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The United States Constitution of 1787: A Commentary

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... [J]udicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

—Benjamin R. Curtis (dissenting),
Dred Scott v. Sandford (1857)
I have been surprised to discover, upon preparing these lectures for publication, that there evidently has not been, since the Ratification Campaign of 1787-1788, any other attempt among us to set forth a booklength section-by-section commentary upon the United States Constitution proceeding primarily from the original text itself. Even during the Ratification Period, the longer commentaries (as in the Federalist Papers and in the State Ratifying Conventions) were not systematic but rather were tailored (properly enough) to local interests and concerns. There have been, of course, many instructive systematic accounts of constitutional law in our own time, but these have relied far more than I want to do here upon judicial and other official interpretations and applications of the Constitution.

The Caroline Werner Gannett Bicentennial Lectures upon which my Commentary is based were prepared for audiences made up of undergraduates of the Rochester Institute of Technology, of faculty of its College of Liberal Arts, and of members of the local bench and bar. Fortnightly lectures were delivered by me between September 1985 and May 1986. (Thus, for example, the date drawn upon in the closing paragraph of Lecture No. 6 was November 7, 1985.) Lectures No. 1, No. 7, and No. 12 each served to introduce a set of five lectures in successive quarters of the academic year. (Lectures No. 1 and No. 2 were originally a single lecture, as were Lectures No. 16 and No. 17.)
The lecture series was enhanced by three public forums I conducted at R.I.T. during the 1985-1986 academic year, featuring talks on issues of the day by Anthony Lewis (of the New York Times), Ramsey Clark (of the New York Bar), and Abner J. Mikva (of the United States Court of Appeals). Commentators on those talks were Leo Paul S. de Alvarez (of the University of Dallas) and Laurence Berns (of St. John's College). In journeying to New York State to deliver the Gannett Lectures, I felt a certain kinship with the James Madison of the Federalist, who also made use of the chance opportunity provided him in that State to expound the Constitution. (It was not inappropriate that the Illinois from which I came had once been claimed by Madison's Virginia.)

I have learned much from the responses of my Rochester audiences as well as from the many comments by readers thereafter of the Commentary manuscript. The Gannett Lectures were most efficiently arranged by Dean Mary C. Sullivan and Professors Glenn J. Kist, David Murdoch and John A. Murley, all of the R.I.T. College of Liberal Arts. Critical to the dispatch with which the lectures were developed for publication have been the efforts of the sympathetic editors of the Loyola University of Chicago Law Journal and of two most reliable secretaries, Dana B. Lane (of the Rochester Institute of Technology) and Christine M. Stack (of the Loyola University of Chicago School of Law). My wife should also be recognized here, not least for having been able to accommodate herself in Chicago to a year of my pre-dawn departures every other weekend. The unfailing hospitality of Dawn H. Murley in Rochester was also appreciated.

The readers of the Commentary manuscript have made many helpful suggestions and corrections. These readers include Larry Arnhart (of Northern Illinois University), Sotirios A. Barber (of the University of Notre Dame), Laurence Berns (of St. John's College), William T. Bluhm (of the University of Rochester), Leo Paul S. de Alvarez (of the University of Dallas), Thomas S. Engeman (of Loyola University of Chicago), Stephen M. Heaton (a Loyola University law student), Jamie Kalven (of Chicago), J. Harvey Lomax (of Memphis State University), Stanley D. McKenzie (of the Rochester Institute of Technology), David Murdoch (of the Rochester Institute of Technology), John A. Murley (of the Rochester Institute of Technology), Robert L. Stone (of the Illinois Bar), and John Van Doren (of the Institute for Philosophical Research in Chicago). David Bevington (of the University of Chicago) and John Alvis (of the University of Dallas) have been helpful with
Lecture No. 7; Mary Cornelia Porter (of Barat College) and John Kincaid (of North Texas State University) have been helpful with Lecture No. 12.

It is appropriate that my readers should have been as useful as they have been: it is, after all, their Constitution as much as it is mine. I hope to make good use as well of the comments, suggestions, and especially corrections of errors by readers of this law journal as I prepare my Commentary for publication in book form. I expect that the text for the book will remain substantially as it is now. Appendices will be added for the book, including the principal constitutional documents drawn upon in my Commentary (such as the Declaration of Independence, the Articles of Confederation, the Northwest Ordinance, various State constitutions, and the Constitution of 1787 with amendments).

I have retained the lecture format for several reasons. This Commentary is directed to the general reader, even as it keeps in mind the training of judges, legislators, and scholars. (I have published elsewhere somewhat more technical discussions of a variety of constitutional and legal issues, guidance to which discussions is provided in the bibliography appended to these lectures.) There is in Anglo-American law a great lecture-series tradition to which I am hereby contributing. (Particularly noteworthy have been the lectures, now books, by William Blackstone, James Wilson, A. V. Dicey, F. W. Maitland, Oliver Wendell Holmes, Jr., and Alexander Meiklejohn.) My lecture format should put the reader on notice that comprehensiveness is not to be expected in this Commentary.

Even so, I believe the United States Constitution is looked at here with an appropriate rigor, providing thereby a reliable guide for those interested in a coherent account of the 1787 document (including suggestions about its true original intent). My hope has been to offer my fellow citizens an account which would exhibit in our Constitution the admirable features that Blackstone was able to find in his:

Of a constitution so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise which is justly and severely its due: the thorough and attentive contemplation of it will furnish its best panegyric. It hath been the endeavour of these Commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of those several parts to demonstrate the elegant proportion of the whole. [Commentaries, IV, 435-36]
I have drawn in this Commentary upon what I have learned in my jurisprudence and political philosophy courses over the years about the nature of law and about natural right, if not even about the nature of nature. Thus one reader of this Commentary could write me:

You are spelling out the virtues, the discipline, the qualities of character and behavior not usually thought about or expressed—though vaguely felt—that went into the making of the Constitution and that are required to make it work as it was intended to work.

My constitutional law courses have been distinguished by their considerable concern with the Constitution itself: we do not begin to look at cases until several weeks have been spent studying fundamental constitutional documents. One illustration which has always appealed to my constitutional law students might be usefully recalled here. It is about Dizzy Dean, a baseball legend in the St. Louis and Southern Illinois area in which I grew up. He won one hundred and twenty games in his first five seasons as a regular pitcher with the St. Louis Cardinals and was only twenty-six when he broke a toe in an All-Star game in 1937. He tried to come back too soon and, favoring his injured toe, ruined his arm. The career of Dizzy Dean can remind us of the distortion that can take place, and the considerable damage that can be done, when one part of a well-constructed “system” is used to do the work of another part. Consider, for example, what has been done with “due process” because the Privileges and Immunities Clause of the Fourteenth Amendment became practically unavailable soon after that amendment was ratified. Consider, also, what led to and resulted from misreadings of the Commerce Clause for more than a century.

I have not attempted to make adjustments to the text of this Commentary in the light of highly publicized constitutional and political developments since my R.I.T. lectures were delivered. These recent developments, which are glanced at in notes 41 and 85, have tended to support the arguments I had made in my Rochester lectures about the proper relation of the Legislative and the Executive under the Constitution. (All of the notes have been prepared since the lectures were given, although some of the material in the notes was originally in the lectures themselves.) I have long argued for the rule of law and hence legislative supremacy, despite the natural presumptuousness of the Executive and the intermittent persuasiveness of the Judiciary—and recent revelations have tended to support my position.
I try to be of service to my fellow-citizens by providing an intelligible account both of the complete constitutional body and of how its parts fit together. This anatomy lesson looks back to sources and ahead to amendments even as it dwells on the original text of 1787. (I take for granted throughout this Commentary a general awareness of what courts, legislators, and executives, as well as scholars, have said about the Constitution. I work, that is, from what "everybody knows.")) Only if the student of the Constitution has some plausible grasp of the whole is it possible for him to begin to make sense of what the recognized experts say from time to time. Far more important than the somewhat dubious positions I may seem to take on various controversial issues in this Commentary should be the general plan of the Constitution which I do develop here.

It is assumed throughout this Commentary that the Framers knew what they were doing—and that what they did was extraordinarily good. The Constitution which was produced by their Committee on Style in September 1787, after two decades of experimentation and three months of deliberation, must have appealed to the Federal Convention delegates for the same reasons that it can appeal to us. Must not they, too, have recognized it as a marvelous piece of draftsmanship? Practice in the proper reading of the Constitution of 1787 can help prepare us to read with due care and imagination not only other well-crafted legal instruments but also the finest works of the mind.

1. THE CONSTITUTIONS OF THE AMERICANS

The American people, as a people, have had a dozen or so constitutions—if by "constitution" we mean that body of principles which defines a community and guides its conduct. These constitutions, which are interrelated and overlapping, guide the American people to this day. It should be useful, for the sixteen lectures that follow this one, for me to call the roll here of these constitutions. This can remind us of what we are all, in one way or another, somehow aware of.¹

The first constitution, in the broadest sense of the term—the first constitution of the American people is one shared with millions in the British Empire (and its successor, the Commonwealth of Nations): I refer to the language of the English-speaking peoples. This is a language which has been decisively shaped, for moral and
political purposes, by William Shakespeare and the King James translation of the Bible.

That language is, so to speak, the sea in which we swim, a sea so much taken for granted that it is rarely noticed as perhaps decisive to the constitutional workings of a people. The English language provides a special guide not only to political things but also to the human things that political life ultimately serves. One can even wonder whether it is possible to have in the modern world a sustained constitutionalism on a large scale wherever the political sense and the human sensibilities of a people have not been shaped by the language (that is, the thought) of a Shakespeare.

Or, put another way, it is difficult to teach tyranny to speak persuasive English. I have begun with something that is anything but obvious in appearance, however obvious it may be when one stops to think about it. Or, to put this still another way, neither Lenin nor Hitler translates easily into our thought: it can even be hard for us to see why such leaders can be taken seriously, except by the most desperate peoples. I will return to this point in my next lecture. The work of Shakespeare will be drawn upon in some detail in the seventh lecture of this series.

II.

Another constitution shared by the American people with millions in the Empire and Commonwealth is the British constitution, which has evolved through centuries of travail and testing in Great Britain. Although it is largely unwritten, its principles are so well known (for example, with respect to the workings of Parliament in the governmental system) that they can be described in considerable detail. We notice that parts of that constitution are written, such parts as Magna Carta and various Acts of Parliament which are obviously regarded as constitutionally significant. But it is the unwritten part of the constitution that determines such things as which acts of Parliament (the Habeas Corpus Act is one) do have constitutional significance.

So critical was the British constitution to the American colonists that they invoked it again and again, as British citizens, in their contests in the 1760s and the 1770s with the government of Great Britain. It was the rights of Englishmen, and the British way of doing things, that the Americans said they were insisting upon in opposition to the usurpers in London.

The Revolution repudiated the British constitution, but only in part. Although the reliance in that constitution upon monarchy
was disavowed, Americans relied upon much of the British constitution as they organized themselves on various occasions—including on that preeminent occasion in 1787 when they drafted a new constitution. The British constitution could be referred to in the Federal Convention as the best constitution then available in the world, but one that Americans could not reasonably be expected to establish at that time.

Just as the English language must be appreciated if one is to read the American Constitution of 1787 properly, so the principal features of the British constitution must be recognized if one is to read and use the Constitution of 1787 as it was intended to be read and to be used.

III.

The first constitution distinctive to Americans can be said to be implied and drawn upon in the Declaration of Independence. It is there that Americans broke loose, to the extent they desired to do so, from the long-established way. The Declaration both invoked the British constitution and repudiated ties to Great Britain. It implicitly indicated what form of government, or at least what ways of proceeding, Americans were thereafter to rely upon.

The Declaration of Independence recognized (it did not invent) the standards of government by which the people are to be guided in assessing and in making or unmaking their governments. The Declaration ratified what the colonists had been doing in several assemblies before 1776 and what they would do in many assemblies thereafter until a proper national constitution was explicitly provided for. The Americans retained what they considered sound in their inheritance from Great Britain.

It is conceivable that the Americans could have proceeded indefinitely, as they had for almost a decade from 1774 on, conducting themselves pursuant to the constitutional system implicit in the Declaration of Independence, even though that declaration is primarily a statement of principles brought to bear upon the relations between the Colonies and Great Britain. The way the principles are stated, and the way the grievances are used to invoke and illustrate them, very much depended upon the circumstances of the day. Even so, the principles were so stated that they have served ever since to remind Americans of standards by which they might be guided.
Among the things still usable from Great Britain was the system of common law—not only the rules of law which had been worked out by judges over centuries, but also the way that judges went about their work. In practice, the body of the common law includes the statutes which modified the common law rulings by judges. Even so, the emphasis was (and often still is) upon the opinions published by judges.\(^4\)

The common law can be seen as the systematic application of human reason, working from generally accepted standards of justice, to the circumstances of one’s day. It reflects the everyday morality of the community, the application of which is adjusted from case to case as justice and the common good require. It is developed by judges, who find what is good and right to be done here and now, keeping in mind the known practices and expectations of the community. As such the common law is indeed common—for it is understood to be the law that would be generally accepted by common-law judges, whatever adjustments there might be made for peculiar local conditions.

Included in the common law has always been respect both for due process and for property. Some have insisted that the guarantees that bear upon *habeas corpus*, *ex post facto* laws, and trial by jury were also included. In any event, the common law was considered part of the British constitution. It is obvious from American experience that the common law can thrive aside from the British constitution. It is evident throughout the Constitution of 1787, and not only in the vocabulary used, that the common law is taken for granted.

The common law I have been describing thus far relates both to civil matters (or the law about the relations between persons) and to criminal matters (or the law about offenses against the community). There is as well a kind of common law which deals with public affairs, such as the rules which guide the conduct of parliamentary bodies.

This public common law, or law of public bodies, was repeatedly drawn upon by the American Colonies, and thereafter by the States, in the way they organized themselves in deliberative bodies (that is, in conventions and legislatures), as well as in the way they selected the members of various assemblies of government. This law of public bodies is evident also in the way the Federal Conven-
tion of 1787 and thereafter the State ratifying conventions assembled and in how they conducted themselves.

Much of this law of public bodies was unwritten. It was widely understood what was needed in order to establish legitimate legislative and other public bodies. Perhaps the most important feature of this law of public bodies was the set of rules (or understandings) as to how one might go about drafting and ratifying a constitution. So well known was this set of rules that the community at large was fairly united in its recognition of when it truly had a constitution to follow.

Perhaps the most remarkable feature of the considerable constitution-making that went on between 1776 and 1789 was the competence with which Americans all over the Continent went about the business of establishing and using constitutions, a feat made even more remarkable because of the relaxed confidence with which this was done.

VI.

Among the constitutions established were those set up, one way or another, in the thirteen independent States. For each citizen of the United States, from 1776 on, his State constitution (unwritten as well as written) was as much a part of his constitutional universe as those constitutions reflected in the language he shared with others, in the parts (and hence much of the spirit) of the British constitution that had been retained, in the Declaration of Independence with its recourse to a natural constitutionalism, in the common law that was very much taken for granted, and in the law of public bodies which guided the establishment of written constitutions.

For the most part, the constitutions of the thirteen States during the first decade of independence were newly fashioned. The few exceptions were adaptations of the Colonial charters that had theretofore governed.5 In each State, decisions had to be made about how much of the British law would continue in force. Constitutions provided locally, State by State, some of the guidance that the Declaration of Independence provided for the Country at large.

From the outset of Independence, the American people were organized by States. A national system was always taken for granted, however, with the State constitutions themselves recognizing (if only tacitly) a constitution for the Country as a whole, just as the Declaration of Independence took the Union and its govern-
ance for granted. Much of the governing of the Country continued State by State while national constitutions were being considered and reconsidered. The States recognized they had to accommodate themselves to each other for the time being—and they did this well enough, along with the Continental Congress, to prosecute the Revolutionary War to a successful conclusion.

There was considerable variety among the constitutions of the States. Experiments were tried and adjustments were made to local conditions. It was generally understood that State governments would have fully whatever powers were not national in their very nature, unless there were provisions made in State constitutions, or in some national constitution, to curtail State power.

All of the experimentation that went on in the States between 1776 and 1787 served to prepare the people of the United States to develop a proper national constitution for their common Country.

VII.

To say that there was experimentation in the States, as well as in the Continental Congresses, is to imply in still another way that there was a set of standards and goals to which the people of the United States looked in determining what constitution they should have and, later on, in determining what amendments should be made from time to time in that constitution. Such a set of standards and goals is explicitly, but not exhaustively, drawn upon in the Declaration of Independence. It was implicitly drawn upon as well in the development and use of the British Constitution and in the development of the common law.

Thus, there has always been for Americans (if not, in principle, for all Western peoples) an unchanging constitution by which public action is guided. This guide is, to put it in old-fashioned terms, the constitution of the best regime. This is truly the enduring constitution, a constitution which is all-pervasive and much drawn upon and yet rarely noticed explicitly. Everyone has some notion of it, but few fully understand it—and a people’s grasp of it changes from time to time. Sometimes that grasp can be quite crude, at other times quite sophisticated and yet wrongheaded (as may be seen in various modern ideologies). This points up the importance, in these matters, both of liberal education and of a sound moral training for citizens.

One’s grasp of the best regime—and hence of what would be better, and what would be worse—may be seen in uses of discretion, whether by a people at large or by their public servants. It
may be seen (however indistinctly) in the standards by which all judging and choosing are done, including of course the standards used in establishing, assessing and amending constitutions, as well as in making and unmaking laws and in exercising other powers under any constitution.

The best regime takes for granted a political universe in which reason can usefully study human nature to determine what action is called for at various times. I am talking here about a form of natural right, in the pre-modern sense.\textsuperscript{6}

To say that a rational political universe is taken for granted by recourse to the best regime is not to deny that there are irrational factors to be taken account of, including the passions and errors that human beings are heir to. It is because the best regime takes account of persistent irrationalities that it can be as sensible, and hence as good, as it is.

For Americans generally, the best introductions to the best regime are the statement of principles in the Declaration of Independence and the enumeration of goals in the Preamble to the Constitution of 1787, both of which will be discussed in my next lecture and will be referred to many times thereafter.

\textbf{VIII.}

The best regime draws upon reason for its understanding of human nature and of the community and the political associations appropriate for mankind in varying circumstances. The very best regime, thus understood, depends for its rare realization upon quite special circumstances. Yet we are told of another "best regime," but in the spiritual realm, not in the temporal. This regime too provides a constitution for Americans, but a constitution which varies from association to association, much as the State constitutions do. That is, religious sects do differ, one from another, as to what is considered authoritative.\textsuperscript{7}

Both of these sets of ultimate standards (temporal and spiritual) seem to be drawn upon in the Declaration of Independence, as when "the Laws of Nature and of Nature's God" are invoked. Since ultimately there can only be one best regime, there is a tension between these two conceptions of the best regime, a tension that, by and large, has been, healthy and productive in the United States, as well as in the West generally.

The best regime in the spiritual sense usually draws upon revelation for its authority. Traces of this dependence may be seen in some State constitutions as well as in the Declaration of Indepen-
The Constitution of 1787

dence. An adjustment of sorts between the competing claims of these two versions of the best regime may be seen in the statesman's use of secular reason in making use of the revelation which happens to be accepted in his community.  

IX.

A community's allegiance to this or that revelation is of particular interest to the statesman concerned for the character of his people. There may well be implicit in the character of each people a set of opinions about what the world is like and about how things should be done. Such opinions comprise a kind of constitution that guides a people.

Both the character of a people and the revelation which helps shape that character may in turn be shaped by such factors as climate, geography, literature, racial types and accident (or history). Thus, the presence of substantial African slavery in Eighteenth Century North America, however much this may have been due to chance, profoundly affected the American character and the alternatives available to American statesmen trying to bring out the best in their Country.

What the community may properly do to shape, reshape and perpetuate the character of the people remains a question down to our day. One often hears the opinion that formation of character should be left to the family and to the church, that the inculcation of morality is no business of government. Even this judgment, as to the best way in our circumstances to provide for character, may be a dim, and perhaps distorted, reflection of the quite old-fashioned approach which saw such allocations left ultimately to the political order. It is easy, at least today, to overlook the dependence—for the effective operation, if not for the very existence and authority—of such institutions as family and church upon political arrangements.

So it was many times said during the Federal Convention of 1787 and during the Ratification Campaign thereafter that the constitution appropriate to and possible for the United States would have to reflect the deep-rooted character of the American people.

X.

This introduction to the constitutions of the Americans would not be complete without reference to the Law of Nations, which
provided the political-legal context in which the Constitution of the United States was established.

The Declaration of Independence was concerned to exhibit "a decent Respect to the Opinions of Mankind." A similar respect, appropriate to the form of the Constitution of 1787, may be seen both in the recognition by the Constitution of the authority of what we call international law and in its acknowledgement of the obligations theretofore entered into by the United States. Such are the duties which accompany the rights and capacity claimed in the Declaration of Independence for the United States upon their "assuming among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them . . ."

There was then, and there remains to this day, a considerable body of the law of nations, a law (or general understanding in the civilized world) which governs both private and public conduct (for example, with respect to international commercial relations and with respect to the rules of war). Treaties and other undertakings or activities affect those relations—and here too there is a considerable agreement as to what the world community requires. The United Nations Charter is but one of many efforts to develop the institutions consistent with the understanding of mankind as to what humanity calls for.

Is not world law, if not some form of world community, implied in all that we now have? Does not humanity make its demands upon sovereign nations? With these questions we return to the guidance provided us by the best regime, no doubt an often uncertain guidance. Although there is much that prompts us to defer to the brotherhood of man, there is also much that inclines us to care most for those immediately around us. It may well be that the very best regime for human beings on earth is possible only in relatively small communities where there can be developed constitutions and laws appropriate to the character of a people. This suggests that serious differences between, if not also within, nations are inevitable.

XI.

Some accommodations to the American character may be seen in the form taken by the first written constitution for the United States, the "Articles of Confederation, and Perpetual Union," which more or less prevailed during the decade prior to the adoption of the Constitution of 1787.
The designation of this document as "Articles" recognized the considerable power claimed by the individual States in the Union. Their association was much more that of a company of sovereigns bound by treaty (or "articles") than it was that of a single government for a united people. This kind of arrangement seemed to respect the considerable desire among Americans for local self-government, a desire which comes down to our day and to which appeals can effectively be made on occasion.

The treaty-like character of this association is reflected in an odd feature of American constitutional history: the Continental Congress began acting pursuant to the Articles of Confederation long before the document was itself fully ratified (in 1781). In a sense, then, formal ratification did not matter so long as the understanding among the States was that the Articles should be in force. One can be reminded of how sovereign nations conduct themselves: sovereigns may comply with a treaty which has not yet been fully ratified, especially when it codifies existing practices.

However much the Articles of Confederation catered to the American desire for local self-government, they failed to serve adequately the also strong desire for an effective government for the "perpetual Union" many times insisted upon. Some government would have to provide those things which only a general government could provide, such as the regulation of the national economy and the control of the relations of the United States with other countries. There was, therefore, a campaign for the Federal Convention of 1787, even as it was generally understood that the States would continue to provide for what was local and otherwise special about various parts of a large and growing Country.

XII.

And so, at last in this roll-call of American constitutions, we have reached the Constitution of 1787. It is that Constitution which we will be examining in some detail in this series of lectures.

It should be evident from what I have said that the Constitution of 1787 cannot be understood, and was not meant to be understood, without taking into account the major elements that contributed to its making. The Articles of Confederation (and the statutes enacted by Congress under the Articles, especially the Northwest Ordinance) must still be reckoned with in interpreting various parts of our present Constitution, as must be the British constitution, the common law and, of course, the Declaration of Independence. The Declaration, with its "created equal" affirmation,
reminds us of how much of a compromise, in the form of a grudging accommodation to slavery, the 1787 Constitution itself was.

Not only must account be taken of the elements that contributed to the making of the Constitution, if it is to be properly understood, but perhaps also account should be taken of the things that have followed from the original Constitution. I refer to the amendments, especially those that conform to the literal meaning of "amendment" (that is to say, "improvement" or "betterment"). It can be salutary to notice that the Bill of Rights amendments did not truly change the powers of the Government of the United States under the Constitution: the liberties and rights protected by these amendments were implied (or at least were not intended to be threatened) from the beginning. The Tenth Amendment, of which much is made by some, restated what had been done in the Constitution; the Eleventh and Twelfth Amendments clarified what had been attempted in the Constitution.

Various of the amendments make explicit, or confirm, what had been taken for granted or at least had been aimed at from the outset. Even the Civil War amendments (the Thirteenth, Fourteenth and Fifteenth Amendments) are consistent with, if not called for by, the American constitutional spirit. One must wonder how many of our twenty-six amendments were implicit either in the "created equal" language of the Declaration of Independence or in the related "Republican Form of Government" language of the Constitution of 1787, to say nothing of the language of the Bible, of Shakespeare, and of Magna Carta. In any event, the three Civil War amendments did ratify the primary intended effects of that war. However much the relations of the States and the Union were changed thereby, the States remain, in principle, largely independent of the General Government.

XIII.

We draw to the end of our roll-call of constitutions which hold sway over the American people by noticing still another constitution, that which is reflected in the way I have described what I take to have been (for at least two centuries now) the comprehensive constitutional system (the dozen interrelated and overlapping constitutions) in which the Constitution of 1787 is found. This system of the world represents a general understanding of things which includes, among its observations, the recognition of how truly remarkable the 1787 Constitution itself is, something worthy of our respectful attention in the months, decades and century ahead.
2. PREAMBLE

I.

I begin this discussion of the Preamble to the Constitution of 1787 by returning to a few of the points I made in the opening lecture of this series. It should be useful to spell out these points with a view to my argument on this occasion.

I have suggested that the first constitution of the American people is one shared by them with many others in Great Britain and elsewhere. I referred to the language of the English-speaking peoples, a language which has been decisively shaped, for moral and political purposes, by William Shakespeare and the King James translation of the Bible. To speak thus is to use “constitution” in the broadest sense of the term, with “language” connoting the traditions (or the accumulated wisdom) of a community.

I have also suggested that an awareness of an enduring body of principles and standards rooted in nature (or “the best regime”) has been implicit in the efforts of the American people for some two centuries now in developing, amending and using their constitutional arrangements. Without such a body of principles and standards, the doings of politicians, moralists and teachers cannot make much sense. This is not to say that people can always make explicit what they are in fact aware of and what they rely upon. Such guidance is there nevertheless—and our greatest leaders, among whom a Shakespeare should be reckoned, help us understand and refine what we seek.

I have suggested as well that there was a law of public bodies repeatedly drawn upon by Eighteenth Century Americans in the way they organized themselves in deliberative bodies (such as legislatures and constitutional conventions). How the law of public bodies was to be applied at the time the Constitution was drafted and ratified depended, in part, upon an assessment by Americans of their circumstances and their needs in the light of standards drawn from their awareness of the best possible regime.

The 1776 Declaration of Independence (which was the foundation for both the 1787 Constitution and the 1777 Articles of Confederation) is a particularly vivid manifestation of the language of the English-speaking peoples. The Declaration states, in an authoritative manner, the enduring ends of American government rooted in the inalienable rights of men. The best regime was looked to in the making of prudent judgments about the claims and deeds of the British government. And, of course, a law of public
bodies was utilized by the Declaration in acting upon the judgments reached. Similar observations can be made about the Preamble to the Constitution, the most eloquent part of the 1787 instrument.

The Preamble confirms several key teachings of the Declaration of Independence, especially with respect to both the consent of the governed and the purposes of government. There is a restatement in this context of the political principles set forth in the Declaration of Independence.

II.

The Preamble permits a transition from the people at large (and from the general principles of government) into the Constitution itself. And at the end of the Constitution of 1787, Article VII leads out of the Constitution back to the people, as they are organized State by State.

In the First Congress, Elbridge Gerry summarized in this fashion the experience which contributed to the establishment of the Constitution:

[T]he causes which produced the Constitution were an imperfect union, want of public and private justice, internal commotions, defenceless community, neglect of the public welfare, and danger to [American] liberties.13

This is a particularly instructive summary since Gerry had been one of the three delegates present on the last day of the Federal Convention who had refused to sign the proposed Constitution. His list of the shortcomings endured under the Articles of Confederation obviously follows the order of our Preamble:

We, the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, 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 presents here the ends for which “this Constitution” is ordained and established. The last end listed—one might even say, the culminating end—is the securing of “the Blessings of Liberty to ourselves and our Posterity.” Why should this be so? Is a proper liberty that for the sake of which this people, as a people, ultimately exists?

We notice that it is only with respect to liberty that a concern is explicitly indicated for “our Posterity” as well as for “ourselves.”
Is liberty something that is best developed and secured over generations, and that once lost it is not easily retrieved? In any event, it seems to be something that people can believe they have a duty to preserve not only for themselves but also for those who follow them.

We should further notice that the first of the ends listed in the Preamble indicates what people this Constitution is for—the people of a Union of States. Is not posterity as well as the present generation looked out for by the concern with “a more perfect Union,” just as it is by the concern with “the Blessings of Liberty”? Does “Blessings” have a spiritual dimension? Is there not something shining, perhaps even transcendent, about both the “more perfect” and the “Blessings” with which the array of ends in the Preamble opens and closes?

III.

Both Union and Liberty, it seems, are to be perfected and thus perpetuated. The central ends in the list in the Preamble—the third and fourth ends, to “insure domestic Tranquility” and to “provide for the common defense”—are concerned with perpetuation in a more immediate sense, the simple maintenance of what already is. There may be seen here a concern for security—for security both at home and abroad.

Domestic tranquility means, among other things, that it is safe for us to live in the United States. Common defense means, among other things, that it is safe for the United States to live in the world. Indeed, for many people, assurances of a pervasive safety may be vital to their satisfaction with any particular regime.

Once safety is assured, it can be argued, then various good things of community life and of personal development become possible. Some would make safety not only central to, but virtually the end-all, of government. Mere continued existence can easily become an end in itself, with all kinds of sacrifices and impositions willingly endured in order to prolong that existence. Is not this too low a view of things, however important it is to recognize, and to provide for, the pressing demands of safety?

That the half-dozen ends of the Preamble are somehow interconnected, at least for this people, is sensed by all of us. Precisely how they may be connected is suggesting itself as we examine the terms of the Preamble on this occasion.

We have noticed both that the first and last (shining) ends are related in several ways to one another and that much turns around
the two central (prosaic) ends. This discovery of symmetry can be carried even further by noticing that the other two ends are also related to one another in that they seem to be concerned with the proper ordering of relations among people, either by establishing “Justice” or by promoting “the general Welfare.” Does not “Justice” tend to look to reliance upon relations already arranged, while “the general Welfare” tends to look to provision for future relations?

Still another set of correspondences can be noticed. The first three ends of the Preamble—to “form a more perfect Union,” to “establish Justice,” and to “insure domestic Tranquility”—follow one upon the other. The various States have to be firmly bound together, States which naturally have much in common along with critical differences which threaten trouble. But it is not enough to bind this people together (in their respective States). Their relations—the relations of States with one another and of individual citizens with one another—have to be so defined and so conducted that justice will be served. Otherwise, there will be constant turmoil. Justice must be established, and must be generally recognized to have been established, if domestic tranquility is to be secured, that tranquility both among the people of the Country generally and between various States in the Union. In this way, it can be said, the formation of a more perfect union, the establishment of justice and the assurance of domestic tranquility do follow one upon the other.

The same kind of connections can be suggested between the last three ends of the Preamble as well—to “provide for the common defense,” to “promote the general Welfare,” and to “secure the Blessings of Liberty to ourselves and our Posterity.” Once domestic tranquility is assured—the tranquility of a people defined by a certain kind of union and reinforced by justice among them—, the common defense can be effectively looked to in this Union’s relations with the rest of the world. Once peace is provided for at home (“domestic Tranquility”) and abroad (“common defense”), the general welfare (particularly with respect to economic and social matters) can be more effectively promoted, especially as a sense of community deepens.

There is as well a certain reciprocity among various of these ends. The common defense should be better served, usually, when the general welfare is promoted, when a people is prosperous and healthy. The same may be said about domestic tranquility. Still, it is instructive to notice the order in which these ends are presented
and to suggest how each might have been thought (or naturally sensed) to lead to the next.

Certainly, it is difficult to promote the general welfare in an enduring fashion when a people is repeatedly threatened by troubles at home and abroad. And, in turn, it may be difficult to secure the blessings of liberty when the general welfare is ill-served, when a people is miserable and discontented.

IV.

We return to the opening and closing ends of the Preamble: the forming of a more perfect Union and the securing of the blessings of liberty to ourselves and our posterity. Do not these two ends identify and determine the people of the United States more than do the other four ends? Is it not the combination of these ends which is the distinctive feature of the Preamble?

The other four ends are, after all, the ends of every respectable regime. All governments worthy of the name attempt to minister to justice, to domestic tranquility, to the common defense and to the general welfare. But this people is identified by a certain kind of Union; and it considers itself a people that is particularly concerned about securing liberty in perpetuity. Critical to true liberty are the practice and prospect of genuine self-government. President Lincoln could speak at Gettysburg of this Nation as having been “conceived in liberty”—and of its form of government as never perishing from the earth.14

We notice, however, that liberty may be the only one of the six ends in the Preamble which is not regarded as an unambiguous good. The blessings of liberty are to be secured, not merely liberty itself—and certainly not the curses of liberty. (One of the curses of liberty, manifested in the desperate determination of some men to continue to hold others in slavery, is touched upon in Section VIII of Lecture No. 13.)

On the other hand, this end may also be the only one of the six which, insofar as it is good, is something which is desired for its own sake as well as for its consequences. Union, justice, tranquility, defense, welfare—all of those ends seem generally to be desired more (if not sometimes altogether) for their consequences rather than for themselves alone. Is not liberty something we would want for itself alone, even if it did not bring us any other good things, so long as it did not bring us too many bad things? Liberty, as an end, seems to be a manifestation and a celebration of our very
existence as rational choosing beings. Opportunities for sensible choice are provided throughout the Constitution of 1787.

A concern for liberty is evident in the body of the Constitution as well as in the Preamble, not least in its pervasive reliance upon the rule of law. (A proper constitution itself serves as the law of laws.) The rule of law stands for, if it does not assure, a certain kind of liberty. One can wonder whether any liberty is likely to endure if the rule of law is not depended upon to help curb the excesses of liberty and otherwise to provide the context within which the meaningful choices might be made which are vital to prudent politics and to moral goodness.

V.

Various features of the Preamble, and indeed of the entire Constitution of 1787, can be pointed out by developing a half-dozen overlapping implications suggested about liberty in the Preamble. The more mature opinions of the Framers’ day are drawn upon and developed for the compilation I now offer:

The Framers of the Constitution believed, it seems, that there are such things as “Blessings.” That is, they seemed to believe that there was something substantial (we would say “objective”) about good things. They would not have dismissed opinions about the good and the bad (as all too many intellectuals do today) as subjective “value judgments.” Rather, they hoped for reliable judgments about the moral and the immoral both from judges in their applications of the common law and from statesmen in the exercise of their powers.

The Framers believed that human beings can reliably identify the blessings, the good things, of this world. That is, it is indicated by them that the goodness of things is knowable and known, that it is (or can be) a matter of public knowledge.

The Framers believed that they were entitled and obliged to provide for those blessings. That is, they did not suffer from a lack of confidence as to either their right or their ability to seek out and secure the good things of this world.

The Framers of the Constitution, in their recognition that there are abuses of liberty to be guarded against, can be understood to have learned that the worst is somehow related to the corruption of the best. Liberty could even mean that some men considered themselves free to enslave others, thereby calling into question the revolutionary insistence in the Declaration of Independence that all men are created equal. (Equality may be reflected in the provi-
sion in the Preamble for the establishment of justice and for the promotion of the general welfare. In addition, the centrality of self-preservation can itself reflect an elementary sense of equality.) I will be obliged to return several times in these lectures to the limitations upon both liberty and equality represented by the accommodations in the Constitution of 1787 to slavery.\(^\text{15}\) The continuing tension between equality and liberty has perhaps contributed to the vitality of our way of life. We are always being challenged to determine whether the current balance between liberty and equality is indeed the one we should have in the circumstances of the day.

