find that probable cause exists to support the warrant. The Supreme Court has ruled that the term probable cause means that there is a "practical, nontechnical" probability that incriminating evidence is involved."

The standards of probable cause differ for an arrest and a search. A "seizure" under the Fourth Amendment occurs when a person is arrested and taken into custody. The officer must have probable cause to seize the person. Police have probable cause to make an arrest when the facts they possess, based on "reasonably trustworthy information" would lead a reasonable person to believe that the person arrested had committed a crime.

Not every incident involves an "arrest" requiring probable cause. Under Terry v. Ohio, police may conduct a limited warrantless search (frisk them) on a level of suspicion less than probable cause when they observe "unusual conduct" that leads them to reasonably believe "that criminal activity may be afoot" and that the suspect is presently dangerous to the officer or others.

The Fourth Amendment also prohibits the unreasonable seizure of personal property without a warrant. A seizure of property occurs when there is meaningful interference by the government with an individual's possessory interests.

Courts enforce the Fourth Amendment via the exclusionary rule. Any evidence obtained in violation of the amendment cannot be used to prosecute the defendant at trial. The defense attorney must move the court to suppress the evidence.

Like any rule, there are exceptions. No warrant is needed if a person agrees to the search. Likewise, if an officer is legally in a place and sees objects in "plain view" that he has probable cause to believe are evidence of a crime, he may seize them without a warrant. "Open fields" such as wooded areas or pastures may be searched without a warrant (there's no reasonable expectation of privacy in them). And so on and so forth.

The most recent exception was handed down by the Supreme Court on May 16th. In a case originating in my state of Kentucky, the Court created a new exception to the warrant requirement. Now, police may enter a home without a warrant when they have reason to believe that drug evidence is being destroyed. The Kentucky police acted properly when they smelled marijuana at an apartment door, knocked loudly, announced themselves, and kicked in the door.

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May 25, 2011 – Amendment V of the United States Constitution – Guest Essayist: Andrew Langer, President of the Institute for Liberty

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment V to the Constitution, among longest in the Bill of Rights, is also one of the richest in terms of content. A transitional amendment, it is unique in that it encompasses restraints on both criminal and civil powers of government—transitionally linking the two. The first half of

the amendment serves as the bedrock of protections for accused individuals under the criminal code, while the second half lays out the bedrock principles underlying private property rights.

Americans are all-too familiar with the criminal elements within the 5th Amendment. These were borne out of the principles of English common law, stemming from the Magna Carta—principles that the revolutionary founders had seen eroded by the Crown prior to and during the War for American Independence. Given the tremendous difficulty many of the founders had in seeing power concentrated in a single federal government, they felt it important enough to further constrain those powers and enshrine basic protections to accused persons within the Bill of Rights.

The assurance of a grand jury indictment before trial, the assurance of not being subjected to perpetual trial should the government not achieve a guilty verdict, the assurance of not being made to testify against oneself, these all had roots in English common law—very basic rights that represent a check on government power run amok. The idea of the grand jury process helps to ensure that a single government official cannot arrest an individual without merit.

The prohibition against "double jeopardy" insures that these same government officials cannot hold an individual in perpetuity, for multiple trials, when a jury of his or her peers has found them not guilty of a particular crime. And the prohibition against self-incrimination is a recognition of the dignity of the individual in not being forced to act against his own interest in self-preservation and liberty.

The statement on due process really forms the transition between civil and criminal in the 5th Amendment. In terms of criminal jurisprudence, obviously an individual accused of a crime must be afforded some fair process by which his case is heard, ensuring that his team is able to amount a fair defense.

But then the 5th Amendment grabs onto a core value of the American founding: the importance of private property rights. Having its basis in John Locke's theory that government's role is to protect life, liberty, and property, Jefferson has originally written that our inalienable rights were life, liberty, and the pursuit of property. Private property undergirds the foundation of the Republic— scholars such as Hernando DeSoto have written that property rights are essential to the stability and prosperity of any free society.

As it happens, it is these rights that have come under the greatest siege in the last century and a half—eroded in an incredible number of ways, largely because they are the among the least understood rights. As it happens, the Bill of Rights sets out very simple protections.

Government has the power to take private property from people. We cede that power to it in the 5th Amendment. But three things have to happen in order for that "taking" to be lawful:

1. First, the taking has to be for a "public use". Traditionally, this was for things like public buildings, roads, even public spaces like parks;

2. Due Process has to be accorded to the property owner. They have to be given a fair hearing or process by which they can negotiate with the government, perhaps to avoid the taking entirely;
3. Should 1 and 2 be satisfied, "just" compensation has to be paid to a property owner, generally what a willing buyer would pay to a willing seller.

For many years, litigation and legal debates arising under the 5th Amendment's property rights provisions centered on what constituted a taking and whether or not property owners had been afforded due process—and at which point a landowner could seek compensation from the government.

A government need not physically occupy or affirmatively confiscate property, either. As government has grown, the reach of that government into the daily lives of property owners has similarly grew—and the concept of "regulatory takings" was made manifest. In the seminal 1922 Supreme Court case of Pennsylvania Coal v. Mahon the High Court stated clearly that when a regulation goes "too far" it will be considered a taking, triggering the 5th Amendment's requirements.

Thus, under laws like the Clean Water Act and the Endangered Species Act, when a piece of property is restricted from substantially all uses, the landowner can seek just compensation for the taking of his property under the 5th Amendment.

What has come to the forefront in recent years is the long-time debate over what constitutes a "public use". In the 2005 Supreme Court case, Kelo v. City of New London, the High Court ruled that the home that elderly Suzette Kelo had lived in since she was a girl could be taken by the City of New London, CT to make way for a parking lot for a Pfizer manufacturing facility.

The public outrage was palpable—after all, the taking would directly benefit a private entity, the Pfizer Corporation, and not constitute a "public use" as stated in the 5th Amendment. People wondered how the Supreme Court could have ruled this way.

The problem was that this decision was the end-result of 130 years of Supreme Court erosion of the "public use" doctrine. Starting with a line of cases in which the High Court ruled that it was appropriate for government entities to take private property for quasi-private/quasi-public utility companies, and leading into years of cases in which the court decided that it was OK for localities to condemn wide swatches of private property in the name of urban redevelopment, we were left with an entirely different interpretation of "public use".

By 2005, the Supreme Court's precedent said that so long as there was a nebulous "public benefit," the Constitution's requirement of a taking for "public use" was satisfied. Generally, this means that if there is a net increase in a city's tax rolls, the 5th Amendment is satisfied.

The problem wasn't that the High Court was making new law in Kelo. The problem was that the High Court didn't have the courage to over-rule years of bad law.

The 5th Amendment's property rights protections are constantly under siege. If we hope to keep the Republic, we must defend those protections earnestly and vigorously.

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May 26, 2011 – Amendment VI of the United States Constitution – Guest Essayist: Marc. S. Lampkin, a Vice President at Quinn Gillespie

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Perhaps more than any other Amendment, the 6th Amendment protects the liberties of the American people most directly. It is so effective in carrying out this goal that most Americans give its protections little thought or consideration.

By setting up the framework which limits the ability of the government to arbitrarily accuse and incarcerate the citizens at large the 6th Amendment minimizes the likelihood that criminal charges will be filed against political enemies of the state. In America no one can be arrested, tried, sentenced and imprison without it occurring under a set of rules in public, with a written record that can be accessed by the public and members of the media. Prior to the adoption of the 6th Amendment, these protections didn't exist for large parts of Europe and Asia.

There are seven elements of the 6th Amendment:

Speedy Trial: As recognized by the Supreme Court this provision has three obvious benefits to the accused

1. To prevent a lengthy period of incarceration before a trial. In other words the accused won't be giving unlimited detention without having been tried and convicted.

2. To minimize the effects of a public accusation. Undue suffering from a false accusation shouldn't occur for more than an absolute minimum amount of time.
3. To ensure that too much time didn't lapse making it harder for the accused to defend himself either as a result of death or sickness of witnesses or due to loss of memories by needed witnesses.

Public Trial: Under its terms the trial must be open to the public and accessible by the media. Interestingly, this right predates English common law and possibly even the Roman legal system and has been thought to be essential to ensure that the government can't use the court system as

an instrument of persecution because the knowledge that every criminal trial is open and accessible to the public operates as an effective restraint.

Impartial Jury: Unlike a trial in which a judge or panel of judges make a decision, a jury trial is a legal proceeding in which the jurors make the decision. Interestingly the size of the jury is universally assumed to be 12 but in state criminal trials it can be as few as 6 individuals and in Ancient Greece a criminal trial might include over 500 persons in the jury. No matter the actual size, it is essential that the individuals who make up this jury be free of bias and prejudice. They should be representative of the population at large from which the accused comes from but should not be his immediate family or close friends.

Notice of Accusation: It is not sufficient that the state merely take the time to accuse an individual. The government must also inform the accused of the specific nature and cause of the accusation and do so in a way which makes it reasonably possible for the accused to mount a defense against the charge. Additionally all of the charges must be outlined and must include all ingredients necessary to constitute a crime.

In other words, the government can't secretly charge you with speeding or tax fraud and yet not let you know specifically how or when you committed the crimes. They must be specific and precise in order to make it possible for you to explain, justify or otherwise defend yourself against the charges.

Confrontation: The right to directly question or cross-examine witnesses who have accused a defendant in front of the jury is a fundamental right which like the impartial jury and public trial requirement pre-dates the English legal system. A variation of this right is referenced in the Book of Acts which describes the Roman governor Porcius Festus, discussing the proper treatment of his prisoner the Apostle Paul: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face-to-face, and has been given a chance to defend himself against the charges."

Compulsory Process: Like the confrontation clause, the right of "Compulsory Process" protects Americans from unfair criminal accusations by allowing them to be able to obtain witnesses who can testify in open court on their behalf. Even if a witness does not wish to testify, compulsory process means that the state can subpoena him and force the witness to testify or be in contempt of court. If a person did not have compulsory process, witnesses who know of your innocence but who simply didn't wish to be involved could lead to a guilt conviction of an innocent person. Embarrassment or fear are not legitimate excuses to avoid compulsory process because this right is designed to ensure the accused has the opportunity to present his strongest defense before the jury.

Counsel: Perhaps the most meaningful of all of the 6th Amendment rights, is the right to select the attorney or counsel of your choice to represent you in a criminal case. While much attention has been focused on the issue of when and whether every accused person must be provided with a minimally competent attorney, the framers felt that the greatest threat was not being able to hire the advocate of your choice. As early as the year 1300 there was an advance trade made up of individuals who represented or advocated on behalf of accused individuals or individuals who

needed to make special pleadings before the government. At the time of the founding of the United States most of the colonies had adopted a policy of allowing accused individuals in all but the rarest cases the right to hire the counsel of their choice to aid in their defense. In other words the framers emphasized the importance of the accused having the option either through his own resources or through that of his friends and family to hire the best and most talented advocate and to prevent this would be considered an injustice. Even though modern litigation over this provision focuses more on the need to insure that every one is provided an attorney "even if they can not afford one" the greatest benefit of this provision is that every individual may choose to expend any or all of their resources to find the most capable lawyer they desire.

The 6th Amendment embodies much of the Founder's concerns about the potential abuse of the individual by the government. The founders were quite familiar with the list of abuses by the English monarch. It is interesting to note that of the 26 rights mentioned in the first through the eighth amendments, 15 of them have something to do with criminal procedure and notably 7 of those 15 are found in this amendment.

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May 27, 2011 – Amendment VII of the United States Constitution – Guest Essayist: W. David Stedman and LaVaughn G. Lewis, Co-Editors, Our Ageless Constitution

Amendment VII: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The following is excerpted with permission from the book Our Ageless Constitution [p.41]

Trial By Jury Of Peers Under Laws By Consent Of The People

The Constitution's Ultimate Protection For Individuals From Government

"What a fine…consolation is it for a man, that he can be can be subjected to no laws which he does not make himself, or constitute some of his friends to make for him…What a satisfaction…that he can lie under…no guilt, be subjected to no punishment, lose none of his property…the necessaries, conveniences, or ornaments of life, which Providence has showered on him, but by the judgment of his peers, his equals, his neighbors…"

–John Adams

Americans often say they're "innocent until proven guilty." Most, however, give little thought to the very real Constitutional protections devised by the Founders for securing individual liberty

from intrusion by arbitrary government power. Incorporated into their Constitution were two great methods of defending liberty:

- Representation in the Lawmaking and Taxing Body

The PEOPLE, through their elected representatives, choose the laws by which they agree to be governed.

- Trial By A Jury Of Peers

The PEOPLE, through a jury of twelve peers, have the final say about their guilt or innocence under those laws.

The people who settled this nation and who formed its government believed strongly that these were the two most important principles on which to build a Constitution for a free people.