The Framers believed that they could and should look out for themselves, that they should not allow chance passions and desires to determine what happened in their community. That is, they did believe in self-government.

The Framers believed that they had a duty to provide for their posterity, which may have been a particularly telling way of looking out for themselves. That is, people should not consider themselves free to do “as they please” (which may be another way of saying “as chance determines”). Various problems confronting a community are not merely personal or immediate but rather, also, of public or permanent concern.

Thus, the Framers of the Constitution believed, it seems, that their primary concern must be with their own. That is, it is these people and their posterity that must be particularly provided for.

VI.

The Preamble puts everyone on notice that the constitutional arrangements which follow in the body of the document are prepared by and for a people which takes government seriously. Only if one takes government seriously, and especially a government of one’s own, can one’s own become something which can be of genuine and continuing benefit to others, if only as a guide to how they in turn should conduct themselves and provide for their own.

At the very least, the Preamble indicates that the government being established must and can do the things that the government of a continental empire should be expected to do. Compare the guarded language with which the Articles of Confederation opened a decade before:

Whereas the Delegates of the United States of America, in Congress assembled, did . . . agree to certain articles of Confederation, and perpetual Union between the States of New Hampshire,
Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled. Do we not see here a perhaps excessive response to the political trauma suffered by the Americans because of impositions by the British government which they had been obliged to resist?

The Constitution of 1787 is, somewhat more than the Articles of Confederation, in the spirit of the Declaration of Independence. The language of the Preamble alerts us, just as does the language of the opening lines of the Declaration, to the elevated calibre of the draftsmanship we are about to encounter.

VII.

The affinity between the Declaration of Independence and the Constitution of 1787 is further suggested by certain implications of the separation-of-powers approach in the Constitution, a principle which had been considerably compromised in the Articles of Confederation.

Various of the grievances in the Declaration of Independence, and the way government itself is spoken of there, presuppose a separation-of-powers approach much like that made explicit in the Constitution. We can even see in the references to divinity in the Declaration of Independence an oblique anticipation of the qualified separation of powers found in the Constitution itself. There are four references to divinity in the Declaration. The first reference, and perhaps the second as well, regarded God as legislator; it is He that orders things, ordaining what is to be. That is, He first comes to view as lawgiver. Next, God is seen as judge. Finally, He is revealed as executive, as One Who extends protection, enforcing the laws that have been laid down (with a suggestion as well of the dispensing power of the executive). Thus, the authors of the Declaration portrayed even the government of the world in the light of their political principles.

In this way, at least, it can be argued that a republican regime is implied by the Declaration of Independence, such a regime as may
be seen in various of the State constitutions of that period, in the Constitution of 1787, and even (however distorted in some respects) in the British constitution. Among the features of the republicanism endorsed by the Declaration are the consent of the governed, a qualified separation of powers, and a proper respect for the inalienable rights of mankind.\footnote{16}

I referred in my first lecture to the natural constitutionalism of the Declaration of Independence. Is it not appropriate, therefore, that the deference in the Declaration to “the Laws of Nature and of Nature’s God” should be reflected in the understanding that the best ordering of human things should take as its model the divine ordering of the world?

The Constitution of 1787 can plausibly be taken, then, as an incarnation of the principles revealed in the Declaration of Independence. It may even be the form of government most appropriate for the people of the Declaration—that is, for a people who could produce such a declaration. It is also a form of government which, in this manifestation, had to defer to circumstances (particularly the long-established institutions of slavery) which left it deeply flawed, but not without hope of eventual redemption.

VIII.

However flawed the Constitution of 1787 was in this respect, it was really no more so (although more obviously so) than the Articles of Confederation. Rather, as we shall see in the course of these lectures, the Constitution may even have implied, more than the Articles of Confederation did, the eventual abolition of slavery.

For one thing, the fact that the government under the Constitution was truly a government meant that it could, in appropriate circumstances, do what could be done to serve the great ends set forth in the Preamble. (It was observed in the September 17, 1787 letter of transmittal from the Federal Convention to the Confederation Congress that the considerable powers to be vested in the new government could not properly have been vested in the general government under the Articles, a government which had virtually all its powers assigned to a legislature, and a unicameral legislature at that.\footnote{17}) It was evident to everyone—to both the supporters and the critics of the Constitution—that a much more powerful government was being provided for therein, which the Preamble clearly anticipates.

We need not be concerned on this occasion with how much the Preamble itself empowers the General Government under the Con-
At the very least, the Preamble assures Americans that the powers elaborated in the body of the Constitution are, and were intended to be, as broad as they may seem. Furthermore, it has always been a respectable argument, recognized even in the earliest discussions of the Constitution by both its friends and its enemies, that ambiguities in the purview of a document should be resolved so as best to promote the objects, or purposes, which its preamble states. It could be protested by more than one critic during the Ratification Campaign that it was all too evident “that the legislature, under this [proposed] Constitution, may pass any law which they may think proper.”

Although the Preamble has been much neglected the past century or so, it has been substituted for in effect by the expansive use made of the Necessary and Proper Clause, a use which was also anticipated during the Ratification Campaign. This exploitation of the Necessary and Proper Clause, it can be said, has been only natural as pressing national problems have been confronted, even though it has sometimes served to conceal from view the superb craftsmanship of the drafters of the Constitution.

IX.

However extensive the powers of the General Government under the Constitution may be, it always has been recognized that the exercise of those powers would be subject to review and restraint by the people, a people which has always regarded with favor the continued existence of the States (and hence the dedication to Union). The critical role of the States is reasserted in the articles of the Constitution where ratification and amendments are provided for.

The extent of the power of the people is dramatically anticipated, as we shall see in my next lecture, by the opening words of the Constitution, “We, the People of the United States...” There was, we are thus reminded, a people available in 1787, and indeed in 1776 and before—a people which could say and do what was said and done in North America from at least 1774 on. The Constitution itself assumes that there are already citizens of the United States in 1787, just as the Declaration of Independence and the Articles of Confederation had assumed the existence of American citizens when those great state papers were drafted a decade earlier.

We shall see in these lectures various ways in which the ultimate power of the people is taken for granted throughout the Constitu-
tion. Consider even what may be seen in the Tenth Amendment, which is made much of by some as a States’ Rights guarantee:

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.

It is not inappropriate to regard the first ten amendments (or Bill of Rights) as a vital part of the great constitutional sowing of the 1787-1791 period. The combination of the Constitution and the Bill of Rights is often considered the original constitutional arrangement in its entirety. This means, among other things, that ultimate mastery by the people is affirmed not only in the opening words of “the original constitutional arrangement” (“We, the People,” with which the Preamble begins) but also in its closing words (“or to the people,” with which the Bill of Rights ends). Thus, the friends of the Constitution in the First Congress in 1789, upon drafting the amendments to be proposed for ratification, confidently looked beyond the States to the People, just as they had done in the Federal Convention of 1787.

The recognition of the people here is reassuring in that the people can control what the General Government may do with all of its considerable power. (At times, of course, the people can and should decide that much of this power should lie dormant.) In order for the people to be able to exercise their control effectively, they must be free to discuss fully what their governments have done, are doing and propose to do. This means that public deliberation must be brought to bear upon community affairs. The Preamble implies one principle drawn upon in the Declaration of Independence and made explicit in the First Amendment: the people have the right freely to discuss the public business of the Country. (We will return to this freedom-of-speech principle again and again in these lectures.) No people can truly ordain and establish any Constitution, and thereafter supervise constitutional applications and amendments, if they are not free to examine the doings of government.

Nor can people truly control these matters if they are not competent enough to know what should be done and disciplined enough to do it. Both competence and discipline in a people are served by an informed appreciation of their Constitution, to which we can now turn in some detail, article by article. In the course of this Commentary we will again and again be reminded of, and guided by, the Preamble—by those words, “echoing the language
of the Declaration of Independence, which breathe spirit into the rest of the Constitution."

3. Article I, Sections 1, 2, 3, 4, 5 & 6

I.

The Senate of the United States is said to be a continuing body. Senatorial terms of office are so staggered that one-third of them expire every two years. Thus, there is always a substantial body of Senators, in every new Congress, carried over from the preceding Congress. The same may be said of the People of the United States from decade to decade, from generation to generation, beginning well before 1787 and continuing down to our day.

I will try to occupy the middle ground between that which preceded the drafting of the Constitution and that which followed upon its ratification—and that is the Constitution itself. For the most part I will be working with quite obvious features of the Constitution, attempting to suggest the implications of things found there.

II.

We can turn now to those parts of the Constitution of 1787 to be examined on this occasion, Sections 1 through 6 of Article I (the Legislative Article). This is rather prosaic-looking material, and yet it can be quite revealing and hence interesting.

These six sections begin, "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." I shall say more about this opening section in Lecture No. 5, when I consider Section 8 of Article I, where various powers of Congress are enumerated, and in Section V of Lecture No. 9, when I consider how Article II opens.

Here, then, is a summary of what is to be found in the sections commented upon in this lecture. Section 2 provides for the membership of the House of Representatives. Section 3 provides for the membership of the Senate. Section 4 provides for the superintending Congressional authority with respect to various matters entrusted to the States in Sections 2 and 3. Section 5 provides rules and procedures for the two Houses of Congress. Section 6 provides for the privileges and disabilities of the members of Congress. Let us see what can be said about, and learned from, these provisions for legislative routines.
Perhaps the most remarkable feature to notice about the 1789 organization of the First Congress under the Constitution, as well as about the 1787 organization of the Federal Convention pursuant to directions from the Articles of Confederation Congress, is the fact that such organizing has not been generally noticed. There was no serious question about legitimacy; there was no major controversy about points of order and the like. It has been true to this day in the United States that inconclusive selections (whether by election or by appointment) are rare, however vigorously contested the selection process may be. It is generally fairly certain, even obvious, who has been selected according to the prevailing rules. This respects the opinion reflected in the Constitution that it is more important to know who the officer is to be than that it be a particular person or even the best possible choice.

Of course, there have been serious differences from time to time as to what the best mode of selection is, as to who should be represented where, and as to whether the States should be equally represented in the Senate or, earlier, in the Continental Congress. Thus, also, the Anti-Federalists could report themselves disturbed during the 1787-1788 Ratification Campaign that there could be only sixty-five members in the House of Representatives from all thirteen States in the First Congress (1789-1791). But such differences have not kept Americans from accepting and making the best of whatever arrangement had been agreed upon, however deep their reservations may have been about what had been arranged.

It can be said, therefore, that sensible people appreciate the importance of an agreed-upon arrangement: they tend to recognize that whatever arrangement is made is bound to be indifferent in some respects; they tend to recognize that what is critical, at least for the time being (and pending amendments), is not that the way of proceeding be the best possible way, but that it be a knowable and known way. Americans can put up with extremes in national policy, whether it be accommodation to slavery or wholesale emancipation, so long as it is done according to the form of law.

Another way of describing these matters is to say that Americans generally understand that it is natural to political life that there be conventions, and that a wide range of conventions can be lived with, so long as they are sufficiently identified as the arrangement agreed upon for the time being by the community. Rules do matter.

And so designated persons could show up for the various Conti-
nental Congresses, for the Federal Convention, and for the First Congress. They could recognize each other as legitimate, and could (when enough did show up) get right to work on the business at hand. Even how many would be considered "enough" depended upon the established conventions of the day.

IV.

It should be obvious that such confidence and competence depend upon considerable experience in self-government. Much of that experience is manifested in the States, the existence of which is taken for granted throughout the Constitution. The States which are relied upon by the Constitution were well defined before the Constitution itself was drafted. They could be counted upon to do the work necessary for the repeated selection of various officers of the General Government (including Representatives, Senators and a President). The States are very much in evidence throughout the Constitution, but especially at the beginning (as the Congress comes into being) and at the end (as Ratification of the Constitution itself is provided for).

It is taken for granted, of course, that the States have legislatures (and usually, it is further assumed, bicameral legislatures). Those legislatures could be counted upon to devise and operate the selection apparatus which would set the General Government in motion. The Constitution does provide a reserve power in the Congress to supervise most of what the States do about the election apparatus upon which the General Government depends, just as it provides (in Article IV) that the United States should guarantee to each State in the Union "a Republican Form of Government." These Congressional reserve powers with respect to the States have rarely had to be exercised.

The State legislatures are recognized to be going concerns, to which qualifications of electors for selection of members of the House of Representatives can be keyed. Behind the State legislatures of 1787-1789 were two centuries of varying degrees of self-government in the British colonies in North America, colonies which were close enough to Great Britain to be protected from other European powers by British arms and influence, but far enough away to be left to their own devices for many everyday matters.

The States, in our Constitutional system, are largely independent of the General Government and yet are quite reliable in providing the General Government what it has needed to be set and kept in
motion. The States, it should be remembered, have never been political subdivisions of, or fully subordinated to, the General Government. This should remind us that the Constitution of the United States may not be suitable for export.

V.

Sufficient direction was provided the States for them to produce the members of Congress and the Presidential electors which the emerging General Government would need in 1789. The fact that it was generally understood that George Washington would be the first President under the Constitution made it much easier than it might otherwise have been to get things moving effectively.

However much the Anti-Federalists complained during the Ratification Campaign that the total number of members of the House of Representatives was too small, there was little public criticism then of the proportions allocated to the various States (aside from the issue of whether and how slaves should be counted). Perhaps this was in part because the political power thus allocated was considered balanced by the vulnerability to the direct taxation to which States would thereby be exposed in the same proportions. It is such balancing which also made it difficult to be sure, at least at the outset, who benefitted most from the counting of a slave as three-fifths of a regular citizen. For representation purposes, Southerners were willing to have each slave counted as five-fifths of a citizen; for taxation purposes, they preferred that slaves not be counted at all.

Perhaps the initial allocation of seats was accepted not only because Americans had then a fairly good idea of relative State sizes, but also because the census constitutionally provided for (to be conducted within three years) would lead soon enough to adjustments in the proportions of seats allocated among the States. The national dedication to equality is reflected in the provision made for a periodic census, after which reallocations of seats in the House of Representatives would routinely take place.

We take for granted periodic reallocations of seats, which in turn affects the relative power of the States not only in the House of Representatives but also in Presidential elections. One consequence of this is to make it hard for privileged regional or class positions or enclaves to establish or to maintain themselves under the Constitution. It is difficult to overestimate the effects of the equality principle in the American regime, especially since it is inti-
mately related to the importance attributed to the liberty of everyone in the Country.

VI.

The dedication to equality is reflected even in the way the two Houses of Congress are to organize themselves. It seems to be taken for granted that the members of a House (no matter where they come from) should have equal weight and that, unless otherwise indicated, majority rule should govern.

It was quite clear in 1789 how members were to organize themselves in Congress. The Constitution provided some guidance, but for the most part the considerable experience of the prospective Members of Congress was taken for granted. The Framers of the Constitution seem not to have been concerned about what would happen when the first Congress assembled, perhaps in part because they had been reassured by the ease with which they had organized themselves in the Federal Convention of 1787.

The way was smoothed by the justified expectation that a significant number of members in the First Congress would have seen service in Colonial and State legislatures, in Continental Congresses, and in the Federal Convention itself. It is remarkable, down to this day, how adept Americans are at organizing themselves in deliberative bodies (in government and out). Other peoples of the world treasure adeptness in other human activities, placing far less emphasis than we do upon a moderate political life and genuine self-government.

VII.

The principle of equality is consistent with (perhaps even requires) the understanding that the American people are the ultimate authority under the Constitution. The House of Representatives is to be elected by the people directly; the Senate is to be selected by the State Legislatures, which are in turn elected by the people directly (for the most part); and the President is to be selected by electors, who are in turn to be selected in a manner prescribed by State legislatures which are themselves likely to be directly dependent upon the people.

Thus, "the people" take more than one form. We have noticed that the people as countable citizens are provided for in the House of Representatives and that the people as communities are provided for in the Senate.

We should notice as well that the people are truly the ultimate
authority—they are truly in control—when and only when they know what they are doing. There are indications here and there in the Constitution that it is recognized (ultimately by the people themselves) that care must be taken to help the people to bring out the best in themselves and to permit them to seek and to secure what they need and hence truly want.

VIII.

Among indications of the advisability of tempering the application of the equality principle are the provisions in the opening sections of the Constitution for the qualifications of members of Congress. The equality principle is not carried so far as to require the conclusion that everyone is qualified to serve in Congress. Nor is it carried so far as to permit the people to select just anyone it happens to please them to want. The different age, citizenship and residency requirements for members of Congress (and, varying from State to State, for the electors [or voters] themselves) seem to be designed to make more likely the appropriate maturity, national loyalty and local experience.

Although the people’s will is to be master, that will (in order to be effective) must be refined. So refined is this people’s will, even before the outset of its activity under the Constitution, that the people can recognize the need for various restraints upon the exercise of their own will. These restraints, adjusted from time to time as circumstances change, reflect an awareness of what is good and of what is likely to promote or to subvert that good.

IX.

The supreme authority of the people in a regime “dedicated to the proposition that all men are created equal” is further recognized in repeated indications by the Constitution that the legislature is ultimately the controlling branch of government. It is that branch which is most like the people in action; and it can safely be supreme in the Constitutional system, because it is most intimately subject to supervision and control by the people.

I shall be emphasizing in these lectures the legislative supremacy assumed by the Constitution because it is easy today—perhaps it has “always” been easy—to make a lot of the President. Certainly, the President is much more visible, much more dramatic, or rather much more easily dramatized. But, as became evident during the Nixon Administration impeachment crisis (and this merely reflected the way the impeachment provisions are drafted), the Con-
gress does have the final say (among the branches of Government) as to who remains President of the United States.

Impeachment is, however, merely a particularly sensational manifestation of Congressional supremacy. There are many other, largely routine, manifestations of such supremacy, including the simple fact that whereas the Congress can control significantly (when it wants to) the composition, the budget and most of the activities of both the Executive and the Judicial branches of government, very little (ultimately, nothing) can be done by the other branches to control Congress in these respects. Although a President or a court may sometimes have something to say about a particular member of Congress (for example, through the criminal indictment and thereafter the trial of that member), the doings of Congress as a body remain largely unchecked except by the electorate.

In short, the Executive and Judicial branches are very much dependent upon, and bound by, the laws Congress chooses to make. For example, although the President is "Commander in Chief of the Army and Navy of the United States," what those forces consist of (or even whether they exist at all) depends upon Congress. The courts are similarly dependent. Congress has the power to determine how many courts there will be in addition to the Supreme Court and even how many members of the Supreme Court there will be from time to time.

Let us return briefly to the impeachment provisions in the opening sections of Article I. Each House of Congress has a distinctive part to play: neither one can do what only the other can do. One makes the charges (that is, impeaches), the other passes judgment upon those charges (that is, acquits or convicts). It is evident from these provisions that no other branch or officer of government can counteract what Congress does here, no matter how mistaken or wrongheaded Congress may be.

A similar ultimate dependence upon the legislative branch may be seen in what the Constitution takes for granted about what happens in the States. By and large, except when there is a need for immediate action (for there are provisions which recognize that legislatures are not always in session), it is taken for granted that when a State government acts, it acts in its most permanent and significant manner through its legislature. For example, the State legislatures choose the Senators who will serve in Congress, a choice in which the Governors of the States do not participate, whatever they may do to fill Senatorial vacancies on an interim
basis. (I suggest in Section I of Lecture No. 16 the sense in which the Constitution regards State government as unitary.)

The considerable weight given to the Legislature may be seen as well in the powers assigned to the Senate for passing on many Presidential nominations (including those of judges) and for ratifying treaties. It is seen in its most pervasive form in the fact that the multitude of directives, the interpretation and enforcement of which occupy so much of the time and energy of the Judicial and Executive branches, are almost all made by, or under the authority of, the Congress. It is no wonder then that Congress is provided for first in the Constitution and that nothing could be done by the General Government in 1789 until Congress organized itself and got to work.

X.

Legislative supremacy can be seen in still another fact which is so massive and so obvious that it can easily be overlooked: it is reflected even in the way the Constitution itself is established and in the place it has in our political life.

After all, the Federal Convention which framed the Constitution resembled in its activities a legislature, not an executive or a court. Also legislative in character were the State conventions which met to consider the proposed Constitution and to decide whether to ratify it or to reject it. The activities of these various conventions, whether as framers of the Constitution or as ratifiers of it, were characterized by the kind of deliberation associated with legislatures.

That the Constitution can be understood to be the law of the land points up the doings of the various conventions as lawgivers. The ultimate lawmakers are the people who proclaim themselves in the Preamble as the source for this Constitution. This, too, reminds us of the supremacy of the legislative mode.

To emphasize as I have the deliberative character of legislative activity is to remind us of still another facet of legislative supremacy: for it is the Legislature, more than any other branch of government, which is open to all possibilities and thus is empowered and obliged to bring human reason to bear upon the issues of the day as it attempts to determine the right thing to do. The Executive and the Courts have to be guided, in decisive respects, by such determinations.

Indeed, it is difficult today, I suspect, for most (perhaps all) regimes not to rely upon an assembly as nominally supreme. Even
the most tyrannical regime depends upon a certain degree of acquiescence, if not support, by the people at large. It is instructive to notice, when changes in the leadership are made in countries such as the Soviet Union and China, how much the ultimate formal authority must rest in some representative assembly.

It is also instructive to remember that even the most powerful British monarchs depended ultimately upon the law of the land for their authority. Except in times of civil war, who the monarch was at any particular time depended considerably upon how a generally accepted rule defined the Succession.

XI.

The two Houses of Congress are different in critical respects, beginning with the differences in their immediate constituents (the people, for the House of Representatives; the State legislatures, for the Senate).

The Senate is mentioned first in the Constitution. But the House of Representatives is provided for first (in Section 2, with Section 3 reserved for the Senate). The House of Representatives is the distinctive body established by the Constitution, with the Senate resembling much more the Congress under the Articles of Confederation. In addition, the House of Representatives does reflect more immediately the American people's ultimate control of government.

But however different the two Houses of Congress may be, they are both needed for the primary purpose of Congress, the making of laws. The President, too, is involved in the law-making process, but he can be dispensed with: his veto can be overridden, just as he is not needed at all in the amendment-proposing process. There is no proper way, however, to override the failure of one House either to agree to proposed legislation or to agree to any proposed amendments to the Constitution coming from Congress.

XII.

The important differences between the two Houses do not keep the Constitution from providing various rules which apply to both Houses, rules with respect to such matters as when and where the Houses should meet, how each House is to be governed, what records are to be made of proceedings, and when "the Yeas and Nays of the Members" are to be entered into the Journal.

We can see an occasional apparent exception to the proposition that the majority rules. Thus, "one fifth of those Present" can re-
quire that the *Yeas* and *Nays* be recorded. This defers to the right of the people to know, with a minority of one-fifth thus being empowered to help the people see who the legislative majority was made up of on any particular occasion. Thus, also, a smaller number than the required quorum (a majority of each house) “may adjourn from day to day, and may be authorized to compel the Attendance of absent Members . . .” This defers to the right of the people to have done on their behalf what may be required for the assembling of the majority needed to do business.

The two Houses are the same in these matters, whatever differences they may exhibit in providing for such details as precisely how absent members are to be compelled to attend. They are the same as well, with no option in either House to be different, in the privileges and disabilities of members of Congress. All members of Congress are to be compensated for their services out of the Treasury of the United States. (This is a reminder that not even Senators are to be considered merely agents of the States from which they come.) Also, they are all exempt from being arrested on certain grounds “during their Attendance at the Session of their respective Houses, and in going to and returning from the same.”

Even more importantly, members of Congress “shall not be questioned in any other Place” “for any Speech or Debate in either House.” This protection for members of Congress again reminds us of the freedom-of-speech privilege (available even before the First Amendment was added to the Constitution) of the people of the country when discussing public business. As pointed out in my last lecture, it is evident from the ultimate control recognized in the people, and from the things the people had to do in order to establish and thereafter to assess and, if need be, to alter, the Constitution—it is evident from all this that the people have to be left free to discuss both what should be done and what their governments are doing.

At the same time that the privileges of members of Congress are assured, certain disabilities are ordered, such as the limitations upon the capacity of members of Congress to hold certain other offices. These disabilities, as well as the privilege of freedom of speech, recognize the weaknesses of which men are capable, including both the temptation to advance oneself at the expense of the community and the susceptibility to threats against doing one’s duty. Thus, both greediness and fearfulness must be anticipated. The freedom-of-speech and the immunity-from-arrest provisions also reflect the opinion that members of Congress should simply be
left free, subject only to either the discipline in Congress itself or the discipline at the polls, to conduct the public business as they see fit.

These and other rules about how the Houses of Congress are to work, how members are to be protected, and what they should not do—all this reflects considerable Anglo-American experience over several centuries with the workings and problems of legislative bodies.

XIII.

Proper use of experience requires, of course, something more than mere imitation of what has gone before. Circumstances do change, requiring adaptations even in what has worked well. Changes are reflected in, among other things, the names used in the Constitution. The members of the new Congress are to be called "Representatives" and "Senators," not "Delegates" as under the Articles of Confederation. "Delegates" are more like ambassadors who represent sovereigns in a league of states. This difference is driven home by the provision of two independently voting Senators, instead of just one (or a delegation) from each State. We again see that each member of the Senate is somewhat independent of the State legislature which has selected him. Nor is he subject to recall before his term of office expires.

The continued use of "Congress," however, may have provided a reassuring connection with the past: it is a term which was originally associated with an assembly of ambassadors (such as, later on, the "Congress of Vienna") more than it was with a national legislature. Names can conceal changes which have been made—in this case, reassuring those who were afraid that the Constitution prepared the way for a consolidated government which would virtually eliminate "the sovereign States." The same effects followed from the appropriation, by the friends of the Constitution, of the term "Federalist," even though it was the so-called "Anti-Federalists" who were much more inclined to a primarily federal rather than to a national government.

There were, of course, clear enough indications in the Constitution itself that this document represented a significant departure from what had been provided by the Articles of Confederation. Perhaps nothing provided a clearer indication of what lay ahead than the opening words of the Preamble of the Constitution, "We, the People . . ." The significance of these words was not lost on so
acute an "Anti-Federalist" as Patrick Henry, who could protest in the Virginia Ratifying Convention on June 4, 1788:

And here I would make this enquiry of those worthy characters [here] who composed a part of the late federal Convention. I am sure they were fully impressed with the necessity of forming a great consolidated government, instead of a confederation. That [the government provided by the Constitution] is a consolidated government is demonstrably clear; and the danger of such a government is, to my mind, very striking. I have the highest veneration for those gentlemen; but, sir, give me leave to demand, what right had they to say, We, the People? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorised them to speak the language of, We, the People, instead of, We, the States? States are the characteristics and the soul of a confederation. If the States be not the agents of this compact, it must be one great, consolidated, national government of the people of all the States.24

But however this and like language in the Constitution is to be interpreted, there is about this document a remarkable restraint, even what could be called a becoming modesty of speech. Again and again, one encounters the calm and confident elaboration of arrangements the development and formulation of which had had to come to terms with great and abiding passions that threatened to divide the Country. The discipline found in such language reflects the experience, competence and civility vital to sustained self-government.

4. ARTICLE I, SECTION 7

I.

It has been reassuring to notice in recent years that both "liberals" and "conservatives" tend to agree that it is essential in this Country that there be a genuine freedom of speech, that citizens should be able to discuss fully all issues of public interest.

Conservatives and liberals are not likely to agree as easily with respect to the proposition that I have advanced from time to time, that among the conditions for an effective freedom of speech are the development and preservation of a citizen body capable of making proper use of such freedom. This requires, among other things, an informed consideration of what television has done, and is permitted to continue to do, to the moral character and the political capacities of the American people.

Productive deliberation does not "just happen." In fact, few
peoples in the history of nations have been able to sustain for long
the kind of deliberation that can readily be recognized as truly use-
ful. And what is true of peoples at large applies also to legislative
bodies. Congress, under the Constitution of the United States, pro-
vides an instructive illustration of the points I have just made.

It was noticed in my last lecture that the freedom of speech of
members of Congress is guaranteed by the Constitution. It does not
take much of an argument to establish that Congress cannot do its
duty properly if it is not left free to discuss, without fear of sanc-
tions elsewhere, whatever it sees fit to discuss. At the same time, it
should be evident that truly useful discussion is not just everyone
talking at random. Much is to be said for imposing some order
upon the subjects to be discussed: each House of Congress is em-
powered to establish rules for the governance of its proceedings.

II.

But, first of all, provision had to be made for bringing Congress
into being. This may be seen in the opening sections of the Consti-
tution, which were examined in my last lecture. We have seen how
each House of Congress is chosen and what its privileges and pre-
rogatives are as a legislative body. By the end of Section 6 of Arti-
icle I, sufficient directions have been given to permit the people of
the United States, acting in their respective States, to select all of
the members of Congress they would need—and to permit those
members to go about their duties in a workmanlike manner.

In Section 7, thereafter, some directions are given on how a bill
becomes a law. I emphasize "some" because there is much left
unsaid. It is taken for granted by the Constitution that everyone
knows what a "bill" is; it is also taken for granted that Congress
itself will determine precisely how something called a "bill" will be
transformed into something called a "law." It evidently was not
considered either necessary or useful to say more about this than
the relatively few things provided for in this section of the Consti-
tution, which we will consider on this occasion.

At the heart of what is provided in Section 7 is the understand-
ing that the making of laws depends ultimately upon Congress.
Despite all that is said about the President's part in the legislative
process, the account of how a bill becomes a law reflects the ulti-
mate supremacy of Congress under the Constitution.

We will see once again, as we examine this section, the legislative
dominance provided for by the Constitution. But we can also use-
fully bring out here something which we have noticed earlier as
well, the extent to which various features of the Constitution are taken from the constitutional history and political experience of the Americans of 1787. The Constitution can be likened to woods which are filled with signs (including tracks of various animals, some of them long gone) which an experienced and alert woodsman can notice. Consider, for example, what is taken for granted, in our text for this occasion, by the “Sundays excepted” language in the counting of days that the President has for considering a bill presented to him by Congress. The political-religious presuppositions of Western civilization, for many centuries back, are casually assumed by this deference to Sundays.

The knowledgeable constitutional woodsman can see where various features of the Constitution came from. For example, passages in the New York and Massachusetts Constitutions of the day anticipate much of Section 7 of Article I of the Constitution of the United States.25 Other State constitutions of the time, however, had quite different provisions with respect to the matters dealt with in these two State constitutions. This should remind us that one cannot explain what is in the Constitution of the United States simply by finding antecedents. The Framers of 1787 had a variety of models to draw upon: they had to choose according to some notion of what was best in their circumstances.

III.

Sometimes, the Framers seem to have believed, it is good not to provide guidance beyond the barest indications. It is indicated that, by and large, decisions would be made by majority rule in the legislative bodies. Precisely how each House would go about permitting the majority to have its way was largely left to each House of Congress to determine.

Once Congress is in being, pursuant to Constitutional direction, it is thereafter substantially within the control of Congress how legislating is to be done. I refer now only to how laws are to be fashioned, not to what the substantive powers of Congress are, what matters Congress may deal with, and that sort of thing.

Among the things Congress must determine, it is assumed, is how the separate doings of the two Houses of Congress are to be coordinated with respect to a particular bill. Although each House seems to be left substantially on its own in determining how it will deal with bills, the two Houses must agree upon what constitutes a joint product for presentation to the President. Here, as elsewhere,
the Framers obviously relied upon the considerable parliamentary experience of Americans (both before and since 1776).

It seems also to have been assumed that many of the forms to be relied upon in the fashioning of laws do not really matter, so long as they are both plausible and known and so long as they allow the majority ultimately to have its way (after due allowance has been made for the consideration of divergent opinions). I emphasize this point because one does find, in various State constitutions (even more so now than then), detailed provisions as to how bills are to be framed, how many times they are to be "read," and that sort of thing. The Framers of 1787, on the other hand, seem to have believed that if Congress could safely be entrusted with vast powers in governing the Country, it could also be entrusted with considerable power to decide how to conduct its own affairs, especially since it is subject every two years to review by the people of the Country.

It should be noticed as well that Congresses today are substantially guided in what they do by the practices and precedents of one hundred past Congresses. Furthermore, there is considerable guidance provided toward the organization of Congress by political parties. To recognize what is taken for granted today is to be reminded that the members of the First Congress also had a considerable body of principle and experience to draw upon (but not political parties) when they sat down to do their work in 1789—so considerable a body that they must have believed, as it is natural for people to believe in such circumstances, that the way things had been done theretofore (insofar as there was general agreement) must be the natural way of doing things.

IV.

Yet is there not something unnatural in what Congress, and indeed any legislature, does—something unnatural, if not even marvelous, to which we are so accustomed that we rarely notice it? I continue to find it astonishing that all a legislature ever does officially is to speak—and, even more remarkable, all the speaking that counts takes the form of *Yea* and *Nay*. The *Yeas* and *Nays* do refer to other things, things that are said about things to be done—but it is the *Yeas* and *Nays* which count and which are to be counted. This generally assumes, as well as making it more likely, that all votes would be of equal weight, which helps make majority rule seem quite sensible.

The national laws to be found in our statute books routinely be-
gin, "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled . . ." A certain kind of speaking is an action, and so we have "acts of Congress." That is, words are made flesh, so much so that they may even be said to have teeth. All this is, I have said, quite remarkable, however necessary (and even elementary) it may be. (The Executive is more likely to be seen to be acting.)

Among the sayings of a legislature is what it says about what the authoritative form of saying is to be. There are two major exceptions to the considerable power of Congress to determine when its actions (that is, its "sayings") are authoritative. It is to these exceptions that most of Section 7 of Article I, on how a bill becomes a law, is devoted.

V.

The first of these exceptions is found in the opening sentence of this section: "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."

Nothing is said here, or elsewhere in the Constitution, as to why revenue bills must originate in the House of Representatives. This is but one of many provisions which are not explained—and yet it is prudent to believe that some notion of the purpose of a provision may affect how one interprets or applies it.

This revenue-bill provision is a sign in the woods which the constitutional woodsman can recognize as particularly dramatic—for it reveals much, at least to the practiced eye, about the constitutional history of the English-speaking peoples for centuries past and about the political circumstances of Americans in 1787.

First, there is a reminder here of British constitutional history—one of the great struggles between House of Commons and King and of the ultimate triumph of the House, determined in large part by its insistence that it alone should have the authoritative say about raising the monies the King wanted from his people. This struggle is an exciting one, with the loftiest invocations of liberty keyed to the most mundane concerns about property. For Americans this dedication to a property-based liberty took the form of the familiar insistence, "No Taxation Without Representation," which contributed to the Declaration of Independence and the Revolutionary War.

A special form of the concern about the prerogatives of the House of Commons became evident in the Federal Convention of
The decision to designate the House of Representatives as the House in which revenue bills must originate was intimately related to the decision to allow each State, regardless of population, to have an equal number of votes in the Senate. This revenue provision meant, in effect, that a House based on population (and hence on the distribution of property, in the normal order of things) would have the primary influence upon how taxes are to be levied. It was thought improper, at least by the larger States, to allow the small States to have (through the Senate) the decisive voice in determining what taxation there would be (which is to say, how much the people in the large States, who would be assessed the bulk of any taxes, would have to pay and in what form).

It is provided (in Sections 2 and 9 of Article I) that direct taxes would be apportioned according to population. This revenue-bill origination provision in Section 7 reinforces what is provided generally in the Constitution about uniformity in taxation. It seems to have been agreed that those who happen to have votes should not be able to fleece those who happen to have money.

The revenue-origination provision may also serve to remind us that the House of Representatives is more nearly an exclusively legislative body than is the Senate. The Senate (as we shall see when we discuss the Presidency) shares some of the powers and functions of the Executive Branch of the government. (This should remind us that much of what is said today about "the separation of powers" must be qualified.)

The concern of the larger States that those who pay more should have the greater say takes many forms. Among nations it may be seen in the recent proposal by the United States that voting power in the United Nations should be somewhat in proportion to financial contributions by nations to that body. At the most local level, such as a faculty meeting, the general principle of equal votes is often tempered by some accommodation to the influence of those members of a faculty who distinguish themselves by their ability to draw students, or by their publications, or by other contributions to the academic community. Against all this, however, is the sense that there should be prerogatives not based on "property," that all are to be treated as if somehow equal. Still, since capital can be quite mobile, those with property (including intellectual property) have to be deferred to somewhat.

The revenue-origination provision may also serve to remind us of how changes in circumstances may affect, if not even nullify, constitutional principles. This provision may have been weakened
from the outset, of course, by the power recognized in the Senate to "propose or concur with Amendments" to revenue bills. Such amendments are, at times, virtually new bills, a practice which the House of Representatives is inclined to resent. Even so, the House which does begin the revenue-raising process, especially when the bill is complex, can have considerable control over the final version: amendments cannot usually be as comprehensive as the original bill, and time does run out.

There has been a change in our constitutional institutions which moderates some of these concerns—and that is largely due to the Seventeenth Amendment whereby the Senate is now elected directly by the people in each State rather than by State legislatures. When this change is combined with the tendency (as through an income tax) to collect monies in ways which do not favor or penalize one State as against another, the importance of the prerogatives here of the House of Representatives may seem to diminish.

However, there may still be good reasons for the House of Representatives to insist upon its prerogatives, especially since there is already much which tends to make the Senate a more prestigious and more attractive place. The constitutional system does depend upon two somewhat different houses which enjoy considerable self-respect. (A different aspect of this matter is examined in Section IX of Lecture No. 14.)

VI.

I have said that there are two major exceptions, in Section 7 of Article I, to the considerable power of Congress to determine how a bill becomes a law. I have just discussed the first of these exceptions, the provision for the origination of revenue-raising bills in the House of Representatives. I turn now to the second, the assignment to the President of what we call a veto power.

It, too, can be seen to be dependent, in part, upon British constitutional history. At times, the British monarch had (at least in principle) an absolute veto power. Such a power was exercised, in effect, by the royal governors in various Colonies when the enactments of Colonial legislatures were presented to them for approval.

This Section 7 provision may not truly be an exception from the Congressional power to control the legislating process. Rather, it may be primarily intended to insure that the executive prerogative which had been traditionally claimed (whatever the status of such a tradition under the Constitution) should be clearly limited. Still, the Framers knew too much about legislative aberrations not to
provide some moderating check, however temporary it in principle has to be, upon legislative power.

Two-thirds of each House is needed to override the disapproval of the President. (Each House considers the bill separately for this purpose; that is, the two Houses are not counted together.) This means, assuming all members vote, that instead of a simple majority of 218 (in the current House of Representatives, with its 435 members), 290 votes are required to pass a bill over the President's disapproval. Thus, a Presidential veto is worth 72 votes in the House today. Similarly, in the current Senate with its 100 members, 67 votes are needed instead of 51.  

Whatever power the President exercises here must be explained by him. The Constitution says that Congress is entitled to an explanation: the President must return any disapproved bill to the House in which it shall have originated, "with his Objections."

One may wonder whether a disapproval is constitutionally effective if the President does not provide objections, if all he says is Nay. The Congress, on the other hand, may act to leap over the Presidential barrier without providing any explanation at all. But then the Congress routinely does a lot of talking and hence explaining in the process of preparing, debating and approving bills.

The obligation of the President to provide objections with his disapproval may help solve one puzzle in the otherwise fairly straightforward veto process. Why are bills which are left unsigned by the President not treated uniformly by the Constitution? What happens to such bills depends on whether Congress has adjourned by the time ten days have elapsed: if Congress is there to receive anything the President might send, then his failure to act is treated as if he had signed and hence the bill becomes a law; but if "Congress by their Adjournment prevent its Return," any bill he has done nothing about is considered not to be a law.

The New York and Massachusetts Constitutions (of 1777 and 1780, respectively) indicate that such a provision is designed "to prevent any unnecessary delays" because of executive inaction. We again see, on the other hand, that the Constitution of the United States does not usually bother (except in the Preamble) to explain the purposes of provisions, leaving it to us to figure them out. And so respectful speculation is invited.

It does seem to be assumed by the Constitution that if the President does not send back a disapproval to a sitting Congress, it may be because he recognizes it is apt to be overturned. In any event,
the Constitution seems to say, disapproval should be accompanied by objections: it is not enough to fail to sign.

But once Congress adjourns, there is no body to which objections may be sent. Still, some might say, why not require him to at least say *Nay*? Perhaps this is not required because it is preferred not to permit the rendering of explicit Executive negatives which are unexplained. Besides, the Constitution does not encourage superfluous actions.

It might also be noticed that once Congress has adjourned, the only "legislative" power left "in town" is that of the President, but only with respect to bills passed by the Congress during the preceding ten legislative days. He is the only one who still has some control over what will become law. Like Congress, in such circumstances, he need not explain himself; he need only say *Yea*. Thus, when one does "legislate," a positive action is required.

Nothing is said about the basis upon which the President may approve or disapprove. Presumably, he is entitled to take into account the various considerations (including those of constitutionality, usefulness and fairness) which Congress might also take into account. It is important, as we have seen, that he give reasons for any disapproval: it must not be a mere act of will, a monarchical fiat. Once he has given reasons, Congress is required to record the *Yeas* and *Nays* in any attempt to set aside the Presidential disapproval.

VII.

I need only touch here upon another implication of the provision for what happens in the event of a Presidential veto. So much detail in this provision dramatizes the complete silence in the Constitution about judicial review—that is, about the supposed duty and power of the National Courts to assess for their constitutionality the laws duly enacted by Congress. Is it likely, one may well wonder, that judicial review was indeed anticipated, when nothing is said about it, considering the care with which executive review is provided for?

Such questions as the following come to mind, especially in the light of the extensive veto provision, about any possible judicial review of acts of Congress: What happens after a court strikes down a law? Is such striking down retroactive to the time the law was enacted? How much of a court does it take to act? Should there be a routine procedure for bringing laws before the courts for such review? Which courts are entitled or obliged to exercise this
power? What may Congress do in response to such action by a court? Is a constitutional amendment the only remedy here—which is to ask, What about the legislative supremacy which is otherwise strikingly evident throughout the Constitution?

These are questions we can only touch upon here, stimulated as they are by the teachings to be gleaned from the arrangements in Section 7 of Article I. We shall consider these matters further when we get to the Judicial Article in the Constitution.27

VIII.

The concluding part of Section 7 prescribes that every “Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary shall be presented to the President” and shall be received from him in the same way, and with the same effect, as bills are presented and received. The purposes of the provision with respect to bills are not to be avoided by calling a bill something else.

This precaution (to which considerable space is devoted) reflects an awareness by the Framers of how human ingenuity may be used in the service of evasiveness. It is known how efforts may be made to circumvent various limitations. It is also known that it is easier for those who exercise power if they do not seem to be acting against the rules.

We have seen here what is again and again evident in the Constitution, that the Framers of the Constitution were very much aware that human nature (in both its lowest and its highest forms) must always be reckoned with.

IX.

I have suggested that the Framers knew, and expected truly political men in government to know, that it is important to have rules which are both defensible and known.

They also knew that many vital rules have to be adjusted to circumstances—and so they left it to each House of Congress to determine precisely how it would go about making the laws it is empowered to help make. Differences in members’ ages, in the sizes of assemblies, in powers, in the terms of office and in constituencies might well affect what rules would be appropriate in each House from time to time.

I have also suggested that a considerable experience, both in Great Britain and in North America, was drawn upon in framing the constitutional provision we have examined on this occasion.
But I have suggested as well that experience, however worthy of serious study, does not alone suffice. Judgment (both moral and political) must be used in determining which lessons of experience are appropriate in the circumstances which one anticipates for oneself and one's posterity.

5. **Article I, Section 8**

I.

It will be recalled that we saw, in our discussion of Section 7 of Article I, the importance of history for one's understanding of the terms of that section. We noticed that the Presidential veto provision drew upon antecedents in the State constitutions of New York and Massachusetts, and that the provision for the origination of revenue bills in the House of Representatives drew upon the parliamentary experience of the British people in the centuries preceding.

Section 8 of Article I is even more influenced by the constitutional history of the Anglo-American people. One cannot help but notice that there are many things in that section which require for their accounting considerable acquaintance with constitutional antecedents and with political experience. Indeed, one suspects, it may never be possible to provide a full accounting for this section, since chance may affect both what was thought then and what we can learn now about prevailing concerns and precedents in 1787.

Various powers of Congress enumerated in Section 8 may depend in large part upon a concern about the effect of leaving out powers which had been previously provided for explicitly in the Articles of Confederation or in some other constitutional document. This means that some of the powers may have been included out of an abundance of caution, especially if they should be powers traditionally associated with either the executive or judicial branches of government.

We need not try to account for the presence of each of the dozen and a half powers enumerated in Section 8. Rather, we need only suggest something about the principle of order in accordance with which these powers are organized here, leaving it to others to work out the details about each of them which help account for its inclusion and placement. Once one sees that there is a plausible pattern here, one is likely to approach in a different way these powers and the possible significance of their enumeration.28

Thus, although chance may have been critical here, there may
also be an organizing principle which takes chance into account and, to some extent, conquers it.

II.

Everyone talks about the Constitution as being an instrument of enumerated powers. Many see the principal depository of such enumerated powers to be Section 8 of Article I. Yet it is evident, upon a careful examination of this section, that considerably more power (somehow provided for elsewhere in the Constitution) is taken for granted. It seems to be indicated, for example, at the outset of Section 8 that the power to lay and collect taxes is to be used, in part, "to provide for the common Defence and general Welfare of the United States." Does not this suggest that a comprehensive mandate for Congress with respect to the general welfare (whatever that may mean) is provided for elsewhere? More is said in this very section about powers related to the common defense, with a half-dozen of them collected here. But even these are rather fragmentary, also presupposing thereby that a comprehensive mandate with respect to the common defense has been provided for elsewhere.29

All this suggests, among other things, that the Preamble to the Constitution should be taken much more seriously than it usually is, for it is there that the purposes, and hence the powers, of the Government of the United States are authoritatively anticipated. The opening section of Article I can speak of "all legislative Powers herein granted"—and this is to suggest that there are no powers intrinsic to legislatures that Congress inherits, but rather "only" those powers provided for in the Constitution. Still, the powers provided for, either expressly or by implication, may be considerable, far more than the bare enumeration in Section 8 of Article I has led many to believe.

The Anti-Federalists, during the 1787-1788 Ratification Campaign, insisted that the powers of Congress, especially when reinforced by the Necessary and Proper Clause with which Section 8 concludes, were vast. Such talk is often dismissed as mere rhetoric, just as are those Federalist arguments during the Campaign which played down consistently the extent of the powers provided for by the proposed Constitution. But may not the Anti-Federalists have offered the sounder reading?

I anticipate my further discussion of the Tenth Amendment by observing that the First Congress, which wrote that amendment in 1789, made sure that the substantive powers granted to Congress
by the Constitution of 1787 remained broad—and one assurance of
that was the First Congress’s refusal to insert the word “expressly”
in what is now the Tenth Amendment (so as to read, “The powers
not expressly delegated to the United States . . .”).

Thus, it can be said, the “party” which dominated the Federal
Convention, the Ratification Campaign, and thereafter the First
Congress was determined to recognize a broad grant of powers for
the new Congress.

III.

We have been concerned thus far in these lectures primarily with
the emergence of the Congress itself and with its operations, much
less with the powers of that Congress. In this we not only imitate
the way the Constitution itself is written, but also the way the Fed-
eral Convention conducted its business in 1787. More than a
month went by that summer before the Convention systematically
considered the powers the new Congress would have. On June
29th, a Georgia delegate expressed the wish “that the powers of the
General Legislature had been defined, before the mode of consti-
tuting it had been agitated.”

I suspect that this delegate failed to appreciate, or at least did
not want to acknowledge, what had been in effect understood from
early on in the Convention, that the new legislature would have
considerable power. This was reflected in the general agreement
quite early in the Convention that the new Congress would be bi-
cameral, thus transforming it into a traditional (and hence full?)
legislature instead of the treaty-like conference of “sovereign”
States (and hence a body of quite limited powers) that Congress
had been under the Articles of Confederation.

Curiously revealing may be the final particular power in Section
8, “To exercise exclusive Legislation” in certain specified cases.
This indicates, by implication, that not all of the other powers in
this section are “exclusive” to Congress, however much the Con-
gress’s actions may control or preempt what the States might
otherwise do. The States can legislate with respect to many of the
things that Congress might. Or, put another way, the fact that the
States in the early days of the Republic did legislate with respect to
many of these things does not mean that Congress was without a
superior power here whenever it chose to use it. Or, put still an-
other way for the most important case, the Congress may have a
comprehensive commerce power which the States may share up to
the point or up to the time that Congress chooses to exercise it.
The States did do a considerable amount of the governing in the early days of the Republic. Besides, a sensible Congress would not often want to do things which the States could do about as well, especially since the same people control both the Congress and the State legislatures. There should be no insuperable problems in adjusting the respective claims of Congress and of the State legislatures, especially if the political process is allowed to work.

Any insistence upon “exclusive” powers in Congress is still another illustration of the observation that “more may be less.” That is, to insist upon “exclusive” powers in Congress is implicitly to deny to Congress various of the powers that the States had been permitted to exercise from 1789 on.

IV.

Let us now look in some detail at our constitutional text for this occasion. The initial impression made by Section 8 of Article I is that it is a most complicated collection of powers, made even more so by the apparent lack of order. Still, it should be evident that most of the provisions can be seen as reinforcing and protecting (or filling out) the power of the General Government over what we today would call the economy of the Country and over what we would call foreign affairs (including the development and uses of the military).

It is also evident that this section ends with an emphatic reminder of Congressional power, with its concluding statement saying, in effect, that Congress would indeed have, or could help others to have, fully and effectively the powers indicated here and elsewhere in the Constitution. It may even be said that the Necessary and Proper Clause points to an ultimately comprehensive power in the Congress.

There is something stark about the way Section 8 begins and proceeds: it is matter-of-fact, with no flourishes and few indications of ends or purposes. The principal concerns do seem to be with commerce, on the one hand, and with war and peace, on the other. Several provisions in this section are ancillary to the concern with commerce; even more are ancillary to the concern with war and peace. Much seems to be taken for granted about the status of property and its use. The broad tax power provided for does not seem to be given for its own sake, but in order to permit the General Government to manage as it should both the economy (broadly conceived) and the foreign relations (including the defense) of the Country.
However complicated Section 8 may seem at first impression, it is revealed as rather simple, once one examines it properly. If the powers are treated as disjointed, then the array does seem rather curious. Only if the enumerated powers are seen as filling in, or reinforcing, the broad powers relating to war and peace and to commerce does the array in Section 8 begin to make sense. Whatever the doctrinal basis of Section 8, the practice has been (especially with the use of the Necessary and Proper Clause) to provide the General Government a quite extensive power with respect to the domestic life of the Country and with respect to the relations of this Country with other countries. It is not generally appreciated, however, how much this practical (indeed natural?) accommodation has been provided for in the Constitution itself.

The general scope of the Congressional powers in the Constitution is indirectly attested to by the restraints placed upon Congress in Section 9 of Article I. Various of the restraints in Section 9 and elsewhere are upon activities not explicitly mentioned in such parts of the Constitution as Section 8, thereby testifying to a general legislative power in Congress. I again suggest that most of the Section 8 provisions may not be so much granting powers to Congress as recognizing particular powers in Congress, powers which are subsumed in grants of general powers to Congress but which (for one reason or another) might be claimed by another branch of government or might even be regarded as non-existent for the General Government.

When one does work out the organization of the powers in Section 8, as suggested in the chart accompanying this lecture, one more easily becomes aware of the general scheme of things which is assumed in Section 8. This scheme reflects the plenary authority of Congress, especially with respect to the economy and to the foreign relations of the Country. The order to be discerned here requires us to reconsider what is usually said not only about Section 8 but about the Constitution as a whole.

First, let us notice that the seventeen sets of powers in Section 8 can usefully be collected in seven categories (as is done in my Appendix A chart). If we accept the conventional interpretations of these powers, the seven categories can be conveniently identified as financial, commercial, monetary, intellectual, judicial, defensive, and managerial (that is, with respect to certain property of the United States). The first three categories are linked in obvious ways. The last three categories indicate Congressional authority with respect to the judiciary, the executive (in its military aspect),
and the States (as sources of the property to be managed by the United States). The central category, concerned with post offices and with copyrights and patents, may have been primarily concerned originally with facilitating economic development, but it does look to what may loosely be called the intellectual life of the Country. It is here that steady improvement in the community is explicitly anticipated ("To promote the Progress of Science and useful Arts . . .").

Much of what one says about the arrangement of these seventeen sets of powers in Section 8 is bound to be speculative. (A half-dozen of these sets can be divided into two or more distinct powers.) I have observed that we simply do not know enough to permit us to be certain about the significance of each set of powers in this context. But, it can be insisted, there must be something which accounts for the arrangement found here, since it is obvious that these powers are not collected in the order in which they were agreed upon by the Federal Convention over the Summer of 1787. One is challenged to try to figure out what guided the constitutional craftsmen (and particularly Gouverneur Morris and James Wilson, evidently the principal draftsmen) in putting the Section 8 powers together as we now find them. It suffices for our immediate purposes to suggest a plausible scheme, which thereby makes us more likely to appreciate the integrity of the Constitution as a whole.

Particularly speculative (and hence most tentative) is what I now turn to, supplementing what I have said about the seven categories in which one may collect the seventeen sets of powers found in Section 8. I further suggest that the seventeen sets of powers may be grouped according to the character of those powers before the Constitution was drafted—that is, according to the way those powers were regarded in earlier constitutional documents or in the constitutional thought of the period.\textsuperscript{33} It was only prudent to provide explicitly for Congress those powers once thought (if only by some) to be judicial or executive in character, as well as those powers which had been exercised or claimed either by the Continental Congress or by the States.

Five such groups (with considerable overlapping) are suggested in my Appendix A chart.\textsuperscript{34} The first group of powers may have been considered by some always to have been "legislative." If so, they may have been enumerated here in order either to retain for Congress what the Continental Congress had had theretofore or to counteract exclusive State claims with respect to these matters.
The second group of powers may have been considered by others to have been at one time or another "executive" (on the civilian or domestic side), especially since there are reflected here various of the prerogatives claimed at one time or another by the British monarch. The third group of powers may have been considered "judicial" by still others—and remind us of the authority of the Congress with respect to the courts. The fourth group of powers may have been considered by some to have been at one time or another "executive" (on the military or foreign-relations side). Was it not prudent to make clear that there is to be no residual executive prerogative with respect to these matters, especially since the President is recognized (in Article II) as Commander-in-Chief of the armed forces of the United States? Finally, there is the fifth group of powers, also considered by some always to have been "legislative." If so, they may have been enumerated for the same reasons the other "legislative" powers (in the first group) were. The seventeenth set of powers, for example, has the claims the States may once have had in places acquired by the United States from the States now completely superseded by the claims of Congress. In many cases, therefore, there may have been two or more reasons for enumerating a power, the most frequent combination of reasons being the desire both to confirm a "legislative" power for Congress and to suppress "executive" pretensions.

There may thus be seen in Section 8 an instructive symmetry. The draftsmen of this section moved, in this affirmation of the powers of Congress, from powers previously believed by some to be "legislative," to those previously believed by some to be "executive," to those previously believed by some to be "judicial," to others previously believed by some to be "executive," and finally to others previously believed by some to be "legislative." A number of subsequent possible claims, arguments and uncertainties are thus foreclosed, not least with respect to the "legislative" powers that had been exclusively exercised by the States under the Articles of Confederation.

Such cautiousness may have had a perverse effect, in that the powers listed here primarily in order to fill out the authority of Congress, and to avoid controversy, may have had the unanticipated result of making these the only recognized powers of Congress. Still, the use of the Necessary and Proper Clause seems to have been such as to permit the expansion of the powers listed in Section 8 to secure for Congress virtually the full range of its in-
tended powers. Has not this come about in such a way, however, as to obscure the order and symmetry I have been pointing out?\(^3\)

It is when one becomes aware of the order and possible symmetry in Section 8 that one can begin to see that the powers enumerated there may be less independent grants of power and more assurances of the extent of the considerable powers of the Congress, powers which are otherwise provided for or recognized in the Constitution. Much of what I have said here about the character of various Section 8 powers needs to be corrected or at least refined by scholars versed in the constitutional history of the Seventeenth and Eighteenth Centuries.

V.

However Section 8 of Article I is read, it does confirm that Congress, as a working legislature, would have two critical powers that the Congress under the Articles of Confederation had not had—a controlling power over taxes and a comprehensive power over commerce. (A third major power, with respect to the military and foreign relations, had already been exercised, more or less, by the Continental Congress and is here reinforced. Since several of the powers listed in Section 8 were exercised by that Congress, they may be mentioned here lest silence respecting them be taken to mean that the new Congress is not to have them.) The power over commerce—over all gainful activity in the United States—has proved decisive in determining the scope of the General Government of the United States. It should be noticed that the United States Supreme Court, in the past half-century, has finally come to the conclusion that the Congress may regulate as much of the economy of the United States as it deems necessary for the general welfare.\(^3\)\(^5\) In this, it is suggested by my analysis of Section 8 of Article I, the Court has merely been obliged to acknowledge what had been intended from the outset by the Framers of the Constitution, something which Chief Justice Marshall recognized more than a century before.\(^3\)\(^7\)

The Congressional power, especially the power over commerce, is now recognized perhaps almost to the extent originally intended.\(^3\)\(^8\) But this has been done in such a roundabout way that it can seem to all too many citizens that the Constitution has had to be circumvented in order to serve contemporary necessities. This has not been a salutary lesson for the Country, especially when extended to the doings of the Executive. The way all this has been done has obscured the craftsmanship evident in the Constitution,
even as it has left gaps in the constitutional scheme which remain
to be filled.

VI.

Much has gotten in the way of a proper reading of the Constitu-
tion with respect to the commerce power, including early Southern
concerns about dangerous Congressional interference with their
sensitive slavery institutions. I have already indicated that the fail-
ure of Congress to exercise many of its powers in the early days of
the Republic was important. One consequence of the subversion of
the commerce power, to which all too many Supreme Court cases
were devoted from about 1840 to the late 1930s, may have been the
diversion of the national government's energies from domestic con-
cerns (where it had little recognized power) into the realm of for-

eign relations and war.

Still, whatever the doctrines of the Supreme Court, it became
increasingly evident as the Twentieth Century unfolded that only
the Government of the United States could govern the economy of
the Country—or, at least, that it was necessary for the national
government to seem to be attempting to govern that economy.

We have noticed that virtually nothing is said in Section 8 about
the ends of government. But then, little is said about those ends in
the body of the Constitution as a whole—and this reminds us of
the importance of the Preamble for suggesting the scope of the con-
cerns of the General Government. We should take to heart the
observation by Patrick Henry in the Virginia Ratifying Convention
of 1788 that some must have considered as a warning and others
must have considered as a reassurance—the observation about the
Constitution, "To all the common purposes of legislation, it is a
great consolidation of government."39

If the Constitution does indeed provide a partial consolidation of
government—if it is a government of the scope that the analysis in
this lecture of Section 8, Article I suggests—, then its ends must be
those which governments typically have, ends which are recog-
nized in the Preamble and which include, in addition to those usu-
ally found, a special place for liberty in the American Union.

VII.

However profound the American respect for liberty, it did not
seem prudent to the Founding Fathers that the General Govern-
ment should be so shackled that it could not do the things it
needed to do, including the maintenance of the conditions that per-
mit liberty to flourish. A reluctance to shackle government is expressed again and again in the 1787 Federal Convention. It is evident that the Government of the United States is empowered to do whatever it is intended to do—however important it may be that the people of the United States always have the freedom to examine and discuss whatever that government does.

To say that the Congress has great powers does not deny there are limits to how those powers are exercised. In Section 8 of Article I alone, there are a half-dozen restrictions upon Congress. (Some of the powers listed in Section 8 may be there partly in order that limitations upon the powers of Congress may be indicated. Related to this consideration is my discussion of Section 9 of Article I in Section III of Lecture No. 6.) These restrictions may be seen in the uniformity that is required as to taxes, and also as to naturalization laws and bankruptcy laws; they may be seen in the limited time for which patents and copyrights may be given, and also the severely limited time for army appropriations; and they may be seen in the various powers retained by the States with respect to the militia occasionally in the service of the United States.

In addition, the wording of the powerful Necessary and Proper Clause reflects profound limitations. What is necessary depends, of course, largely upon judgment; but it seems, at least, that there must be a plausible relation between what is being done and the evident ends of the powers thus being supplemented. What is proper depends upon limitations found elsewhere in the Constitution, as well (it is to be hoped) upon a sense of decency, if not upon natural right itself.

It may well be, of course, that the limitations found in the Constitution do help us appreciate what the ends were intended to be of the government established by the Constitution. Those ends are such, it might well be noticed again here, that the Congress which wrote the Bill of Rights (in 1789) obviously did not believe that it was cutting in any way into the substantive powers of the Government of the United States. In fact, those (and like) limitations serve, for a people such as ours, to make it more likely that the Government of the United States is able to do, with deeprooted and enduring popular support, the things it was intended to do.

With these remarks I have anticipated my next lecture, which will examine the two concluding sections of Article I of the Constitution and which will look ahead as well to the Bill of Rights.
6. **Article I, Sections 9 and 10**

I.

The discipline reflected in and permitted (if not even required) by the Constitution should be evident from a careful reading of the document. Discipline is reflected in, among other things, the care and competence with which the Constitution is put together. Discipline is called for if the various public servants authorized by the Constitution are to be able to exercise in a salutary manner the powers entrusted to them.

We have glimpsed in this lecture series the kinds of sources upon which the draftsmen of the Constitution drew. These sources are evident upon studying the constitutional documents (such as the Declaration of Independence, the Articles of Confederation and the State constitutions) which preceded the Constitution of the United States. They are evident as well upon studying both the early history of the United States and such accounts as we happen to have of the proceedings of the Federal Convention of 1787.

We have also seen—and perhaps this may be more important for us than any investigation of the sources of the Constitution, since that which I am now about to notice is often neglected—we have seen that there is a sense to the whole of the Constitution, that the document can be thought about, part by part as well as the relations among the parts. This *thinking* about the Constitution—the very insistence that it can be thought about—is critical to the inquiries in these lectures.

This Commentary, then, is an exercise in how to read—how to read the Constitution, of course, but also how to read anything serious. We can see how the two parts of the Constitution with which we are primarily concerned on this occasion (Sections 9 and 10 of Article I) illuminate one another. Various of the provisions in Section 9 seem, standing alone, to be directed at all governments in the United States. If the opening and closing provisions (of the eight provisions) in Section 9 did not themselves conclusively indicate that only the Government of the United States is being addressed throughout Section 9, the provisions in Section 10 make it clear that this is so. For, we can notice, Section 10 is obviously addressed to the States—and yet several provisions are repeated there (with respect to bills of attainder, *ex post facto* laws, and titles of nobility) which may also be found in Section 9, provisions which it would not have been necessary to repeat in Section 10 if Section 9 should have been intended to apply to the State Governments as
well as to the Government of the United States. My immediate purpose in pointing out these relations is to illustrate what it means to say that the Constitution invites and requires careful reading, a reading which takes each part seriously even as it keeps the whole in mind.

I can now turn to a more or less systematic consideration of Sections 9 and 10 of Article I. I will first consider Section 9 and some of its implications, and then Section 10 and some of its implications. A full consideration of these two sections would have to say much more than I can here about the sources of various of its provisions in the constitutional documents upon which the Constitution of the United States draws. It is one consequence of the success of the constitutional statesmanship of 1787 that the Constitution itself has come to be regarded as if it stood virtually alone—and this can have the unfortunate effect of helping make the Constitution seem less meticulously organized than it is. We have seen in our discussion of Section 8 of Article I that one must make an effort to discern today the care and hence the organization with which the seemingly divergent parts of the Constitution are put together. A Constitution which proved to be remarkably successful in large part because it was so well-crafted has, because of its eclipse of its predecessors, come to be regarded as in some degree arbitrary and therefore as far less well-crafted than it was originally recognized to be.

II.

Section 9 follows immediately upon the development, through the first eight sections of Article I, of the Legislature and of much of the legislative power of the United States. Restraints are placed in Section 9 upon how that legislative power is to be exercised, upon how revenues may be raised, and upon how expenditures of such revenues are to be made.

This section begins with a guarantee, for twenty years, of the right of States to engage in the international slave-trade. This may be thus emphasized, rather than being hidden among the tax and commercial provisions later in this section, because it may have been one unhappy but obvious condition for perpetuation of the Union: two of the States (South Carolina and Georgia) evidently made it clear in the Federal Convention that they would not accept the proposed Constitution without this guarantee, a guarantee hedged in by a restraint upon any use of the tax power to accomplish the same thing that was feared from a commercial regulation
by Congress of the slave trade. If those two States had stayed out, there was no telling what effect that would have had either upon other Southern States or upon European powers interested in meddling in American affairs.

The second and third provisions of Section 9 (dealing with *habeas corpus* and with bills of attainder and *ex post facto* laws) are, in effect, an insistence upon the rule of law, something which it is well to have after such great powers had been recognized for the Government of the United States as are evident in Section 8. Perhaps this insistence upon the rule of law is particularly to be treasured by a people who could see, in the slavery institutions with which they were saddled, the despotism that a perversion of the rule of law can lead to.

The fourth, fifth and sixth provisions of Section 9 (dealing with direct taxes, with export taxes, and with preferential treatment of some ports at the expense of others) exhibit a concern lest the revenue (and to a lesser extent, the commerce) powers of the United States be used to favor some States at the expense of other States. This lively concern, that all States be treated the same, continues down to our day, as may be seen in contemporary legislative struggles about policies which favor, say, “the Sun Belt” as against “the Frost Belt.”

The seventh provision of Section 9 proceeds, naturally enough, to precautions about how the money collected, in a fair fashion, by the United States is to be distributed and to be accounted for. It seems appropriate that immediately following these severe restrictions upon the distribution of money there should be even more severe restrictions (in the final provision of Section 9) upon the distribution of titles of nobility by the United States. Some like money, we are thus taught; others like honor—and checks have to be placed against abuses which may conceal from the self-governing American people how things really stand with respect to where the money in the Treasury goes and where the merit among them is to be found.

III.

The restrictions found in Section 9 reinforce what we have seen in the preceding sections of Article I about the extent of the legislative powers and about the relation of the legislative branch of government to the executive and judicial branches. It has been suggested that it is the Appropriations Clause (of Section 9) “that, more than any other [clause], gives Congress control over the acts
of other branches of government . . . since all depend on Congress for money to carry out their functions. The implications of various of the Section 9 provisions can thus be appreciated.

The constitutional scholar whom I have just quoted can dismiss the slave trade provision as "of historical interest only" at this time. To take this approach, however, is to neglect a most revealing (and hence instructive) feature of the Constitution. For it can be quite useful to ask what the twenty-year guarantee of the international slave-trade power of the States implies about the original power of Congress to regulate (and hence abolish) the slave trade. Does not this guarantee implicitly recognize that without it the Congress would have been able, at once, to forbid Americans to engage in the international slave trade? A further question: If so, what would have permitted Congress to do this? The answer: The Commerce Clause, of course, with its grant of power to Congress to "regulate Commerce with foreign Nations." This leads to still another question: And what does the grant of power to Congress to "regulate Commerce . . . among the several States" permit Congress to do about the slave trade moving between the States of the Union, to say nothing of slavery's influence and effects upon the commercial life of the Country as a whole? Does not the twenty-year international slave-trade guarantee tacitly recognizes a quite broad commerce power in the Congress of the United States, and perhaps also a broad general-welfare power? The insistence by Georgia and South Carolina upon this temporary curtailment of Congressional power can be read as eloquent testimony to the great dormant powers of the Government of the United States under the Constitution.

These, and like, analyses suggest that the powers provided for by the Constitution were intended to be, from the beginning, far more extensive than they are yet recognized to be in principle, however extensive they may now be in practice. It can still be said by scholars that "there is no general power granted to Congress to legislate for the general welfare." Rather, we are told, the principal (if not the only) general welfare power to be exercised by Congress comes from the power given it in Section 8 of Article I "to lay and collect Taxes, Duties, Imports and Excises . . . [in order to] provide for the common Defense and general Welfare of the United States . . ." It should be evident to those who have found merit in the way I have interpreted the Constitution thus far in these lectures, that it is unlikely that the only power given Congress to provide for the general welfare should come in the form of a power given it to lay
and collect taxes in order to provide for the general welfare. It is remarkable that this language in Section 8 should not have led scholars and judges to the rather obvious conclusion that an extensive Congressional power to provide for the general welfare must be otherwise accounted for in the Constitution. For this we can look to the Preamble of the Constitution, if not to the very nature of a legislative body for the Country as a whole. We can look as well, as we have only begun to do in this lecture, to the general welfare power (and the other great powers) taken for granted in the very restrictions placed upon Congress in Section 9 of the Constitution.

I notice in passing that if one proceeds in this fashion in reading the Constitution as originally intended and in applying it to contemporary problems, then there has been no need for the Constitution to “grow.” It was (in principle) fully-grown from its outset, subject to the critical challenge with respect to slavery (evident in the original Constitution) which was eventually faced up to by the Thirteenth, Fourteenth and Fifteenth Amendments.

We now return to Section 9 by observing that there is much in that section to confirm what is generally evident in the Constitution—to confirm what James Wilson (who was later to serve on the United States Supreme Court) said in the Federal Convention (on August 13, well after the Constitution had begun to take its final form), “War, Commerce & Revenue [are] the great objects of the General Government.”

IV.

If the Government of the United States was intended from the outset to be a government of extensive powers, what safeguards were there (again from the outset) to protect against the abuses of such powers? The principal safeguards evident in the Constitution itself are, first, the qualified separation of powers (which means, among other things, that no one officer or body of men can have its way without securing the cooperation of others, with even Congress divided into two largely independent bodies); second, the considerable place left for the States in the complete constitutional system; and third, the ultimate control by the people, who retain the power to review at regular and frequent intervals what their public servants are doing.

Much was made during the 1787-1788 Ratification Campaign of the absence from the Constitution of a bill of rights, the preparation of which had been considered (fairly briefly) in the Constitu-
tional Convention and rejected. I suspect that if it had been anticipated by the Convention delegates how much of a fuss would be made during the Ratification Campaign about the lack of a bill of rights, a separate compendium of the rights and privileges of citizens would have been prepared, drawing upon what was already available in various State constitutions of the day.

Even so, it has been noticed, "Section 9 and Section 10 [of Article I] were originally looked on as a kind of bill of rights." Several of the provisions found in these sections are to be found in State bills of rights of the day, particularly the guarantees with respect to habeas corpus, bills of attainder, and ex post facto laws. These particular rights, coming as they do in the Constitution after the Legislative branch is established, serve as reminders that this government should indeed proceed through laws. This insistence upon the rule of law, which may be seen throughout the Constitution, is sometimes regarded as significantly different from what may be seen in the Bill of Rights we now have: the rule-of-law emphasis may be somewhat more political, and less personal, in orientation than our contemporary concern with rights. But one should not make too much of this, since not only is the habeas corpus concern in Article I rather "personal" in interest but so are the jury-trial and perhaps the treason-trial guarantees found in Article III of the original Constitution.

Besides, it can also be said, many of our Bill of Rights guarantees very much depend upon, or aim at, the rule of law. This means it is recognized that our rights and privileges presuppose established government and a civilized way of life. An insistence upon the rule of law may be seen, for example, in one feature of the freedom of the press recognized in the First Amendment. A substantial part of that guarantee looks to keeping government from instituting a system of censorship: the "no previous restraint" rule included in "freedom of the press" means that publishing will be subjected only to the kind of rule of law that other human activities are routinely subjected to.

Still, as we have noticed, freedom of speech and of the press were taken for granted by the Constitution even before the First Amendment was adopted. After all, there is considerable reliance in the Constitution upon discussion. It is obviously taken for granted in the exercise of the power recognized in the people to ratify and to amend the Constitution (in Articles VII and V), in the Republican Form of Government Guarantee for the States (in Article IV), in the protection of the freedom of speech of legislators (in Article I),
in the obligation of the President to state his objections when he vetoes a bill passed by Congress (in Article I), and of course in the periodic recourse to elections (in Articles I and II). Even before the Constitution was prepared, there had been, for some two decades, a vigorous public reliance upon the most uninhibited freedom of speech. And so the First Amendment was in a sense superfluous. This is not to deny that it is important to keep the amendment, once we have had it and have relied upon it, lest its removal be taken to mean a national repudiation of our vital freedom of speech.