As a matter of fact, the Continental Congress of 1774 had declared them to be the bulwarks of individual freedom and essential to the defense of all other freedoms, saying:

"The first grand right is that of the people having a share in their own government by their representatives chosen by themselves, and…of being ruled by laws which they themselves approve, not by edicts of men over whom they have no controul…

"The next great right is that of trial by jury. This provides that neither life, liberty nor property can be taken from the possessor, until twelve of his…countrymen…shall pass their sentence upon oath against him."

John Adams called these two "popular powers…the heart and lungs…and without them," he said, "the body must die…the government must become arbitrary."

The 7th Amendment Defined

The Sixth Amendment assures that Americans receive a jury trial in criminal cases. Similarly, the 7th amendment guarantees that same right for Americans in civil cases. Unlike criminal cases, civil suits don't require unanimity of the jurors – a simple majority can suffice – and per its terms, the 7th Amendment also provides that any conclusions of fact reached by the jurors cannot be set aside by a judge.

The following is excerpted with permission from the book Our Ageless Constitution [p.176]

Our Ageless Constitution

"The structure has been erected by architects of consummate skill and fidelity; its foundations are solid; its components are beautiful, as well as useful; its arrangements are full of wisdom and order…"

–Justice Joseph Story - Commentaries on the Constitution of the United States, 1789

The Qualities of Agelessness

America's Constitution had its roots in the nature, experience, and habits of humankind, in the experience of the American people themselves-their beliefs, customs, and traditions, and in the practical aspects of politics and government. (See: Part I-Roots and Genius) It was based on the experience of the ages. Its provisions were designed in recognition of principles which do not change with time and circumstance, because they are inherent in human nature.

"The foundation of every government," said John Adams, "is some principle or passion in the minds of the people." The founding generation, aware of its unique place in the ongoing human struggle for liberty, were willing to risk everything for its attainment. Roger Sherman stated that as government is "instituted for those who live under it…it ought, therefore, to be so constituted as not to be dangerous to liberty."And the American government was structured with that primary purpose in mind—the protection of the people's liberty.

Of their historic role, in framing a government to secure liberty, the Framers believed that the degree of wisdom and foresight brought to the task at hand might well determine whether future generations would live in liberty or tyranny. As President Washington so aptly put it, "the sacred fire of liberty" might depend "on the experiment intrusted to the hands of the American people." That experiment, they hoped, would serve as a beacon of liberty throughout the world.

The Framers of America's Constitution were guided by the wisdom of previous generations and the lessons of history for guidance in structuring a government to secure for untold millions in the future the unalienable rights of individuals.

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May 30, 2011 – Amendment VIII of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The text of the Eighth Amendment, concise and plain, masks the fluidity that the Supreme Court has assigned to its words. The more intensely scrutinized portion, by far, is the prohibition against cruel and unusual punishments. There are two applications that have been particularly significant in recent years, the constitutionality of the death penalty and the application of the amendment to "enhanced interrogations."

It would be fatuous for opponents of the death penalty to claim that the Framers understood the death penalty to be unconstitutional. The Constitution's text belies such an assertion, because the Fifth Amendment three times makes it plain that the death penalty is a proper punishment for crime: "No person shall be held to answer for a capital…crime, unless on…indictment of a Grand Jury…; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb…, nor be deprived of life, liberty, or property, without due process of law." Moreover, the common law at various times recognized capital punishment for a couple of hundred criminal offense. Given the additional availability of whipping, branding, ear cropping, and other such forms of corporal chastisement, the Framers' understanding of "cruel and unusual punishment" was restricted to those torturous punishments that stood out for their infliction of extended periods of particularly gruesome pain for no end other than the infliction of that pain, and that were applied with such extreme rarity as to undercut any realistic claim that they served a moral purpose such as retributive justice or moral reformation. An example would be the rarely-used, but then still available, punishment of drawing and quartering applied in exceptional treason cases in Britain.

To further the cause of modern death penalty abolitionists, the Court was obliged to impress upon the Eighth Amendment an interpretive mechanism that could supersede the specific textual recognition of the death penalty's legitimacy. That mechanism is the judicial matrix of "evolving standards of societal decency" that would "guide" the Court's interpretation of the Eighth Amendment. Using "cruel" in a qualitative sense and "unusual" in a quantitative sense, this approach allows for a judicial finding that punishments that fall into comparative disuse, either by change in legislation or even through failure of prosecutors to seek the death penalty or of juries to impose it on a regular basis for certain crimes, become violations of the Eighth Amendment.

Particularly galling to the opponents of this approach, such as Justice Scalia, is that the procedural hurdles created for the imposition of the penalty in past cases themselves are much to blame for the (comparatively) infrequent use of the death penalty.

Although the Court has not finally found the death penalty to violate the Eighth Amendment, the end is clear. Death penalty jurisprudence has been one instance of ad hoc judicial law-making after another. Capital punishment, the Court once opined, is applied too haphazardly. When states responded with mandatory death penalty laws and other restrictions on jury discretion, the

Court found those wanting in that juries must be able to exercise discretion to impose the death penalty or not. However, further decisions then determined that the jury discretion must be subject to specific guidance. Moreover, the judge must have the power to override a jury's imposition of the death sentence, but not the other way around. Juries must be able to hear any and all mitigating personal evidence for the defendant, dredging up every aspect of the defendant's life that would place some blame for the crime, somehow, on some person other than the defendant. On the other hand, aggravating evidence, such as about the victim whose life was snuffed out, had to be very carefully limited.

As to the "evolving standards of decency" test, the Court once declared that the Eighth Amendment must not cut off the normal democratic process. Yet, more recently, the Court, led by Justice Kennedy, has taken great pains to do just that, overturning laws that provided the death penalty for older juveniles who commit particularly heinous murders and for non-homicide crimes. Kennedy, in particular, while dutifully declaring the contrary, seems intent on imposing through the Constitution his own vision of the moral and "decent" society. The Court earlier pronounced that the "Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions." Once more assuming the role of philosopher-king, Kennedy in the last capital punishment case, Kennedy v. Louisiana (2008), rejected the idea that the death penalty could be expanded (though, in fact, the law at issue there, capital punishment for aggravated child rape, did not "expand" the death penalty). After all, that would not fit Kennedy's Hegelian march of "evolving standards of decency…on the way to full progress and mature judgment." So, there is only one direction of evolution, regardless of what the people might enact, one that leads, Kennedy all but assured the abolitionists, to the eventual demise of the death penalty.

In Roper v. Illinois (2005), the juvenile death penalty case, Justice Kennedy resorted to comparing the United States unfavorably with European systems, as well as with other, even less savory, exemplars of justice, and, as he has done in some other areas of constitutional law, invoked the decisions of his fellow Platonic guardians on tribunals overseas. Due to the rebukes launched by Justice Scalia in his dissents, the Court is less inclined these days to feature that line of internationalist argumentation as a basis for guidance of the American Constitution in a direction Justice Kennedy finds to be more civilized.

International standards have also been used in attempts to limit the use of techniques to interrogate suspected terrorists. Leaving aside specific anti-torture statutes or treaty obligations, note that the Eighth Amendment itself only prohibits cruel and unusual "punishment." Not only is this limited to torture and other extreme actions; the Court in past cases repeatedly has held that it applies only to punishment, not to other actions by the government. Hence the challenged behavior must be directed at "punishing" the individual. This distinction between punishment and other objectives in the use of force against prisoners is one long established in many Western systems of law, and one that the Framers clearly understood.

If a prisoner brings a claim that excessive force was used in violation of the Eighth Amendment, he must show that this was for the purpose of punishment. If the force or condition of confinement was for another purpose, the Eighth Amendment is not implicated. Thus, the state

of mind of the persons conducting the interrogation becomes important. Did they do so for purpose of discipline, security, or information gathering, or did they do so simply to punish? That state of mind can be demonstrated circumstantially by a number of factors, such as the asserted purpose of the treatment and the degree of force used in relation to the many varied circumstances that triggered the interrogation, an evaluation that implicates the proportionality principle that lurks in Eighth Amendment jurisprudence. Only if the actions go beyond the asserted disciplinary or investigatory needs, might the treatment amount to cruel and unusual punishment. As the Court has said in several cases, the prisoner must show that the government agent acted "maliciously and sadistically for the very purpose of causing harm."

The prisoner might assert claims that the government violated Fourth Amendment standards against unreasonable searches and seizures, or, more likely, nebulous Fifth Amendment due process standards against treatment that "shocks the conscience." Even if a foreign terror suspect kept overseas is entitled to those constitutional protections as a matter of right (an issue not resolved even by the Court's Boumediene decision that, for the first time, granted such detainees access to the writ of habeas corpus), they might not help him. The "shocks-the-conscience" test is particularly difficult to confine, and the Court employs a utilitarian approach. The Justices have made it clear that it is not just the severity of the method, but the degree of necessity for the challenged action, that will determine whether the consciences of at least five of them are shocked. In any event, whether or not the justices are suitably shocked under the Fifth Amendment, the Eighth Amendment does not apply to careful methods used demonstrably for the purpose of extracting information.

An expert on constitutional law, **Prof. Joerg W. Knipprath** has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

May 31, 2011 – Amendment IX of the United States Constitution – Guest Essayist: Steven H. Aden, Senior Counsel, Alliance Defense Fund

Amendment IX: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Despite 220 years of constitutional interpretation, there really isn't much one can say about the Ninth Amendment. And that's just what James Madison and the Framers intended.

The Ninth Amendment is that rare creature in American politics, a success story conceived in humility. The first eight amendments of the Bill of Rights established freedom of worship, the freedoms of assembly, speech, press and petition, the rights to bear arms, to be free from

government intrusions into citizens' homes, to due process and to a jury of one's peers, and many others. Having penned what may have been the finest articulation of the rights of man in human history, Madison and his colleagues could have been forgiven for giving way to hubris and capping it with a rhetorical flourish. Instead, they added a caution, by way of an afterthought. The Ninth Amendment's quiet caveat has done much more to protect fundamental rights from government encroachment than its humble phrasing would suggest.

The Bill of Rights exists because a compromise was required to satisfy the Anti-Federalists and States that were cautious about ratifying into existence a federal government of broad powers. The Ninth Amendment exists because another compromise was necessary to satisfy those in the Federalist camp who believed that an enumeration of rights would tend to negate recognition of rights left unmentioned. Madison, Alexander Hamilton and other Federalists contended that a Bill of Rights was unnecessary because the federal government's powers were delineated by and limited to those set forth in Article I, Section 8 [link to John Baker's blog on this provision - http://www.constitutingamerica.org/blog/category/analyzing-the-constitution-in-90-days-2011-project/article-i-section-08-clause-01/] Hamilton's Federalist 84 queried, "Why declare that things shall not be done which there is no power to do?" But the Anti-Federalists, led by Thomas Jefferson, prevailed, and history has affirmed their wisdom as through expansive interpretations of the Necessary and Proper Clause and the Commerce Clause the mantle of federal power has come to envelope virtually every aspect of life from the light bulbs in our ceilings to the "individual mandate" to purchase health insurance. The enumeration of rights stands as a bulwark against that tide of federal authority in the sphere of private life, speech and conduct. On the other hand, the Ninth Amendment lifts its staying hand against the argument that these rights, and only these, stand between the citizen and his seemingly omnipotent (and, with digital technology, increasingly omnipresent) government.

That the rights enumerated in the first eight amendments are not all the rights we possess may strike one at first as a challenging notion. For rights that went unenumerated at the time, but became "self-evident" (in the words of the Declaration) much later, consider the right to be free, expressed in the Thirteenth Amendment prohibiting slavery (1865); the right to vote (Amendment XIV in 1870); and the right to vote for women, which came a half-century later (Amendment XIX in 1920). Except for the salutary effect of the Ninth Amendment, it might have been presumed that no other fundamental human rights existed outside of those enumerated in 1789 – that the "canon of human rights" was closed, not subject to further elaboration through constitutional amendment. Or perhaps what is worse, it might have been supposed that all "rights" secured by the people through amendment of the Constitution subsequent to the Founding were not "fundamental" human rights, but only positive political rights secured through an effective application of the Social Contract.

For unenumerated fundamental rights that have yet to be affirmed in the written constitution, consider the right of conscience; the right of parents to raise and educate their children outside of the government school system (unrecognized in parts of Europe and elsewhere), or the right to be free from genetic manipulation.

Mark Twain quipped, "Some compromise is essential between parties which are not omniscient." Our generations, and generations to come, will have to struggle with the meaning of rights enumerated and unenumerated, and with the wisdom of further constitutional amendments. Thankfully, because the two great forces in the making of the Constitution were willing to admit their fallibility and broker resolutions, we have the wisdom of the Bill of Rights, and the wisdom of the "Bill of Other Rights" – the Ninth Amendment.

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June 1, 2011 – Amendment X of the United States Constitution – Guest Essayist: Andrew Langer, President of the Institute for Liberty

Amendment X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The last amendment in the Bill of Rights, the 10th, is an apt bookend for the 1st. In fact, taken together with the 9th Amendment, it can be said that the entire vision the founders had for the United States can be found in these two amendments.

The Founders were inherently skeptical of concentrated government power—it is why we were initially conceived as a loose confederacy of sovereign states. When that ultimately collapsed, the Founders looked towards federalism, a political system in which power is diffused among various branches and levels of government. As the Supreme Court said only 20 years ago, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[1]

What was envisioned was a system of "dual sovereigns," separate, but (at least as conceived) co-equal systems of government, a system in which the federal government had carefully enumerated powers, the states had carefully enumerated powers, and that which had not been delegated would be retained by the people. In other words, power flows from the people to the government, and as the High Court said 70 years ago: "The amendment states but a truism that all is retained which has not been surrendered."[2]

Abuse of the Commerce Clause led to a near-ignoring of the 10th Amendment by federal authorities for decades. It was only in the 1990s that there began a resurgence of these principles, as the High Court finally began to recognize that the Founder's vision of the nation had become rather twisted. They began to restate that vision, and the reason why, re-affirming that efforts to grow federal power should only be undertaken with great deliberation. In one of the most poetic Supreme Court passages ever written, Justice Sandra Day O'Connor wrote:

[T]he Constitution protects us from our own best intentions: it divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.[3]

How often have we seen federal power enlarged, or attempts made to grow federal power, for just those reasons?

Many of the cases brought to the Supreme Court in the 1990s and beyond have centered on the problem of Congress essentially compelling the states to act in a particular manner—or forcing those states to act as agents of the federal government. There are a number of problems with this, from a basic "good government" perspective—not the very least being it forces those states to spend money on federal priorities, rather than their own. Moreover, it removes policy prioritization an additional level away from an impacted population.

Again, as the High Court said in New York v. United States:

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 246 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.[4]

Since the 1990s, there has been a line of cases in which these principles have been reasserted by the High Court. In 1995, the Supreme Court finally found a limit to the Commerce Clause by striking down the Gun-Free School Zones act in United States v. Lopez. Two years later, in Printz v. United States, the Court struck down portions of the "Brady Bill". The court has repeatedly stated now that regardless of how well-intentioned a federal law might be, Congress cannot ignore the Constitution's precepts on limiting federal power and not forcing a state to substitute federal priorities for its own. The federal government can encourage, it can even "bribe" with federal funds, but it cannot out-and-out compel a state to act in an area in which the states hold their own sovereign power.

In New York v. United States, Justice O'Connor called the 10th a "tautology", a restatement of what is obviously true. But given the erosion of the 10th Amendment over the course of the republic's history, and the even greater erosion of constitutional knowledge, this so-called tautology needs to be restated. When discussing the principles undergirding our founding, regardless of the audience, it is helpful to reiterate the following, as underscored by the 10th Amendment: government does not have rights. People have rights. Government has powers—powers that we have narrowly and carefully ceded to it by limiting some measure of our rights. All that we have not surrendered, we have retained, and we must defend those rights earnestly and vigorously.

[1] New York v. United States, Coleman v Thompson, etc

[2] United States v. Darby, 312 US 100, 124 (1941)

[3] New York v. United States, 505 US 144 (1992)

[4] Ibid.

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June 2, 2011 – Amendment XI of the United States Constitution – Guest Essayist: Kevin Theriot, Senior Counsel with the Alliance Defense Fund

Amendment XI: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State

Eleventh Amendment Immunity: Good Legal Fiction

On its face, the Eleventh Amendment to the United States Constitution seems to provide a great deal of protection for states against lawsuits. The amendment says:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

Judicial interpretation has made it even broader. For instance, the amendment appears to only prevent a private citizen of South Carolina from suing the State of Georgia in federal court. But the Supreme Court has said that it also prohibits suits by citizens of Georgia from suing their own state in federal court, Hans v. Louisiana, 134 U.S. 1 (1890), and immunity even applies if the complaint is filed in Georgia's state courts. Alden v. Maine, 527 U.S. 706 (1999).

This judicial willingness to go well beyond the language of the Eleventh Amendment is based upon the idea that it is just one aspect of the broader doctrine of sovereign immunity, a doctrine that precedes the constitution itself. Article III of the Constitution gives federal courts jurisdiction of cases "between a State and a citizen of another State." Historians suspect that most of the Founding Fathers anticipated that this would involve cases where a state is suing a citizen of another state, but not vice versa. See 13 Charles Alan Wright, Miller, Federal Practice & Procedure § 3524 (3d ed.
2010). The founders likely thought states were protected from suits by citizens by the well-established English Common Law rule that a sovereign could not be sued without its consent. This foundational belief may explain the quick passage of the Eleventh Amendment, which was enacted shortly after the Supreme Court found in 1793 that a citizen of South Carolina could indeed sue the State of Georgia in federal court. Chisholm v. Virginia, 2 U.S. (2 Dall.) 419 (1793). It also explains why over the years the Court has viewed the Eleventh Amendment as just one aspect of a broader common law principle.

But it doesn't explain why courts have made it so easy to circumvent the Eleventh Amendment. For instance, someone who has had their civil rights violated by the state of Georgia cannot sue

Georgia, but they can sue its head executive, Governor Deal. For all practical purposes, the result for the plaintiff is the same. If the plaintiff wins, the court will enter an injunction against the governor in his official capacity, which will affect all other state officials. This principle was established in Ex Parte Young, 209 U.S. 123 (1908), and is often referred to as the "Ex Parte Young fiction." Practically, suing governors in their official capacity is just a suit against their state. But the Court said the state officer could never really be given authority to violate the law, so it is not really a suit against the state. One can understand why it is referred to as a "fiction," since it resembles a Star Wars Jedi mind trick. Later, the Court determined that a successful plaintiff can even obtain damages from state officials. See Hafer v. Melo, 502 U.S. 21 (1991).

Why is it the Court feels justified in reading the Eleventh Amendment so broadly, but then completely undermining it with a legal fiction? Most likely, it's because judges understand that in a country built upon the concept of inalienable rights, state officials must be held accountable when they violate those rights. In fact, in Chisholm, the case that prompted passage of the amendment, the Justices discussed "whether sovereign immunity—a doctrine born in a monarchy and based upon the notion that the crown could (or perhaps simply should) do no wrong—ought to play any role in the new democratic republic." Wright, Miller, supra, § 3524.

It seems unnecessarily complicated to adopt a legal fiction requiring plaintiffs to sue state officials in order to give lip service to a doctrine that shouldn't even apply to our form of government. But we do get the right result in the end – citizens have legal recourse against state officials that violate their rights. After all, subtle nuances, complicated plots, and happy endings are what good fiction is all about.

Kevin Theriot is senior counsel with the Alliance Defense Fund, a legal alliance that employs a unique combination of strategy, training, funding, and litigation to protect and preserve religious liberty, the sanctity of life, marriage, and the family.

June 3, 2011 – Amendment XII of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Amendment XII: The Electors shall meet in their respective states, and vote by ballot for President and Vice- President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;

The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;

The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The election of 1800 was a critical moment in the evolution of American republicanism, even more momentous than the decision of George Washington four years earlier not to seek election to a third term, an election he surely would have had won. Washington's decision set the stage for the informal term restriction on Presidents that lasted a century and a half. It had to be formalized in the 22nd Amendment after Franklin Roosevelt became, in the phrasing of political opponents, a "Third Termite" and more. Washington's move, all personal reasons aside, made the point that republics are endangered by long-serving executives. Such longevity, combined with the inherent powers of the office, promotes concentration of power, with a likely cult of personality and attendant corruption.

No less a threat to republics is the failure of the dominant political coalition to yield power when it loses at the polls. That is particularly true when the republic is young and its political institutions not yet fully formed and tested. The history of the world is rife with rulers, swept into office on revolutionary waves that establish formally republican systems, entrenching themselves in ever- more authoritarian manner when popular opinion turns against them. That first election when the reins of government are to be turned over from those who led the system from its founding to those who have defeated them is crucial to establish the system's republican bona fides. For Americans, that was the election of 1800, when the Democratic Republicans under Jefferson defeated the Federalists under Adams.

If such a change of power is to occur peacefully, optimally the verdict of the voters is clear and the process of change transparent. Anything less greatly reduces the chance for peaceful transition.

Judged by those standards, the election of 1800 was a bad omen for Americans at the time. The selection of the President was thrown into the House of Representatives, where it took 36 ballots

and considerable political intrigue to select the leader of the victorious group, Thomas Jefferson. In a bit of historical irony, the delay was not due to Federalist plotting, but the fact that Jefferson and Aaron Burr received the same number of electoral votes. Though the latter was the intended vice- presidential nominee, he declined to step aside, making future relations between the two rather frosty. That lengthy and murky process promoted talk of the use of force by both sides, ultra- Federalists for whom the political chaos justified disregarding the election results and rabid Jeffersonians who called on state militias to march on Congress to compel the selection of their champion and to "punish their enemies," to borrow a phrase.

Fortunately, Adams and (perhaps more reluctantly) Jefferson, along with other cooler heads in both groups, subordinated their immediate political advantage to longer-term republican stability. Adams left town. With political manipulation from, among others, Alexander Hamilton of all people, Jefferson was elected, after all. In turn, Jefferson, prodded by the pragmatic among his advisors, limited political retaliation against his vanquished opponents.

Contributing to the murkiness and indecision of the process was the formal constitutional structure for election of the President. It was anticipated that the system in Article II of electors chosen as directed by the several state legislatures would nominate several candidates for President. After the election of George Washington, it was surmised, no nominee likely would receive a majority vote from those electors. Instead, nominations of up to five individuals (based on each elector voting for two persons) would be presented to the House of Representatives, which would choose as President the person who received the approval of a majority of state delegations in that chamber. Worse, it turned out, the runner-up would be Vice-President.

On first glance, as I explained in connection with Article II, Section 1, clause 3, the system made great ideological and historical sense. Hamilton, one of the principal architects, wrote proudly in Federalist 68 that "if the manner of it be not perfect, it is at least excellent." The system would produce the most qualified nominees, as those would be selected by a small number of persons who were themselves chosen for their fitness to make wise selections and to avoid "cabal, intrigue, and corruption." On a more practical level, the system contained checks and balances whereby unqualified local favorites might receive scattered votes, but a group of better-known and more qualified regional and national figures would receive enough votes to be nominated. The selection of the President from the nominees would then be made by the House, whose members' decisions would, presumably, be reviewed for wisdom and lack of corruption by the voters at the next election.

In fact, the emergence after the Constitution's adoption of nascent proto-parties spoiled the plan. Initially, a group of Congressmen coalesced around opposition to the ambitious Hamiltonian program of public finance and commercial development represented in the Treasury Secretary's famous three reports to Congress in 1790 and 1791. Their enigmatic and at times reluctant figurehead was Thomas Jefferson, though most of the organizing was done by James Madison and others. This development had the classic characteristics of what has historically been called a political "faction," a term that any righteous and self-respecting republican of the time found vile. Factions developed in support of (or, more likely, opposition to) some matter of political controversy or charismatic political figure. They tended to rise and fall with such single issues and figures.

Once a faction formed in opposition to Hamilton, the "spirit of party" (i.e. political self-interest or local parochial advantage, rather than the "common good") was said to have been loosed in the land. Acting purely out of self-defense, as they assured the people (and themselves), Hamilton's supporters, too, organized as a coherent group. And whatever charismatic ante the Jeffersonian faction might have from their leader in this political poker game, the Federalists could "see" with the personality and political skills of Hamilton and "raise" with the increasingly partisan stance of George Washington.

Both sides quickly organized into entities that more resembled modern political parties. Both were centered in Congress, but began to make mass appeals to the public. The Federalists were far superior in the number and reach of their newspapers (unlike today's media, in those days newspapers were refreshingly candid about their political biases). But the Jeffersonians were more adept at public organizing, honing their skills in that arena because they were the minority in Congress during most of this time. Ultimately, it was that latter skill that proved crucial in 1800.

In practice the Congressional caucuses dominated the nomination process, and the discipline of the emerging party organizations—especially of the Jeffersonians–at the state level, effectively turned the electors into voluntary partisan non-entities. As Justice Robert Jackson satirized them in a dissenting opinion in 1952, "They always voted at their Party's call, And never thought of thinking for themselves at all."

Prodded by the debacle of the election of 1800 and the emergence of a rudimentary two-party system, the Congress and the states adopted the Twelfth Amendment. Primarily, this changed only the process by which nominations for President and Vice-President were made and placed the election of the Vice-President in the Senate if there was no electoral vote majority. That has been enough, however, to avoid a repeat of the confusion of the election of 1800, at least once a stable two-party political structure emerged in the 1830s. The election of 1824, similarly chaotic, was the result of the breakdown of the existing structure into multiple competing political factions.