Whatever one may think about the necessity for the Bill of Rights, one thing about it should again be emphasized as we prepare to draw to a close our consideration of the legislative powers of the Government of the United States. The Bill of Rights did not cut in any significant way into any of the substantive powers of the Government of the United States. This should not surprise us. As I pointed out in my last lecture, it is hardly likely that the very men who wrote the Constitution would, immediately upon taking control of the Congress two years later, have set out to dismantle what they had so painstakingly built up during the Summer of 1787. They did intend that the General Government should be able to govern, especially with respect to commerce and to war and peace; they also intended that Congress should have the tax power to properly finance such governing. The freedom of citizens to examine and discuss what their government is doing does not mean that that government cannot do the things it is empowered to do. In fact, we can again say, the government is better able to do what it is empowered to do precisely because people can freely examine what is done.

We need not go further into what freedom of speech is and how it contributes to a proper government in these United States. It suffices, for this occasion, to assure ourselves that the Framers of the Constitution did not go to the trouble they did in order to empower the Government of the United States to abridge freedom of speech, to quarter soldiers improperly, or to deny people life, liberty or property without due process of law.

Due process, which is primarily a courts-based guarantee, may be temporarily set aside in grave circumstances, as can be seen in the habeas corpus provision. It seems to be suggested by the Section 9 provision that only Congress can order, or authorize (if only retroactively?) the President to order, a suspension of the privilege of the writ of habeas corpus. But, one must wonder, why was not a
similar provision put in Section 10 to control State governments, especially since the bill of attainder and ex post facto provisions in Section 9 were repeated with respect to the States in Section 10? May this suggest something which few recognize even today, that it was intended from the beginning that improper arrests in the States could be reached by means of a habeas corpus action in a national (or “federal”) court, or at least that Congress could authorize access to the National Courts for this purpose (and this well before the Fourteenth Amendment, of course)? Or does it merely suggest that sufficient habeas corpus protection in the States is implied by the Republican Form of Government Guarantee for the States? Some clarification of all this can be hoped for when we consider the judicial power of the United States in Lectures No. 10 and No. 11.

It should be instructive to notice here how the habeas corpus privilege is provided for. It seems to be indicated that the long-established privilege is not to be infringed except in special circumstances. The Framers obviously built here upon the common-law privilege, a privilege similarly available in most if not all of the States at that time. This should remind us that the various common-law rights and privileges were always considered by early Americans to be constitutionally available to them, independent of what any document might say from time to time. One risk of a bill of rights was repeatedly pointed out during the 1787-1788 Ratification Campaign, and that was that the formal enumeration of certain rights might be taken to repudiate other long-established rights. So well-recognized were common-law (and hence constitutional) rights and privileges among the English-speaking peoples that Americans could confidently invoke them when they drew up their grievances against Great Britain in the Declaration of Independence. They obviously did not need a bill of rights in order to do that, and to make it stick.

I have already referred to the suggestion that a formal bill-of-rights approach may have encouraged a greater emphasis upon the personal than upon the political in the way citizens approach their governments. Does this follow from, or does it make more likely, a greater emphasis upon judicial review, and hence judicial governance, than was exhibited in the early days of the Republic? Even so, it should be noticed, much of what the United States Supreme Court has been doing (with the Fourteenth Amendment and perhaps with other constitutional provisions) may be somewhat similar to what English common-law courts did in the Seventeenth and
Eighteenth Centuries in building up the great body of common-law rights and privileges recognized under the British constitution. This, too, is a subject I shall say more about when I examine Article III.

One more point should be made before we turn from this Bill of Rights digression to a systematic consideration of Section 10 of Article I. It should be evident, from a study of all of the provisions we have discussed thus far in this lecture series, that the Framers of the Constitution certainly believed in “absolutes.” We see again and again, including in Sections 9 and 10, qualifications and exemptions that do not make sense unless the language thus modified would otherwise be unqualified and hence absolute in effect. We also see, of course, provisions that are presented without qualifications or exceptions.

V.

Let us turn now to a consideration of the arrangement of provisions in Section 10, a consideration which can be briefer than it might otherwise be because of what we have already said about Section 9. There are some fourteen provisions collected in three paragraphs. The first paragraph sets forth complete (that is, absolute) prohibitions upon the States; the second and third paragraphs set forth qualified prohibitions upon the States—that is, prohibitions which Congress may suspend from time to time.

The first five provisions (comprising roughly the first half of the first paragraph) help make sure that the Government of the United States will not be interfered with by the States in its exercise of its constitutional powers with respect to foreign relations (the first two provisions) and with respect to monetary matters (the next three provisions). Thus, the United States is to be able to act as a sovereign abroad and is to have virtually unlimited powers over the domestic economy.

The latter half of the first paragraph contains the bill-of-rights-type provisions I have already discussed. The States are limited with respect to these matters as is the Government of the United States. The “sleeping giant” here is the “Obligation of Contracts” provision, something not found in Section 9. Almost all scholars see the Contracts Clause as a special form of an *ex post facto* prohibition, extending to contracts already made a special immunity from retroactive State interference.47

The remainder of Section 10, in its second and third paragraphs, places restraints upon the exercise by the States of their tax powers...
(in the tenth and eleventh provisions of this section) and upon various things the States might do which affect foreign relations (in the twelfth, thirteenth and fourteenth provisions of this section). These restraints may be waived, and the exercise of these State powers may be supervised by Congress, which has ultimate control over the relations among the States and over the relations with foreign powers that these restraints are designed to keep particular States from disturbing.

We can again see how extensive the great objects of the Government of the United States were intended to be, especially with respect to commerce, domestic tranquility, and foreign relations. One might wonder whether even the bill of attainder and ex post facto restraints upon the States exhibit a considerable concern that property rights, and hence commercial activity, not be interfered with by the States. Or does it suffice to see them as contributing, along with the titles-of-nobility restraint, to the necessity of maintaining republican governments in the States if a continental republic is to survive? If so, then these bill-of-rights-type provisions are not primarily for the sake of citizens of the separate States but for the sake of the Union itself.

The various “without the Consent of the Congress” qualifications in Sections 9 and 10 once again remind us not only of the broad powers of the Government of the United States but also of the primacy of Congress among the various branches of the General Government. When the Government of the United States speaks to the States, it is primarily through Congress. We can thus see here, still another time, the extent and character of legislative supremacy under the Constitution. I keep making this point not only because it is so much neglected, but also because various sections we have come upon suggest problems which cannot be satisfactorily explained without a recognition of legislative supremacy. All this testifies as well to how carefully crafted the Constitution is, how meticulously the parts fit together and reinforce one another.

VI.

It will not do, however, to leave things as they now are. For it is well to be reminded that, for Americans, “the government” includes, along with the General Government (the so-called “federal” government), both various local governments and the people itself in its capacity as the ultimate government.

Although the “Consent of the Congress” qualifications reflect
the supervisory power of Congress in our system, especially with respect to the economy, domestic tranquility, military matters and foreign relations, a good deal is left for the States to do. It is well to emphasize again that the States are not subdivisions of, or simply subordinated to, the Union. The slave-trade provision with which Section 9 opens includes a rare instance of a special privilege for some States ("any of the States now existing") as distinguished from other States. The rarity of such advantage for any State points up the essential equality among the States, not just among the original States but also among all States, whether original or subsequent.

The various restrictions upon the States also suggest that the States are the loci of special interests (some have ports and others do not) as well as the loci of special vulnerabilities (some may be invaded when others are not). So we see that the passions of men can have distorting effects to be guarded against: there is the passion for gain, which has to be disciplined (not simply eliminated, but disciplined, which means that States cannot be permitted to take improper advantage of other States in order to make themselves prosperous); and there is the passion of fear, which has to be recognized in permitting people to defend themselves without having to wait upon a distant government to act.

VII.

Greediness and fearfulness help account for many of the problems to be faced. Consider, for example, the opening and closing provisions in Section 9. The section opens with a recognition (if not even the protection) of slavery; it closes with a repudiation of titles of nobility. It thereby moves from a blatant denial of equality to an insistence upon a degree of equality that perhaps no other modern people had ever had. Why were the slavery interests compromised with? In part because of legitimate concerns both with respect to commerce (or property) and with respect to war and peace (or self-preservation). These concerns affected what could be done about slavery, once again reminding us of the tension there can be between personal rights and community needs.

Even so, it is evident from Section 9 that slavery would become even more vulnerable after 1808 than it already was in 1787—and this the Southern slave-holder came to appreciate as the Country moved for some four score years toward the crisis that would considerably advance the great task initiated by the Declaration of Independence.
We notice also that the Legislative Article to which we have been devoting our attention thus far in this lecture series ends with a recognition that war, or the prospect of imminent invasion, takes precedence over the limitations placed in the latter part of Section 10 upon the powers of the States. Such a recognition of the inexorable requirements of war may be seen elsewhere as well, as in the *habeas corpus* provision in Section 9. Thus, the demand upon mankind of self-preservation is recognized. It is this demand, sometimes so compelling, which can make the Executive seem so attractive—and this we must discuss in our next three lectures. We need not wait until then, however, to notice that the recognition of the compelling character of the desire for self-preservation should remind us, if reminder we need, that the Constitution, and the government set up pursuant to it, are not ends in themselves: they must ultimately be seen in terms of their service to life, liberty and property—or, put another way, in their service to genuine and enduring human happiness, something very much in need of serious and repeated examination.

We the people of the United States have been conducting such an examination, off and on, for some two centuries now. We should not be discouraged if the work done in one generation has to be reconsidered in the next, for that does seem to be the way of a self-governing people (if not of every civilized people), a way which is reflected in the constitutional provision for amendments. Nor should we be discouraged by the all-too-fashionable belief that we live in too different a time to be able, or perhaps to need, to understand what the Framers of the Constitution meant and said. They were very long ago, of course, but they can be quite near as well. It depends, in part, on how one looks at it:

A man born in 1787 (the year the Constitution was drafted) and who lived seventy years (which we no longer consider a remarkably long life) would have died in 1857. A man born in 1857 and who also lived seventy years would have died in 1927. By that time, someone my age today was two years old. Thus, three life-spans separate us here today from the men who sat in the Federal Convention in Philadelphia. So we can say, and be heartened by our ability to say, that the Constitution is both old (the oldest written political constitution in effect today)—it is both old and, depending upon how one figures, young. This means that the Constitution of the United States can be venerable and yet vital, something we can all wish not only for our institutions but also for ourselves personally.
7. ANGLO-AMERICAN CONSTITUTIONALISM

I.

My primary assignment in this lecture series is to read the Constitution of the United States, working as much as possible from the text of 1787.

In the first third of this lecture series we have devoted most of our effort to a somewhat detailed consideration of the text of Article I of the Constitution, the Legislative Article. Most of the last third of this lecture series shall be devoted to a somewhat detailed consideration of the fourth, fifth, sixth and seventh articles of the Constitution, which are very much concerned with the relations of the States to the Union.

The middle third of this lecture series we must devote to Article II, the Executive Article, and to Article III, the Judicial Article. The Presidency will be discussed in our next two lectures; the Judiciary will be discussed in the two lectures thereafter.

Although our principal activity in these lectures consists of interpretation of the constitutional text itself, we have indicated here and there the background and foundations which the Constitution takes for granted. We have noticed that there are presupposed by the Constitution of 1787 such things as the British Constitution, the Common Law, the Law of Nations and something which I have called the Law of Public Bodies (which provides, among other things, guidance to what is to be taken to be a constitution and its adoption). In addition, the Constitution presupposes such American instruments as the Declaration of Independence, the State Constitutions and the Articles of Confederation. The character of the American people very much affects what it is possible to do here, a character which has been shaped by and which bears upon what is generally believed about the best regime, either temporal or spiritual. That character, which helps determine the constitutional and political principles and aspirations of our regime, is shaped as well by the language of the English-speaking peoples, that language which incorporates and reflects Anglo-American opinions about the most important moral and political questions.

When we wonder what it was that the Framers of the Constitution brought to their Constitution-making, we must remember the influence upon them of the greatest English authors. Thus, a half-century after the Federal Convention of 1787 at Philadelphia, Alexis de Tocqueville could record in his Democracy in America, "The literary inspiration of Great Britain darts its beams into the
depths of the forests of the New World. There is hardly a pioneer's hut which does not contain a few odd volumes of Shakespeare. I remember reading the feudal drama of Henry V for the first time in a log cabin."

The hold of Shakespeare upon Nineteenth-Century Americans, often in quite primitive circumstances, is testified to again and again. Consider this account (by a Nineteenth-Century Western rancher) of what could happen among cowboys in the West:

The Englishmen brought a lot of culture into the West. There were practically no books out there, but an Englishman always brought Shakespeare with him: it was the decent thing to do. And they read their books, read them aloud to the cowboys, many of whom never got any further in their schooling than the rudiments of reading and writing. I've seen a bunch of cowboys sitting on their spurs listening with absolute silence and concentration while somebody read aloud... I remember once after we'd been listening to Julius Caesar, one of them said to me, "That Shakespeare is the only poet I've heard who was fed on raw meat." When I sold my ranch in Montana, I divided my books among the riders, and eighteen out of twenty-one wanted Shakespeare.

I do not mean to suggest that Shakespeare was the only author to whom early Americans would look—for there were also the Bible, Milton, Locke, Bunyan, and Blackstone—, but Shakespeare (who is usually ignored by students of the American regime) was the one who probably provided early Americans with the most comprehensive moral and political account of things. They encountered in his plays an entertaining instructor in constitutional principles, an obviously wise man who could teach them about the most important temporal things (just as the Bible guided them with respect to spiritual things). The way he spoke about the things he described (the moral presuppositions underlying what he said) helped shape generations of Americans. Since the things Shakespeare described included a rather extensive account of the constitutional history of England, he provided early Americans something which could seem to be an authoritative contribution to an understanding of their own constitutional antecedents. James Wilson (in the Federal Convention) could take it for granted that his fellow delegates would understand his reference to "the project of Henry the 4th & his Statesmen." Where else but from Shakespeare's History Plays would the typical American (or his teachers) have gotten fairly reliable opinions about Henry IV and his ministers (centuries before) as well as about their predecessors and
successors? (I myself have been struck by how much Shakespeare and Blackstone agree in their accounts of English constitutional history.)

Let us consider then, with a view to our own examination of the Constitution of the United States, what early Americans could have learned (or, at least, could have believed they learned) about constitutionalism from these plays by Shakespeare about English history. It should become evident how all this bears upon what we have already seen, and upon what we have yet to see, about what may be found in the Constitution of 1787. It should also be encouraging, and not only for those citizens who may be drawn more to literature than to political treatises, to see how much one can learn about constitutional matters from a great playwright.

My first lecture of this series was on the constitutions of the Americans. I have recalled on this occasion various elements in that array of a dozen constitutions. In this lecture we shall see again, but from the perspective of noble fiction, various elements of the interrelated and overlapping constitutions of the Americans. I turn now to brief observations, suggested by a reading of Shakespeare's History Plays, observations which bear on the presuppositions and purposes of American constitutionalism.

II.

i.

We see in Shakespeare's History Plays one great account of English constitutional history, a history during which constitutional government of sorts is taken for granted by the kings, nobles and commoners portrayed there. These plays draw upon a history that runs from King John to King Henry VIII, with episodes that extend from 1199 to 1533. There is in Shakespeare's coverage a span of three and one-third centuries, beginning with the King John play (which may have muted references to Magna Carta) and ending with the Henry VIII play (which concludes with the birth of the great Elizabeth). "When Elizabeth came to the throne," we are told,

England was already in some ways a "limited" monarchy. Parliament, and especially the members of the House of Commons, claimed prerogatives of their own and were steadily gaining in both experience and power. In the mid-1560s, for example, the Commons made repeated attempts to use parliamentary tax-levying authority as a means of obliging Elizabeth to name a Protestant successor to the throne. . . . She never claimed or exercised
the right to establish law; that was Parliament's prerogative. She needed all her considerable diplomatic skills in dealing with her Parliaments and with the English people, self-reliant and proud of their reputation for independence.51

We are reminded that England during Shakespeare's lifetime (1564-1616) was "a small nation by modern standards": Probably not more than five million people lived in the whole of England, considerably fewer than now live in London. [London's population stood at perhaps one hundred thousand people within the walls and as many more in the suburbs.] England's territories in France were no longer extensive, as they had been during the fourteenth century and earlier; in fact, by the end of Queen Elizabeth's reign (1558-1603), England had virtually retired from her once-great empire on the Continent. Her overseas empire in America had scarcely begun. Scotland was not yet a part of Great Britain...52

This account continues with a description of Shakespeare's country that late Eighteenth-Century Americans could have readily applied to their own as well:

By and large, England was a rural land. Much of the kingdom was still wooded, though timber was being used increasingly in manufacturing and shipbuilding.... England's chief means of livelihood was agriculture.53

ii.

Among the things taught by Shakespeare in these (and other) plays is the primacy of the political, affecting significantly even non-political matters. When the political life of a country is in bad shape, we are taught, the private as well as the public life of the community can be contaminated.

We wonder, in passing, what it means when political things are spoken of often in non-political terms. This may be seen in our own time by the considerable use of sports imagery in the discussion of politics.

iii.

The History Plays testify to the importance of both peace and liberty, with both of these somehow grounded in justice. There are indications here and there in Shakespeare (not only in the History Plays) that there is much to be said for a republican tradition. Even in the History Plays, in which a monarchical regime is taken for granted, there are repeated references to ancient Rome (and especially to the Republic) as providing the model for citizenship.
It may well be that we have to look beyond the History Plays—indeed, to *The Tempest*—for a development of the opinion of what would be the truly best regime for Shakespeare. But the regime of *The Tempest* is not faced, in the way the History Plays are, by "historical realities." Shakespeare can celebrate the aspirations (and some of the accomplishments) of the British regime, even as he records all too graphically (more so than does Blackstone) its shortcomings.

iv.

Critical to the English constitutional order is a respect for the rights of Englishmen. Protection of property is taken for granted—and one can see, especially in *Richard II*, how much mischief can be generated (for decades to come) by arbitrary royal confiscations. One can also see in these plays the risks run by a king and his ministers when they have recourse to oppressive taxation.

It is taken for granted throughout the History Plays that good government depends upon citizens (particularly the nobility) being able to tell the truth to their sovereign. One can see again and again the harm suffered by kings when they do not permit themselves proper counselling from their peers.

The importance of being able to state one’s grievances is recognized, as well as the sensibleness of those sovereigns who want to learn what their subjects’ grievances are and who then do something to deal with them justly. At times, indeed, a right of revolution seems to be tacitly recognized whenever a grievance is severe and longstanding and when there is no prospect of redress by the acknowledged authorities.

v.

The most obvious authority in the History Plays is, of course, the king of the day. But even in these plays, there are indications (guarded, but nevertheless to be taken seriously) that who the king is depends, if there is to be a sustained dynasty, upon parliamentary determinations. Force is not enough to secure one’s throne, although force can be significant. No one dares to say publicly, in any of the plays, "I am king simply because I have had the power to seize and hold the throne." Again and again, an interpretation of the rule of succession is invoked, which elevates this man rather than that one—and so it matters what the rule is generally under-
stood to be and also what is generally understood to be the facts to which the rule is to be applied.

When one talks about a rule, one is talking ultimately about the dictates of some legislative body (or of a kind of common law produced over centuries by the community as Legislature). True, the parliamentary power of earlier days often rested in the hands of the nobles, in large part. True, also, the nobles could be very much influenced by their king (or by some other claimant to the throne). Nevertheless, it is recognized that one is not truly king until one has been properly crowned (a ceremony for which a parliamentary determination, or a judgment pursuant to a long-established rule, can be critical); and one is not safely king unless in accordance with an established and known rule, since otherwise there will surely come along someone else with some support who can persuasively invoke the appropriate rule to justify his own effort to seize the throne.

This is not to deny, of course, that a king (even when his power is nominal) can be quite dramatic in appearance, whereas parliamentary bodies (and certainly parliamentarians) tend to appear pedestrian. But this does not settle the question of where the ultimate power lies.

vi.

Not much is said in the History Plays about the status of the judiciary in the English constitutional system. Perhaps the most dramatic recognition of the desirability of an independent judiciary is seen at the end of 2 Henry IV, when the newly-elevated Henry V endorses the integrity and rigor which had been exercised by the Chief Justice even against himself as Prince Hal.

Much is made tacitly of judicial prerogatives in what is taken for granted throughout the plays about the rule of law.

vii.

But it is the monarch who holds center-stage in the History Plays. So great is his allure, or magic, that these plays are, in large part, Shakespeare's version of Machiavelli's Prince (of which Shakespeare is aware, not without respect, but about which he has serious reservations).

Various of a king’s attributes in the plays anticipate those of any chief executive anywhere, it would seem, except perhaps where a constitution is so clear about allocations of powers that the implied powers of the Executive are quite limited. Thus, in the History
Plays, the King serves as symbol of his country. The integrity (or unity) of the country may depend upon him, especially since the nobles tend to head off in the diverse directions dictated by their respective local loyalties. It is the king who speaks for the country as a whole when it deals with other countries.

One can see in the History Plays how much divinity does hedge about a king. One can see that there is a tendency (a natural tendency?) to make much of the lone executive, once he is singled out. The man thus raised up can seem godlike, someone whom others can be guided by in ways great and small. Henry V can assure the French princess whom he is courting, when she informs him that "it is not the fashion for the maids in France to kiss before they are married," that "We are the makers of manners, Kate; and the liberty that follows our places stops the mouth of all findfaults . . ."

So dramatic is the monarch that concerns about treason can turn around him, with any denials of his title to office constituting a serious offense. Perhaps this is in part due to the necessity for vesting in one man supreme control over matters of war and peace. (Even in our Constitution, we see that the President is designated "Commander in Chief of the Army and the Navy.") Such supreme control means that the proper commander must have the capacity, and the power, to be shrewd, tough, perhaps even cruel and deceitful, if need be. (The Archbishop of Canterbury can speak over the infant Elizabeth's cradle of a sovereign's servants being "peace, plenty, love, truth, terror."^^54) Some two hundred years later, Gouverneur Morris, in the Constitutional Convention, could regard the President of the United States as "the general Guardian of the National interests."^^55

I shall say more about these matters when we come, two lectures from now, to the problem of the implied powers (if any) of the President under the Constitution. Perhaps such an inquiry can be taken as also examining, in effect, how much the supposed powers of the monarch in the History Plays were more show than substance.

viii.

It should be no wonder, then, that the mode of selection of so exalted a personage as a king (and of his successors) should be made so much of—as we can see both in the History Plays of Shakespeare and in the Constitution of the United States.

It is evident that there are rules for determining who he is; it is also evident that these rules are critical. It is evident as well, as we
have noticed, that it is the function of some legislature (which can be, in the case of Constitution-framing itself, the entire people of the United States)—it is the function of some legislature to define such rules.

We shall also see that it is vital to the interests of the community that there always be an immediate, clear designation of who the Chief Executive is in a variety of circumstances.

ix.

A perennial problem, in assessing any claimant to the post of Chief Executive, is whether legitimacy depends upon some form of merit, especially in those circumstances where the one who is next in line is clearly inferior by nature to another with less of a legal claim.

In the History Plays, the rule of succession is often treated as if natural. It is sometimes suggested that a royal nature asserts itself even in adverse circumstances. The comic version of this may be seen in Falstaff’s justification of his cowardice on one occasion, when he was badly frightened by Prince Hal in disguise: instinct, he explained, had kept him from striking the true prince.

Still, it is also evident in the History Plays that installation of the legal successor means that someone naturally better may have to be set aside. Troublesome as that may be, it is generally true that natural merit is not enough to justify disregarding legitimacy. There is a considerable “momentum” to the lawful claim.

Even so, the ultimate dependence of law upon merit (or justice) may be seen in the fate of the tyrannical Richard III. For he is, at the time of his overthrow, the man with the best claim to the throne according to the law of succession. Of course, in order to get where he is he has had to kill one brother and two nephews with better claims.

But by the time the History Plays begin to draw to an end, the audience should be prepared to concede that mere legality does not suffice. Indeed, it can be said, the right of revolution has had to be recognized, that right which was to put the kings of England in their proper (and permanent) place a century later in Great Britain and two centuries later in North America.

x.

Americans can see, upon working their way through the History Plays, what those titles of nobility can mean which have been for-
bidden by the ninth and tenth sections of Article I of the Constitution of the United States.

Hereditary claims, one sees, can be quite complicated matters in the plays. The nobility which then held much of the effective legislative power of England were most respectful of royal claims of succession, not least because their own titles to considerable lands and privileges also depended upon such claims.

Among the consequences of a dependence upon heredity is that much is made of honor. (This means hereditary enmities as well as hereditary alliances.) A Falstaff can provide a healthy corrective: he suggests that honor is made too much of by his countrymen, that honor is the man who died last Wednesday. But however much of a corrective is provided both for the pretensions of honor and for the claims of heredity, the laws of succession have to be complied with. No matter how much Henry IV laments the undisciplined conduct of his elder son and heir-apparent, Prince Hal, it is taken for granted by all loyal subjects (as well as by the king himself) that it is Hal who will succeed his father, if he survives him.

xi.

The nobility are thought to have a certain character by nature. The same can be said of the people at large as well. It is one of the strengths of England, it would seem, that it has no depressed classes, no institution of slavery. Henry V can say at Agincourt that those who fight with him that day will be ennobled by their achievement, however base their birth.

He, perhaps more than any of the monarchs we see in the History Plays, can thus encourage the people to identify their interests with his. His distinctive merit may be, partly because of his extended association with Falstaff and other dubious company, that he has access to both the high and the low.

We see, again and again in the History Plays, that the good sense and the sound character of the people at large have to be reckoned with, that the people are sensitive to the shortcomings of their “betters,” including the king and those around him. At times, one suspects, ultimate control by the people is indicated, along with the passions to which the people are susceptible.

xii.

The oaths of office required by the Constitution of the United States are provided for against the background of a constitutional
history, evident in the History Plays, during which it very much mattered who swore allegiance to whom. Of course, oaths of allegiance are repeatedly violated in the plays—but we are given to understand that this cannot be done without grave risks. Although sophistic arguments can be made as to how oaths might be set aside, we are shown again and again the dreadful effects of perjury.

A special form of oath-taking, of great importance in the History Plays, is that seen in the marriage vows which can be so critical to legitimacy and to a proper succession. It is here, by the way, that the influence of the Church can be specially felt, since the Church has much to say about what the rules are by which families (and hence claims to succession) are constituted. It is also here that we can see how different our own regime is in critical respects, including the relative insignificance among us of the institution of marriage as political action. The two monarchs in the History Plays who are shown to have married for love (Edward IV and Henry VI) are looked down upon for having allowed their lust to override their better judgment, if not even their monarchical duties.

Once allegiances are prescribed by law, the risks of usurpation are serious, even when there has been great provocation. It can take generations to cure the wound left by usurpation. In the History Plays, the War of the Roses can finally be settled only when the surviving claimants from the two lines join in marriage.

One does not strike down a king (whether he is legitimate or a usurper himself) without profound consequences. We have seen in the United States the remarkable dislocations brought about by Presidential assassinations. Even the peaceful removal from office of a President threatened with impeachment has had traumatic effects. That is, there simply may be no good way of doing this sort of thing.

On the Continent, during the period covered by the History Plays, the English monarchy became known as remarkably unstable. And so it could be said by Spanish ambassadors, when their monarchs considered allowing Katherine of Aragon to marry the son of Henry VII, “Bearing in mind what happens every day to the kings of England, it is surprising that Ferdinand and Isabella should dare to give their daughter at all.”

However that may have been, it is repeatedly taught in the History Plays that if one secures power through disloyalty, one cannot hope to be secure. More important, one can see (as in *Richard III*)
what can eventually happen because of usurpations and civil war: there is a general corrosive effect, with a widespread deterioration of trust and mutual respect, as the monstrous takes over.

xiv.

We have already noticed that Edward IV and Henry VI allowed their passion to override considerations of policy in their marriages. We are repeatedly reminded in the History Plays of the relation of moral virtue to political virtue, and hence to the happiness of the community. Rulers always do have a dormant moral sense in the community to reckon with.

This is related to what we can see in the History Plays of the place of religious faith and of conscience in the life of the community. One teaching of these plays, easily picked up by Americans, is that religious institutions should be kept somewhat separate from the political order. This is not to suggest that it is assumed that religion cannot be made proper use of by the statesman. But it is evident in the History Plays that religion—or, at least, ambitious churchmen—can get in the way of good government. Sometimes, it seems, the Church is seen as a foreign state, or as another state within the state.

We further see that the determinedly pious prince can be far less effective, and hence less virtuous, than he should be. Early and late warnings are provided, in the careers of Richard II and Henry VI, of princes unfitted by their piety for proper rule. Love and policy are thereby distinguished.

On the other hand, a complete lack of piety will not do either. Impious villains are shown as eventually failing and suffering. Shakespeare is bound somewhat by “the historical record”—but he accounts in his own way for what is generally known to have happened. By and large, the truly good prevail. The playwright suggests, by the way he presents the troubles England was subject to, that for several generations there was no one both strong enough and good enough to lead the country properly. Another way of putting this is to say that Shakespeare brings together history and nature.

xv.

A standard of the common good seems to be evident throughout the History Plays, even though it is often only implicit. One continuing problem is what, precisely, constitutes the country to which king, nobles and commons should be dedicated. How much
should England claim as its own? Is France worth repeated battles? What about Ireland, which requires constant attention? Is it not enough of a challenge for English leaders to deal properly with Wales and Scotland, to which they have ready access?

The History Plays leave open the question of what should be made of French expeditions by the English kings. Does nature suggest what is properly British? We can (in 1 Henry VI) see Joan of Arc fairly easily persuade the Duke of Burgundy to abandon his allegiance to the English king and to align himself with other Frenchmen. We can also see that the most glamorous of the English kings, Henry V, resorts to his exciting French adventures upon the advice of his dying father who, aware of the fragility of his own claim to a usurped throne, counsels his son to unite the country behind him by engaging in a foreign war.

All this reminds us of something that can be disturbing about the political life depicted in the History Plays: there is surprisingly little evidence of sacrifice by any monarch of his “personal” interest to the common good, although the rejection of Falstaff by Henry V may appear to be such a sacrifice. Most (if not all) of the kings tend to look out for themselves, even as they call upon their subjects for sacrifices.

One must wonder how the regime established by the Constitution of the United States undertakes to make it more likely for the common good to take precedence over personal interests.

Fortunately, it usually is clearly in the interest of English sovereigns in the History Plays that the rule of law should be respected. For one thing, a fully proper succession presupposes the rule of law. (A lawyer in 1 Henry VI is shown as siding with the Yorkist claim to the throne on the basis of what the law provides.)

So much is a respect for the rule of law emphasized that even tyrannical executions (except in the most dreadful cases) routinely require a written order in due form. This respect may be seen also in the considerable power exercised by the Lord Mayor of London in maintaining law and order among the quarrelling nobles attached to the royal court.

It is made clear in our plays that even during these days of usurpation, of intrafamily killing and of civil war, no total breakdown of the rule of law is to be tolerated. It is evident throughout the History Plays that a standard of justice is repeatedly looked to, a standard which respects property, law-abidingness and even cul-
ture. This respect for the established way is dramatized by the barbarity of the rebellious Jack Cade in 2 Henry VI. Shakespeare repeatedly reminds the English-speaking audience what radical self-serving can mean. Here it is seen in a commoner; in Richard III, it is seen in the king himself. In both cases, the villain is shown abandoned (naturally abandoned?) by all supporters with any shred of decency left in them as he faces remorseless destruction at the hands of the righteous.

xvii.

Jack Cade's determined attack upon law and culture—even to the extent of killing anyone whom he finds to be literate—has, as one effect, a reminder of the civilization required for constitutional government, that civilization which is itself nourished and sustained in turn by constitutional government. Thus, we are reminded, the non-political aspects of life are also critical. We are reminded, that is, of the human things which political life ultimately serves.

Religion, properly used, is seen as making a contribution here. So does philosophy, however rare its appearance. The happiness of the community—for nobles, people and king alike—is held up by the History Plays as a worthy objective. We can see here an anticipation of that "pursuit of Happiness" celebrated in the Declaration of Independence and to which the Constitution of the United States is dedicated.

III.

I have talked on this occasion about the History Plays not as one would who was concerned primarily with them as works of art but rather as one would who is concerned to discover the kind of principles and aspirations that early Americans might have inherited from the education provided them in the English language.

I have turned to the History Plays for guidance in Anglo-American constitutionalism, even though I recognize both that several plays by Shakespeare are much better as plays and that various works by other authors have also been important for the education of Americans. The History Plays, insofar as they address both the problem of what happens when rulers are not properly selected and the problem of what happens when rulers (however selected) do not conduct themselves properly, very much touch upon issues and concerns which should be evident to us as we turn to the provisions in the Constitution for the Executive and for the Judiciary.
Our problem now is not with the authoritative making of laws (to which I devoted my opening lectures) but with the interpretation and execution of laws (to which I now turn). In my next lecture, I will examine the opening section of Article II and the Twelfth Amendment to the Constitution. In the lecture following, the remainder of Article II will be discussed, in which the powers of the Presidency are dealt with, those powers which are subordinated to the laws made by Congress and to the law (or constitution) made by the people.

We will continue, in our examination of these texts, to see how the various parts of the Constitution fit together, thereby reassuring each other that the Constitution can indeed be thought about.

8. ARTICLE II, SECTION 1

I.

Much is made in this Country of the President of the United States. Much is made as well of Presidential elections—of how Presidents are selected, of campaign strategies, and of the lives and times of Presidents. Yet, one must wonder, would we make as much as we do of the Presidency if we recognized how much of a role chance plays in determining both which particular man does become President and how little he personally can do? (Chance may have far less to do with which party or which policy is chosen from time to time than it does with who the candidate of a party is.) The President is looked up to because he seems to be in control—or, is it because we hope that someone is in control? But is it not rare for anyone to control either his becoming President or his principal doings as President? There may have been only two or three Presidents in the Twentieth Century (if that many) who can be said to have been substantially in control of their Presidential careers.

I have suggested that the careers of legislators and judges are much more predictable: one can have reasonable ambitions, with respect to either Congress or the Courts, and thereafter one can have (if one is both talented and not unlucky) a career which is substantially what one had planned. Citizens in various private careers may have even more control over their lives than do those with ambitions in public life.

This is not to deny that there is something spectacular about the Presidency: it looks big; and Presidents themselves (and the Presidents' men) tend to make a lot of the Presidency, reinforced by
what they are told by "Presidents' men" and by Chief Executives of other countries (who also see themselves as truly special). So remarkable is it when any particular man makes his way to the Presidency that it is tempting to regard his rise as providential, if not even miraculous. Quite trivial things can chance to derail a Presidential candidacy, and sometimes even a Presidency.

Lest one be troubled by the realization of how vulnerable Presidents and would-be Presidents are, it should be remembered that much, perhaps most (if not even all), of the important things a President does are very much dependent upon other people—and particularly upon what Congress makes as laws and upon how the National Courts interpret those laws. To a considerable extent, the regime provided for by the Constitution encourages moderation—and to the extent that that is true, to that extent also it may not matter much who the President is or what political party is in power most of the time.

Yet we keep tinkering with the mode of selecting the President, in order "to be sure"—as if it made all the difference in the world who is chosen. We may well ask, "In order to be sure of what?" I will argue on this occasion that probably the only thing we really need to be sure of, most of the time, is that we have indeed designated someone clearly enough for the office, so that there is no lingering uncertainty or festering resentment.

It is primarily to the process for choosing the President that most of the material I am considering in this lecture is devoted. A discussion of this process, and of various changes which have been proposed, permits us to see how one might think sensibly about the Constitution. Some features of the Constitution here may most usefully be seen by delving into other ways of doing the same things.

II.

I have made much of chance in the selection of a President. I may even exaggerate the role here of chance, partly because far too much is made these days of the Presidency.