Admittedly, there have been a few close calls, such as in 1876 and 2000. The system has worked, though critics might say it has done so in spite of itself. At the very least, it has worked in a manner unforeseen by the Framers.

Incidentally, as the Supreme Court opined in the 1952 case (Ray v. Blair) mentioned above, states can disqualify electors who refuse to pledge to vote for their party's candidate. The Court reasoned that electors are acting for the states and can be regulated by them. Of course, "automatic" voting for the candidate to whom the elector is pledged can result in a surreal spectacle like that in 1872 when three Democratic electors cast their votes for their candidate, Horace Greeley—who had died. Justice Jackson's dissent emphasized the Framers' design of the role of electors and argued that a state can no more control "the elector in performance of his federal duty…than it could a United States Senator who also is chosen by, and represents, the State." About half of the states have laws that purport to punish a "faithless" elector, but no such punishment has ever occurred.

An expert on constitutional law, **Prof. Joerg W. Knipprath** has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

June 6, 2011 – Amendment XIII of the United States Constitution – Guest Essayist: Hadley Heath, a Senior Policy Analyst at the Independent Women's Forum

Amendment XIII: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.

The Declaration of Independence, penned in 1776, proclaimed that "All men are created equal," and "they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

God gives rights; government serves God and the people by protecting rights. America's Founding Fathers recognized this principle, but our young country failed to protect the God-given rights of some Americans. In the U.S., the practice of slavery continued throughout the Revolutionary War and the birth of our new country, and for nearly 100 years afterward.

It was not until the ratification of the Thirteenth Amendment to the U.S. Constitution, in 1865, that our government established a protection of liberty for all Americans, specifically liberty from slavery or forced labor.

For centuries, slavery was a worldwide phenomenon, legal and socially acceptable in many empires, countries, and colonies. From their early development, the southern American colonies relied on slavery as integral to their agricultural economy. But opposition to slavery – in the colonies and abroad – was growing stronger throughout the 17th and 18th centuries.

In America, religious groups including the Quakers strongly opposed slavery and advocated for its abolition. Pressure from Quakers in Pennsylvania led to the passage of the state's "Act for the Gradual Abolition of Slavery" in 1780, only four years after the establishment of the United States as a country.

The British government put an end to slavery in its empire in 1833 with the Slavery Abolition Act. The French colonies abolished it 15 years later in 1848. These worldwide events added fuel to the anti-slavery movement in the U.S.

Some American Abolitionists, including William Lloyd Garrison, called for the immediate emancipation of all slaves. Other Americans who opposed slavery did not call for immediate emancipation, but instead hoped that the containment of slavery to the southern states would lead to its eventual end.

The American Civil War broke out in 1861 when several of the southern slave states seceded from the Union and formed the Confederate States of America. This dark chapter of America's history ultimately decided the fate of slavery when the nation came back together after the defeat of the Confederate States.

President Lincoln dreamt of an America where all people were free. In fact, he declared all slaves to be free in his 1863 Emancipation Proclamation. An amendment to our Constitution followed as the next step to make the end of slavery a permanent part of our nation's governing document.

Together, at the end of the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments greatly expanded the civil rights of many Americans.

While the Thirteenth Amendment outlawed slavery, it did not grant voting rights or equal rights to all Americans. Nearly a century after the Thirteenth Amendment was ratified, Congress passed the Civil Rights Act of 1964 that outlawed racial discrimination and segregation.

Sadly, the Thirteenth Amendment did not bring about an immediate or total end to slavery in the U.S. Today, it is estimated that 14,500 to 17,500 people, mostly women and children, are trafficked into our borders for commercial sexual exploitation or forced labor each year. This is in clear violation of the Thirteenth Amendment, and Americans should work toward a swift end to human trafficking in the U.S. and all over the world.

Before our Declaration of Independence was written, English philosopher thinker John Locke developed the idea that individuals have the natural right to defend their life, health, liberty, and possessions (or property). While the United States has always and should always protect the property rights of individuals, the Thirteenth Amendment makes it clear that owning "property" in the United States cannot mean owning another person.

Individual liberty for all and the God-given right to pursue happiness are not compatible with slavery. The end of slavery with the ratification of the Thirteenth Amendment is one of the most "American" of all of our historical events, because this event brought our country closer in line with the principles upon which it was founded.

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June 7, 2011 – Amendment XIV of the United States Constitution – Guest Essayist: Kevin Theriot, Senior Counsel with the Alliance Defense Fund

Amendment XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice- President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fourteenth Amendment and a Return to Federalism

The Fourteenth Amendment to the United States Constitution was enacted in 1868, just three years after the Civil War. For obvious reasons, Congress didn't trust the Southern States to voluntarily provide former slaves with all the benefits of U.S. Citizenship, so it specifically required them to do so via the federal constitution. Subsection 1 of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This amendment greatly undermined federalism since before the enactment of the Reconstruction Amendments, civil rights were largely protected by state constitutions. The Bill of Rights applied only to the federal government, which was smaller, and had less power. In fact, some Southerners still maintain that the Civil War was not about slavery, but about State's rights and the power of the federal government.

Justice Harlan described this nationalization of civil liberties as a "revolution…reversing the historic position that the foundations of those liberties rested largely in state law." Walz v. Tax Com. of New York, 397 U.S. 664, 701 (1970) (Harlan, J., dissenting). Beginning in 1897, the Supreme Court began interpreting the Fourteenth Amendment's prohibition on depriving any person of "life, liberty, or property, without due process of law" as incorporating the Bill of Rights in to the amendment so that they also applied to the states. See Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897) (incorporating the Fifth Amendment).

The Free Exercise Clause of the First Amendment was incorporated in 1940 in Cantwell v. Connecticut, 310 U.S. 296 (1940). Given the history of the Fourteenth Amendment, it's assumed the Court thought it necessary to apply the Free Exercise Clause to the states because they could not be trusted to protect religious freedom with their own constitutions and statutes. But those roles are now reversed.

The Supreme Court's 1990 decision in Employment Div., Dept. of Human Services v. Smith drastically weakened the federal Free Exercise Clause by holding that general, neutrally applicable laws do not violate religious freedom. In that case, a general law prohibiting ingestion of a hallucinogenic drug called peyote applied to everyone, so the fact that it also restricted the freedom of Native Americans who use it during religious ceremonies did not violate the federal constitutional. Smith has had a profoundly negative impact on church religious freedom in such diverse areas as land use and the ability speak out on political issues. As a result, States are now increasing the protection they provide to religious freedom because the federal courts can no longer be trusted to protect it.

To date sixteen (16) states have taken it upon themselves to enact Religious Freedom Restoration Acts protecting their citizens: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia.[1] And at least twelve (12) states have interpreted their constitutions to provide the heightened protection applied by the Supreme Court of the United States prior to Smith: Alaska, Indiana (possibly), Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, North Carolina, Ohio, Washington, and Wisconsin.[2]

So states now provide the real protection for religious freedom – an interesting return to the federalism that was undermined when it was thought states couldn't be trusted to do so.

[1] Alabama – Ala. Const. amend. 622, § V(a); Arizona – Ariz. Rev. Stat. § 41-1493.01(B) (2003); Connecticut – Conn. Gen. Stat. § 52-571b(a) (2000); Florida – Fla. Stat. ch. 761.03(1) (Supp. 2003); Idaho – Idaho Code § 73-402(2) (Michie 2003); Illinois – 75 Ill. Comp. Stat. 35/15 (2001); Louisiana – La. R.S. § 13-5233 (2010); Missouri – Mo. Rev. Stat. § 1.302 (2009); New Mexico –
N.M. Stat. Ann. § 28-22-3 (Michie 2000); Oklahoma – Okla. Stat. tit. 51, § 253(A) (2003); Pennsylvania – 71 Pa. Stat. Ann. § 2403 (2002); Rhode Island – R.I. Gen. Laws § 42-80.1-3 (2002); South Carolina – S.C. Code Ann. § 1-32-40 (Law. Co-op. Supp. 2002); Tennessee – T.C.A.§ 4-1- 407 (2009); Texas – Tex. Civ. Prac. & Rem. Code Ann. § 110.003(a) (Vernon Supp. 2004- 2005);Virginia – Va. Code § 57-2.02(B) (2007).

[2] Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994), Cosby v. State, 738 N.E.2d 709, 711 (Ind. App. 2000) ("Indiana Constitution may demand more protection for citizens than its federal counterpart"); Stinemetz v. Kansas Health Policy Authority, (KS app., May 4, 2011), Rupert v. Portland, 605 A.2d 63 (Me. 1992), Attorney Gen. v. Disilets, 636 N.E.2d 233 (Mass.
1994); People v. DeJonge, 501 N.W.2d 127 (Mich. 1993); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); Davis v. Church of Jesus Christ of Latter Day Saints, 852 P.2d 640 (Mont. 1993); Matter of Browning, 476 S.E.2d 465 (N.C. App. 1996); Humphrey v. Lane, 728 N.E.2d 1039 (Ohio

2000); First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992) (en banc); and State v. Miller, 549 N.W.2d 235 (Wis. 1996). See generally Angela C. Carmella, State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence, 1993 B.Y.U. L. Rev. 275 (1993).

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June 8, 2011 – Amendment XV of the United States Constitution – Guest Essayist: Colin Hanna, President, Let Freedom Ring

Amendment XV: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Congress shall have power to enforce this article by appropriate legislation.

The Fifteenth Amendment to the United States Constitution was passed by Congress on February 26th 1869, and ratified by the States on February 3rd, 1870. Although many history books say that it "conferred" or "granted" voting rights to former slaves and anyone else who had been denied voting rights "on account of race, color, or previous condition of servitude," a close

reading of the text of the amendment reveals that its actual force was more idealistic. It basically affirmed that no citizen could rightfully be deprived of the right to vote on the basis of that citizen's race, color or previous condition of servitude – in other words, that such citizens naturally had the right to vote. That is how "rights" should work, after all; if something is a right, it does not need to be conferred or granted and cannot be infringed or denied.

It is worth noting that the Fifteenth Amendment only clarified the voting rights of all male citizens. States have the power to define who is entitled to vote, and at the time of the signing of the Constitution, that generally meant white male property owners. The States gradually eliminated the property ownership requirement, and by 1850, almost all white males were able to vote regardless of whether or not they owned property. A literacy test for voting was first imposed by Connecticut in 1855, and the practice gradually spread to several other States throughout the rest of the 19th Century, but in 1915, the Supreme Curt ruled that literacy tests were in conflict with the Fifteenth Amendment.

Section 2 of the Fifteenth Amendment sets forth the means of enforcing the article: by "appropriate legislation." It was not until nearly one hundred years later, with the passage of the Voting Rights Act of 1965, that the enforcement of the Fifteenth Amendment was sufficiently clarified that no State could erect a barrier such as a literacy test or poll tax that would deny any citizen the right to vote, as a substitute for overtly denying voting rights on the basis of race or ethnicity. The Civil Rights Act of 1957 had taken a step in that direction, but practices inconsistent with the Fifteenth Amendment remained widespread. The Nineteenth Amendment. ratified in 1920, had granted women the right to vote. The only remaining legal barrier to citizens is age, and that barrier was lowered to 18 by the Twenty-Sixth Amendment, ratified in 1971. Many people do not realize that a State could permit its citizens to vote at a lower age than 18, and none has.

The moral inconsistency between a Declaration of Independence that proclaimed that all men (and, by widely accepted implication, all women) were created equal, and a Constitution that tolerated inequality based on race and gender, required more than 150 years to be resolved. The ratification of the Fifteenth Amendment in 1870 was one of the major milestones along that long path.

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June 9, 2011 – Amendment XVI of the United States Constitution – Guest Essayist: Horace Cooper, legal commentator and a senior fellow with The Heartland Institute

Amendment XVI: The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

At the founding of our nation, the framers decided not to allow the federal government to assess income or other direct taxes unless they were apportioned according to population. A direct tax is simply any tax that is paid directly to the federal government by the individual. Commonplace today, these types of taxes were frowned upon when the nation began. Instead of income or other direct taxes, the founders thought that indirect taxes – sales taxes, import duties and the like – were legitimate means for the federal government to raise money.

The consensus of the founders was that the power of direct taxation would shift the dynamic between the individual and the state in a powerful and oppressive way. With direct taxing power, it was feared that Congress could assess a tax on all persons with no limits on the amount. Whether assessed as a percentage or a fixed amount, these taxes couldn't be readily avoided or evaded by the citizens. For instance, a person couldn't simply not engage in the behavior that was subject to taxation the way you could with a sales tax or other transaction style tax. A direct tax could apply to income, land, cattle, securities transactions etc. and force people to either pay the tax or have their property confiscated. In addition, with Congress' power of the purse over the army and the militia, the people would be powerless to prevent collection.