It is salutary, for pedagogical purposes, to be reminded as well of how much chance determined the particular mode of selection of the President that we do happen to use. Indeed, it can be said, this may be the one major provision in the Constitution which is itself very much the product of chance: that is, it could easily have been quite different in critical respects. It is well to be reminded that the character and talents of any particular President are not likely to
be critical, at least when compared to the circumstances of his time and to the policy that Congress is prepared to lay down on vital issues of the day. However the President is chosen—and whoever he may happen to be—, what is likely to be decisive are the character of the people and the calibre of the continuing deliberation in the community at large, which deliberation the Congress and the President may contribute to, of course, and which they are in any event likely themselves to be shaped and guided by.

The major provisions in the Constitution for the selection of other officers of government (and especially members of Congress and of the National Courts) are pretty much what they were bound to be, once it was decided (as it was decided, perhaps, even before the Federal Convention first met in May 1787) that there would be a national government with broad powers with respect to commerce, foreign affairs (including war and peace), and taxation. Even the distinctive American division of the Congress could have been somewhat expected, at least to the extent that it was likely that the interests and demands of both the large and the small States would have to be respected.

The powers of (as distinguished from the mode of selecting) the President were pretty much determined by the decisions made about the powers that the Congress would have. The complicated mode of selecting the President does not matter as much as it may sometimes seem to us, however much we do allow ourselves to get caught up by the superficial aspects of political contests.

III.

Although much of my discussion on this occasion will be devoted to the mode of electing the President—or, rather, to my comments upon discussions of this issue—, we should first touch upon the length of the term of office of the President. This issue was much debated in the Federal Convention, as was the related issue of whether the President should be able to succeed himself. Good arguments were made in support of various positions with respect to these issues. It is difficult to assess any of the delegates' arguments, however, since various of the proposals made from time to time were keyed to other proposals. The important thing to notice is that it was understood that there would be a series of complicated consequences, depending upon which combination of proposals was adopted. It is also important to try to take complex ramifications into account when assessing current proposals to change long-established arrangements—and this we shall see when
we consider current proposals for changing the mode of selecting the President.

It should be noticed that there was not much concern in the Convention either about the lengths of the terms of members of Congress or about whether they should be able to succeed themselves. As for judges, the Convention provided for them the lifetime appointments which British judges then had. About this there does not seem to have been much serious question in the Convention, however much uncertainty there may have been about precisely how judges should be selected.

The issue of whether the President should be able to succeed himself was much agitated in the Federal Convention. George Washington's emphatic refusal to seek a third term proved decisive for a century and a half. Franklin Roosevelt's willingness and ability to get elected four times overrode the Washington precedent and moved Congress and the Country to make sure that that would not happen again—and so we have the Twenty-second Amendment limiting a President to two elected terms.

One argument against such a limitation is, of course, that it may sometimes deprive the Country of the services of the very man most needed in critical times. Whether this makes too much of the Presidency, and of particular men, is a question related to the one with which I opened this lecture. May there not be good reasons for not having a President serve more than two terms? After a decade of acting “Presidential” (that is, during one's first election campaign and then while in office), one is not apt to be very well informed about what is happening among the people of the Country (however instructive and disciplining a political campaign may be): one is likely to have had a decade in which one's contacts with people have been surprisingly limited; one's information tends to become considerably restricted (however bolstered by specialized secret intelligence); and so one is likely to become simply “out of touch,” adept only for ceremonial occasions. Perhaps most critical is the lack of time the typical President has for serious reading, extended conversation, and sustained reflection.

One curious consequence of the Twenty-second Amendment is that it has thus far imposed a restraint only upon the political party which pushed it. It was the Republican Eightieth Congress which proposed the amendment—the only Republican Congress since the days of Herbert Hoover a half-century ago. Subsequent to the amendment's ratification (in 1951) the only Presidents with substantial prospects of third terms have been Republicans. Not only
should this remind us of one of the beauties of the rule of law—one can be hoisted by one’s own petard—, but it should also remind us that the consequences of constitutional changes can be far-reaching and difficult to discern.

IV.

James Wilson reported that the problem of determining the mode of selecting the President was one of the most difficult before the Federal Convention.59 Certainly, this was something the delegates struggled with again and again. Even so, the arrangement they did settle upon—a complicated arrangement utilizing electors who would be chosen in each State and who would in turn be free to choose a President and a Vice President—this original arrangement required an early amendment, the Twelfth Amendment (ratified in 1804). This amendment is itself as long and as complicated as the provision it was intended to correct, separating out as it does the electors' votes for the Presidency from their votes for the Vice Presidency.

But to recognize a provision as being long and complicated is not to regard it as truly important in itself. It is, I have indicated, far more important that it be clear what the Presidential-selection provision is than that it be this or that provision. However important the President may or may not be, it is important that it should be generally (and preferably immediately) apparent who he is once the votes have been counted in whatever way has been appointed for doing so, provided of course that that way is not obviously unsuitable. One reason so much is made of being sure who the President is at any particular moment is that much of the considerable power he does have depends upon public opinion—not upon law-making authority, as for Congress, or upon reasoning, as for judges.

The present longstanding arrangement for choosing the President, with its dependence upon the allocation of votes according to States (with the smaller States getting more votes per capita than strict allocation by population would warrant), reflects the federalist element in the Constitution. The federalist character of the arrangement is reinforced by the general practice, for a century and a half now, of assigning the electoral votes of each State on a winner-take-all basis.

Obviously unsuitable would be recourse to one possible system which would produce in most circumstances a President adequate to the times, the selection of the Chief Executive by lot from
among an array provided through an appropriate screening process. The difficulty here would not be that of developing the screening process (for, after all, we have always had that in the form of party caucuses or conventions or primaries). Rather, the difficulty would be that of admitting to an out-and-out recourse to chance, which would undermine the salutary opinion that the people are in fact governing themselves. The use of a lottery would probably be bad for political morale. Still, it can be said that it makes sense—it can be a good choice—to make deliberate use of a lottery in some circumstances. Besides, I have suggested, much of what we do in choosing a President is dependent upon chance anyway, but in a much more expensive and burdensome (perhaps even corrupting) way than an out-and-out lottery would be. But we do not choose to recognize this publicly—and there may be a sound instinct at work here.

We are obliged to recognize, however, that chance plays a considerable part in the choice of vice-presidential candidates and, thereafter, in the determination of what Vice President succeeds to the Presidency (as eight Vice Presidents have done, in completing their predecessors’ terms).

V.

The mode of selecting the President culminates in what happens in Congress once the votes in the several States have been recorded and sent to the President of the Senate of the United States, pursuant to Constitutional direction. We are once again reminded of the general supervisory power of Congress in the Constitutional system. Until Congress acts, there is no President chosen. This means that Congress may provide the rules (and hence the standards) by which the votes counted and recorded in the States are to be in turn received, counted, and dealt with by Congress. There is something of the pageantry of a formal ceremony about all this, a ceremony which should remind us of the ultimate power in Congress (which in turn is itself immediately subject, of course, to the electorate).

It is instructive to see how this ceremony is conducted, as recorded in the Congressional Record for January 6, 1977 (following upon the Carter-Ford election contest in November 1976). This is how the Record reports the Joint Session (of the two Houses of Congress) that day, a session held pursuant to the provisions of a concurrent resolution:

At 12 o’clock and 55 minutes p.m., the Doorkeeper, the Hon-
orable James T. Molloy, announced the Vice President and the Senate of the United States.

The Senate entered the Hall of the House of Representatives, headed by the Vice President and the Secretary of the Senate, the Members and officers of the House rising to receive them.

The Vice President took his seat as the Presiding Officer of the joint convention of the two Houses, the Speaker of the House occupying the chair on his left.

The joint session was called to order by the Vice President.

The Vice President. Mr. Speaker, Members of the Congress, the Senate and the House of Representatives, pursuant to the requirements of the Constitution and the laws of the United States, have met in joint session for the purpose of opening the certificates and ascertaining and counting the votes of the electors of the several States for President and Vice President.

Under well-established precedents, unless a motion shall be made in any case, the reading of the formal portions of the certificates will be dispensed with. After ascertainment has been made that the certificates are authentic and correct in form, the tellers will count and make a list of the votes cast by the electors of the several States.

The tellers on the part of the two Houses will take their respective places at the Clerk's desk.

The tellers, Mr. Cannon and Mr. Hatfield on the part of the Senate, and Mr. Dent and Mr. Dickinson on the part of the House, took their places at the desk.

The Vice President. The Chair will now hand to the tellers the certificates of the electors for President and Vice President of the State of Alabama, and they will count and make a list of the votes cast by that State.

Mr. Dickinson (one of the tellers). Mr. President, the certificate of the electoral vote of the State of Alabama seems to be regular in form and authentic, and it appears therefrom that Jimmy Carter of the State of Georgia received nine votes for President and Walter F. Mondale of the State of Minnesota received nine votes for Vice President.

The Vice President. There being no objection, the Chair will omit in further procedure the formal statement just made for the State of Alabama, and we will open the certificates in alphabetical order and pass to the tellers the certificates showing the vote of the electors in each State; and the tellers will then read, count, and announce the result in each State as was done in the case of the State of Alabama.

Is there objection?

The Chair hears no objection.
There was no objection.

The tellers then proceeded to read, count, and announce, as was done in the case of the State of Alabama, the electoral votes of the several States in alphabetical order.

The Vice President. Gentlemen and gentlewomen of the Congress, the certificates of all of the States have now been opened and read, and the tellers will make the final ascertainment of the results and deliver the same to the Vice President.62

After the tellers delivered to the Vice President a statement of the results, the ceremony continued with this announcement:

The Vice President. The state of the vote for President of the United States, as delivered to the President of the Senate, is as follows:

The whole number of the electors appointed to vote for President of the United States is 538, of which a majority is 270.

Gov. Jimmy Carter, of the State of Georgia, has received for the Presidency of the United States 297 votes;

President Gerald R. Ford, of the State of Michigan, has received 240 votes; and

Gov. Ronald Reagan, of the State of California, has received 1 vote.

The state of the vote for the Vice Presidency of the United States, as delivered to the President of the Senate, is as follows:

The whole number of the electors appointed to vote for Vice President of the United States is 538, of which a majority is 270.

Senator Walter F. Mondale, of the State of Minnesota, has received for Vice President of the United States 297 votes; and

Senator Robert Dole, of the State of Kansas, has received 241 votes.

This announcement of the state of the vote by the President of the Senate shall be deemed a sufficient declaration of the persons elected President and Vice President of the United States, each for the term beginning on the 20th day of January, 1977, and shall be entered, together with a list of the votes, on the Journals of the Senate and the House of Representatives.

Members of the Congress, the purpose for which the joint session of the two Houses of Congress has been called, pursuant to Senate Concurrent Resolution 1, 95th Congress, having been accomplished, the Chair declares the joint session dissolved.

(Thereupon, at 1 o'clock and 34 minutes p.m., the joint session of the two Houses of Congress was dissolved.)

The House was called to order by the Speaker.

The Speaker. Pursuant to Senate Concurrent Resolution 1,
the Chair directs that the electoral votes be spread at large upon
the Journal.63

We can see here, in this thirty-nine minute performance, the for-
mal compliance there usually is with the constitutional power and
duty of Congress to determine in early January every four years
who is to become President of the United States on the forthcom-
ing 20th of January. We can also see reflected here various other
features of the Constitutional provisions we are examining in this
lecture. The 538 electors identified as “the whole number of the
electors appointed to vote for President of the United States” are
derived by adding together (in accordance with Section 1 of Article
II, as supplemented by Amendment XXIII) the 100 members of
the Senate, the 435 members of the House of Representatives, and
the 3 votes from the District of Columbia.

Particularly impressive in all this—although very much taken
for granted by us—is that a Vice President of one party can preside
over a ceremony which marks the ouster of an incumbent of his
own party from the Presidency. An odd feature on the 1977 occa-
sion was the single vote for Ronald Reagan, who had not even been
on the ballot in the State of Washington, where one elector voted
for him. This action by that elector bears on the proposals for elec-
toral reform with which I will soon be dealing.

But first, it is instructive to notice how much there is, not only in
the ceremony we have just witnessed but throughout Article II,
which testifies to the concern of the Framers of the Constitution
that the President be properly (and thoroughly) hedged in. It is
recognized that the President, however limited he may be by the
laws made by Congress, still has considerable prestige, to say noth-
ing of the potential for usurpation (especially since he is designated
“Commander in Chief of the Army and Navy”). And so the irre-
pressible Patrick Henry could protest in the course of the Ratifica-
tion Campaign in Virginia, that the proposed Constitution “squints
toward monarchy.”64 The prestige likely to attend “the God-like
prince,” the single man at the top (no matter how he gets there),
can be reinforced by the patronage he is likely to have at his dispo-
sal, the discretion he must exercise in the execution of laws (to say
nothing of the pardoning power), and the contact he has with
others abroad (which includes, as was again and again said in the
Convention, the temptation to be bribed).

The Framers’ concern for the integrity of the Presidency is indi-
cated by their providing for this case only that the incumbent must
be “a natural born Citizen.” In addition, the President has a
higher age requirement than any other officer of government. True, it is only five years higher (35) than that for Senators (30), which in turn is only five years higher than that for Representatives (25). But the principle is nevertheless indicated, that the President is somehow to be considered more august (even though the ages actually used are so low as not likely to have much effect in practice).

It seems to be understood that the principal locus of abuse of power lies in the Presidency (and hence in Presidential selection). This understanding is reflected in various precautions. For example, “[t]he 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 seems to have been primarily designed to reduce improprieties, or the appearance of improprieties, in bargaining among States for votes. Improprieties are also guarded against in the limitations upon who can serve as electors: “but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.” Some of these people may be too much under the influence of an incumbent President; others (the Senators or Representatives) have to receive and certify what the electors do and, in some contingencies, may have to go on to choose the President themselves. Stringent restrictions (more so than for others) are placed upon the changes that may be made in the compensation of the President (partly to protect him, partly to hold him in check?). And he alone has a specific oath provided for him in the Constitution.

Finally, it should not be considered accidental that the impeachment power (which applies to other officers of the General Government as well) should have been returned to at the end of the Executive Article (in Section 4 of Article II). It is instructive that the Executive Article, which began with identification of the power cf the Presidency as “the executive Power” (that is, the power to execute the laws made by legislatures), should end with a reminder of the ultimate control by Congress of who remains President of the United States.

VI.

The question of who becomes—or rather, of how someone becomes—President of the United States remains one that continues to vex American citizens down to our day. We have seen that considerable space was devoted to this question in Article II and soon
thereafter in the Twelfth Amendment. Related questions were re-
turned to in Amendment XX, in Amendment XXII, in Amend-
ment XXIII, and in Amendment XXV. Almost half of the space
devoted to amendments is allocated to provisions for the mode of
selection and the term of office of the President, much more than is
allocated to any other subject.

If various politicians, and an even larger number of political
scientists, have their way, there will be considerably more language
added to the Constitution to guide the selection of the President.
For we hear much, from time to time (there is something of a lull
these days), about abolishing the “Electoral College” (that is, the
customary arrangement whereby the votes of each State are allo-
cated as a unit to one Presidential candidate). There has been
much said about all this which it would not be useful to repeat at
length here. I need only touch here and there upon this problem as
part of my overall effort to suggest how the Constitution may well
be thought about.

What is at the bottom of the anxiety about the Electoral Col-
lege? Primarily, the possibility that the man who secures the most
popular votes in a Presidential election may not be the man who
gets the requisite number of votes in the Electoral College. Typical
of the concerns expressed from time to time is the observation by
President Carter in March 1977:

Under the Electoral College, it is always possible that the winner
of the popular vote will not be elected. This has already hap-
pened in three elections, 1824, 1876, and 1888. In the last election
[in 1976], the result could have been changed by a small shift of
votes in Ohio and Hawaii, despite a popular vote difference of 1.7
million.65

Allied to this kind of observation (which has been made again and
again) is the kind of warning issued by an editorial writer after the
1976 election:

Imagine the mood of the nation right now if one of the presiden-
tial candidates had won a majority of the popular vote on Tues-
day but had failed to garner the 270 votes needed to seal his
victory in the electoral college. Such an indecisive result unques-
tionably would have intensified disillusionment with the electoral
process just at the time when the nation is beginning to get rid of
the aftertaste of Watergate.66

What “the mood of the nation” would be in such circumstances
would depend, of course, upon how the Country had been taught
to see any disparity between the popular vote and the Electoral-
It should be noticed, first, that it is rare when there is such disparity. But much more important to notice is that a disparity between the Electoral-College vote and the popular vote need not be taken as significant, however much the increasing emphasis upon equality may lead us to magnify the significance of popular votes. If it is known in advance that only the popular vote counts, then the popular vote would indeed mean more than it does now. What is to be made, for example, of a light turnout in a large State when it is known in advance that that State will go by a wide margin to a particular candidate? When voting is conducted under the present dispensation, it does not make sense to be agitated about precisely who happens to have the largest total popular vote. Not only does it not make sense, but it is irresponsible thus to magnify the significance of the popular vote. It would be as if we counted up nationwide all who voted for Democratic candidates for the House of Representatives and all who voted for Republican candidates for the House of Representatives, and then insisted upon allocating the House seats between these two parties in accordance with such totals. There is always the possibility of a discrepancy between the total popular vote and the unit-by-unit vote wherever there are units that matter in any political arrangement. Yet are there not good reasons for having units that matter? On the other hand, there may be no good reason for having the selection of the President be, or seem to be, more "democratic" than the selection of Congress.

It is curious that those proposing amendments here can be satisfied with eventually settling upon a candidate who may have a plurality of only 40% in the popular vote, under their proposed arrangement, while they are troubled by the prospect of someone winning with only 49.9% under the present arrangement, if someone else has 50.1%. It is also curious that they accept so blithely (as some evidently do) the prospect of fairly frequent run-offs and other uncertainties under their proposed arrangement. Too many intellectuals have been unduly influential here, the very people who should have thought through what the present system does do. They should be much more appreciative than they evidently are of the obvious fact that the overall system has worked as well as it long has.

The arguments for the present arrangement, or something close to it, are many and sound, including arguments which see it as
encouraging respect for the States as States, permitting the smaller States more participation in the national choice, moderating recourse to nationwide demagoguery, limiting the attractiveness of election fraud (or at least localizing its consequences), and making for quicker and surer determinations of who the winner is in accordance with the accepted rules. Should not the burden of proof rest with those who would change what has been so successful for almost two centuries? We are told that people are concerned. But are not those concerns due at least in part to the analyses and arguments of those who have not explained properly either how things truly stand or what the consequences of change could be?

VII.

The concern now expressed is that we should guard against the fluke that the popular “winner” may lose. It is not generally appreciated how much the most-supported amendment-proposals would expose us to all kinds of unpredictable developments.

I have suggested that it is already largely a matter of chance what particular man becomes President of the United States. But that is the kind of chance we can expect, can adapt ourselves to and perhaps even make good use of. However much our present mode of selecting a President may itself also be due to chance, there are various important and useful institutions, expectations and practices which have naturally formed around that mode. It is one thing to recognize that chance is inevitable and that accommodations to it must be made; it is quite another thing gratuitously to expose ourselves to the vagaries of chance, to increase the number of important activities which become unpredictable. The fact remains that no one can reasonably predict what the proposed changes in the mode of selecting a President may lead to.

The proposed popular-election change need not (and once resorted to, might not) be limited, in principle, to the mode of choosing Presidents. Why should not the choice of Senators also be keyed to a national vote—that is, in a manner which allocates Senators according to population? Or if that should seem somehow destructive of the traditional balance of the Congress, what about another change so as to rely more upon popular votes: why not require proposed constitutional amendments to secure three-fourths of the vote in a national referendum rather than (as now) three-fourths of the States voting as States. We can see that the mode of choosing Presidents is not the only constitutional device we use that does not defer to the total popular vote. Yet should we
not be reluctant to rely upon Countrywide popular votes in the two situations I have just mentioned? (I return to this question in Section VI of Lecture No. 14.)

It should also be noticed that there are simply too many unpredictable consequences of the proposed Presidential-selection amendments (which could mean, of course, that nothing important would in fact be changed if any of them should be ratified). Or it may be that many vital things would be changed, including the significance of the States in the Union, the mode of campaigning, and the role of political parties—things such as these (to which I will return) which are somehow keyed to the present mode of selecting the President (however accidental some features of the present mode are bound to be).

It may seem odd to defend as desirable (that is, on the basis of nature) conventions which have been accidentally developed. But that happens all the time, as may be seen for example with our much-respected institution of trial by jury. In any event, the present system does have the advantage of being old (and hence venerable), of having worked quite well for a long time, and of having many other institutions (some of them perhaps as yet unrecognized by us) adapted to it.

One risk of a change now is that it could subvert even further the federalist elements in our Constitutional arrangement, accelerating the centralization and the consolidation which the economic life of the Country may require and which the communications industry promotes. One thing I have tried to emphasize about the proposed changes here is the unpredictability of what could happen—and this should make us cautious, considering both how vital Presidential elections do seem to be among us and how smoothly our long-established system has worked. And whatever one may think about the element of chance naturally found in any Presidential selection (under any dispensation, I suspect), nothing is to be gained by making it uncertain (for days, if not for weeks, at a time) who has actually been anointed according to whatever the prevailing rule may be. It is, as I have indicated, one merit of the present dispensation that things are almost always settled promptly, unlike what can be expected under the proposed amendments (which might encourage much more vote fraud and recounting than we now have and which might, according to their proponents, require frequent run-offs).

Perhaps an even more serious consequence of a popular-vote amendment would follow upon the efforts to be expected to get out
the vote at all costs, with the related changes in the way issues are discussed, in the way “personalities” are presented, and in the way campaigns are run. It would be difficult to have a national popular-vote election for President without eventually taking away from the States the considerable control they have now over elections, and vesting that power completely in the Congress. Yet, as we know, political parties in this Country still tend to be organized for the most part within States. Politics for us remains mostly local politics—and there may be something healthy about this, permitting the people truly to control (to the extent possible) what is happening. A subversion of local politics, in the name of a supposed national popular control, could undermine effective self-governance by the very people in whose name the popular election of Presidents is being advocated. The Framers of the Constitution, on the other hand, recognized that there are better and worse ways to organize the institutions through which the ultimate power of the people is exercised.

VIII.

I have not tried to show that the present mode of selecting the President is preferable to various possible alternatives. Rather, I have been primarily concerned to show that the case has not been made for a change in a well-established institution which seems to have served us well. I have also suggested the ways things could change, and for the worse, with an alternative mode of selection. Should it not be said, on the basis of all this, that it simply may not be prudent to change at this time?

Yet there are problems which should be addressed, including the fact that for one reason or another people have come to be somewhat disturbed (in part because of the influence of those who should have known better) by the system we now have. Certain genuine (though minor) defects in the long-established Presidential-selection system might well be addressed, lest agitation about them undermine respect for the entire constitutional system. There is, for example, the threat of the “faithless elector,” as exhibited most recently (as we have seen) by an elector from the State of Washington who voted, in 1976, for Ronald Reagan, when he had been elected on a Gerald Ford slate. Rare as this kind of infidelity is, people can be disturbed by it—and by the prospect of much more of it some day. There no longer seems to be any reason for leaving any option with the Presidential electors chosen in each State. The general understanding is that they should vote as they
have been pledged to vote. To take care of the danger that people anticipate, however, changes in State laws should suffice, requiring Presidential electors to vote in accordance with their pledges. No constitutional amendment is needed to deal with this problem.

Other people are more concerned, of course, about the practice of having each State’s votes cast as a unit in favor of one Presidential candidate. It is not generally appreciated that this practice, too, is a product of State law; it is certainly not required by the Constitution. The States, one by one, could decide to have their votes allocated according to the popular vote for each candidate.67 Those who would like to see this done nationwide should perhaps experiment in a few States, to see what in fact seems to happen thereafter.

It should be recognized that there would still remain people who would not be satisfied with the two experimental, State-by-State remedies I have suggested for consideration. We do live in an age when it is easy for many to believe that there is something wrong when the popular vote of the Country at large does not seem to count for anything. It may not be prudent therefore simply to dismiss such a concern—and with this in view I make some tentative suggestions for study. Perhaps the popular vote of the Country at large can be used in those rare instances when the Electoral-College approach does not produce a winner. (This means, under the present arrangement, that the election of the President goes to the House of Representatives.) The popular vote could be used either directly or indirectly to identify a winner in such a contingency.

The direct way would be to allow the total national vote itself to be used. This poses many of the difficulties I have already indicated, including the impetus it would give toward establishing national election laws, even a national election board. Such a vote could be misleading, again for the reasons I have given, since that popular vote might not reflect what the vote would have been if it had been generally known in advance that the popular vote might mean something “this time.” Perhaps, then, the popular vote should be used indirectly, in the rare contingency I have referred to, by having the members of the House of Representatives vote individually on the President, rather than (as now) State by State (with each State having one vote). All this, too, could be done without a Constitutional amendment, since the Congress could announce, before each election, the way the Presidential race will be decided in the unlikely event the upcoming race is left to the House of Representatives for resolution.68
A solemn declaration in advance by Congress would not satisfy everyone, however, even though much in our constitutional system depends upon well-established understandings and traditions which have no formal constitutional sanction. Some would still insist upon a constitutional amendment incorporating the change I have tentatively proposed for study. If the amendment mode is resorted to, I should like to see it consider three features: first, that the Presidential electors be eliminated, with the votes of the States credited directly to the appropriate candidates; second, that the votes of each State be allocated as a unit, subject to being changed by State law with the approval (if not at the direction) of Congress; and third, that in the event the States' electoral votes do not elect a President, the House of Representatives just chosen in the same national election would do so, with each member of the new House voting individually (along with the votes by appropriate representatives from the District of Columbia).

But, I should at once add (having thus tried my own hand at Constitution-amending), the critical problem here is not with the matters I have been discussing, despite the agitation one hears from time to time. Rather, the critical problem here is with how Presidential campaigning is done under the present system, including how primaries are arranged. An informed national debate is needed on this question, with a view to developing a policy which makes sense, one that reduces the kind of happenstance found in the primary system we now have as well as the increasing reliance (both in primaries and in general elections) upon advertising techniques, and huge expenditures. A creative use with respect to primaries of the power and duty of Congress to make sure that Presidential electors shall give their votes on the same day "throughout the United States" could well be experimented with here. Our concern should not be with "scenarios" conjured up about unlikely Electoral College contingencies which would not matter much anyway if they did come to pass. Rather, our principal concern should be with the corruption of the political process which is going on all the time around us and which should be addressed not by constitutional amendments, but by sound deliberation about what we want our election campaigns to be and to do.

IX.

The common good ultimately depends in this Country not upon the mode of electing Presidents or upon who the President happens to be at any particular time or indeed upon precisely what the Con-
stitution says about any number of things. The common good depends, instead, upon the calibre of the discussion that the American people continually engage in. The kind of discussion engaged in, and the conduct permitted and promoted, depend upon the character of the American people—and that character, in turn, is shaped and perpetuated by the kind of discussion we engage in.

It is that continuing national discussion upon which we depend. We should not allow the splendor of the Presidency to seduce us from our republican virtue: for the more we make of the Presidency (whose proper powers I will be discussing in my next lecture), the less apt are we to think for ourselves and the more apt are we to be manipulated. Among the bad effects of this distortion is an undue concern about how the President is chosen, instead of recognizing that all we can reasonably hope for is a well-established plausible mode of selection which is generally agreed upon.

I should not conclude this discussion of the Constitutional text for this lecture without saying something more about the Vice President. It was accepted, upon the death of the first President in office in 1841, that the Vice President becomes President (not merely Acting President) in filling out the term of a departed President. This well-established constitutional custom has now been ratified by the Twenty-fifth Amendment, which provides at length for an “Acting President” in various other contingencies. We need say no more on this occasion about the Vice President than what was said in 1793 by John Adams, while serving as our first Vice President, “My Country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived, or his imagination conceived.” It is salutary to be reminded of Vice President Adams’s attitude, which distinguished in effect between the present power and the “great potential” of his office. It is also salutary to be reminded of what happens to the power of the man serving as President when he leaves office: usually he becomes little more than a helpless celebrity, pampered and yet bedeviled by his countrymen. This, too, should make us wonder about how much power any President truly has when in office in our circumstances.

Is it not much more fitting for us to look to Congress as the ultimate governor of the Country? For Congress is that branch of the General Government which relies most upon political deliberation and which requires (and gets) more reliable guidance from the
people. It is that branch of the General Government which people can know best as they choose among the men and women most familiar to them in their local districts. It is upon Congressional elections that all our self-government, as a Country, is properly grounded, not upon whatever President may happen to be made available to us from time to time by chance.

9. ARTICLE II, SECTIONS 2, 3 & 4

I.

I stand with this lecture at the midpoint of my series of lectures on the Constitution of 1787. It is appropriate that this series should turn around a lecture concerned with the powers of the President, for it is today a critical problem among us what the status of the President should be. It is important, that is, to recognize that the President is very much confined by the Constitution.

It is indicated at the outset of Article II, the article devoted to the Presidency, that the President’s power is to be known as “the executive Power.” This recognizes that the President is to execute laws made by Congress, which laws serve the policies laid down by Congress. Indeed, one can say, the executive power means very little, at least under this Constitution, without direction from the Congress (which includes, of course, the directives deposited in the statute books over the centuries by one Congress after another).

Congress, I have argued again and again in these lectures, is obviously intended by the Constitution to be the dominant branch, however much may be made of Presidents and of the Presidency from time to time. The extent of the powers of the Government of the United States is determined for the most part by the extent of the powers of Congress.71

Even today, when the mass media and others make so much of the Presidency, the President has far less power than he appears to have. The personal popularity a President may have does not mean much unless he can put it to effective use in persuading the people at large to act—to so act as to prevail upon Congress to do this or that. If the people do not respond, or if in turn the Congress does not respond to the popular opinion of the moment, then the President is left with little more than the appearance of power. And that, it can be concluded upon reflection, is how things should be.

This is not to suggest that the President does not have a variety of powers. One can have various powers and yet not truly have
much power, if the exercise of one's powers very much depends upon what others do. For example, we have observed, the President's powers as Commander-in-Chief of the army and navy may not amount to much if the Congress should decide to establish or finance no more than a token military force.

Even so, it is instructive to notice what the powers of the President are and how they are organized. This we now do by considering the second and third sections of Article II (where the President's principal powers, aside from the veto power spelled out in Article I, Section 7, may be found). Thereafter we will reconsider the fourth section of Article II, which was touched upon already in my last lecture.

II.

Section 2 can be conveniently divided into two parts. The first part includes the President's power as Commander-in-Chief, his power to require certain written opinions of the principal officers in each of the Executive departments, and his power to grant reprieves and pardons.

It is wondered from time to time how far the powers of the President go. Are there implied powers? It would seem reasonable to suggest that the powers he is granted should be read with their broadest meanings. But it should not be assumed that he also has all other powers “necessary and proper for carrying into Execution” the powers he is granted—since the Congress itself has such a “necessary and proper” power only, it would seem, because the Constitution explicitly gives Congress that power. That is, why should we assume that the President has implied for him a sweeping power which the Congress had to have explicitly granted it in order to have it? Furthermore, Congress is empowered by the Necessary and Proper Clause to make all laws useful and hence needed for carrying into execution the powers which have been vested by the Constitution in the President.

We are obliged to consider, as we did in our efforts to understand the principle of order of various Article I provisions, why these three powers (with respect to being Commander-in-Chief, with respect to requiring certain written opinions, and with respect to granting reprieves and pardons) should have been the first ones set out among the powers of the President in Sections 2 and 3 of Article II. These three powers are those that the President exercises more or less independently of Congress.

But, as it has already been suggested, not even these powers are
exercised altogether independently of Congress. Not only does Congress decide what kind of an army and navy we are to have, but Congress also determines what Executive departments there are to be.

We have also noticed that appropriations that Congress chooses to make provide the material foundations for all activities of the Executive Branch. Related to these are both the laws upon which the very existence of the Executive departments rests and the Congressional actions (such as the declaration of war) which are supposed to determine much of what the Executive may do. We should also remember that all of the laws that Congress makes can be made without the approval of the President, a fact of profound Constitutional significance.

III.

The second part of Section 2 (of Article II) provides for the President’s ability to make treaties and to appoint various “Officers of the United States.” The powers enumerated here are not exercised independently of Congress: treaties require the concurrence of “two thirds of the Senators present”; Ambassadors, Judges and other officers of the United States whose appointments are provided for by the Constitution require the concurrence of the Senate (probably by a majority thereof, although it may be left to the Senate to determine what constitutes its concurrence?); and the appointments of other officers established by law may be subject to the concurrence of the Senate or may have their appointments vested by Congress “as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” (I consider in Section VI of Lecture No. 4 and in Section I of Lecture No. 14 the Congressional numbers required on various occasions.)

Recess appointments are also provided for, “which shall expire at the End” of the next session of the Senate. The need for an interim (or emergency) power of appointment is recognized, even as an ultimate dependence upon Senate concurrence is again affirmed. If the Senate does not choose to act upon a recess (or any other?) appointment, after it returns, the appointment expires at the end of the session.

The arrangements in Section 2 with respect to treaties and appointments seem to take it for granted that the Senate can be depended upon to be as well equipped as the President to know (or at least to be told) what is needed by the Country from time to time. The Senate shares the Executive power here, however more conve-
nient it may be to vest in a single man (such as the President) the supervision of the drafting of treaties and the nomination of particular men for various posts. The President is not assumed to know things the Senate does not know or that the Senate cannot be told in appropriate circumstances.

There is a parallel here to the sharing by the President in the legislative process, with the use of the veto power, but with this critical difference: the Congress is permitted to override a Presidential veto as it goes on to make laws, whereas the President is not permitted to override a Senatorial refusal to concur in a treaty or in an appointment. Permitting "executive agreements" and such devices to circumvent the Senate prerogative here would be like permitting devices whereby the Congress can completely disregard a Presidential veto.

It is well to emphasize this since all too many people like to believe that the President knows and feels things that the rest of us, and especially those in Congress, cannot. The Constitution does not count upon such Presidential superiority. Some people are no doubt superior to others—but there is little reason to believe, either from the constitutional arrangement or from the experiences we have had, that those superior beings are apt to be found more in the Presidency than in Congress or in other walks of life among us.

IV.

There are emergency situations in which some one person should be able to act promptly or until Congress can be assembled to act. But we should be cautious about finding other emergency powers than those provided for here and there in the Constitution. One such power, as we have seen in reviewing the powers of Congress, has to do with the suspension of the privilege of the writ of habeas corpus. Another emergency power, of sorts, has to do with the Presidential recess appointments we have noticed. We are assured both that the Constitution is aware of extraordinary circumstances and that it does something about them when that is considered desirable.

Yet we can hear complaints about the President’s being handcuffed in his conduct of foreign affairs by the War Powers Resolution of 1973 and by other actions (that is, laws enacted) by Congress. Such complaints fail to appreciate both the extent to which emergency power is (and is not) provided for by the Constitution and the significance of the arrangements whereby the Senate routinely passes on treaties and various appointments. The foreign-
aid, defense and other such appropriations by Congress, along with related legislation, really do far more than the things most Presidents do most of the time to determine what the United States will be in the world at large.

Some critics of our current arrangements argue, "Congress shares in the determination of foreign policy, but the president is responsible for its conduct." They can be troubled by developments whereby "the president's essential freedom of maneuver has been restricted by a series of laws, amendments, and continuing resolutions that transfer responsibility for the conduct of foreign policy, especially its military aspects, to a deliberative body." They can be further troubled by the recognition, "The president must now consider, not the efficacy of his actions, but the reaction of Congress to them."

Related to such concerns are those which find critics disturbed when the President has to take into account the opinion of the people of the United States about what he is doing. Such critics can even observe that the rule of law (of which the Constitution is the highest form among us) can be such as "to give free play to [Fidel] Castro in Angola, who [is] not similarly restrained by a Cuban legislature." There are many things that dictators can do that our President cannot—and when we stop to think about it, should we not recognize that we are stronger, and better, because of many restraints upon government among us?

Arguments on behalf of unhampered Presidential discretion are not new. Perhaps the classic Supreme Court case on the subject followed upon President Truman's seizure of the strike-threatened steel mills in 1952 during the Korean War. The problem, simply stated, was that the President wanted to exercise a power that Congress had debated giving to him, but had deliberately denied to him. The President might even have believed it would be disastrous for the Country if he did not exercise the extraordinary power he did in the circumstances, circumstances which could have easily been taken care of with emergency legislation (literally overnight) if the Congress had wanted to do so.

But then, Congress does, or fails to do, all kinds of things which the President does not like. Suppose that a President decides the Country desperately needs a substantial rise in taxes but the Congress refuses to raise taxes. May he then raise taxes on his own? Surely not. Or suppose a President decides the Country should go to war but Congress refuses to declare war or to appropriate funds to conduct a war. May he go to war or secure such funds on his
own? Surely not, the Framers of the Constitution assumed, however much well-intentioned usurpation there may have been here in the Twentieth Century.

President Lincoln's extraordinary measures, in the absence of Congress (which did not reassemble until several months after his inauguration), are often pointed to as justification for "strong" Presidents ever since. It is prudent to recognize that in the most devastating circumstances, as when the Union is breaking up, unanticipated (even extra-constitutional) measures may have to be taken on behalf of the Country, and not only by the President. But, thank Heaven, this is not the typical situation. Today, there is no doubt but that the President is, or can be, empowered by various acts of Congress to fend off or to respond to sudden threats to the Country. Moreover, he can let us all know from time to time if he believes even more powers are needed for emergency purposes. The lack of sufficient empowerment by Congress is not the primary complaint of critics, however, but rather the constitutional understanding that the President simply is not on his own in the conduct of the grand affairs of the United States, whether at home or abroad.

It remains to be seen whether the War Powers Resolution of 1973 effectively restrains Presidents. Indeed, there may be something wrong with the War Powers Resolution both in that the Congress has had thus to assert its constitutional authority and in that so many respectable people regard such an expression of Congressional integrity as itself a usurpation. And so it can be said, "We have, through the War Powers Resolution and through the amendments that have followed it, institutionalized Neville Chamberlain as the model for American presidents." 78 This is a misdirected argument, considering that the lack of a War Powers Resolution did not keep a Neville Chamberlain from acting as he did. Nor did the British parliamentary system (a system which makes much of Cabinet power and accountability) spare Great Britain from ineffective government in the late 1930's or at various times since then. It is not this act or that, or even this institution or that, which ultimately determines how a country acts, but rather the understanding and the soundness of the people, at least in a liberal democracy. This is well to keep in mind, especially when perilous times abroad and economic distress at home tend to enhance the status of the President of the United States.

Much is made these days of modern technology and of the need for the General Government to be able to act with speed. Does not
the ever-growing technological power available to and threatening all mankind call for more, not less, deliberation out in the open, deliberation in which everyone can share who may have something to contribute—and deliberation which all of us can listen to and judge? Instead, we are asked to permit more and more manipulation and maneuverings among the often-faceless advisors of Presidents hidden away in the recesses of the White House and elsewhere.

We can learn, for example, that a prospective appointment to the Cabinet (as Secretary of Agriculture) “jarred political sensibilities at the White House” by having been so bold as to insist upon “direct access to the President.”89 We also learn that the White House Chief of Staff “would never agree to permit [this (or any other?) Cabinet officer] to bypass him and go directly to the President.”80 What is most startling about this quite remarkable state of affairs is that it should be so casually accepted that Cabinet officers (“the Heads of Departments” provided for in the Constitution, and subject to Senate confirmation) should be treated as subordinates by Presidential aides who are not confirmed by the Senate. Consider, also, the National Security Advisor (also not confirmed by the Senate), who can cavalierly take over many of the duties of the Secretary of State and of the Secretary of Defense.

Yet the Heads of Departments are again and again regarded by the Constitution as officers of considerable stature. We see in Section 2 of Article II that Heads of Departments may be empowered by Congress to make appointments on their own, as may the President and the National Courts.81 So independent are the Heads of Departments under the Constitution that the President had to be empowered to “require the Opinion, in writing, of the principal Officer in each of the executive Departments,” and then only “upon any Subject relating to the Duties of their respective Offices.”82 The continuing importance of the principal officers of the Executive departments is dramatically testified to by the Twenty-fifth Amendment provisions with respect to Presidential incapacity.

Much is to be said, therefore, for returning to the spirit as well as to the letter of the Constitution, a constitution which takes it for granted that the people of this Country are the ultimate rulers here, with the Congress as their principal agent among the branches of the General Government.
V.

We turn now to Section 3 of Article II, which section can conveniently be divided into three parts. The first part reads, "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 . . ."

It is evident here that information about the State of the Union need not be limited to an annual speech (or to any speech at all), but rather may be given “from time to time,” which probably means whenever the President chooses to communicate with Congress (unless Congress provides otherwise?). It seems to be assumed that the President may have some information the Congress does not have. What readily comes to mind is what he may learn in the course of the conduct of military operations and what he may learn from the ambassadors and other public ministers he is empowered to receive. It is apparent that such information is not authoritative, in the sense that the Congress has to accept as binding whatever the President reports: he can do no more than “recommending to their Consideration such Measures as he shall judge necessary and expedient . . .” If Congress does not agree that the recommended measures are truly necessary and expedient (in serving one or more of the goals set forth in the Preamble), then the President must make do with what Congress has already provided while he marshals whatever additional information and arguments he may be able to muster to persuade Congress (either directly or through the people).

Is it not clear here as well that the Congress is to have the decisive, or authoritative, voice as to what the controlling measures of the United States are to be? Such provisions as this indicate how limited any inherent or implied powers of the Presidency are under the Constitution. Again we notice that there is not given to the President anything comparable to the Necessary and Proper Clause power of the Congress. The specificity with which Presidential powers are provided suggests that the President has only the powers indicated, and even these are usually circumscribed by or are dependent upon powers of Congress.

This is consistent with the oath laid down for the President (and only for the President) in precise terms. He is to “faithfully execute the Office of President.” That is, he will perform the duties and exercise the powers provided by the Constitution, not the duties and powers other executives elsewhere may have from time to time. Among his duties is that he will, to the best of his ability,
“preserve, protect and defend the Constitution of the United States.” Notice that he is not personally pledged to serve the people or the Country or the good and just, but rather the Constitution, which would seem to discourage the invocation by any President of prerogatives rooted in the people or in the Country at large or in any extra-constitutional standards. He, like all the other officers of the General Government and of the State Governments (referred to in Article VI), must conduct himself pursuant to the Constitution. But, more than for the others, his office is strictly defined by the Constitution, whereas some of the other officers have powers and prerogatives independent of the Constitution, which is true, for example, of State Government officers, and may be true as well of Judges of the United States (especially if they are to serve as traditional common-law judges). Is not all this implied by the way Article II opens, speaking simply of “The executive Power,” not of “The executive Power of the United States” (in the fashion of Article III with its opening words, “The judicial Power of the United States”)?

The President of the United States may be more strictly confined than any other officer of the General Government because it was recognized by the Framers that anyone who is singled out as a President (no matter how limited his formal powers may be) tends to be made much of by his fellow-citizens, especially in a large country.

VI.

The second part of Section 3 (of Article II) is devoted to what the President may do, “on extraordinary Occasions,” to convene both or either of the two Houses of Congress. It is devoted as well to what he may do, in quite special circumstances, to “adjourn them to such Times as he shall think proper.” I do not believe the adjournment power has ever been used by any President. Congress, if it conducts itself sensibly, makes such Presidential action unnecessary. It may also be that with Congress sitting virtually all the time now, there would be few occasions for a President to convene either or both Houses of Congress.

In any event, we can again see that emergency contingencies are provided for by the Constitution, thereby pointing up the limitations of the President in situations in which he is not thus empowered to act. It should be evident, upon examining the Constitution, that there can be innumerable situations in which one branch of the General Government obviously refuses to do something which
another branch of that government considers vital to the welfare of the Country—and there may be nothing that can be done about it in the immediate circumstances. That is one of the risks of constitutional government. But then, the branch of the General Government which refuses to act may be doing precisely what is required for the common good. Besides, the other branches of that government, and the people at large, are still left free to explain to the recalcitrant branch what may seem to them to be so vitally needed.

We can also see, in these provisions of Section 3, the sense in which the President may be regarded as a “presiding” officer, especially with respect to Congress. Perhaps the powers given here to the President to convene and to adjourn can be understood as qualifications upon, or supplements to, the broad legislative powers given to the two Houses of Congress. Even so, these powers are minor when compared to the veto power given to the President, which can routinely affect in a significant way the legislation that Congress enacts.

VII.

The power given the President to “receive Ambassadors and other public Ministers” may be put immediately after the convening and adjourning power because the receiving of diplomats is something like the calling together (the “receiving”?) of the Congress. This power could thus fit into the second part of Section 3 (of Article II).

Or should we consider it as leading off the third part of Section 3? That part includes as its principal provision, “[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.” Is detailed conduct of affairs (both at home and abroad) to be left to duly-certified officers who are commissioned by the President? If so, it could be said that these three powers reflect facets of Presidential activity: the conduct of foreign affairs may be seen in the receiving of diplomats; the conduct of domestic affairs may be seen in faithfully executing the laws; such conduct of affairs, both at home and abroad, may be ultimately dependent upon “all the Officers of the United States” commissioned by the President.

Or is it chance which brings these three powers together at the end of Section 3? That is, these may simply be powers left over and in need of inclusion somewhere, especially if they happen to have been powers that the Congress under the Articles of Confed-
eration had exercised, which means that it is prudent to specify them for the President if he is to have them.

Still, the last empowerment of the President in Article II does remind him of his duty to see that the laws are faithfully executed. We have seen that this is the foundation upon which all else necessarily and properly rests for his office. 85

I have observed that we may never be able to work out in as much detail as we should like precisely why each part of the Constitution is where it is. In political matters, particulars and hence chance can play a considerable (sometimes even a mysterious) part. Does not this suggest the limits of the practical life, even that life which is so active as that of the president of a great country?

VIII.

The limits of political life are indicated in still another way in the final section (Section 4) of Article II, where the problem of impeachment (introduced in Sections 2 and 3 of Article I) is returned to with the provision, “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.” To provide for impeachment is to recognize that political judgments can be mistaken. Even the people may not know all that they need to know in order to choose properly.

One gets the impression here that the offenses from which impeachment might follow are to be of a serious character, not something light and transient. It seems to be suggested in Article III that impeachments relate (usually, if not always) to “Crimes.”

Is it not significant that the last words in the Executive Article are devoted to the possibility of impeachment, thereby not only pointing up the Framers’ concern with the conduct of the Presidency, but also once again reminding us of the ultimate superiority of Congress among the three branches of the General Government?

IX.

With this reminder of Congressional superiority we return to the problem of what we have allowed the Presidency to become. Concerns about what has recently been called “the Imperial Presidency” have been expressed from the beginning of the Republic under the Constitution, and even before that beginning.

Always in view, of course, was the British monarchy with its
extravagant claims a century or two earlier about royal preroga-
tives, dramatized by the ceremony and pomp attending upon the
monarch. Also in view, at least for the Framers, was the insistence
by writers such as Montesquieu, several times referred to in the
Federal Convention and many times referred to during the Ratifi-
cation Campaign, that only a monarchic form of government could
rule a large country properly.

The determination in the early days of the Republic to keep the
President under control may be seen in the way he is spoken of.
Thus, in the arguments reported for *Marbury v. Madison*, in 1803,
the former President can be several times identified simply as “Mr.
Adams.” It is well to notice also that the Executive Article is the
second article in the Constitution, not the first, and that it is far
shorter than the first.

In any event, it is not good either for the President or for the
Country to make as much of the President as we do, no matter
who he may happen to be. A recent dispatch from an American
columnist in Paris seems to me to strike a healthy note in opposi-
tion to the symphony of adulation with which Presidents tend to be
met today. The column, “Why Treat Presidents Like Gods?”, begins as follows:

When the president of the United States travels abroad, his
tasters precede him, trying the food he is to eat, overseeing the
preparation of the banquets he will attend. At the dinner given by
West Germany’s president in Bonn on May 4, American security
men told German officials where they could, and could not, move about. The president of France was blocked in his car for
20 minutes because the Secret Service would not move President
Reagan’s back-up car.

What does this remind you of?

The Founding Fathers considered setting up a monarchy but
decided, in all gravity, not to do so. George Washington refused
a crown. He was too modest, or merely before his time. Today,
in fact but not in name, the United States has a king (or em-
peror), surrounded by pomp, protocol and protection.

Consider, by way of contrast, these observations:

In the meantime, the president of the Swiss Federation, not a
global power but not an inconsiderable one either, jostles with
other guests to get his coat from the cloakroom at concerts. The
president of the French Republic takes his friends to dinner in
restaurants, and leaves the quality of his food to the chef.

And now, back to the United States:

It wasn’t so long ago that such things happened in Washing-
ton—in republican, pre-imperial Washington. Ah, the reader may say, but times today are different. They are, but not that much.

There are terrorists today, but there were terrorists yesterday, and the great and murderous American Nut, who shoots famous people to give a little meaning to his life, has always been with us.\(^9\)

It is well to be reminded:

There is an intelligent and experienced vice president. There is a line of succession. There are, to be blunt, plenty more where this one came from. The halls of Congress and the statehouses are crowded with people who want desperately to be president—and have the qualifications, such as they are. A new election comes along every four years.\(^9\)

We should take to heart, rather than to our “national ego,” the casual way the Swiss President is treated and the humane way the French President conducts his private life, however dangerous this can be from time to time. Is there not something demeaning to a republican people to make what we now do of our Presidents—and of their families and other intimates?

Is it salutary to make as much as we do of the preservation of the life of any man? What does that teach the rest of us? It is important to notice, “There are, to be blunt, plenty more where this one came from.” It is also important to notice that the powers of the President are far more limited than they often seem. But he does have power enough, because of the way we now kow-tow to the Presidency, to have a corrupting influence in a Republic.

Among the consequences of our unbecoming obsequiousness, which the mass media like to encourage and to exploit, is that we are diverted both from serious politics and from a proper reading of the Constitution. It is, after all, a Constitution pursuant to which the President can do no more than recommend to the consideration of Congress “such Measures as he shall judge necessary and expedient.” This is something which we as citizens are (in accordance with the First Amendment) also entitled to do.

The measures we are free to recommend include those which might restore the Presidency to proper proportions, even as we resist the temptation to harass our Presidents when they run into the trouble they all too often deserve. We can begin to set things right by leaving Presidents pretty much on their own, with no more than a reasonable pension, once their terms are finished. To consider the Presidency virtually a Title of Nobility is subversive of republican virtue and encourages both misreadings of the Constitution
The Constitution of 1787

and misconduct by men eager to serve the President and thereby themselves. We, the people, are not well served thereby.

10. Article III, Sections 1 & 2

I.

I have argued, in discussing Article II, that the President has been made much more of in our political system than the Constitution expects. Similarly, in what I say about Article III, I will be arguing that the Judiciary has been made too much of. And yet I will also argue that the Judiciary is not made enough of.

The Judiciary has been made too much of in that it is generally assumed that the National Courts are entitled and obliged to review acts of Congress for their constitutionality. I have already touched upon this, especially when I discussed the veto power of the President in Lecture No. 4. I shall return to this supposed power of judicial review in my next lecture, a power first exercised by the Supreme Court (it is usually said) in an 1803 case^92 which saw the Court interpret the provisions in Section 2 of Article III for the original jurisdiction and the appellate jurisdiction of the Supreme Court (about which provisions, too, I will have something to say next time).

It is in my next lecture, then, that I will be arguing that the Judiciary has been made too much of in certain respects. On this occasion, however, I argue that the Judiciary has not been made enough of—and this is with respect to the proper powers of the National Courts in determining and developing the common law of the Country. Before we look at this problem, however, we should examine Sections 1 and 2 of Article III.

This lecture, and the next one, will be the most complicated lectures in this series. That is appropriate, indeed even most instructive, considering the subject-matter. It is evident to everyone that judges are called upon for a more technical—a less political and hence a less accessible—learning than either legislators or executives. It is not surprising, therefore, that the public tend to defer to judges as learned, whereas they consider (if not even look down upon) legislators as very much like themselves. And so, when a Jack Cade runs wild in Shakespeare's 2 Henry VI, his attack upon all learning is dramatized by the proposal that his mob kill the lawyers.
II.

The existence of "one supreme Court" is recognized at the outset of Article III, with other courts being left to Congress to "ordinance and establish." Thus, Congress is to do for the judicial system of the United States what the American people do for the Constitution itself, which they "ordinance and establish." One is reminded also of the various Executive departments that Congress is responsible for establishing. It should be noticed, as still another instance of legislative supremacy under the Constitution, that the Supreme Court is shaped in decisive respects by the Congress, including various aspects of its activities. Even the size of the Supreme Court is determined by Congress (which size may be changed whenever the Congress chooses, something which the Congress has not chosen to do for more than a century).

The considerable subordination of the National Courts to Congressional regulation is offset by providing for judges some critical protection that is not available for any other public servants under the Constitution: there is, in effect, lifetime tenure, as well as the guarantee (also available to the President) that one's compensation will not be diminished while one is in office. Such protection must have seemed natural to the Framers, familiar as they were with the prerogatives of the British judges of their day.

British judges seem to have been highly regarded, for the most part. Americans evidently hoped that their judges would be comparable—comparable not only in the security they would enjoy, but also in the wisdom and the integrity that that security would permit the judges to exhibit without fear of deprivation or of retaliation.

The National Courts—both the one "supreme Court" established by the Constitution and the various "inferior Courts" which may be established by the Congress—these Courts have vested in them the "judicial Power of the United States." It seems that all of such power is vested in these National Courts—but it may depend upon Congress precisely how there is to be exercised that judicial power which the National Courts are to exercise in its entirety.

III.

Section 2 of Article III tells us what the judicial power of the United States extends to. Various kinds of "Cases" and "Controversies" are listed.93

It is not hard to figure out why the things listed here should be declared to be subject to the jurisdiction of the National Courts.
First, there are the strictly national matters—those matters which arise “under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” It should be obvious that these are matters with which the Courts of the General Government should probably be entrusted.

Second, there are the matters which bear upon the conduct of foreign relations by the General Government. These may be seen not only in the treaties already referred to, but also in the “Cases affecting Ambassadors, other public Ministers and Consuls” and in “Cases of admiralty and maritime Jurisdiction,” as well as simply in “Controversies to which the United States shall be a Party.” It should be obvious why these are matters that no State courts should be permitted to control if there is to be a truly national government.

Third, there are the matters involving differences between States, either directly or indirectly (with citizens of one State in opposition to another State or to citizens thereof). One can see, upon consulting the Articles of Confederation, how such differences between States or between the citizens of diverse States were anticipated. Elaborate procedures are spelled out in Section IX of the Articles of Confederation for establishing a fair tribunal in each such instance. This was because there was no permanent national court system established by the Articles of Confederation, which seem to have relied for the most part upon State courts to continue to take care of most of the judicial business of the Country.

Such then are the matters to which the “judicial Power of the United States” shall extend, matters which seemed to the Framers better dealt with in the National Courts than in the courts of the several States. This observation is consistent with the argument made throughout these lectures that the Constitution can be seen to make sense: there are plausible reasons why it is put together the way it is.

IV.

Should we say that it is mandatory that the “judicial Power of the United States” (as here defined) not only must be vested in the National Courts but also that it must be fully vested in those courts? The Constitution does sound that way—and this would mean that at least the Supreme Court should be able to have some “say” about all cases of this type. Whether any other National Courts would ever be involved would depend, of course, upon whether they have been established by Congress. In any event, it
would seem that there is a limit to what Congress is entitled to do in keeping certain kinds of cases from being within the ultimate control of the National Courts.

There was some early talk (that is, in the Federal Convention of 1787 and thereafter in the First Congress) about having the General Government rely upon State trial courts (as the Articles of Confederation government had done), rather than having Congress establish trial courts of its own. Certainly, it would be easier for the General Government to rely upon the States to take care of the judicial business of the United States than it would be to rely upon the States for either legislative or executive duties on behalf of the United States. Reliance upon State courts would face the problem, however, that such courts need not have the tenure and compensation guarantees that the Constitution evidently considers desirable, if not even necessary, for proper judicial conduct in exercising the “judicial Power of the United States.”

It did seem to be understood in 1787 that a proper judge, at least in the English-speaking world, was bound by a generally-known set of rules, principles and precedents wherever he sat. It seems also to have been understood that a supreme court would be needed to keep in line all the inferior courts in this Country, whether State or National Courts, at least to the extent that such courts dealt with the laws of the United States.

Some supervisory power by the National Courts over State courts makes sense since even routine State-court proceedings can have raised in them (sometimes unexpectedly) questions which depend upon a proper understanding of the Constitution, statutes or treaties of the United States. It would seem, therefore, that a power of reviewing State-court decisions in such matters belongs to the National Courts if the judicial power of the United States is to be applied consistently. This suggests that all the kinds of cases and controversies to which the judicial power of the United States extends should be susceptible to supervisory control, one way or another, by the National Courts. It may be the duty of Congress to keep all such cases within the reach of the National Courts, leaving it up to those courts to exercise their discretion as to what they will handle and how.

V.

A critical question remains down to our day, and will extend beyond it: how is the common law to be developed in the United States? The common law is that body of customary law which
stretches back for several hundred years in Anglo-American jurisprudence, having found expression, for the most part, in the judgments and opinions of generation after generation of judges. It is the common law which governs many, perhaps most, of the everyday relations of people to one another in this Country. Were common-law disputes intended to be included within the provision of "all Cases, in Law and Equity, arising under this Constitution"? The most likely way common-law disputes would arise in the National Courts would be in the diversity-of-citizenship controversies provided for in Section 2 of Article III. The decisive question here is not whether the United States Supreme Court is to exercise continuing, direct and deliberate control over common-law developments in State and other courts in this Country. Rather, the decisive question here is where the Supreme Court is itself to look for the rule in the cases that do happen to come before it in which common-law determinations must be made.

The answer to this decisive question was, from the earliest days of the Republic until a half-century ago, that the Supreme Court should do what any other court in the English-speaking world should do when confronted with a common-law problem. The traditional teaching had been that a court should, with due deference to the rulings of superior courts, use its best judgment as to what the common law is. (The lower the court, the more deference it is expected to exhibit.) In short, the judges in the National Courts (including the Supreme Court) were counted upon to be judges, doing what centuries of common-law judges had always done.

The traditional approach tended to encourage and permit a national uniformity with respect to the common law, with the Supreme Court leading the way. At the very least, Supreme Court precedents would appear to judges in all the States as authority that should not be lightly disregarded. It is here, however, that the Judiciary of the United States has been made far less of than it should be. For since 1938 it has become fashionable to believe that the National Courts should exercise no independent judgment with respect to any common-law determinations they may make in diversity cases. Rather, they are to look to the rule which happens to have been laid down by State courts in the State considered to be "controlling" in the case which has found itself into the federal system.

State Courts, when they come to make common-law determinations, are not similarly bound, however. They are not even bound
by their own precedents. Rather, they are free, in their efforts to do justice, to try to arrive at the best judgment possible in the circumstances. Only the National Courts, including the Supreme Court, are now precluded from doing what common-law courts have always done, and which the National Courts themselves tried to do during the first century and a half under the Constitution. Simply put, the National Courts are now precluded from being fully courts of justice: they are unable to exercise in its amplitude that "judicial Power of the United States" to which Article III is dedicated.

VI.

The depreciation of the Supreme Court's role in common-law cases may be related to a failure to appreciate how wide the Congressional power is, especially with respect to commerce. Commerce and commercial relations are matters with which much of the common law is concerned (in the form of the law of contracts and sales, the law of property, and the law of torts).

One can even suspect that the depreciation of the powers of the Supreme Court as a common-law court is in large part due to efforts on the part of Southern interests who were concerned about any possible power in Congress to interfere in any way with local regulation of slavery. Those efforts included a Southern insistence upon narrowing the commerce power of Congress, thereby making it more likely that the General Government would not interfere with how Southern States dealt with their threatening and threatened institution of slavery.

If, on the other hand, a broad common-law power is recognized in Courts of the United States, that means that there is likely to be a legislature, preferably a coordinate legislature (that is, Congress), able to deal with (and regulate and, if need be, correct) the common-law matters that common-law courts deal with. That is, courts have never been considered entirely on their own with respect to such matters. It is considered anomalous by students of the common law to have a court with great common-law powers without a concurrent legislature with authority over the same subject-matter. And so it has been routinely recognized, in the United States as in Great Britain, that legislatures can alter the rules that common-law courts lay down, however much justice requires that courts should be left alone in particular cases (once judgment had been rendered between parties). One consequence of (if not even a purpose for) denying extensive common-law powers to the Na-
tional Courts was to make less evident the broad legislative powers of Congress, especially with respect to commerce. But this is one country economically, and the common law (especially with respect to the law of contracts and sales) should reflect that fact. Certainly, constitutional interpretation has come around somewhat to this view, recognizing as it does a virtually unlimited commerce power in Congress (however confusing may have been the way this has been done).

By the time the National Courts were stripped of their long-standing and broad common-law powers, the Supreme Court had begun to recognize a broad commerce power in Congress. But the connection between the commerce power in Congress and the common-law power in the National Courts had long since been lost sight of. Besides, the more sophisticated American scholars and judges had been converted to a jurisprudential doctrine which explains common-law rulings not as the products of reasoning with a view to justice, but rather as merely the exercise of sovereign power—and States could be looked to as sufficient depositories of such power.

The curious thing about all this is that the principal judicial spokesman for this development was a thrice-wounded Union veteran of the Civil War who evidently did not recognize the extent to which he was in effect advancing Southern “States’ Rights” doctrine at the expense of national unity, in this case a unity dedicated to a rational system of law grounded in nature (which is, after all, what the common law stands for).97

VII.

The Supreme Court, when it switched as it did in 1938, saw itself as being “realistic” as to what it is that courts “really” do. In addition, it further justified the new approach, which required the National Courts to defer for the most part to State courts’ common-law determinations, by arguing that the old approach permitted plaintiffs to “shop” for “friendly forums” by resorting to the National Courts when the law in the State courts they would otherwise have to submit to seemed un receptive to their claims.

Whether “forum shopping” has truly been curtailed, or only made more sophisticated, is a complicated question. However that may be, one thing is certain as things now stand: the National Courts, usually staffed by the better judges in this Country, are no longer to use their own best judgment, and their learning, in making the common-law determinations they are obliged to make. In-
instead, they are merely to decide two subordinate questions, which require only more or less mechanical responses on their part: What State's common law is controlling in this case? What does that State's common law say on such a matter as this, as that law is recorded in the official reports? This means that the common law, as applied by the National Courts, can no longer be adapted to circumstances, which adaptability has always been one of the virtues of the common law. Rather, the National Courts are bound by what then happens to be the recorded State doctrine, no matter how unreasonable (or difficult to justify) that doctrine may have become, and no matter how vulnerable that recorded doctrine might be in that very State the next time the Supreme Court of that State comes to reconsider it.

Critical to the contemporary approach seems to be the assumption that one body of State common law is just as good as another body of State common law, at least so far as the National Courts should be concerned. This approach takes for granted the notion that marked and permanent divergences in the common law make sense. We are in effect being taught that law is primarily the emanation of some will (or sovereign) rather than a dictate of reason (or nature). We thereby are likely to lose sight of the fact that a standard of right and wrong is something all are somehow aware of or may be guided by.

Fundamental here, in this discussion of the common-law role of the National Courts, is not a historical question or even any question about the original intention of the Framers. Rather, it is a question about the very nature of law and how justice is to be arrived at by courts working on their own (somewhat independent of legislatures). It is a question about the way that reason and nature may be looked to in securing justice, something that common-law courts have always been thought of as most adept in doing, and doing in such a way as to take due account of the opinions, expectations and limitations of the people they serve. Vital to the common-law approach is the reliance upon argument in assessing the reasons given by courts in attempting to apply long-established principles to changing circumstances.

Especially odd about the current situation is, as I have indicated, that State courts, when they come to consider their own common-law rulings, usually try to draw upon the best opinions available to them. This is consistent with the way common-law judges have always worked. Since everyone knows that people (even judges) may differ when they try to employ reason in determining the just
rule in a particular kind of situation, there is much to be said for having superior courts with the power to choose among the determinations of various inferior courts. There has to be in a country, it is reasonable to conclude, one authoritative court which is to guide the general common-law development, especially with respect to matters (such as commercial law) upon which the entire country depends. Such a court should itself be subject to criticism by scholars and by other judges and to correction by a legislature ultimately controlled by the people. The way things have been left by the current doctrine has been to make far too much of chance in the development and application of the common law in the United States.

It may well be, of course, that a national common law is developing in various fields, at least in part because of certain necessities. But the most important aspect of the current situation is that it tends to teach us the wrong lessons about the very nature of justice and about the relation of justice to law, just as it helps conceal from view the achievements and the aspirations of the common law.

VIII.

We return to historical considerations when we notice that it would have been thought peculiar by the Framers that diverse manifestations of the common law could endure within the Country. They would have assumed that all judges would try to do the same thing, with the United States Supreme Court having a particularly influential say as to what the law should be, a say that would tend to smooth out the discrepancies that can be expected to develop between courts from time to time. Thus, in the Articles of Confederation it seems to have been assumed that a common-law jurisdiction was natural to American courts, with the various State and other tribunals doing more or less the same thing, even though there was no high court to provide the required guidance for the entire Country.

The Framers would have wondered how the United States Supreme Court could truly be considered supreme if it should have to be subordinated, in a distinctively judicial activity, to the precedents of the courts of the various States. On the other hand, setting up courts, and determining the jurisdictions thereof, need not have been considered a judicial function, but rather a legislative function, and this Congress was empowered to do for the National Courts. It is important thus to emphasize the difference between,
first, what the Supreme Court can pass upon (including the common law) and, second, when or how the Supreme Court can pass upon it (which does depend upon legislative arrangements). Or, put another way, the Supreme Court should have ultimate judicial authority over what the common law in this Country is to be, even though it may not have ultimate authority over which courts may handle which common-law (or any other) issues from time to time. It should be evident that the Supreme Court cannot itself handle more than a very small part of the litigation in the Country: what it can do is to make the substantial statements about the law (whether interpreting acts of Congress or expounding the common law) which every court in the Country should be inclined to draw upon as much as possible. Such deference is neither desired nor likely if it should generally come to be believed that law is little more than an act of power (or will), not a dictate of reason on the part of someone authorized thus to speak for the community.

IX.

I have suggested that it is perhaps impossible to appreciate fully the Supreme Court, for what it was intended to be, if its common-law powers and duties are not recognized. But then, it is impossible to understand the United States Constitution itself if its considerable dependence upon the common law is not recognized, a dependence so deep and so extensive as to make it seem only natural that the Supreme Court should be regarded as a critical part of the common-law system.

The common law is taken for granted again and again in the Constitution. Many of the terms used (including "citizen," "inhabitant," "treason," "felony," and "breach of the peace") have been shaped by centuries of the common law. Many of the rights referred to, and guaranteed, by the Constitution depend for their detailed application upon the common law, even when they have been modified by statute (including the right to the writ of habeas corpus and the right to trial by jury). Consider as well how much the common law is drawn upon in the constitutional assurance given as to "Privileges and Immunities." The rule of law is taken for granted throughout the Constitution, not only in the restrictions with respect to bills of attainder and ex post facto laws, but also in the very dependence upon legislation—a rule of law which centuries of the common law had taught the English-speaking peoples to expect and to make proper use of.

One does not need to know anything about what happened in
the Federal Convention of 1787, where the common law was again and again relied upon and where the authority of Blackstone (as the great Eighteenth-Century expositor of the common law) could be repeatedly invoked, in order to conclude that the common law is vital to our constitutional system. Nor does one need to look into the doings of Congress, both under the Articles of Confederation and under the Constitution of 1787 (such doings as the Northwest Ordinance enacted by the Continental Congress and the Bill of Rights drafted in the First Congress) to see that the common law was continually taken for granted. The Constitution itself stands as a monument to the common law, built as it is upon the common law. It is that common law, I suggest, of which the Supreme Court was to have been the supreme expositor.

A system of law which is so deeply rooted as to be generally accepted can reaffirm the traditional teaching that reason and a sense of natural justice should be looked to for guidance in courts of law. A proper opinion about the common law, and about the duties and powers of the National Courts with respect to the common law, continues to stand as a bulwark against an inundation of our institutions by positivism, relativism and "legal realism," if not even against a mindless fascination with power for its own sake.

The most serious complaint to be made against the United States Supreme Court, therefore, is not that it has been too "activist," but rather that it has not been active enough. That is, the Supreme Court has not been fully aware of what it can and should mean under the Constitution for a court to be a court. It has been kept from its full realization as a court, and as a national teacher of what law is, by its diversion into that career as a super-legislature which easily follows from making much of a general power of judicial review, something which I shall examine further (along with the common law) in my next lecture.

11. Article III, Sections 2 & 3

I.

I suggested in my last lecture that there has been a diversion of the United States Supreme Court from one of its proper judicial functions. For more than a century the Court has been conducting itself as a super-legislature (or, at least, as a third or fourth branch of the national legislature). This means that the Court (as well as thousands of lawyers and judges) must spend considerable time
and energy reviewing constitutionality questions, which are almost always decided in favor of what has been done by Congress.

Among the constitutional questions the Supreme Court has decided is one which, as we have seen, has made it act less as a court than it should: for it has surrendered its power, if not even its duty, to serve as the ultimate judicial supervisor of the common law in the United States. Instead, the Supreme Court has (since 1938) considered itself bound, when it has had to decide common-law questions, to take its own guidance from one State legal system or another. The common law, it is well to be reminded, is that body of largely customary law, usually left to judges to declare, which governs many, if not most, of the everyday legal relations between people.

The States are now relied upon by the Supreme Court to develop the common law of the Country. Much is to be said for the States and for federalism, of course, and I will do some of that saying in my remaining lectures. Since the common law is a complicated subject, it should be useful for me to say even more about it here before I turn to the subject of judicial review.

The States simply cannot be depended upon to develop a proper common law, especially an efficient commercial law, for the Country at large. What the State courts can do they are doing; that is, they work things out the best they can, but with majority and minority rules developing among them on various subjects.

It is a matter of chance, it sometimes seems, when a satisfactory general rule emerges in this fashion. The Government of the United States gets into the process somewhat, by legislation keyed to the commerce power or to the monetary power, but this cannot substitute for the steady common-law contribution that the National Courts could make.

The Supreme Court may believe that it has more than enough business that the States cannot at all take care of—and so it is well rid of any effort to supervise the common law. But the Court may have given up (through its 1938 abdication) one of its most useful activities. It is potentially most useful, because no one else can act here for the Country at large.

It is often important with respect to the common law that there be a generally known rule (not necessarily the best possible rule), especially if nationwide commercial developments are to be advanced. It is even more reassuring when it is understood that the generally-known rule is also likely to be, because of the competence
of the reviewing court, a quite good (perhaps even the best possible) rule.

The approach pursuant to which the Supreme Court now conducts itself tends to confirm the proposition that the common law (like the Constitution?) is what the judges say it is, rather than that reasoned consensus about justice which is continually to be searched for and reexamined in varying circumstances. Thus, I have argued, the most serious problem with the current approach is what it teaches us about what law is (and is not).

II.

The common law depends upon arguments, and upon assessing what has been said and done. It requires repeated reconsiderations, because of faulty reasoning by some judges and because of changing circumstances. In a common-law system, things work themselves out over decades: reason and a sense of natural justice tend to assert themselves. I have suggested that the truly great power that the National Courts have is with respect to the common law, since they can thereby guide everyday life, and with considerable ease. The general moral sense of the Country can be shaped thereby, and in a relatively uncontroversial manner.

The common law is a way of applying, case-by-case, the enduring standards of the community in a variety of circumstances—and in such a way as to bring the community along, even as reforms are being made. It is salutary to recognize here that the judges discover the law, that they do not simply make it: reason looks to nature (instead of will looking to desire) in declaring the rule which is to be followed.