Although not consistently, the Supreme Court struck down several attempts by Congress to establish so-called "direct" taxes. However, during one critical period – the Civil War – the Supreme Court upheld a temporary income tax established to fund the war effort. The Revenue Act of 1861 levied a flat tax of 3% on annual income above $800 (or roughly $20,000 in today's dollars)

In 1893, after the war was over and the temporary tax expired, Congress adopted another income tax law. In this case, the Congress attempted to assess a federal tax on income derived from real estate. In 1895, in Pollock v. Farmer's Loan and Trust, the Supreme ruled that the income tax was unconstitutional. This view prevailed through the turn of the century.

Historians suggest that the growing needs of the Federal Government necessitated a regular and more lucrative revenue source and increasingly politicians in both parties eyed the direct or income tax as a solution. Nevertheless, it wasn't until 1909 that the effort to push for an amendment began.

President William Taft sent a formal message to Congress requesting that an amendment be adopted that would allow Congress to have this power once and for all. The Senate approved the Sixteenth Amendment unanimously 77-0 and the House approved it by a vote of 318-14. After being ratified by 36 states in February of 1913, it became law. Ultimately, 42 of the 48 states would ratify the amendment.

Within a few years, it had become the principal source of income for the federal government. Nevertheless, its impact wasn't obvious. In the beginning, hardly anyone had to file a tax return because the tax did not apply to the vast majority of the people in the U.S. For example, in 1939,

26 years after the Sixteenth Amendment was adopted, only 5% of the population, counting both taxpayers and their dependents, was required to file returns. Today, nearly all adults and even some youths must file an annual income tax form.

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June 10, 2011 – Amendment XVII of the United States Constitution – Guest Essayist: Dr. John S. Baker, Jr., Distinguished Scholar in Residence, Catholic University School of Law; Professor Emeritus, Louisiana State University Law Center

Amendment XVII: The Seventeenth Amendment, adopted April 8, 1913, provides as follows:

1: The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

2: When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

3: This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

The first sentence substitutes "elected by the people thereof" for the words "chosen by the Legislature thereof" in the language of the first paragraph of Article 1, Sect. 3. The amendment also provides the procedure for filling vacancies by election, but permitting states by legislation to allow the state's governor to make temporary appointments.

Prior to the 17th Amendment, the Constitution provided for US senators to be elected by the legislature of each state in order to reflect that the Senate represented the states, as contrasted with the House which represented the people of each state. Originally, U.S. senators did represent their own states because they owed their elections to their state legislature, rather than directly to the voters of the state. The Senate, thus, carried forward the (con)federal element from the Articles of Confederation, under which only the states were represented in the national legislative body. As noted in The Federalist, the fact that state legislatures elected U.S. senators made the states part of the federal government. As intended, this arrangement provided protection for states against attempts by the federal government to increase and consolidate its own power. In other words, the original method of electing senators was the primary institutional protection of federalism.

In the decade prior to the Civil War, over the issue of slavery, and increasingly after the Civil War, some state legislatures failed to elect senators. That development, plus charges that senators were being elected and corrupted by corporate interests prompted some states to adopt a system of de facto election of senators, the results of which were then ratified by the state legislature. Proposals for a constitutional amendment providing for direct popular election of senators were long blocked in the Senate because most senators were elected by state legislatures. Over time, the number of senators elected de facto by popular election increased. Also, states were adopting petitions for a constitutional convention to consider an amendment to provide for popular election of senators. As the number of states came closer to the number requiring the calling of a Constitutional Convention, the Senate allowed what became the Seventeenth Amendment to be submitted to the states for ratification.

A major factor promoting direct popular election of senators was the Progressive Movement. This movement generally criticized the Constitution's system of separation of powers because it made it difficult to enact federal legislation. The Framers had done so in order to protect liberty and to create stability in government. The Progressives, on the other hand, wanted government to be more democratic and, therefore, to allow easier passage of national legislation reflecting the immediate popular will.

By shifting the selection of senators to the general electorate, the 17th amendment not only accomplished those purposes; but it also meant that senators no longer needed to be as concerned about the issues favored by state legislators. Predictably, over time, senators voted for popular measures which involved "unfunded mandates" imposing the costs on the states. Senators were able to claim political credit for the legislation, while the states were left to pay for new national policies not adopted by the states. Such unfunded mandates would have been unthinkable prior to adoption of the 17th amendment.

Ironically, more than the required number of state legislatures ratified the 17th Amendment, with little or no realization that the Seventeenth amendment would diminish state power and undermine federalism generally. Many legislators apparently thought they had more important matters to attend to than to devote time to the struggles that often revolved around electing a senator. Such an attitude might have been understandable at a time when the federal government had much less power vis-a-vis the states. What those legislators did not appreciate was that the balance of power favorable to the states was due to the fact that state legislatures controlled the U.S. Senate. Over time, since adoption of the Seventeenth Amendment, the balance of power has consistently shifted in favor of the federal government.

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June 13, 2011 – Amendment XVIII of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Amendment XVIII

1: After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

2: The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

3: This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Prohibition was not a novel idea in 1919. It was part of a social reform movement, the first waves of which had lapped American shores during the middle of the 19th century. It was a movement different from the ecclesiastical Great Awakenings that had surged periodically through the American colonies, though it shared some connection with those movements. Still, these reforms were sufficiently novel and widespread to lead Ralph Waldo Emerson to characterize them as a "war between intellect and affection" and its adherents as "young men…born with knives in their brain."

Thirteen states had passed laws that prohibited the sale of alcohol by 1857, including, incredibly from a 20th-century perspective, New York. Following the Civil War and abolition of slavery, the enthusiasm for social reforms in general was exhausted in favor of a general yearning for a return to normalcy. But it returned with a vengeance towards the end of the century, with prohibitionists joining women's rights groups to combat "demon rum." That urge fed into a broader social movement to better the human condition and, indeed, human nature. While reformation of the human soul previously had been mainly the province of religion, the remaking of human nature had become, by the 20th century, as much a secular as a religious project. The growing middle class, "social science" movements in the study of human institutions, modern psychology, and old-style political power calculations combined in the Progressive Movement. Its adherents sought to improve human beings, as well as institutions, whether or not those human beings or institutions wanted to be improved.

The Progressives looked to the power of the state, not to individuals or private groups, to get things done efficiently. For many of their leaders, such as Princeton professor (and eventual U.S. President) Woodrow Wilson and his later advisers, such as Herbert Croly, the old institutions, such as the Constitution and the courts, were anachronisms that prevented the emergence of a better order, led by an enlightened and [P]rogressive elite. To achieve what critics then and now have characterized as totalitarianism of more or less soft type, these Progressives looked to the law as the tool to forge the new order. Law was no longer a series of constructs that reflected an inherent reason and that was useful to provide some rules to maintain a basic order in society. For the Progressives, the law was nothing less than an extension of social policy.

Alcohol prohibition also reflected the Progressive impulse to national mobilization to address issues, and the desire for a strong national government led by a strong and charismatic leader. It is not coincidental that these traits were also found in various continental European mass movements that sought to establish the new man, freed of traditional human weaknesses. The American version may have lacked some of the more pugnacious aspects of its European counterparts in Italy, Spain, Germany, and the Soviet Union, but it was close enough. As the National Review writer Jonah Goldberg has written, the period was one episode of America's "Liberal Fascism."

Prohibition previously had primarily been the project of the states, with Congress and the Supreme Court assisting "dry" states by declaring that their prohibitions did not violate federal control over interstate commerce. By 1913, in the Webb-Kenyon Act, Congress went further, by affirmatively forbidding the shipment of liquor in interstate commerce into dry states. Thus, prohibition became a national matter, a development also reflected in federal criminalization of drug trafficking, gambling, and prostitution. All of those were vices that the Progressives (just like their reformist ancestors) saw as products of a craven humanity that needed to be—and could be—reformed, while their critics saw such activities as necessary social safety valves, inevitable for societies composed of humans that could, at most, be nudged towards slight and gradual enlightenment at the cost of great personal effort of which most people were incapable. For the critics, laws against such behavior had the same effect as telling the tides not to come in (or commanding the sea levels not to rise).

By 1919, the Eighteenth Amendment completed the process by prohibiting the manufacture, transportation, and sale of intoxicating liquors within the United States. Later that year, Congress acted on the authority it had under that amendment and enforced national prohibition through the Volstead Act. That law set the maximum permissible alcohol content at 0.5%, an amount that outlawed anything stronger than juice from stored oranges.

In light of the negative historical reputation that has developed around Prohibition, it bears remembering that the concept was hugely popular initially. It took barely one year for the needed 36 states to approve the 18th Amendment. However, that support turned to opposition within a very brief time, in the process raising a number of constitutional questions about that amendment specifically, and about the constitutional amendment process more generally.

A novel attribute of the 18th Amendment was a clause that required the amendment to be adopted within 7 years. When the issue was presented to the Supreme Court in Dillon v. Gloss in 1921, Justice Willis Van Devanter upheld this limitation for a unanimous court. Van Devanter concluded this clause was not part of the amendment, but part of Congress's resolution of submission of the amendment to the states. Therefore, such a clause did not violate Article V, which deals with amendment of the Constitution.

Van Devanter's opinion was important for the proposed Equal Rights Amendment of the 1970s. When that amendment failed to gain passage during the time (7 years) set, Congress by a majority vote—but not two-thirds—added three years to the timetable for adoption. While this action arguably was constitutional in light of Dillon, it came at a political price. Opponents made

an effective case that the extension was political overreaching, at best, and unconstitutional, at worst.

The Dillon court had also declared that it was a good idea that constitutional amendments be adopted within a certain time-frame, to reflect a dominant political consensus at a particular time. Van Devanter noted that there were still several proposed amendments that had not been ratified, including two from the original twelve in the Bill of Rights. He questioned whether such an amendment would be legitimate, if adopted after such long dormancy. That hypothetical became concrete when the 27th Amendment (dealing with Congressional pay changes) was adopted by the requisite number of states in 1992, after two centuries of constitutional purgatory.

Interestingly, Van Devanter may have had a point because the practice has been not to allow states to rescind their approval of an amendment even though the amendment may not have been adopted on the date of the attempted rescission. Of course, states are free to approve after having previously refused to adopt the proposal. This one-way ratchet in favor of approval has little to recommend it jurisprudentially over the opposite view. It was simply the product of political necessity, when Congress refused to allow states to rescind approval of the 14th Amendment because the unpopular and controversial amendment's congressional supporters needed every state they could to get it past the constitutional finish line.

Another curiosity of the 18th Amendment was that, as disillusion set in, many of the new opponents were Progressives and elites of all political stripes. Due to the perceived difficulty of repealing the amendment, they urged nullification by having the states refuse to enforce the federal laws and decline to make their own. The irony of their position was not lost on them, as they openly appealed to the success that Southerners had enjoyed with their refusal to enforce the 14th and 15th Amendments. Sounding like John C. Calhoun and other 19th-century Southern apostles of nullification, these good liberals distinguished between lawbreaking and orderly, principled, majoritarian nullification.

Another question involved whether the Ohio legislature could approve the 18th Amendment when a non-binding popular referendum had resoundingly rejected it. In Hawke v. Smith in 1920, Justice William Day's opinion for a unanimous Supreme Court held that the legislature, voting on a constitutional amendment was performing a federal function under Article V, not a state function. Since Article V did not provide for popular referenda, the voters of Ohio had nothing to say about the matter, a proposition of some delicacy, since state legislative elections rarely turn on how a legislator proposes to vote on a federal constitutional amendment that, typically, is not submitted until after such election.

Finally, a number of opponents urged that any amendment, such as the 18th, that curtailed individual rights, must be adopted by state constitutional conventions, not state legislatures. Though it was not expressly required by Article V, such had been the approach for the Bill of Rights. The Supreme Court rejected that argument unanimously in U.S. v. Sprague in 1931, but the argument had such political appeal that Congress directed that the repeal of prohibition through the 21st Amendment be decided by state constitutional conventions.

An expert on constitutional law, **Prof. Joerg W. Knipprath** has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

June 14, 2011 – Amendment XIX of the United States Constitution – Guest Essayist: Carol Crossed, Owner and President, Susan B Anthony Birthplace Museum

Amendment XIX: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.

It is hard to imagine that only 90 years ago, one half of the population of the United States could not vote because of their gender. But the passage of the Nineteenth Amendment in 1920 mandated that states could no longer deny women this fundamental right. It was named the Susan B Anthony Amendment, after the foremost leader for women's suffrage.

On that first Election Day, November 2, 1920, single and married women, young and old, exercised a right they had fought for in their homes and churches, in town halls, and on the streets. Polling places swelled almost beyond capacity with voters who had never before done such a thing.