The common law, I have also suggested, is very much taken for granted by the Constitution of the United States, and not least with respect to the “judicial Power of the United States.” The common law which is taken for granted is a vital common law, not something either fossilized (that is, frozen as of 1787-1789) or fragmented (that is, dependent upon the diverse rulings of various “sovereign” States).

The common law presupposes, then, some court which can provide guidance for all the judges in the Country—and it is difficult to see how that can be done by any court but the United States Supreme Court. It also presupposes—and this recognition, at a time when efforts were being made to keep national power to the minimum, may have contributed to the original subversion of the common-law function of the National Courts—the common law
also presupposes a legislature able to keep common-law courts in line, to guide them, and to correct aberrations (or to lay out changes in course which would be too abrupt or too extensive for any common-law court to make). We can thus see, once again, the ultimate superiority intended for Congress in our constitutional system.

Whether or not the National Courts, and hence the Congress, exercise a common-law power, it should be evident that those courts have their work largely determined by the legislative activity of Congress—by the directives and programs in the statute books. The judicial function of the National Courts includes the courts’ interpretation and application of the laws Congress makes. Much of this must be routine and tedious—and yet that is most of what the National Courts are now bound to do. I suspect, therefore, it would provide some relief for National judges if their courts had old-fashioned common-law questions put to them routinely to consider properly, thereby linking them with the great common-law judges across the centuries.

III.

The laws of Congress extend to the creation of most of the National Courts, to the determination of the sizes of such courts (as well as the size of the Supreme Court), to the provision of salaries, facilities, support services, and so forth.

Even more important, Congress can determine what the jurisdiction is of the many courts that Congress provides for. The rule-making power with respect to judicial activity is, in principle, legislative; it must rest ultimately with the legislature, however much a legislature may delegate some of this power to its courts from time to time.

There does seem to be, however, one Article III limitation placed upon Congress here, and that is with respect to the original jurisdiction conferred by the Constitution upon the Supreme Court. It would seem that the original jurisdiction is immutable, at least in that nothing can be removed from the Supreme Court’s original jurisdiction which the Constitution has placed there.

But, the Constitution indicates, the appellate jurisdiction of the Supreme Court can be adjusted by Congress: for the allocation in Article III is made subject to “such Exceptions, and under such Regulations as the Congress shall make.” It is this provision that we must now examine, since it is in its interpretation and application that we encounter the first instance in which part of an act of
Congress was declared unconstitutional by the United States Supreme Court. This was in the famous 1803 case of Marbury v. Madison.\textsuperscript{99}

IV.

We need not concern ourselves on this occasion with the facts of Marbury v. Madison.\textsuperscript{100} It suffices to notice that one William Marbury brought suit in the Supreme Court in order to secure the post he believed himself entitled to as a Justice of the Peace in the District of Columbia. Among the questions the Supreme Court addressed was whether the Congress had been constitutionally empowered to do what it was said had been done by Congress, the addition to the original jurisdiction of the Supreme Court of a right to hear, and to issue a mandamus in, such a case as Marbury had brought.

According to the Supreme Court in Marbury, the First Congress had, in the Judiciary Act of 1789,\textsuperscript{101} moved something from the appellate jurisdiction of the Supreme Court to the original jurisdiction of the Supreme Court—and this, the Court insisted, Congress should not have done. Critical to the Court’s conclusion was the argument that if Congress could thus move something out of the appellate and into the original jurisdiction of the Supreme Court, there would have been no purpose in the original constitutional allocation.

But is this so? Could not the initial appellate-jurisdiction allocation have been considered a provisional arrangement in the Constitution, just as there are several other provisional arrangements in the Constitution? There is good reason for such provisional arrangements: the Framers wanted the system to be able to start running from the outset—and this was to be true for the Supreme Court as well, once it was set up by Congress and its members had been selected.\textsuperscript{102}

So from the outset, it would have been useful to know what the Supreme Court’s jurisdiction was, both original and appellate. Then, as experience suggested and time permitted, Congress could rearrange the initially-allocated appellate jurisdiction, which means that it could put some of it in the original jurisdiction of the Supreme Court, and it could do so with such particularity and in such detail as the Framers might have thought premature or otherwise inappropriate for the Constitution itself to provide.

It can be figured out why certain kinds of cases should always be in the original jurisdiction of the Supreme Court. But is there any
reason why other kinds of cases could not be added to (and thereafter removed from) the original jurisdiction, as experience and reflection suggest? The Court never faced up to this argument in its insistence that the Congress should not have done what it did.

Not only did the Supreme Court insist that Congress should not have done this, but it also ruled that Congress could never do this, that what it had done was unconstitutional and hence void. And thus judicial review of the acts of Congress (and of the acts of the President?) had its first effective exercise.

V.

Among the serious consequences of the position taken by the Supreme Court in *Marbury v. Madison* is one which does not seem to be generally appreciated: for the *Marbury* ruling in effect concedes that the “exceptions” power means that Congress can altogether keep out of the jurisdiction of the Supreme Court (both appellate and original) any of the variety of cases referred to in the appellate jurisdiction. Once the Court insisted that “excepting” a case from the appellate jurisdiction of the Supreme Court could never mean adding it to the original jurisdiction of the Supreme Court, then it tacitly conceded that it must mean (if it is to mean anything) that cases may be altogether removed by Congress from the jurisdiction of the Supreme Court.

Yet, one might wonder, should not the “judicial Power of the United States” always be within the reach of, and hence subject to supervision by, the United States Supreme Court? This bears upon a controversy which flares up from time to time (and which is currently before us again): can any of the kinds of cases listed in Section 2 of Article III be kept away from the Supreme Court altogether? It is often said by the authorities that they can be. But is not this improper, being against the spirit of the Constitution, as would be extinguishing the Court itself by making no replacements to it as its members retire or die?

Even without judicial review of acts of Congress, there are vital cases that should always be within the purview of the United States Supreme Court (including the review for constitutionality of various *State* actions, something which does seem to be anticipated by the Constitution and which was explicitly recognized in the Judiciary Act of 1789). It is revealing that in the very case in which the Supreme Court insisted upon its power of judicial review (over acts of Congress), it also tacitly recognized a power in Congress to remove cases altogether from the Court’s jurisdiction, which means
that Congress could routinely remove from review by the Court any cases within its appellate jurisdiction which might result in declarations of the unconstitutionality of acts of Congress. This, alone, should make one wonder about how much sense judicial review makes in our system.

Therefore, judicial review, fully to make sense, must repudiate in principle the holding of the Supreme Court in the very first case in which it was exercised to declare an act of Congress unconstitutional. Must not all of the kinds of cases listed in Section 2 of Article III remain within the reach of the Supreme Court if there is to be a practical check upon unconstitutional legislation by the National Courts? But then, I have suggested, the Supreme Court may simply have misread the Constitution (because of partisan considerations?)—and this would mean that the "judicial Power of the United States" (whatever it does include) cannot properly be impaired by the Congress.

To redeem the Court thus, by correcting its reading of the Constitution, does oblige us to wonder why we want judicial review in the first place. It is not in order to get still another opinion about constitutionality, but rather to get an authoritatively-correct opinion. Yet in the first obvious instance in which the power of judicial review was exercised adversely to Congress, the Supreme Court may well have been wrong (or at least not clearly right) in its reading of the Constitution—with the mischievous implications (as I have indicated) for the safety of the Court itself.

After *Marbury v. Madison*, the Supreme Court did not venture to declare another act of Congress unconstitutional for a half-century, which suggests that there was indeed something special about this 1803 case, so special that the Court's claim to the general power of judicial review remained under a cloud. When the Court did venture, a second time, to declare an act of Congress unconstitutional, it so put the Country in jeopardy that it could very well have (perhaps should have) killed off for good the institution of judicial review: for its second venture into judicial review was the *Dred Scott* case (of 1857), which meant in effect that Congress had no power to prohibit the spread of slavery into the Territories of the United States (even though Congress had done precisely this under the Articles of Confederation in the Northwest Ordinance of 1787, an act deliberately ratified thereafter by the First Congress under the Constitution of 1787).

The *Dred Scott* case reminds us of a significant fact: whenever the Congress and the Supreme Court have differed on those great
matters of constitutional interpretation which have assumed crisis proportions, the Congress has been correct. The two most critical instances have been the *Dred Scott* case and the early New Deal cases.\textsuperscript{105} The New Deal cases found the Court insisting, in effect, that Congress had no substantial power to attempt to bring the national economy out of a great depression. It is hardly an argument for judicial review to say that the Court can be relied upon when relatively minor constitutional questions are before it but that it can cripple the Country when truly major questions arise.

We can detect, even in such an accidental case as *Marbury v. Madison*, the effects of political passions upon the Court. It is not equipped to deal effectively with such passions, especially in “confrontations” with Congress. Indeed, depending upon the times, such passions may be intensified, if not created, by the exercise of judicial review.

VI.

Difficulties with judicial review seem to have been anticipated by the Federal Convention of 1787, at least sufficiently so that the Framers clearly rejected (on more than one occasion) attempts to provide something like judicial review of acts of Congress.\textsuperscript{106} Certainly, it is not provided for in the Constitution, whereas (as we have seen) the veto power of the President is spelled out in detail. The President can consider constitutionality when he reviews a bill presented to him by Congress—but Congress is left free to override Presidential disapproval, however he may have explained it in the message he is obliged to send Congress along with his disapproval. We have also seen in Section VII of Lecture No. 4 that there are a number of questions about how the institution of judicial review should operate, questions that would surely have been anticipated if the institution had been intended. “Logic,” some say, demands judicial review—but logic would also seem to point up the need for as much guidance in the Constitution for the exercise of judicial review as is provided there for the exercise of other major powers. Besides, the slightest acquaintance with the British Constitution (as set forth, for example, in Blackstone’s *Commentaries*\textsuperscript{107}) would have reminded the Framers that the Legislature is by nature supreme (not any courts, or the executive alone, whatever his part in the legislative process may be)—and thus the Framers would have known that if something other than legislative supremacy was intended, it should be provided for explicitly and unequivocally by the Constitution. In the most technical sense, then, the judgments
that the Supreme Court issues in exercising judicial review may be little more than "advisory opinions," something (by the way) that the Court says it may not issue. These judgments have been, in effect, advisory opinions in which both Congress and the President have acquiesced.

What, then, should be done about all this? Should judicial review be accepted now as an accomplished fact, even if the Court makes less and less use of it? Since much has been organized around this institution, including habits and expectations not only in the people at large but also in the Congress and in the Executive branch, we should proceed with extreme caution in changing what we now have, just as we should with the Electoral College.

VII.

We should, in thinking further about the institution of judicial review, consider whether it makes much sense the way it has developed. Although it may well be a matter of chance that the Supreme Court exercises this power and that Congress and the Executive acquiesce in it, we must still wonder whether it is a good thing and, if so, in what respects.

The Framers, it can be said, may have conceded such a power to the Supreme Court, as well as to the Congress and to the President, in protecting its own prerogatives. Blackstone recognized, for instance, that each part of Parliament may be able to act alone "in matters relating to their own privileges." Perhaps the Court saw itself as acting defensively in *Marbury v. Madison*, even though (as I have suggested) it may have made itself vulnerable to being stripped altogether of various parts of its appellate jurisdiction whenever Congress chooses to do so—and all this even as it claimed what was (in Anglo-American jurisprudence and constitutional history) virtually unprecedented powers of judicial review.

The Framers, it can also be said, may have conceded that the National Courts need not accept as laws things which are not duly made pursuant to the legislative process prescribed by the Constitution. Furthermore, courts as courts should insist upon due process in all proceedings they participate in (and this even aside from the Fifth or the Fourteenth Amendment).

In addition, the National Courts can interpret laws enacted by Congress as if they conformed to the Constitution as generally understood. If the Supreme Court draws upon the Constitution in interpreting and applying a law, Congress will naturally be reluc-
tant to contradict the Court by insisting that it intended something "unconstitutional" in the law under consideration.

Our principal concern should not be, however, with Congress's refusal to respect the Court's judgment but rather with Congress's willingness, even eagerness, to depend upon the Court. After all, Congress would usually prefer to do the popular, and politic, thing, leaving to others the hard constitutional decisions. But that is a bad habit for us to allow legislators to fall into, since most things Congress does cannot easily, if at all, be subjected to judicial review. For better and for worse, we do have to rely upon Congress to be faithful to its charge. Blackstone had recognized the Members of Parliament as "the guardians of the English constitution."109

One dubious consequence of judicial review is that constitutional errors made by courts seem to require constitutional amendments to correct, not merely an overruling by a "super-majority" of the legislature (as in the case of Presidential vetoes). If the Supreme Court should seem clearly mistaken to the community at large, this can tend to undermine the confidence of people as to the principles of right and wrong. Particularly pernicious can be reliance upon the opinion that the Constitution is what judges say it is—for it is all too often clear that what the judges say is not good.

People want to believe that the Constitution is something by which even the judges are bound—and judges will continue to be respected so long as they are believed to be speaking knowledgeably about what the Constitution indeed says. Besides, if the Constitution is taken to be only whatever the judges say it is, what respectable basis can there ever be for asking judges to reverse themselves?

VIII.

When we go further into Section 2 of Article III, we can see, in the trial-by-jury provision, another important check that courts were intended to have upon misconduct by other branches of the General Government: the courts can insist that judicial proceedings be conducted according to rules laid down in the common law and by the Constitution.

We can see even here the supervisory power of the Congress. For example, it alone can determine where certain criminal trials are to be held (when "the said Crimes" have not been "committed within any State"). Also, we can again see that the common law
has to be looked to for guidance—this time as to what is required for a proper trial by jury.

We can see as well here a limitation placed upon the courts: trial by jury also reflects a popular control over judges. Thus, day in and day out, in the criminal courts of the Country, no judge can convict by himself a defendant charged with a felony, unless the defendant waives a jury trial. And in civil matters also, under the common law, there is a considerable power left in juries, a power ratified by the Seventh Amendment to the Constitution for common-law suits in the National Courts.

IX.

An even more dramatic limitation placed upon the National Courts (as well as upon Congress) may be seen in the final section of Article III, which is devoted to “Treason against the United States.” It seems to be provided that one can commit such treason only by engaging in a rebellion against the United States or by aiding the enemies of the United States (which suggests that there must be a declared war in progress with identified enemies).110

The treason provision may have been put here, rather than in the Legislative Article, because historically the most severe (even barbaric) abuses and condemnations of “traitors” seem to have been at the hands of judges. So Congress, and definitely not the Courts, is left with the “Power to declare the Punishment of Treason.”

It should also be noticed that placing the treason provision in the Judicial Article may also recognize the common-law power of the National Courts. Indeed, one must wonder, are not common-law crimes taken for granted by the Constitution? It seems to be assumed in Section 3 of Article III that the crime of treason already exists, so much so that it has to be restricted in its coverage. Article III concludes with a concern to keep judges (and others) in check with respect to treason.

We have observed that the last word with respect to Congress in Article I (in Section 9) is devoted to keeping citizens of the United States from acquiring titles of nobility or related gifts and honors either from the United States or from “any King, Prince or foreign State.” We have also observed that the last word with respect to the President in Article II is devoted to the impeachment of the President and others. We now observe that the last word with respect to the National Courts in Article III is devoted to the prohibition of any “Attainder of Treason [which] shall work Corruption
of Blood, or Forfeiture except during the Life of the Person attainted."

In all three instances, I suggest, the same concern (or principle) is being addressed (or invoked): the dedication to equality upon which the American regime so much depends. Thus there can be no titles of nobility (Article I). Thus, also, even the President himself may be brought to account before the law (Article II). Thus, as well, just as there are to be no titles of nobility, there are to be no titles of disability (that is, no hereditary punishment or deprivation) (Article III).

We can see, even from the way the last word is framed with respect to the establishment of each of the three branches of the General Government, that equality before the law is what the American regime very much depends upon. I have many times referred in these lectures to the importance among us of the dedication to equality. This points up the anomaly of the institution of slavery in the United States from the very beginning, something that is made even more of hereafter in these lectures, especially as I consider in more detail the place of the States in the constitutional system.

But, I should at once add, the dedication to equality is restrained in the Constitution. The fact that we have judges placed in privileged positions reflects our recognition that ignorance and vice are to be subjugated (whatever the Jack Cades of the world may happen to believe). Or, as Thomas Jefferson said about the judiciary, in a letter of March 15, 1789 to James Madison, "This is a body, which if rendered independent & kept strictly to their own department merits great confidence for their learning & integrity."  

A compromise of sorts with equality may be seen as well in something I have noticed and depended upon throughout this lecture series, the care and competence with which the Constitution itself is drafted. Not every possible interpretation that may be conjured up about the Constitution is sound. Some interpreters are surely better at reading the Constitution than others. On the other hand, a respect for equality may be seen in the general understanding that the Constitution is available to everyone to draw upon, to examine and to invoke.

Furthermore, does not the very fact that the "last word" with respect to the Congress, to the President and to the Courts in the first three articles of the Constitution returns in each case to that principle of equality drawn upon in the "We, the People" language of the Preamble—does not this remarkable coincidence suggest
that a thoughtful mind is exhibited at work in the way the entire Constitution is put together? Should not this too encourage us to take the Constitution with a becoming seriousness, as we try to discover (one by one, but especially altogether) what is, and is not, provided for and why?

12. THE STATE CONSTITUTIONS IN 1787

I.

I have examined thus far in this Commentary the first three articles of the Constitution of 1787, those articles which provide for the Legislative, Executive and Judicial departments (or branches) of the General Government. In the next four lectures of this series, I shall be looking at Articles IV, V, VI and VII, those articles in which the States of the Union figure prominently.

Before we turn to the States (which, of course, we have already touched upon from time to time, as when we looked at the restrictions upon them found in Section 10 of Article I)—before we turn to the concluding four articles with their considerable concern with the States, we should notice the constitutional arrangements in the States at the time the Federal Convention met in Philadelphia in 1787.

The United States is generally considered to have come into being, as an independent Country, on July 4, 1776. This, we have noticed, is reflected in the way that official documents are identified down to our day. We complete on July 4, 1987, the two hundred and eleventh year of the Independence of the United States. It was not until the twelfth year "of the Independence of the United States" that the Constitution we now have was written.

There were, of course, significant constitutional developments on this Continent, not only before September 17, 1787 (the day the Constitution was completed by its Framers), but also before July 4, 1776. The thirteen Colonies, later to become States, wrote constitutions of their own well before the United States did. No doubt, the interest we now have in early Colonial and State constitutional developments depends, in large part, upon what happened in 1776 and after 1787—but we cannot hope to understand what we have now (and have had for two centuries) if we are not aware of what contributed to the evolution which culminated in the deliberations which produced the Constitution of 1787.
II.

It is evident, upon tracing the constitutions (or royal and other grants and charters) of the Colonies from "the beginning," that constitutional government was very much taken for granted by British Americans for two centuries before Independence. Virginia, for instance, could look back for its founding to a grant to Sir Walter Raleigh in 1584, and thereafter to a charter of 1606; that is, it could look back to the time of Shakespeare for its formal origins. By the 1776-1787 period, North Americans had become quite practiced in reliance upon written constitutional instruments, especially since such instruments were useful in their disputes with the British government.

They were accustomed as well to the rights, duties and expectations of Englishmen under the British Constitution (both written and unwritten), not the least of which was the much-acclaimed common-law system. Thus the Declaration of Independence, in which Great Britain is roundly condemned, is itself firmly grounded in the British Constitution as well as in the natural rights of mankind. (The same combination is evident in many of the original State constitutions.) The British Constitution may be seen as well even in the ways the Americans organized themselves—in conventions and other assemblies—as they maneuvered, State by State and yet altogether, to arrange and to justify (that is, to explain) what they were doing in setting out on their own.

These maneuverings included many resolutions and actions in the various Colonies, with Virginia and Massachusetts quite prominent in early resistance to British authority. The Congress, too, had had much to say before it issued its decisive statement on July 4, 1776. One Congress after another, which had become known as the Continental Congress (that is, the Congress for the British Colonies on the North American Continent), spoke repeatedly for the Colonies (and later the States) which the delegates in Congress represented.

Useful collections of documents are available which illuminate the doings of the pre-1776 Congresses. I need mention, by way of illustration, only a few of the things which set the stage for 1776 and 1787.¹¹²

A convenient place to start is with the Resolutions of the Stamp Act Congress, October 19, 1765, in which the Colonists insist that they should not be taxed without proper representation, that they are entitled to trial by jury as well as to the right to petition for redress of grievances. They can further point out that there is no
way they can be properly represented in the British Parliament, which means that if they are to be taxed, it must be by their own legislatures on this side of the Atlantic.

Then there were the Declarations and Resolves of the First Continental Congress, October 14, 1774. Various acts of Parliament are condemned by the Colonists as “impolitic, unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights.” They thus insist upon their rights as Englishmen, especially those rights assured by the common law. Their own charters and the statutes of England (some of them incorporating and extending the common law) could also be invoked on this as on many other occasions.

These declarations and resolves were followed up a week later (October 20, 1774) with the announcement by the Continental Congress (in “The Association”) that the Colonists would neither import nor consume British goods. Of course, the British government did not take lightly these various manifestations of Colonial resistance. That government then made what turned out to be a critical mistake, a recourse to arms.

The Americans could thereupon take a righteous defensive posture, as may be seen in their Declaration of Causes of Taking Up Arms, of July 6, 1775. They describe themselves as a “Congress of delegates from the United Colonies,” and they challenge what they take to be Parliament’s claim to be entitled to “make laws to bind [them] in all cases whatever,” even though no member of Parliament was chosen by them. They do insist that they do not mean to dissolve the union between Great Britain and the United Colonies. “Necessity has not yet driven us to that desperate measure,” they report—which seems to be their way of warning that they may well be on the verge of so serious a step, a step they hope will be guided (if they are driven to it) by the Divinity which they several times invoke. Two days later, July 8, 1775, a petition of grievances and requests was sent to the King from the Continental Congress.

The following year the Continental Congress could report that “no answer whatever to the humble petitions of the colonies for redress of grievances and reconciliation with Great Britain [had] been or [was] likely to be given.” Still, it was vital to the way the Colonists regarded themselves and hence their cause that they make the repeated attempts they did to explain themselves and that they work through what we call channels. Such reliance upon both argument and established processes reflects respect for constitutionalism and the rule of law. In this way they were not only in-
voking the rights of humanity, but also challenging the British with key principles from their own great tradition. The British were thus challenged by the best of themselves—and in such a way that, in the long run, they could win only by losing: a British military victory in North America (riding roughshod over constitutional principles and over fellow-citizens) might well have threatened seriously the rule of law and hence English liberties even at home.

III.

And so things moved inexorably (it now seems) to the decisive step on July 4, 1776. Two months before the Declaration of Independence, in mid-May of 1776, the Continental Congress recommended the formation of appropriate governments in the various Colonies:

Whereas, His Britannic Majesty, in conjunction with the Lords and Commons of Great Britain, has, by a late Act of Parliament, excluded the inhabitants of these United Colonies from the protection of his Crown; and whereas, no answer whatever to the humble petitions of the colonies for redress of grievances and reconciliation with Great Britain has been or is likely to be given; but the whole force of that kingdom, aided by foreign mercenaries, is to be exerted for the destruction of the good people of these colonies; and whereas, it appears absolutely irreconcilable to reason and good conscience for the people of these colonies now to take the oaths and affirmations necessary for the support of any government under the Crown of Great Britain, and it is necessary that every kind of authority under the said Crown should be totally suppressed, and all the powers of government exerted, under the authority of the people of these colonies, for the preservation of internal peace, virtue, and good order, as well as for the defence of their lives, liberties, and properties against the hostile invasions and cruel depredations of their enemies; therefore

Resolved, That it be recommended to the respective Assemblies and Conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have been hitherto established, to adopt such a government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.

The resolution set forth here (the concluding half-dozen lines of this pronouncement) preceded in time its considerably longer preamble. (The resolution, which is said to have been the work primarily of John Adams, was passed on May 10, 1776; its preamble,
on May 15, 1776.) The preamble, in its mustering of grievances against His Britannic Majesty, anticipates the authoritative constitutional position set forth two months later in the Declaration of Independence.

We notice that it is taken for granted in this preamble that it is a proper concern of government that there be preserved “internal peace, virtue, and good order,” along with the defense of “lives, liberties, and properties.” We also notice that the various Colonial governments are obliged to look out not only for the happiness and safety of their respective constituents, but also for the happiness and safety of “America in general.” It would seem that the legitimate powers of government are comprehensive and that there is a recognizable national community from the outset, and hence a general interest to take account of along with particular local interests.

We have observed that the May 15th preamble (or explanation) followed the May 10th resolution (or action). That was true as well of much of the constitutional and political development in that period. Often, the explanation, or formal authority, followed upon the actions taken. Even so, the actions were not complete—they were not sufficiently grounded—until the Declaration of Independence could present the decisive explanation of what they were doing.

IV.

The May 1776 recommendation of the Continental Congress was taken to refer to the need for the development of written constitutions in various of the Colonies. The Congress made this suggestion despite the fact that it itself had no written constitution at that very time, nor would it have any (technically speaking) for five more years. The American people—the more or less United Colonies (and later, the United States)—did many remarkable things (perhaps the most decisive things in the history of this country) without any written national constitution, through a twenty-year period, from about 1760 to 1781 (the year in which the Articles of Confederation were fully ratified). Of course, there had been a general understanding about how their Congresses might proceed (such as the somewhat dubious arrangement whereby each Colony had one vote), as they addressed themselves to awesome questions about independence, war and peace, and the finances of the Country, as well as to the day-to-day tasks of raising and equipping armed forces, appointing and supervising officers and diplomats, and generally conducting the military and international efforts of
the Country. Perhaps no foreign policy or war policy in the nation's history has been as successful as the policies formulated and administered by the Continental Congress in the 1770s and the 1780s.

Although they had no written constitution to guide them, the original delegates to the Continental Congress knew both how to conduct themselves and what to expect from each other. They certainly knew how to organize themselves to make the best possible use of their somewhat limited powers—and the same can be said of the Federal Convention which met in Philadelphia in 1787. But then, in thus conducting themselves, they were in the best tradition of the British Constitution which itself is, for the most part, not written.

Still, the delegates believed it prudent in their circumstances that (whatever the status of a national constitution) the Colonies should look to their forms of government, and this the Continental Congress advised the Colonies in May 1776.

V.

It should be noticed that the Congress made this suggestion to the Colonies despite the fact that the Colonies themselves (like the Congress) had also been doing things critical to the national effort without the written constitutions which now seemed to be called for—and they had been doing what they had done in defiance of British laws and constitution, both written and unwritten.

Among the things the Colonies had been able to do was to supply delegates and resources to the Continental Congress. Colonial legislatures and conventions (or other associations) had been organized, sometimes pursuant to royal or other charters and grants, sometimes without (if not even in opposition to) such authority. There seems to have been a general understanding about what the people of the various Colonies could do—and this they were doing. It was also recognized that, by and large, a competent people (in each Colony) was conducting its own domestic affairs, that two centuries of experience in virtual self-government (due, in large part, to the great distance from Europe) could be confidently drawn upon.

The amazing thing is not that the Colonies (and later the States) could work as well as they did with no written constitutions or with rudimentary constitutions—after all, Great Britain also operated thus, or so it seemed. Rather, the amazing thing is that the British government did not recognize in time how competent the
American people had become. No doubt, the lessons learned by Great Britain in dealing with the Americans later served them in good stead when they came to deal in turn with independence-minded Canadians, Australians and New Zealanders (but not with the Irish?).

Although the State constitutions may not have been absolutely necessary in order for the States to be able to continue to do the work the Colonies had begun, they did prove critical in shaping the Constitution for the Country. The States are very much taken for granted in the Constitution of 1787: the existence of States, their names, their boundaries, and their relative sizes and relations are drawn upon. Various State institutions (including State constitutions) are also taken for granted, such as their modes for determining suffrage, their election machinery, their provisions for citizenship, their militia, and the dominance of their legislatures.

Critical as well are the many provisions in the State constitutions, available to the Federal Convention in 1787, which could be considered, refined and rearranged in the shaping of the Constitution of the United States.

VI.

Virtually all of the thirteen Colonies/States responded to the May 1776 recommendation by the Continental Congress that they look to their forms of government. In so doing, did they not take for granted the superintending authority of Congress? At no time, so far as we can tell, did the separate Colonies do much (if anything) completely on their own in declaring themselves independent or in establishing new forms of government. All this is related to the insistence by Abraham Lincoln that the Union preceded both the States and the Constitution.

And so there are repeated recognitions (often implicit, sometimes explicit) of the supremacy of the Continental Congress (or the Government of the United States) in its proper sphere. Furthermore, so long as the Colonies depended upon their Colonial charters and grants, they tacitly recognized the superiority of the British government in its proper sphere.

It is evident again and again in the Colonial/State constitutions, that much was carried over from the past. For example, the Pennsylvania constitution could provide that “trials shall be by jury as heretofore . . .” Attempts are made to reduce to writing the people’s rights and various governmental arrangements—but different things are recalled or emphasized in various States (depending, it
There is never a completely new beginning. And there is usually provision made for getting things moving under the revised dispensation, with considerable reliance upon already existing intra-State divisions, local officialdom and practices, and upon accepted property allocations. A proper study of State constitutions should include a review of the predecessor charters, grants and constitutions. Even so, it can be instructive to examine, however briefly, the State constitutions that were in force at the time the Federal Convention sat in 1787.

VII.

The two oldest State Constitutions in place in 1787 were those of Connecticut and Rhode Island, since those States had continued to use (with modifications) their longstanding charters (of 1662 and 1663, respectively). Connecticut had, in 1776, prepared itself a very short Constitution which confirmed its 1662 charter with appropriate adjustments (and with the guarantee of a few rights). Rhode Island made adjustments in the preamble of its 1663 charter. These two States were evidently content to continue with these revamped charters, which constitutions they would use until 1818 and 1842, respectively.

Even though these two States did not have modern constitutions, but rather relied upon documents more than a century old, they were still able to conduct themselves much as the others did. True, Rhode Island stayed out of the Federal Convention in 1787 and was quite late thereafter in ratifying the Constitution. (But North Carolina, too, was quite late in ratifying, even though it had been represented in the Convention.) Connecticut, on the other hand, was active in the Convention and was thereafter quick to ratify the Constitution.

The situations in Connecticut and Rhode Island remind us of something to be found in all of the States: there was continuity with more than a century of experience and thought with respect to government and the rights of Englishmen in all of the States. We are again reminded of the entire body of law, written and unwritten (including the common law), which was taken for granted in all of the States, and which was taken for granted as well in the general constitutional understanding. We are also reminded that these State governments generally conducted themselves the same way toward their citizens whether or not they had explicit bills of
rights (or whether or not this or that particular right was included in such bills). Certainly, it was difficult (if not impossible) to determine, on the basis of what was said or done by any delegate in the Constitutional Convention, what his State Constitution was like or what its bill of rights (if any) included, unless he mentioned it. Connecticut, for example, was regarded as one of the more democratic States, despite its quite old-fashioned constitution.

It is useful, before we consider briefly the other eleven State constitutions of 1787, to sum up what I have been saying here about the British and American Constitutions. For the British, more of their constitution is written than we usually recognize, since it includes such celebrated parts as Magna Carta, the Petition of Right, and the Habeas Corpus Act. On the other hand, for Americans, more of their Constitution is unwritten than we recognize, since it includes reliance upon such things as an accepted mode of interpretation, the common law and an understanding of what and where the States are. As one examines the State constitutions in the 1776-1787 period, one can see how much is taken for granted and never spelled out in the States (as well as in the Articles of Confederation).

Americans have generally had recourse to constitutions with a larger proportion of written elements than have the English. This may be, in part, because America has been less homogeneous in its population and circumstances than was England and hence needed to have things spelled out more if there was to be a reliable consensus. Related to this is the fact that the Americans have had to move faster than the English: one may not need to spell out as many things (or reduce them to writing) if one's constitution is the product of slow growth and adaptation. The parts of the British constitution which are written, such as Magna Carta and the Petition of Right, tend to be associated with crises in English constitutional development.

The continuous American crisis from the 1760s on may help account for the widespread recourse in this Country to written State and National constitutions, something which may be seen as well in that most influential constitutional document, the Declaration of Independence.

VIII.

We have looked at the two oldest State Constitutions as of 1787, the revamped charters of Connecticut and Rhode Island. Recourse was had to them by these Colonies/States in response to the
May 1776 recommendation of the Continental Congress to the Colonies.

Nine of the other State Constitutions, in place in 1787, were prepared during the 1776-1778 period. These were, in the order in which they were completed, Virginia (June 29, 1776); New Jersey (July 3, 1776); Delaware (September 21, 1776); Pennsylvania (September 28, 1776); Maryland (November 11, 1776); North Carolina (December 18, 1776); Georgia (February 3, 1777); New York (April 20, 1777); and South Carolina (March 19, 1778).

Two of these nine Constitutions (those of Virginia and of New Jersey) were completed before the July 4th Declaration of Independence by the Continental Congress. All of them can be considered responses, at least in part, to the May 1776 recommendation by the Continental Congress that the forms of government of the Colonies be looked to. One of these constitutions (that of South Carolina in 1778) had been preceded by another Constitution, that of March 26, 1776. Several of these constitutions leave the way open to a possible reconciliation with Great Britain. The earlier they are, the more likely are they to do so.

The two remaining constitutions in place in 1787 were those of Massachusetts (March 2, 1780) and New Hampshire (June 2, 1784). New Hampshire had had a much earlier constitution, one of January 5, 1776, which had not waited upon the May 1776 recommendation by the Continental Congress (but which, like the 1776 South Carolina constitution, seems to have been in response to an earlier recommendation by the Continental Congress).¹¹ Five

Virginia (with the oldest of the “modern” constitutions in place in 1787) is considered to have led the way into constitution-making, just as it was to do in the Federal Convention. It is considered to have been especially influential because of its bill of rights, which was adopted on June 13, 1776 (six weeks before its constitution).¹¹⁶ The 1777 constitution of New York has been praised as one of the best-written State constitutions available before 1787, second only perhaps to the 1780 Massachusetts constitution. Yet the New York constitution was written by a convention very much on the run, because of the events of the war.

Each of the thirteen constitutions has its distinctive features. The earlier they are, the shorter they are apt to be (even shorter than the Constitution of the United States was to be). The longer ones, ranging from two to three times the length of the Constitution of the United States, are found among the later constitutions.
(those of New York, Maryland, New Hampshire, and Massachusetts, in ascending order of length).

There were, despite their differences, significant affinities among the constitutions made from 1776 on. They are, first of all, very much American constitutions. By this time, of course, English only is used in such documents (not Latin, as in an occasional early charter). More important, all of the States had been formed in some ways by the constitutional crises of the preceding decade.

No doubt, some of the later constitution-writers were aware of what had happened in other (and especially in adjoining) States. Throughout, it was the American people (a people made more nearly homogenous politically by the perceived oppressiveness of the British government than they might otherwise have been)—it was the American people who moved in and out of, and through, these State constitutions. The differences in their constitutions reflected their varied circumstances, something which should be evident in the abundant quotations in Lecture No. 15.

And so experimentation continued, as the Americans made their way (in effect, and without fully realizing it) to Philadelphia in 1787.

IX.

There are several additional features of the constitutions written from 1776 on which should be noticed here. Perhaps most dramatic for us, aside from the massive fact that these were constitutions ordained and established by the authority of the American people (State by State), is that so much of the language now familiar to us from the Constitution of 1787 may be found here and there in the pre-1787 State constitutions. We can also see various institutions and processes tried out in one constitution or another before being refined into the form we now have in the Constitution of 1787. We can see as well arrangements which have been rejected after having been tried in one or another State constitution. Pennsylvania, perhaps somewhat under the influence of Benjamin Franklin (the president of its State constitutional convention of 1776), proved a fertile testing ground for experiments that few others wanted to have much to do with thereafter—particularly its reliance upon a plural executive, a unicameral legislature, and a requirement that most bills could not become law until the convening of the legislature after the one in which the bills were first introduced.

We have already noticed that State governments continued do-
ing pretty much what they had been doing, whether they kept (in modified form) their ancient charters or devised quite "modern" constitutions. It seemed to be taken for granted in all of the State constitutions in force in 1787 that the State legislatures had plenary powers, being entitled (perhaps even obliged) to concern themselves with virtually all aspects of the lives of their people, including their morals and their education. Those State governments are able to do whatever government naturally does, subject of course to the limitations that may have been long recognized in English constitutional law (including common-law and natural-right principles) or that may have recently been provided for in declarations of rights.