Mothers, daughters, sisters, and aunts proud and eager, rushed to their polling location as early in the morning as possible, as if vying for the front row seat at the theater. Flustered by the idea of a secret ballot, one woman thought she needed to sign the back of the card. Others carried their groceries on their hips, maneuvering the crowds and chatting enthusiastically over screaming children.

The New York Times reported that while approximately one in three women, who were eligible, voted, more women than men actually voted in some districts. The Chicago Tribune credited Republican Harding's landslide victory to the woman's vote.

Unlike some other amendments to the constitution, the 19th Amendment was hard fought. For instance, the 26th Amendment passed in 1971, which granted the right to vote for citizens 18 years of age, took only 3 months and 8 days to be ratified. As a matter of fact, of the 27 amendments to the Constitution, 7 took only 1 year or less to become the law of the land.

However, women struggled for72 years to pass the Nineteenth Amendment. Anti suffrage organizations were most popular in the New England states. Opponents claimed that the female

brain was of inferior size. Others claimed that women did not possess a soul. Humorous postcards portrayed women taking too long to get all their petticoats on to get to the polls. Some newspaper editorials said that women would only vote the way their husbands told them to anyway.

But even the movement that supported votes for women was ripe with internal dissention. The passage of the 15th Amendment, giving the Negro the right to vote in 1869, caused a 30 year split in the women's movement. Some felt that Negro suffrage should only be passed if it also gave women suffrage. Others felt that the country was not prepared to enfranchise both and therefore women had to take a back seat.

Did the rights of the Negro have to diminish the rights of women, black and white?

That question was also being asked about women's rights as it related to motherhood and family life. Would freeing women to participate in government put at risk the care of children? In other words, could the rights of all coexist?

Against this backdrop, suffrage leaders took seriously these portrayals of power and domination by their gender. They exercised their greatest skill in combating this perception put forth by their opponents that they would abandon their children. Nowhere was this made more apparent than in their opposition to 'Restellism,' the term given to abortion, the most heinous form of child abandonment. It was named after the infamous abortionist Madame Restell, frequently arrested and discussed in Susan B Anthony's publication The Revolution. Suffrage leaders saw opposition to 'ante-natal murder' and 'foeticide' as an opportunity to clear their name of unfair accusations against them by anti-vice squads, who believed the decadence of the Victorian Era lay at women's independence.

But opposing abortion was more than a political strategy. It was support for a human right, a right that was integral to their own. The organizer of the first women's rights convention in 1848, Elizabeth Cady Stanton, made these connections in a letter to suffrage leader Julia Ward Howe.

Howe believed war was the enemy of women because it destroyed their sons and husbands and brothers. Stanton made this same death connection with mothers who destroyed their children: "When we consider that women are deemed the property of men, it is degrading that we should consider our children as property to destroy as we see fit."

Not only were anti-suffrage crusaders misinformed about the care for children that was integral to the suffrage agenda, they misunderstood that women wanted the vote not so much for their own self aggrandizement but for 'life over material wealth' or for the good of families and children. Child labor laws, poverty, and universal education were issues for which they sought the vote. They sought the vote for themselves because they were mothers who knew the needs of everychild. It was their maternity that they saw as their greatest gift of citizenship. As political artist J Montgomery Flagg's winning 1913 poster proclaimed, Mothers bring all voters into the world.

Susan B Anthony did not live to see the passage of the Amendment that was named for her life's work. A radical young new woman leader, Alice Paul, was jailed with 66 colleagues for their protest at an event honoring President Wilson and the US participation in World War I. This sparked the nation's awakening and compassion, but more importantly, weakened the President's opposition to the justice they demanded.

Paul created a flag with the suffrage colors: gold for the sunflower of Kansas (an early state to grant women suffrage), white for purity, and purple for eminence. She sewed on it a star for each state that ratified the Amendment. Only one more state was needed, and on August 18, 1920, Paul received a telegram proclaiming the 'yes' vote by the Legislature of the State of Tennessee. Paul draped the flag over a balcony in Washington DC. Women now could exercise the right to shape and determine the course of history.

Resources:

- Boston Daily Globe, Nov. 3, 1920
- NY Times, December 19, 1920
- Chicago Daily Tribune, Nov. 3, 1920
- Archive collection, Susan B Anthony Birthplace, Adams, MA

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June 15, 2011 – Amendment XX of the United States Constitution – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation

Amendment XX

1: The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

2: The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

3: If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall

have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

4: The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

5: Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

6: This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Congress proposed the Twentieth Amendment in March 1932 and it was ratified 327 days later in January 1933. The lack of controversy surrounding the amendment's proposal and ratification has been matched by a lack of attention to it since ratification. Unlike some other, even seemingly innocuous provisions in the Constitution, there have been no major U.S. Supreme Court cases interpreting it or significant political controversies surrounding it.

This despite the fact that it was intended to effect an important change in American political practice.

Professor Nina Mendelson explains that the main purpose of the amendment was to increase "the responsiveness of government to the people's will as expressed through the election." Nina A. Mendelson, "Quick Off the Mark? In Favor of Empowering the President-Elect" 103

Northwestern University Law Review Colloquy 464, 472 (2009). The way this was to be achieved was by abolishing "lame duck" sessions of Congress.

The lame duck sessions were created by the interaction of two Constitutional provisions.

First, Article I of the Constitution originally provided that Congress would convene once a year in December (article I, section 4, clause 2). Second, prior to the Twentieth Amendment, presidential, vice-presidential and Congressional terms began in March, four months after the presidential elections. The date for the commencement of the new Constitutional officers had been set by the First Congress. The Constitution itself specified the length of the terms so, in order to be faithful to the Constitutional mandate regarding term length, newly elected officials would take office two, four and six years from the date in March the First Congress had appointed.

These two provisions taken together resulted in a long session in election years during which the president and members of Congress could continue to enact legislation and perform other functions after the election, even when those officials had been rejected by voters.

There were some obvious concerns with the lame duck sessions. For instance, the problem of accountability of elected officials to those they are meant to represent when an election has been held and an official has been rejected by voters but that official is still making law. Officials who have not been retained in office are also likely to be susceptible to other pressures, such as the need to find work following their exit from office. See John Copeland Nagle, "A Twentieth Amendment Parable" 72 N.Y.U. Law Review 470, 479 (1997).

Because the lame duck sessions were created by Constitutional provisions shortening the terms was not possible without amending the Constitution itself.

That is exactly what the Twentieth Amendment was meant to do. The Senate Judiciary Committee report on the proposed amendment specifically said one "effect of the amendment would be to abolish the so-called short session of Congress." Congressional Research Service, Annotated Constitution: Twentieth Amendment at http://www.gpoaccess.gov/constitution/pdf2002/038.pdf.

By abolishing the lame duck sessions, the Twentieth Amendment would resolve the problems associated with them and increase the responsiveness of elected officials to their constituents.

The amendment would accomplish this by doing away with the mandatory December session, moving it instead to the subsequent January 3rd when the amendment called for the new Congressional session to begin. The president would be inaugurated shortly thereafter. If, for instance, the November election had not resulted in a clear majority in the Electoral College, the newly elected members of Congress, rather than the old, would select the new president.

The problem is that while the framers of the Twentieth Amendment did not "expect the outgoing Congress to meet during the lame-duck period from Election Day in November until January 3" that is, in fact, what happened. Nagle at p. 485. So, even after the Twentieth Amendment was ratified, lame duck sessions continue to be held with outgoing officials enacting legislation, spending money and bailing out industries. Presidents have been particularly active during this period, issuing pardons, signing treaties and appointing judges.

The failure of the Twentieth Amendment to do away with lame duck session illustrates a truth the Founders knew well—the law cannot supply what is lacking when self-restraint fails.

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June 16, 2011 – Amendment XXI of the United States Constitution – Guest Essayist: Andrew Langer, President of the Institute for Liberty

Amendment XXI

1: The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

2: The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

3: This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

If nothing else, the 21st Amendment to the Constitution underscores the slippery slope that comes from both the adaptation of Constitutional prohibitions to the mores of the day, and the legal gymnastics that invariably ensue.

If you've already read Professor Joerg Knipprath's excellent essay on the 18th Amendment here at Constituting America, you understand what led to the Prohibition era in the United States. It became clear within the matter of a decade that America's statist experimentation with a wholesale ban on alcohol was an abject failure—but because the nation had taken the extraordinary step of banning the manufacture, sale and use of a something within the Constitution, it would take another constitutional amendment to repeal that ban.

But while this act of "liberal fascism" (as Jonah Goldberg so aptly put it) took many years to come to fruition and ratification, it was undone in a matter of mere months. This is because the architects of the 21st recognized something that should remain foremost in the minds of citizen activists when they are trying to figure out if politicians will do the "right thing" on issues. They recognized that when push comes to shove, politicians will invariably be beholden to a narrow range of vocal special interests, and are thus apt to do something profoundly stupid for the rest of us.

When it comes to ratification of constitutional amendments, we are provided with two methods— the state legislature method, which had been the primary method of ratification of most of the Amendments to that point; or the state convention method. In the case of the 21st, the architects chose the latter. The reason for this is simple: the proponents of the 21st wanted to avoid the political pressures that had, in fact, led to the adoption of the 18th amendment in the first place.

State legislators continued to be beholden to the temperance movement, a loud group whom it was perceived held great political power.

Using a method of state conventions, the 21st Amendment was ratified just months after it was passed by Congress.

The 2nd section of the amendment makes manifest the axiom of the road to hell being paved with good (legal and political) intentions. While the architects clearly wanted to do the right thing and preserve those essential elements of state sovereignty guaranteed in the 10th Amendment, the broad, sweeping language has puzzled legal scholars and presented case after case to the courts.

Fundamentally, the questions arise as to whether or not the powers reserved to the states in section 2—to essentially decide for themselves if the state will remain "dry", trump other rights guaranteed or powers created or reserved elsewhere in the Constitution. Can a state ban the total use of alcohol, for instance, even in religious situations, thereby trumping both the 1st and 14th Amendments? The answer is no, it can't but it took a ruling by the Supreme Court to make that certain.

Clearly, the states have the power to exercise tremendous control over the alcohol that is manufactured and purchased within their borders. But like all other powers in our republic, those too are limited.

America's foray into constitutionally prohibiting the sale of a good in the marketplace offers us a helpful object lesson for those attempting just the flip-side today. Today we're not talking about the federal government trying to enact a sweeping ban on the sale of a good—we're talking about attempts to enact a federal mandate on the purchase of a good: health insurance.

Citizens implicitly understand the Constitution's limitations in the imposition of the individual mandate: Congress simply has no power to compel individual Americans to purchase a good. We will most likely see the Supreme Court striking down those provisions of the recent comprehensive health care reform legislation on those very grounds.

But with almost similar certainty, when that happens, we will see a movement, similar in many respects to the Temperance movement, attempting to pass and ratify an amendment to make the compelled purchase of such a good constitutionally legal.

We know from careful study of the constitution and an implicit understanding of the concepts of limited, enumerated, and separated powers just how terrible such an amendment would be. We need only look at the tortured history of the 18th and 21st amendments, and their impacts on American society and legal frameworks, to see directly what would happen if such a mandate were to come to constitutionally pass.

If there's anything that we've learned from our foray into using the Constitution to tinker with both the marketplace and societal norms, it's that it not only doesn't work well, it has horrendous unintended consequences.

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June 17, 2011 – Amendment XXII of the United States Constitution – Guest Essayist: Marc. S. Lampkin, a Vice President at Quinn Gillespie

Amendment XXII

1: No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

2: This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

"No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

The 22nd Amendment was ratified on February 27, 1951. It places terms limits on the office of the President and provides that no US President can be elected to more than two terms. It also limits the maximum time a President may serve to 10 years, if one should succeed to the office.

The issue wasn't new – in fact the founders had specifically considered this issue. Proposed language limiting the number of terms our elected officials could serve was rejected three times during the Constitutional Convention. The Founding Fathers saw no reason why an effective and popular elected official should be arbitrarily forced out of office. On the contrary, the Founders

thought that short terms of office — interrupted by frequent elections — would better ensure accountability than limited terms, which is why members of the House of Representatives, the branch designed to be the closest to "the people," have to run for re-election every two years.

However at the same time instead of using a rule in the Constitution – America had the Washington precedent. At the founding of the United States government, a clear and consistent pattern had been created by Washington – Presidents served only for two terms. Consistent with the idea that the American president was a monarch President George Washington made clear that he had no intention of running for a third term in 1796. This pattern stayed intact for nearly 150 years and then Franklin Delano Roosevelt was elected President.

He was first elected President in 1932, and re-elected in 1936. The eight years that followed his first election saw the dramatic expansion of the federal government as part of his administration's response to the Great Depression. Although the economy had not been

revitalized by 1940, many Americans – particularly Democrats – were quite impressed with the leadership he showed in transitioning the federal government from a government of limited powers to one with far more ambitious goals. From creating a federal minimum wage and a host of public works programs to expanding federal regulation of business generally, Roosevelt fundamentally transformed the Federal Government and American society.

And since the Depression had not yet ended, Democrats were especially fearful that these changes would get rolled back so when it came time for the Democrats to nominate a candidate for the Presidency in 1940, they settled on renominating Roosevelt. At the same time WWII had begun — even though the U.S. would not enter it until 1941

When 1944 rolled around, changing leaders in the middle of World War II, which the United States was now fully engaged in, seemed extremely unwise, and FDR ran for and was elected to an unprecedented fourth term.

However he would not complete his fifth term. He died less than 100 days after his inauguraton. Within a year of the war ending Congress – pressed by Republicans – determined to insure that George Washington's self-imposed two term limit would become enshrined in the Constistution.

Specifically excepting Truman from its provisions, the 22nd Amendment passed Congress on March 21, 1947. After Truman won a second term in 1948, it was ratified on February 27, 1951 (1,439 days).

Marc Lampkin is a Vice President at Quinn Gillespie

June 20, 2011 – Amendment XXIII of the United States Constitution – Guest Essayist: Horace Cooper, legal commentator and a senior fellow with The Heartland Institute

Amendment XXIII

1: The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

2: The Congress shall have power to enforce this article by appropriate legislation.

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State…….

While many Americans – including many in Washington, D.C. – may not be aware, the Founders originally contemplated that Congress would be the primary authority over any and all aspects of the nation's capital and not the residents themselves.

The 23rd Amendment changed the U.S. Constitution to allow residents of the District of Columbia to vote in Presidential elections. Before the passage of this amendment, residents of Washington, D.C. were unable to vote for President or Vice President as the District is not a U.S. state. They are still unable to send voting Representatives or Senators to Congress.

Operating under the auspices of Article I, Section 8, Clause 17 [[The Congress shall have Power] To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States.] the Congress has nearly Carte Blanche to set up rules for the operation of the capital city.

The 23rd amendment places specific limits on Congress' authority by its expressed grant of voting rights to DC residents. However the grant is not unlimited. It restricts the district to the number of electors of the least populous state, irrespective of its own population. As of 2010, that is Wyoming with three Electors.

The 23rd Amendment does not change the status of DC. The language clearly establishes that D.C. is not a state and that its electors are only for Presidential elections. The House Report accompanying the passage of the Amendment in 1960 expressly states that the Amendment would not change the status or powers of the District:

[This] . . . amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. It would not make the District of Columbia a State. It would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its form of government. . . . It would, however, perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress.

History shows that the government of the city of Washington and the District of Columbia have been dominated by Congress for most of the district's history. The Congress has expanded and restricted the franchise several times since the District's creation. In the 1820s Congress acted to let DC citizens vote for a Mayor and City Council. After the Civil War changed course and created a territorial form of government for the district. All the officials, including a legislative assembly, were appointed by the president. This system was abandoned in 1874, when Congress

reestablished direct control over the city government. From the 1870s forward until 1961 District residents had no rights to vote whatsoever.

The 23rd Amendment opened the door at the Presidential level and in recent years Congress would expand the franchise further. First, Congress allowed DC residents to elect a School Board. In 1970, DC citizens gained a nonvoting delegate to the House of Representatives.

By 1973, Congress would pass the Home Rule Act which District residents approved in a special referendum in 1974. This act allows citizens to elect a Mayor and City Council.

This is the present system operating in Washington, DC today.

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June 21, 2011 – Amendment XXIV of the United States Constitution – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School

Amendment XXIV

1: The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.

2: The Congress shall have power to enforce this article by appropriate legislation.

A poll tax is an ancient device to collect money. It is a tax on persons rather than property or activity. As a regressive tax from the standpoint of wealth, it is often unpopular if the amount at issue is steep. But it can also be unpopular for other reasons.

In the United States, such a capitation tax was assessed in many states on the privilege of voting. Amounts and methods varied. One of the last poll taxes of this type, that of Virginia, was just $1.50 per person at the time it was struck down by the Supreme Court in 1966. That is not more than $10.00 in current money, hardly an exorbitant price, except for the truly destitute. But the problem was more than the amount. It was the manner of administration.

The common practice was to require that the tax be paid at each election, and that a potential voter demonstrate that he had paid the tax for a specified number of previous elections. If not, those arrearages had to be paid to register to vote in the ongoing election. The effect of the tax was to hit many lower income groups, but primarily Southern blacks, whose participation in elections dropped to less than 5% during the first part of the 20th century. To be sure, that low rate of participation was not entirely due to the poll tax, but that tax was a particular manifestation of a regime of suppression of political participation by blacks.

The 15th Amendment had been adopted to prohibit overt racial discrimination in qualifying to vote. However, the poll tax and other restrictive measures, such as literacy tests, were not, strictly speaking, race-based, so they did not come within the 15th Amendment. A different solution was needed, according to those who saw the poll tax as intolerable. Literacy tests, if fairly administered (though often they were not), had a clear connection to the responsible exercise of the voting franchise that poll taxes lacked. After all, especially in those years before the electronic media, having a literate electorate was a significant community interest. Republican theory has traditionally looked to having those with the most interest and highest stake take the leading role in the community. Literacy provided a foundation to acquire the knowledge needed for a wise and effective participation in res publica. Poll taxes, on the other hand, are just revenue-raising devices, and, since they are applied equally per capita, they are removed from republican considerations of having those with the highest economic stake in society direct the political affairs of that society.

Opposition to the poll tax increased during the 1930s and President Roosevelt briefly attacked it in 1938. But FDR had to be mindful of the powerful influence of Southern Democratic barons in the Senate and the crucial role that the Southern states played in the politically dominant Democratic coalition. By the 1940s, the House of Representatives passed legislation to outlaw poll taxes but a Southern-led filibuster in the Senate killed the effort. By 1944, the Republican Party platform and President Roosevelt (though not his party's platform) called for the tax's abolition.

Eventually, qualms arose about using ordinary legislation to block the tax. Article I of the Constitution places principal control over voter qualification in the hands of the states. The 15th Amendment (race) and the 19th Amendment (sex) had limited the states' discretion. To many—even opponents of the poll tax—the message from those amendments was that limitations on state power had to proceed through specific constitutional amendment. The opinions issued by the Supreme Court seemed to echo those sentiments, as the Court had accepted the predominant role of the states in that area even when it struck down the racially-discriminatory "white primaries" in the South in the 1940s and 1950s. The debate allowed Southern supporters of the poll tax to characterize the controversy as a states' rights issue.

The effort to adopt a constitutional amendment to ban poll taxes dragged on through the 1950s into the 1960s, even as support for the tax grew weaker. Literacy tests remained widespread, even in the North. But Southern states, too, abandoned poll taxes until, in 1960, only 5 states retained them.

Finally, in March, 1962, the Senate approved what would become the 24th Amendment. This time, no Southern filibuster occurred. In August of that year, the House concurred. The concerns over
state sovereignty remained, in that the amendment proposed to abolish poll taxes only in federal elections, leaving states and municipalities free to continue the practice for their internal affairs.

When the amendment was sent out to the states, every state of the old Confederacy, but two, refused to participate, still portraying the matter as a states' rights issue. The two exceptions were Mississippi, which formally rejected the amendment, and Tennessee, which approved it.

Outside the South, every state adopted the amendment between November, 1962, and March, 1964, except Arizona and Wyoming.

But, as mentioned, states were still free to adopt poll taxes for local elections. This apparently was a call to action for the Supreme Court. Casting constitutional caution to the wind, the Court in Harper v. Virginia Board of Elections in 1966 struck down the Virginia poll tax for state and local elections. Creating an odd alloy of different constitutional concepts, due process and equal protection, Justice William Douglas announced for the majority that poll taxes impermissibly discriminated on the basis of wealth and/or improperly burdened a fundamental right to vote. In any event, the opinion announced, the Virginia tax violated the 14th Amendment.

The Court obviously was aware of the 24th Amendment, so recently adopted. But the learned justices must have found the effort to amend the Constitution through the proper Article V process unsatisfying. It appears that the 24th Amendment, having been limited to federal elections to avoid further intrusion into state sovereignty over voting qualifications, was not constitutionally rigorous enough. The Constitution, as it thus stood, was unconstitutional in the eyes of the Supreme Solomons. If the Court was right in Harper, members of Congress and of the state legislatures could have saved themselves much trouble and just used the 14th Amendment to declare all poll taxes unconstitutional. Congress could have accomplished the goals of the 24th Amendment, and more, just by passing a law to enforce these supposed rights protected under the 14th Amendment.

Of course, traditionally the 14th Amendment was not understood to provide direct restrictions on state control of voting qualifications. Otherwise, the 15th Amendment, as it applies to states, would have been unnecessary. The Court had used the 15th Amendment to strike down certain voting restrictions on race earlier in the 20th century, and did not even begin to take gingerly steps towards the 14th Amendment until striking down the "white primaries."

Not much significance, other than as a symbol and a constitutional curiosity remains of Harper. The Court since then has repudiated the notion of wealth as a constitutionally "suspect" classification entitled to strict judicial scrutiny under the equal protection clause. As well, the notion of voting as a fundamental right protected under the due process clause, has had a checkered history.

Rights conceptually are "fundamental" if they do not depend on a political system for their existence; they are "pre-political" in the sense of the Anglo-American social contract construct that the Framers accepted. Freedom of speech and the right to carry arms for self-defense come to mind. Voting is an inherently political concept that does not exist outside a political commonwealth, and the scope of the voting privilege (that is the meaning of "franchise") is, necessarily, a political accommodation. Even republics, never mind monarchies, have no uniform understanding of who may be qualified to vote. The great historical variety of arrangements of republican forms of government, and the inherently political nature of defining them, is one reason the Supreme Court has not officially involved itself in defining what is a republican form of government guaranteed under the Constitution.

A final word about the 24th Amendment: Historically, many republics, including the states in our system, required voters to meet designated property qualifications, as a reflection of having a sufficient stake in the community to vote responsibly (and to pay for the cost of government). Strictly speaking, the 24th Amendment does not forbid those. The Supreme Court has upheld property qualifications for voting for special governmental units, such as water districts. One wonders, whether the abolition of such qualifications, if they were required in all elections, would need a constitutional amendment today, or whether the Supreme Court would just wave the magic wand of the 14th Amendment, as it did in Harper.

An expert on constitutional law, **Prof. Joerg W. Knipprath** has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

June 22, 2011 – Amendment XXV of the United States Constitution – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation

Amendment XXV

1: In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

2: Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

3: Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

4: Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty eight hours for that purpose if not in session. If the Congress, within twenty one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty one days after Congress is required to assemble, determines by two thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

The 25th Amendment, ratified in 1967, answers open questions about presidential succession.

What happens when the president dies in office?

Under Article II, if the president is removed, dies, resigns or is unable to perform his duties, these duties fall to the vice president (section 1, clause 6). Alexander Hamilton said a vice president "may occasionally become a substitute for the president" (Federalist 68). While this seems clear, the exact status of the vice president when taking on the president's duties or acting as a "substitute" was not certain. When William Henry Harrison died of pneumonia in 1841, Vice President John Tyler insisted on becoming the president rather than just an "acting president" as some urged. See Mark O. Hatfield, Vice Presidents of the United States, 1789-1993 (1997) at http://www.senate.gov/artandhistory/history/resources/pdf/john_tyler.pdf. All eight of the vice presidents who assumed the presidency on the death of the president followed this precedent. Section One of the 25th Amendment formalized the precedent, specifying that if the president is removed, dies or resigns "the Vice President shall become President."

What happens if there is a vacancy in the vice presidency?

The eight times a president died in office and the vice president became president there was a vacancy in the vice presidency, as occurred also when seven vice presidents died in office and two resigned. See John D. Feerick, "Presidential Succession and Inability: Before and After the Twenty- Fifth Amendment" 79 Fordham Law Review 907, 943-944 (2010). The Congressional Research Service notes, "for some twenty percent of United States history there had been no Vice President to step up." CRS Annotated Constitution, "Twenty-fifth Amendment" at http://www.gpoaccess.gov/constitution/pdf2002/043.pdf. Section Two of the 25th Amendment provides the solution for these instances by allowing the president to nominate individuals to fill vacancies in the vice presidency. The person nominated can take office when a majority of the

House and Senate confirmed the nomination. Gerald Ford (in 1973) and Nelson Rockefeller (in 1974) became vice presidents following this procedure.

What happens if the president knows he or she cannot fulfill the duties of the presidency?

The Constitution did not specify the procedure to follow in the case of a president being incapacitated. If the president knows of the incapacitation beforehand, as in a planned medical procedure, section Three of the 25th Amendment allows the president to notify the President pro tempore of the Senate and Speaker of the House that the Vice President will be Acting President during a period when the president cannot fulfill the duties of that office. When ready to resume the duties, the president notifies these same officials. President George W. Bush invoked this portion of the Amendment twice for routine medical procedures.

What happens when the president is incapacitated but cannot or will not step aside and let the vice president act as president?

Before his death by assassination, President James A. Garfield lived in a coma for eighty days. President Woodrow Wilson had a debilitating stroke a year and a half before the end of his final term. President Dwight D. Eisenhower experienced a heart attack and stroke while in office. See Calvin Bellamy, "Presidential Disability: The Twenty-Fifth Amendment Still an Untried Tool" 9 Boston University Public Interest Law Journal 373, 376-377 (2000). Until, the ratification of section four of the 25th Amendment there was no Constitutional direction for handling situations where the president could not function and could not or would not step aside. Now, the vice president "and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide" can notify legislative leaders of the president's inability to fulfill the duties of the office and the vice president then begins acting as president. The president can resume office by notifying the legislative leaders that there is no inability. When the vice president (and the executive officials) disagree with the president about the president's capacity and send dueling declarations to Congress, Congress decides the issue. Specifically, if 2/3 of members of Congress agree that the president is incapacitated, the vice president acts in the president's stead, otherwise the president continues to function (and White House meetings are, no doubt, chilly).

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June 23, 2011 – Amendment XXVI of the United States Constitution – Guest Essayist: Andrew Langer, President of the Institute for Liberty

Amendment XXVI

1: The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.

2: The Congress shall have the power to enforce this article by appropriate legislation.

The final (or, more accurately, most recent) amendment to the US Constitution is the 26th. It lowered the national voting age from 21 to 18 years of age.

The founders initially left it up to the several states to determine various eligibility requirements for voting. But following nearly a century of reform, including the passage of the 19th Amendment ensuring suffrage for women and various civil rights laws operating under the auspices of the 14th amendment, national leaders began to grapple with pressure to lower the overall voting age nationally from the generally-accepted 21 to 18.

President Eisenhower was the first chief executive to publicly support such a move, but Congress' attempts to nationally require states to do so were met with constitutional opposition from the Supreme Court. The High Court found that Congress had exceeded its authority under the Constitution, and that amending the Constitution would be required.

Contrary to popular belief, it wasn't simply the anti-war movement that was pressuring national leaders to lower the voting age. Young adults from all walks of life, who had already assumed the full mantle of adulthood (marriage, children, sole self-support, etc), were eager to ensure that they had a voice in public policy. But it was the anti-war movement that captured the popular sentiment, with the concept that "if I'm old enough to be drafted to fight for my country, I ought to be able to vote those policies facing my country."

The issue of the draft isn't a small one, either. The fact that young men were facing the possibility of involuntarily putting themselves in harm's way is a compelling justification for allowing these same young men a voice in their own futures.

By 1971, the White House had become a champion of the push to lower the voting age as well—which, given the ire the anti-war movement felt towards the Nixon administration, was nothing short of ironic. In fact, in one of the oddest instances of changing places, The New York Times, incapable of seeing anything good coming from the Nixon White House, came out in opposition to the lowered voting age—stating that young people were simply too immature intellectually to be good voters.

But the proposed amendment did pass Congress, and Nixon signed it in March of 1971. The amendment rocketed through state legislatures, and by July 1 it had been ratified.

The force and effect, however, has been somewhat limited. Rates of voting for the 18-21 year old segment of the population was at its highest for the 1972 election. After that, even considering important contributions in the 1984, 1996, and 2008 Presidential elections, voter turnout among this demographic has remained tremendously low. Despite this fact, there are some calling for lowering the voting age even more—to 16![1]

It is doubtful that this will happen, given a host of factors—including one trend that has run parallel through the 40 year history of the under-21 vote.

While there may have been some justification in the late-1960s and early-1970s for lowering the age due to the factors facing a disenfranchised segment of the population, those factors have

continued to shift. Not only do we have an all-volunteer military, wherein nobody is forced to join without their own-free choice, but the age we consider "adult" today continues to increase.

Currently, for instance, we have the greatest percentage of individuals under 30 living in their parents' homes. Few have families, fewer own homes. It has become acceptable to consider adolescence to extend well-beyond age 18, and some believe it to extend beyond 30 years of age!

This belief became enshrined now in federal public policy as well. One of the central issues in Obamacare is the mandate to health insurance companies that they allow parents to put their children on their insurance plans up to the age of 26. I believe such a consideration would have been unthinkable in the era when the 26th Amendment was being considered.

Nobody is suggesting that the voting age be raised again—though many believe that young people do squander their franchise rights. What is certain is that the 26th Amendment is illustrative of the idea that pressing issues of the day ought not drive the amendment process. Rarely does such tinkering with the founders' vision produce the results that we want.

[1] This organization, the American Youth Rights Association, believes that voter turnout will increase, and that because young people may retain better knowledge of historical facts than the general population, that they will be a more informed segment of the voting electorate.

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June 24, 2011 – Amendment XXVII of the United States Constitution – Guest Essayist: Charles K. Rowley, Ph.D., Duncan Black Professor of Economics at George Mason University and General Director of The Locke Institute

Amendment XXVII: No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened.

Congress is required by Article I, section 6 of the Constitution to determine its own pay. Prior to 1969, Congress did so by enacting stand-alone legislation. From 1789 through 1968, Congress raised its pay 22 times using this procedure. Initially members were paid per diem. The first annual salaries, in 1815, were $1,500. By 1968, pay had risen to $30,000. Since 1969 two other methods may also be used to increase the pay of members: automatic annual adjustments and a commission process. By 2009, the annual salary of Congressmen and Senators had risen to $174,000. So, even allowing for inflation, Congress has not demurred in paying itself well. The issue of constitutional constraints over the effecting of pay increases, therefore, is no minor matter.

The Twenty-seventh Amendment prohibits any law that changes – increasing or decreasing – the salary of members of the United States Congress from taking effect until the next two-year term

of office for the Representatives. This allows members of Congress to reflect on potential voter rage before dipping into the pockets of their taxpayer-electors. It is the most recent amendment to the United States Constitution, ratified in 1992, just shy of 203 years after its initial submission in 1789.

The long history behind the Twenty-seventh Amendment is curious and unprecedented. Its origins lie in very early suggestions from two founding states. During the 1788 North Carolina and Virginia Conventions – called to consider the original Constitution that emerged from Philadelphia – wordings almost identical to those ratified in 1992 were requested of Congress.

Representative James Madison presented this proposed amendment to the House of Representatives in 1789. It became the second of the twelve Constitutional amendments originally submitted by the 1st United States Congress for ratification by the states on September 25, 1789. The last 10 of these would be ratified as the so-called Bill of Rights by December 15, 1791.

The proposed compensation amendment did not fare well in the hands of the states. Between 1789 and 1791, it was ratified by the legislatures of only six states – Delaware, Maryland, North Carolina, South Carolina, Vermont and Virginia – out of the ten states then required by the Constitution. As more states entered into the union, so the ratification threshold slowly increased under the three-quarters rule. The proposed amendment was then largely ignored for the better part of a century.

Ohio was the only additional state to approve the amendment over that time-period, when its General Assembly voted in favor in 1873. This ratification vote was a method of protesting the so- called Salary Grab Act of that year, providing not only for a substantial Congressional pay raise, but making that pay raise retroactive. Almost another century would then pass until the proposed amendment was ratified by Wyoming in 1978, once again as a protest against another outrageous Congressional pay increase. The numbers required for ratification, however, remained painfully short of those required.

Young students following this invaluable educational program should be interested to note that the issue was brought to the attention of the public once again by a person very like you. In 1982, Gregory Watson, a twenty-year-old undergraduate at the University of Texas at Austin, wrote a term paper arguing the case for ratifying the amendment. For this contribution, Watson received a 'C' grade from his professor. Note that a 'C' grade in 1982, prior to the grade inflation that would follow, was an entirely respectable, though not a spectacular, evaluation.

Undeterred by this modest grade, Watson embarked on a one-man campaign for the amendment's ratification. From his home in Austin, he wrote letters to state legislators across the country, typing each one out separately on an electric typewriter. Fortuitously his missives arrived on the desks of elected representatives, many of whom were confronting voter rage about their own budget-busting pay increases. As symbolic gestures, primarily to immunize themselves from such voter alienation, state legislatures began to ratify the amendment, rationally calculating that the requisite threshold of thirty-eight states would never be achieved.

Their expectations turned out to be misplaced. The tally of ratifying states began to rise. Maine signed off first (1983), followed by Colorado (1984). Then the ratifications began to flood, as the dam burst its banks. Five states followed in 1985, three more in 1986, four more in 1987, three more in 1988, seven in 1989, and two in 1990. Now the amendment was close, and the numbers slowed, as ratification became a real possibility. North Dakota slipped across the line in 1991, apparently as the 35th state to ratify. Under the close scrutiny of a watchful public, Alabama and Missouri surrendered on May 5, 1992. Michigan broke the log-jam two days later, apparently providing the crucial 38th vote.

It would later be discovered that the Kentucky General Assembly had actually ratified all twelve amendments during that state's initial month of statehood, making Missouri the 38th state to ratify. The official record of the federal government, nevertheless, still recognizes Michigan as the 38th state to ratify.

Because the Twenty-seventh amendment had taken more than 202 years to ratify, a few self-seeking members of Congress challenged its validity. Under the U.S. Supreme Court's landmark decision in Coleman v. Miller, 307 U.S. 433 (1939), any proposed amendment that has been submitted to the states for ratification and that does not specify a ratification deadline may be ratified by the states at any time. In Coleman, the Supreme Court further ruled that the ratification of a constitutional amendment is political in nature. It cannot be assigned to the judiciary for oversight.

On May 18, 1992, the Twenty-seventh amendment was officially certified by Archivist of the United States, Don W. Wilson. On May 19, 1992, it was printed in the Federal Register, together with the certificate of ratification. In so doing, the Archivist had acted under statutory authority granted to his office by the Congress under Title 1, section 106b of the United States Code.

Immediately, Tom Foley (Democrat), Speaker of the House of Representatives, called for a legal challenge and Senator Robert Byrd (Democrat) of West Virginia scolded Wilson for certifying the amendment without waiting for Congress to scrutinize its validity. The Archivist held his ground and on May 20, 1992, under the authority recognized in Coleman, and in keeping with the precedent first established regarding ratification of the Fourteenth Amendment, each house of the 102nd Congress passed a version of a concurrent resolution agreeing that the amendment was validly ratified despite the 202 years that it had taken. Interestingly, the two versions of the resolution were never reconciled by the entire Congress.

From the perspective of public choice, difficulties in ratifying the Twenty-seventh amendment are understandable. The Federalists recognized from the outset the existence of a fundamental problem that over-shadows any constitutional or compound republic: who guards the guardians? It is an evident fact of life that $100 bills are rarely left lying on the sidewalk. If the representatives of the people can vote moneys into their own pockets without penalty, the expectation is that they will gladly so do.

What is true for the federal goose is equally true for the state gander. So state politicians, called upon to constrain their federal counterparts, unless hard-pressed by their own voters, will not

willingly put a money-bags constraint around necks that quickly might metamorphose into their own. The more highly remunerated a state's legislators are, the less likely they are to vote the federal ratification into law. Massachusetts, New York and Pennsylvania have not ratified the Twenty-seventh amendment. We do not need to strain our little grey cells to understand why this is so!

Even with the Twenty-seventh amendment in place, politicians find wiggle room around it in the form of annual cost-of-living adjustments (COLAs). COLAs have been upheld against legal challenges based on the Twenty-seventh amendment. In Boehner v Anderson 30 F.3d 156 (D.C. Cir, 1994) the United States Court of Appeals for the District of Columbia Circuit ruled that the Twenty-seventh amendment does not impact on annual COLAs. In Schaffer v. Clinton 240 F.3d.876 (10th Cir. 2001) the United States Court of Appeals for the Tenth Circuit ruled that receiving such a COLA does not grant members of Congress standing in federal court to challenge that COLA. The Supreme Court refused to grant certiorari in either case, and so has never ruled on those legal precedents.

Why should it not surprise us that the federal courts are turning a blind eye to Congressional maneuvers around the Twenty-seventh amendment? Once again, public choice saves us from straining those little grey cells. Federal salaries are related directly to Congressional salaries, by Congressional legislation. It is a rare judge or justice who is prepared to challenge a maneuver that puts money directly into his or her own pocket.

The Founders strove mightily to protect the People from the potential predations of their own representatives. Ultimately, however, only the People can protect themselves by exercising eternal vigilance at the ballot box over the behavior of the agents that they dispatch to and from Washington.

It is surely appropriate that those who guard the guardians should be the People in whose interest the Founders crafted such a beautiful Constitution, designed to protect their lives, liberties, and properties, and to allow them to engage in the pursuit of happiness as they individually define that glorious goal.

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