X.

Although there is relatively little said in these State constitutions about the powers of the State governments, there is considerable concern, just as there can be said to be in the Constitution of the United States, with arranging relations among the three branches of government and for getting and keeping "the machinery of government" working. There is considerable detail provided about how various officers of government are to be chosen, what the age, residence, property and other qualifications of such officers and of their electors are to be, how legislative bodies and other government activities are to be organized, how legislative seats are to be apportioned, and what is to constitute a quorum in legislative bodies. These are immediate, practical concerns that have to be settled one way or another. No doubt much that had happened in recent decades helped determine how these matters were to be provided for, what precautions should be taken (for example, against executive interference with legislative processes), and how the people are to be kept informed of what goes on in government (with provision for ready public access to legislative journals in which, for example, the Yeas and Nays of legislators are recorded).

The striking diversity in suffrage qualifications from State to State helps account for the decision of the Federal Convention to leave this matter to determinations in the several States (even when national officers are being chosen). To have proceeded otherwise would have risked considerable, and probably unproductive (and certainly unnecessary), political disturbances in those States.

Although the people are obviously in control, it was considered necessary, or at least desirable, to leave it to the people, State by State, to determine precisely who would be able to speak for the
people. Rule by the people is evident from the beginning. It can even be said that there was implicit in the Americans’ approach to things not only universal adult suffrage, but perhaps also the eventual elimination of slavery. The last two State constitutions adopted before 1787 (Massachusetts and New Hampshire) shared a feature which was to prove critical for the Constitution of the United States: these were the only two State constitutions prior to 1787 which were submitted to the people in their respective States for ratification.

This movement toward ratification by the people found its culmination in those arrangements made in the Constitution of 1787 which permitted the Framers of the Constitution to open the Preamble with “We, the People of the United States” (unlike the Articles of Confederation, which had begun by presenting that constitution as having been agreed to by the delegates of the thirteen States named there, not simply by the people of one united Country).

XI.

Ultimate control by the people is reflected in many of the provisions in the State constitutions. Various of the elements in their bills of rights (which proved important sources for the first ten amendments to the Constitution of the United States) are put in terms of the rights of the people (such as the rights to trial by jury, to habeas corpus, to the common law itself, to due process, and to property). Much is made of annual elections, of representative government, and of majority rule—all of which reflect deference to the people. The people are to be further enhanced in their control by the disparagement of hereditary privileges and by the elimination of primogeniture, as well as by an insistence upon the liberty of the press.

Control by the people is probably reflected as well in the assumption in the pre-1787 State constitutions that the legislative branch of government is to be dominant. Legislative supremacy may even be seen, I have suggested, in constitution-framing itself, since what the writers of constitutions do—and do in an authoritative way—is what legislatures do. Legislative supremacy was evident as well in the actions of the General Government, where virtually all of the governing that was done for the Country as a whole was done for a decade by the Continental Congress, which (as we have seen) not only legislated but also made appointments, supervised military operations and conducted foreign relations.
When one looks at the legislatures of the States before 1787, one finds that the dominant house of the legislature is usually the more numerous branch. It is that house which typically has the first say (and sometimes the only say) about revenue bills. Sometimes it is also the house which chooses the other house, perhaps from among its members.

There are occasional affirmations that there should be distinct branches (or departments) of government. That was believed to be consistent with the legislative power to choose the governor (which was often provided for), to choose and otherwise to provide for judges, and to impeach all officers. Usually there was no veto power given the governor; certainly, there was no hint of any power of judicial review in the courts. The executive becomes more important in the later State constitutions and, of course, in the Constitution of the United States. But the dominance of the legislature, which is considered the branch of government closest to (and more directly subject to control by) the people, is never lost sight of, especially as precautions are repeatedly taken against military usurpation (which is associated with executive power). The ultimate power of the people is further reflected in one vital power or right retained by the people, that power or right of revolution which is several times referred to in the State constitutions and which was being vigorously exercised by the American people from 1776 on, if not even before.

The people, in turn, are held in check by their informed recognition of the natural rights of mankind and by their pious submission to the judgment of God. Whatever a few here and there might have said (or meant) about "the separation of church and state," it is difficult (perhaps impossible) to read the pre-1787 constitutional documents without recognizing the widespread (and evidently deeply-felt) reliance by Americans, in public life as well as in private, upon Divinity. This reliance (as we will see in Lecture No. 15) is reflected in the considerable recourse to oaths of various kinds (oaths which often included affirmations of certain religious opinions). Such reliance was usually accompanied by the general desire for religious toleration, a desire which was intensified by the recognition that there was considerable religious diversity in the Country at large and hence among citizens who moved around from one State to another. This desire for toleration (which is of course enshrined in the First Amendment) was considered consistent with continuing official reliance upon, and even public financial support of, religious institutions in the various States.
Indeed, it probably would have been generally said in 1787, a Godless people cannot long be trusted to be self-governing.

XII.

We have several times noticed that during much of the Revolutionary Period the United States was technically without a written Constitution. Although the Articles of Confederation were written by a committee of the Continental Congress in 1776 and adopted by that Congress in 1777, they were not fully ratified until 1781.

But Congress did begin its work before Independence and continued until it was replaced by the legislature provided for by the Constitution of 1787. Congress could do what it did, and could be accepted in doing what it did, because people generally relied upon the same kind of understanding of what government should do as may be seen in the States (where governments could carry on equally well with or without written constitutions). Do we not see here, in effect, the British constitutional system (largely unwritten) still guiding the American people, with the Continental Congress being allowed by the States the narrowest range of powers conceded by Americans to the British government?

We are thus reminded again that we should not make too much of written constitutions, especially when a people's character and habits are sound. And we can wonder: to what extent, and in what way, is it assumed among the Americans of 1787 that the Union is, that the United States should (and will) continue to exist, that the States are dependent upon the people of the Union, and that the American people will (one way or another) govern themselves?

With or without written constitutions, State or National, Americans did govern themselves—and could have been expected to continue doing so indefinitely. After all, as we have noticed, this people, without written constitutions, made and successfully executed perhaps the most important decisions ever made by the United States. We should also notice that various other peoples, even when they have copied for themselves the American Constitution of 1787, have not been able to do very well at governing themselves.

To speak, then, of unwritten constitutions as I have throughout this lecture series is a way of talking about the critical habits and vital character of a people.
XIII.

The Federal Convention of 1787 drew upon the existing State constitutions and upon much more, including the remarkable British constitutional heritage shared by the Americans. That Convention reshaped the national constitution for an even better attempt at self-government by the Country as a whole. Perhaps the written Constitution of 1787 was needed primarily in order to restore to the national legislature the plenary powers over those matters of obvious national concern (such as taxation, commerce, peace, and war) which had been imprudently whittled away under the Articles of Confederation. Those Articles and their implementation show the effects of an unhealthy suspicion of all central government, in part because of the then-recent unhappy experience of Americans with the British government.

The Constitution of 1787 both responded to what had gone before (by drawing upon it or departing from it) and ratified (or reinforced) what was already being done. The written Constitution of 1787 made explicit the general constitutional framework within which the States would continue to work, including new States that would have to be properly shaped for admission to the Union. The Constitution of 1787 provided Americans overnight, so to speak, the general constitutional framework that the English had had centuries to develop for themselves and within which Colonial charters, grants and other political and judicial arrangements had found places.

Particularly significant for the Framers who concluded their work on September 17, 1787 was, we all know, the Declaration of Independence proclaimed on July 4, 1776. We can see in that Declaration an authoritative invocation of the relevant constitutional heritage and of the guiding principles upon which the American people were to draw in framing both their State constitutions and their Constitution of 1787.

Fundamental to all these developments (it is salutary to repeat) is the recognition that the American people, in the very framing of founding instruments for better governing themselves, exercised in its highest form the art of legislation.

13. Article IV

I.

The Constitution of 1787 becomes, in a manner of speaking,
more self-conscious after having provided for the General Government of the United States in Articles I, II, and III.

In Article IV, the Constitution can turn to the place of the States in the Union and to the relations of the States to one another. Although the States are made use of, dealt with and restrained in various ways in the first three articles of the Constitution (just as they are in the last three articles), it is in the central one of the seven articles of the Constitution of 1787 that the States are primarily, or at least substantially, dealt with. Much, then, turns around this article, an article in which the federalism of the regime is both recognized and disciplined.

There are four sections in Article IV, all of which can be said to regulate one "movement" or another. Section 1, with its Full Faith and Credit provision, is concerned with the movements from one State to another of "the public Acts, Records, and judicial Proceedings" of States. Section 2 is concerned with the movements, legitimate and illegitimate, of persons from one State to another. Section 3, with its provisions for new States and for the governance of Territories, is concerned with the movements of various parts of the Country from one status to another (that is, from Territory to State). Section 4 is concerned with those movements within States which bear upon domestic tranquility and their very form of government.

The matters dealt with in Article IV need not directly affect the activities of the General Government. The relations between, and the activities of States, do bear upon the prosperity and tranquility of the Country and can otherwise affect the character and the mood of the people upon whom the General Government depends. How republican the General Government can be may depend, at least in part, upon the form of government in "every State in the Union." I now consider, in turn, each of the four sections of Article IV.

II.

The Full Faith and Credit requirement, in Section 1, ministers to an obvious need, since there must be some rule as to how States are to regard each other's records and judicial proceedings. Otherwise, it would be uncertain what the effect is in all other States of the findings and determinations of any particular State, especially when those who are ruled against in one State take themselves and their property to another State. In Section 1, the powers of all
States are disciplined in order to enhance the dignity and effectiveness of official proceedings wherever they originate.

Since the final section of Article IV is addressed to the form of government of all the States, are not the conditions guaranteed which would make it more likely that the determinations in any particular State will be pretty much like the determinations in like circumstances in all other States? Such uniformity makes it more attractive than it might otherwise be for Americans generally to rely upon what happens in any particular State.

That such a provision is needed if any enduring Union is to be secured is reflected in the fact that even the Articles of Confederation, with their considerably looser relations among States, had a comparable provision (also in their fourth article):

Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.

The Constitution of 1787 adds to this kind of provision the grant of power to Congress to “prescribe the Manner” in which such things are to be proved, “and the Effect thereof.” This reminds us, still another time, of the general supervisory powers that Congress is intended to have under the Constitution of 1787. Someone should be able to say, in an authoritative manner, how the States are to receive and respond to what is submitted as the official doings of other States (particularly the doings in the courts of other States). There are more and less reliable ways of proving what has been done elsewhere, and Congress may choose among them.

A desirable uniformity in responses is to be sought. Notice the restriction placed upon Congress: it must lay down its rules “by general Laws.” This seems to be intended to keep Congress from meddling in particular cases, reminding us of the understanding in Anglo-American constitutionalism that the legislative power, however dominant it ultimately is, should not be permitted to interfere with the disposition of particular cases by the judiciary.

The arrangement in Section 1, with Congress empowered to lay down rules for handling relations between States, reminds us of the arrangement in Section 2 of Article III, where it is provided that the “judicial Power of the United States” shall extend to “Controversies between two or more States.” Amicable and productive relations among “sovereign” States, just as among “sovereign” citizens, are much more likely when there is a sensible government to supervise those relations.
III.

Section 1 provides, we have seen, for how various official doings of one State should be received and treated in other States. Section 2 continues with the concern of Section 1 by providing how persons from one State are to be received and treated in other States.

Three categories of "visitors" are anticipated: persons traveling (in ordinary circumstances) from one State to another; persons "flee[ing] from Justice" in one State to another; and persons "held to Service or Labour in one State" who escape to another.

The ordinary traveler (if a citizen) is entitled to be treated, in whatever State he is, the same way any citizen who resides permanently in that State is entitled to be treated in like circumstances. He is protected in effect both by the rule of law and by the reluctance of the local people to deprive themselves of "Privileges and Immunities" which they would have to give up in order to be able to deprive the visitor.

The rationale of the Privileges and Immunities guarantee in Section 2 of Article IV is indicated by the comparable provision in Article IV of the Articles of Confederation:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the Owner is an inhabitant . . .

We need not determine on this occasion what the precise purpose and effect may be of the differences in wording between these two provisions. Is it not likely that much the same concern is exhibited in both the Articles of Confederation and the Constitution of 1787, a concern particularly important because of what was known and what was expected about the considerable mobility of Americans in the United States?

We notice that there is in the Articles of Confederation an explicit exception for "fugitives from justice," something which the Constitution reserves for the second paragraph of Section 2, where there is what we know as the extradition (or "interstate rendition")
duty prescribed for the State into which a fugitive has fled. This extradition duty may be considered a special case of that general respect for the legal integrity of one State which another State is expected to exhibit.

The respect required for legal arrangements elsewhere is carried one step further when the persons who come from another State are not fleeing from justice, but rather are escaping from the service or labor required of them. Without such required respect, the borders between States, and the relations among States, are likely to become quite troubled.

What are the powers of Congress here? May Congress “prescribe the Manner etc.” in which the three provisions in Section 2 are to be carried out? Such a power is explicitly granted Congress in Section 1. Does the absence of such a grant in Section 2 suggest that Congress is not empowered to act here, that these matters are to be left primarily to State officials guided by their oaths? And, one may further wonder, are the National Courts available to help secure compliance with the various restrictions upon States found in Section 2 of Article IV?

Be all this as it may, we do move in Section 2 of Article IV from the rights of visitors to the disabilities of visitors—and hence to the rights or at least the powers of those whom the visitors are trying to avoid in the States from which they have fled.

IV.

Once various critical relations among States are addressed in the first two sections of Article IV, an even more critical relation must be addressed. What States are provided for in Article IV?

It is several times indicated elsewhere in the Constitution what constitute the States which are referred to throughout. The House-of-Representatives allocations in Section 2 of Article I indicate that thirteen States are anticipated as the original contingent (subject to their ratification of the Constitution). Provision is made in Section 3 of Article IV for additional States—for the “movement” of Territories of the United States into fully-empowered States of the United States. These States can expect to have their official doings treated the way the official doings of the original States are treated.

Precautions are taken to protect States already established, lest parts of them be removed or their separateness be destroyed without their consent. Notice that here, too, there is an emphasis upon the legislative branch of government, for these arrangements and rearrangements with respect to the States are emphatically said to
depend upon decisions by Congress and "the Legislatures of the States concerned." There is no reference here to "the executive Authority," something which had been relied upon in the extradition provision in Section 2, where the execution of laws is dealt with. Is it not particularly important that Congress should dominate the decisions about additional States, since the very composition of Congress may be considerably affected by such decisions? I do not mean to suggest, however, that the President may not attempt to exercise here the powers of review he generally exercises when any bill or resolution is passed by Congress.

It makes sense, then, that the General Government should have the powers it does with respect to the Territories, especially since Territories may eventually become States. By the time the Constitution of 1787 was written, Americans had seen (in the Northwest Ordinance) the sort of thing Congress was expected to do both in governing a Territory and in preparing the way for the creation of new States and their admission into the Union.

A massive fact has been taken for granted, it would seem, if not in the Constitution itself, at least in how it has been interpreted and applied from the outset: there are not to be, on the North American continent, any permanent second-class territories of the United States. This is anticipated by the Northwest Ordinance and is consistent with the assumption, drawn upon in Section 1 of Article IV, that Americans can expect to be treated like Americans wherever they go in their Country.

Nothing is said here or elsewhere, explicitly, about whether any States, once in the Union, may leave on their own. The reference in the Preamble to "a more perfect Union" suggests a permanent association. So may the detailed provision in Article V for amendments, which suggests that there may be no other way (aside from a legitimate recourse to the right of revolution) to make massive constitutional changes in a short time.

V.

We find in the final section of Article IV three duties prescribed for the Government of the United States, duties which must be performed if the States provided for throughout this article are to be appropriate for this Union. Protection is provided for republican institutions from subversive changes, for the territory of a State from external attacks, and for the life of a State from internal disturbances.

All this bears upon the relations among States and upon the
character of the Union. If, as we have seen in Articles I and II, State election arrangements are relied upon in the choices of Members of Congress and in the choice of a President, then the States should be of a character appropriate for a republican Union. The Government of the United States has a duty, on its own initiative, to judge that character. Notice, on the other hand, that the States are themselves to judge whether any particular manifestation of "domestic Violence" requires intervention by the United States. The General Government may act on the basis of the Republican Form of Government Guarantee, independent of any State request, for still another reason: if republican government has indeed been subverted in a State, then that State may have no legislature whose opinion must be awaited or need be respected by the United States.

The question remains as to what is meant by "a Republican Form of Government." The variety of the State constitutions, as of 1787, suggests how flexible republicanism was taken to be. The United States Constitution of 1787 was itself probably regarded as an exemplary manifestation of republican government. That constitution helped shape State constitutions thereafter, including the development of the requirement that a written instrument be part of constitutional government in every State.

It is easy to dismiss the Republican Form of Government Guarantee as vague, and hence inconsequential. Must not the standards for republicanism remain flexible, lest reliance upon technical compliance mask a spirit which is unrepublican? Still, various things are expected: monarchy and hereditary aristocracy are ruled out; elections are to be genuinely free, not charades; the people are ultimately to be in control, which implies that they should be at liberty to discuss public affairs fully. Questions can be raised about such things as bicameralism in the legislature and the degree of separation of powers among the branches of a government. Was it not reasonable to rely upon the Country as a whole, republican in and at its founding, to police what would happen here and there, intervening when a particular State was clearly out of line? Such intervention on behalf of the Country could be through one branch or another of the General Government, as circumstances indicated.

The infrequency with which the Republican Form of Government Guarantee has been resorted to for two centuries now may reflect the fact that it has not been much needed. The people are in control in this Country, and they manage to assert themselves wherever they are threatened (in one State or another) with loss of power, especially if they can retain the freedom of speech.
has been little for the General Government to do in local situations. A major exception has been with respect to the radical malapportionment into which State legislative arrangements have been permitted to deteriorate from time to time. The Supreme Court, relying primarily upon the Equal Protection Clause of the Fourteenth Amendment, has stimulated considerable reform here.\textsuperscript{118} But it might have been even better, allowing more flexibility (and hence less of a mechanical, numbers-based approach), if the Court had relied instead upon the Republican Form of Government Guarantee to shake up State legislatures in which minorities had systematically, and permanently, come to rule majorities. It might have been even better if the Congress had intervened to do all at once and uniformly what the Court has been obliged to do on a case-by-case basis.

But, it is sometimes said, the Congress presumes that a State has a republican form of government if Congress permits members from that State to take their seats.\textsuperscript{119} Still, may not the institutions of a State be republican for some purposes and not for others?

On the other hand, the Supreme Court said long ago that the Republican Form of Government Guarantee is not something that it can do anything with, that that guarantee must be left to the other branches of government to enforce.\textsuperscript{120} It is not clear why this should be insisted upon, especially since the United States is addressed in Section 4 of Article IV. One consequence of the Court’s abdication of its duty and power here is to require the Court to look to other provisions in the Constitution (as was done in the Reapportionment Cases) in order to deal with the chronic problems presented to it. But to resort to other provisions is likely to produce distortions and to conceal from view how well-crafted the Constitution is.

In any event, the Republican Form of Government Guarantee for the States reflects the principles of the regime.\textsuperscript{121} We notice that no such explicit guarantee applies to the United States as a whole (just as there is no Equal Protection Clause or no Contracts Clause applicable to the United States). Must not the American people as a whole be depended upon to keep the Government of the United States republican? There does not seem to be any other authority available for this purpose.

The linking, in Section 4, of the Republican Form of Government Guarantee with the protection against invasion and against domestic violence reminds us that the health of the soul (for the form of government is the soul of a regime) may presuppose the
soundness of the body (which is subject to physical attack). This is one more instance of the general awareness of the Founding Fathers that there is, in practical affairs, an intimate relation between the high and the low, between principled aspirations and material interests.

VI.

The need to defer to material interests, even when principles might seem to suggest otherwise, may be seen in the accommodations in the Constitution of 1787 to slavery.

These accommodations took several forms in the Constitution. We have noticed in Article I, Section 2, the counting of slaves in the allocation of seats in the House of Representatives. And we have noticed in Article I, Section 9, the immunity of the international slave-trade from Congressional interference until 1808. Here in Article IV, we can see provision made for the return of fugitive slaves to their masters. Also, the "domestic Violence" and "Insurrections" protected against may have anticipated, among other disturbances, slave uprisings in various States.

The debates should never end among us as to whether those compromises should have been agreed upon in 1787. Powerful arguments can be made on both sides, arguments that we today may not be able to appreciate fully since we are not likely to grasp how intractable the problem of slavery seemed then, even as it could be hoped (not without reason) that slavery would be gradually eliminated. Whatever the merits of the various arguments, it is clear that there were men among the Founding Fathers who hated slavery as deeply as we all do now. But they had good reason to believe that unless accommodations were made to the slavery interests of the South, there would be no continuing Union of the thirteen States. This seemed to them even more dangerous than the risks of a temporary compromise with slavery. Permanent disunion would not only have meant that two or more contending confederations would have existed in North America, but it would also have meant that at least one of those confederations would have been completely under the control of the slavery interests, able to import slaves as it pleased and able also to expand freely to the South, to the Southwest, and into the Caribbean, if not even into South America. It must have been difficult for the Framers of the Constitution to see how either the cause of freedom or the fortunes of the slaves themselves were likely to be served by such developments.
The only defensible alternative to compromise, then, may have been recourse to war—but the Free States were not strong enough in the late Eighteenth Century, compared to the Southern States, to be able to promote the abolition of slavery by the sword. On the other hand, if that majority of Southerners ultimately moved by slavery interests had recognized in 1787 how much stronger the Free States would become, relative to the Southern States, they might well have wondered whether it made sense for them to accept the Constitution, even with its toleration of slavery.

VII.

Time, I am suggesting, was on the side of freedom in this Country. The longer the Union prospered and grew under the Constitution of 1787, the weaker the Southern States became relative to the Free States. Had the Southern States waited still another generation, before making the move they did make in 1860, they probably would have been put down much more easily than they were during the Civil War.

Some may argue, however, that it was a matter of chance that things turned out even as well as they did, since slavery was finally eliminated under a Constitution which was unconcerned about, if not even friendly to, slavery. Such an argument does not give due weight to the fundamental antipathy of the American constitutional system, from the beginning, to slavery. That antipathy goes back, as we all know, to the Declaration of Independence, which ratified a principle of equality which in turn inspired and shaped anti-slavery sentiments for generations to come.

In addition, the American dedication to a republican form of government implicitly called slavery into question. The Constitution takes the rule of law for granted, even as it guards against violence both from abroad and at home. Yet slavery is itself usually a denial of the rule of law, resting ultimately upon sustained violence which cannot justify itself.

The overall inclination of the regime under the Constitution of 1787 was toward freedom and equality. Even the protection of the international slave-trade until 1808 recognized that Congress, left to itself, was likely to abolish the slave trade immediately. Furthermore, the controversial allocation to the Southern States of some seats in Congress based on their slave populations acknowledged that slaves were human, that they could not be considered as mere property. The even more controversial fugitive-slave provi-
sion recognized that, left to themselves, the Free States could not be relied upon to return slaves who escaped into them.

Various uses of language in the Constitution also testify to the dubious status of slavery in 1787, however marked the accommodation to it had to be. There is, first, the deliberate avoidance of the use of the words “slave” and “slavery” in the Constitution of 1787, reflecting both a general abhorrence of the institution and the universal hope that it would be eventually eliminated. There is also something revealing in the way the fugitive slave is referred to, compared to the fugitive who has been charged elsewhere “with Treason, Felony, or other Crime” and who can hence be referred to as “flee[ing] from Justice.” Not the slave: he is referred to as “escaping”—escaping from what? From “Service or Labour in one State, under the Laws thereof”—and we are thus reminded that slavery is keyed to State laws and that such laws simply may not be just.

It was no accident then that the decided majority of the people shaped by the Constitution of 1787 should have become (if they were not from the outset) so “dedicated to the proposition that all men are created equal” that they were eventually willing and able to make great sacrifices on behalf of strangers among them held in bondage by fellow-citizens whose material interests had blinded them to their original republican faith.

VIII.

The Secession to which the desperate slavery interests resorted in 1860 reminds us not only of the distortions which material interests can induce, but also of the perversion to which salutary principles can be put. For the South did stand for the critical prerogatives of States and for the importance of liberty, including unfortunately the liberty of men who seemed to be beneficiaries of a system of slavery which they could see no way out of (a system which enslaved master and servant alike).

It is well to be reminded that the States did exist: they derived their principal powers not from the United States but from the same people who, collectively, gave the General Government all of its powers. It is also well to be reminded that the powers originally recognized in the States were considerable, even with respect to many matters about which Congress can legislate. Congress is supreme, when it decides to act, but much is left for the States to do where Congress is not empowered to act or when Congress has chosen not to act.
How much the States should do, and how much Congress should do, may vary from time to time. The determination of who should use what powers and when is ultimately left in our constitutional system to the American people, that people who have ordained and established both the Constitution of the United States and the constitutions for all of the States in the Union. It is the people, after all, who choose, directly or indirectly, all the constitutional conventions, legislative assemblies, executive officers, and even judicial officers in the United States.

IX.

The States, we have seen, are somewhat systematically dealt with in Article IV: their character is assured; their relations with one another are prescribed; and their augmentation is provided for.

The Constitution can then turn in Article V to how the Constitution may be amended. Critical to the amendment process are the States provided for in Article IV. I will discuss the subject of amendments in my next lecture, during which we will return to the always challenging problem of slavery under the Constitution of 1787.

Thereafter, the Constitution can turn in Article VI to how this new constitution fits into the general scheme of things, a scheme which includes both the arrangements made prior to this constitution and the demands to be made of all officers, National and State, subsequent to the ratification of this constitution. I will discuss that subject in the lecture after next.

Finally, the Constitution can turn in Article VII to the ratification of this constitution. With the lecture devoted to that subject, we will be prepared to conclude this series of lectures, having seen (I trust) how sensibly the Constitution of 1787 is crafted.

14. Article V

I.

The Constitution pursuant to which both the General Government and the State Governments are to conduct themselves in national affairs is arranged by the end of Article IV. Powers are distributed among the branches of the General Government; the relations of the States with each other and with the General Government are provided for.

It was anticipated by the Framers of the Constitution that
amendments would be needed from time to time. It was generally understood that the unanimous consent required in the Articles of Confederation for any constitutional alteration should certainly not be retained for the new constitution.

One of the modes of proposing amendments—and the only mode relied upon thus far in amending the Constitution of 1787—is that amendments be proposed by the Congress, which the States would then be called upon to ratify in one designated way or another. There have been more than five thousand amendments introduced in Congress since 1789. Only thirty-three amendments have been proposed by Congress to the States for ratification; twenty-six of these have been ratified by the States (ten of these at one time, in 1789-1791).

State ratifications of amendments proposed by Congress have usually moved much faster than one might have expected. It has been reported that “one year, six months and thirteen days [is] the average time used in passing upon amendments which have been ratified since the first ten amendments” and that “three years, six months and twenty-five days has been the longest time used in ratifying.” This reflects the fact that amendments are likely only when there is general support for a change.

The Congressional mode of proposing amendments, Article V specifies, requires decisions by “two thirds of both Houses” of Congress. It seems that each House must vote separately. It has been suggested, “‘Two thirds of both Houses’ means two-thirds of a quorum in both houses.” It might seem that so solemn an undertaking as proposing a constitutional amendment should require two-thirds of the entire membership of each House of Congress, rather than two-thirds of the majority which make up a quorum. And yet, nowhere in the Constitution of 1787 is the whole number of the Houses of Congress said to be required in computing majorities (or super-majorities) no matter how serious the matter. In practice, of course, virtually all members are likely to be present for the more momentous votes.

Nothing is said in Article V about any formal role for the President in the amendment process. But since a two-thirds vote is enough to override a Presidential veto in ordinary circumstances, there might not have seemed to be any need to give him a formal part to play here. Besides, the States are to provide in this matter the check upon Congress that the President supplies when legislation is being considered. From the beginning, then, Congress alone has handled amendment-proposals, however much the President
may do in making recommendations and marshalling Congressional and State support for his position.

II.

The irrelevance of executives in the amendment process may also be seen in the alternative mode provided by the Constitution for proposing amendments. The Congress, "on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments."

We again notice that it is assumed that the legislative branch of government is supreme. The governors of the States do not seem to be depended upon here; whatever the State legislatures say seems decisive. An emphasis upon State legislatures, or upon conventions in each State (presumably organized under the direction of their respective State legislatures), may be seen as well in the ratification process.

The Federal Convention mode of proposing amendments means that the State legislatures are empowered to initiate action if Congress should prove delinquent. Of course, Congress could ignore the State applications for a Federal Convention, and there would be no way within the General Government to make Congress act—but that would be a rather blatant dereliction of duty on the part of Congress, subjecting its members to reproof and sanctions at the hands of their constituents. All of this means, therefore, that the people can get at a problem in more than one way.

May the State legislatures themselves propose amendments rather than ask Congress to call a convention for proposing amendments? And, one might also wonder, may Congress itself call for a Federal Convention rather than depend upon the States to do so? I consider each of these questions in turn.

It does not seem that the States can propose amendments of their own, since they are the ones to decide whether to ratify proposed amendments. Two quite different sets of judgment have to be made in the course of the amendment process. For the same reason, Congress is not asked to decide whether to ratify proposed amendments but only to prepare and offer them up for ratification. Such division of labor would seem to argue against permitting State legislatures to designate the specific amendment-proposals that a Federal Convention should consider, since the same legislatures would thereafter have to consider ratifying such proposed amendments. We should also notice, as a reason for not allowing State legislatures to propose amendments, that a well-crafted
amendment probably requires a deliberative body to develop it properly. Consultation between two houses of one legislature is feasible, and is done routinely, but hardly among dozens of legislatures. This too bears upon the question of whether State legislatures should be able to specify the precise language of amendments to be considered by a convention called to propose amendments, except perhaps as suggestions to be considered by such a convention.

Nor does it seem that Congress itself may call for a Federal Convention. But, it would seem, Congress can sit in effect as a constitutional convention to consider one or many possible amendments. In fact, Congress does this all the time—and in doing so, it can no doubt establish panels or committees (on a representative basis or otherwise) to advise Congress about possible amendments for it to propose. But Congress in proposing amendments must act by two-thirds votes, not by the majority votes that a convention could use.

III.

A Federal Convention called by Congress upon the application of the State legislatures is something which remains available at all times, even though it has not yet been resorted to for the purpose of proposing amendments to the Constitution of 1787.

Many questions remain open as to how such a convention might be organized. The circumstances of the only plausible precedent, the Federal Convention of 1787, were so special that that convention does not readily lend itself as a guide to future conventions called by the State legislatures for proposing amendments.

Three sets of questions present themselves: the first set is as to how such a convention may be called and whether its subject-matter can be limited; the second set is as to how such a convention is to be organized and how it should conduct itself; and the third set is as to what might be done by Congress and by the States in response to whatever such a convention does.

Much will depend, in dealing with all such questions, upon what Congress says. Several substantially different positions, each backed up by respectable arguments, confront us with respect to these various questions. This means, among other things, that it will be up to Congress to answer such questions in the event a Federal Convention seems to have been called for. The first thing Congress might have to decide is what kind of call by the State legislatures truly binds Congress, and in what way. Many conservatives today are in favor of a convention called for the purpose of
proposing a balanced-budget amendment, while many liberals are dubious about such an amendment. But most liberals and most conservatives are emphatically agreed that precautions should be taken to guard against "a runaway convention," one which would not limit itself to the single designated subject of a balanced-budget amendment.

It has been argued, with some force, that State legislatures can apply only for a general convention, that they cannot limit their applications. Does this mean that every application is to be treated as an application for a general convention, even if directed to one subject? But what of those applications which come from State legislatures which insist that their applications are to be treated as "null and void" if a convention cannot properly be limited to a single subject? This means, some argue, that many, if not all, of the thirty-two State applications sent Congress thus far calling for a balanced-budget amendment convention should be treated as defective.  

Even so, if two more balanced-budget amendment applications from State legislatures should be added to this list, will it not be difficult for Congress to ignore the demand? Will not Congress then take care of the matter, and avoid the problem of constitutional interpretation, by promptly sending out a balanced-budget proposal for consideration by the States?

Whatever happens in such circumstances, Congress would still have a great deal to say about what any Federal Convention would be like, how the Convention would be organized, how the States would vote in the Convention, how the Convention would conduct itself, and what would become of the proposals it prepared. It is well to be reminded, furthermore, that whatever any Convention (or, for that matter, any Congress) produces is no more than a proposal: it still has to be ratified by three-fourths of the States, pursuant to the arrangements designated by Congress, including arrangements as to how much time would be available and perhaps even precisely what questions would be put to the States. It should be remembered that the Federal Convention of 1787 had to make its own proposed Constitution acceptable to the Articles of Confederation Congress before that body would transmit the proposed Constitution to the States for their consideration.

In short, a sensible Congress, guided by a prudent people, is not likely to permit either a federal convention or the State legislatures to do anything that would wreck the constitutional system we now
have, a system which has long been regarded with favor by the people of this Country.

IV.

Another useful way of talking about the amendment process is to look, however briefly, at a half-dozen suggestions which have been made much of in our own time, but which have not yet been converted into constitutional amendments.

An equal-rights amendment came within a few States of ratification before time ran out for it in 1982. One must wonder, however, whether such an amendment would have made much difference upon ratification: have judicial decisions, especially under the Fourteenth Amendment, made it seem unnecessary? Some efforts are now being made to revive it, even though it is coming to be regarded as moot, with Congressional legislation (and the growing political power of women) accomplishing most of what was intended. Such an amendment has largely come to be regarded as "merely" symbolic both by its proponents and by its opponents.

A reapportionment amendment aroused considerable interest in the 1960s. "Of the many attempts to get Congress to call a constitutional convention," it was pointed out a few years ago, "so far the closest to success came in the spring of 1967 when thirty-three state legislatures, only one short, petitioned Congress to call a convention to propose an amendment to reverse Supreme Court rulings requiring both chambers of state legislatures to be apportioned on the basis of population." But, it has turned out, the court-ordered reapportionments of State legislative districts, which began in 1962, have so changed the composition of State legislatures that it is unlikely that a reapportionment amendment which would permit a return to the old way of doing things (or, rather, of not doing things) would stand much chance of success.

Supreme Court rulings forbidding State-sponsored prayers in public schools have also prompted calls for amendments. Here, as elsewhere, there are condemnations by some of what are considered _de facto_ judicial "amendments" of the Constitution. Still, it has proved difficult to get agreement upon a school-prayer formula which would be acceptable even to the various sects of believers interested in such prayers, with perhaps a recourse to silent meditation the only thing that can be generally agreed upon—and that could well pass judicial muster during the next decade even without a constitutional amendment.

Far more troublesome, and also in response to court decisions, is
the call for an amendment permitting the States once again to regulate abortions even in the first trimester of a pregnancy. Whether there was indeed either a constitutional basis or a political need for what the courts have done here remains a serious question, especially since there had been (prior to the Supreme Court innovations in 1973[128]) a steady liberalization by State legislatures of abortion regulations. However that may be, this seems to be the one issue of our time that simply will not go away in the fashion of the equal-rights amendment and the reapportionment amendment, both of which may have been superseded by events. Still, it should be noticed that it is hardly likely that many State legislatures, even if left free to do so, would return abortion law to what it was before 1973.

An effort has been made to invest the District of Columbia with the representation in Congress of the States, and an amendment was proposed by Congress to that effect in 1978. But the seven-year time limit for its ratification has expired, leaving its proponents with the alternative of attempting to accomplish their purpose by simply having Congress convert most of the District of Columbia into a regular State.[129]

I addressed in Lecture No. 8 the proposals we hear from time to time about changing the mode of selecting the President of the United States. This is, I have argued, one constitutional amendment which could have a considerable effect upon the way we do things. But, I have also argued, it is far from clear precisely what that considerable effect would be.

On the other hand, I have suggested, it is difficult to see that any balanced-budget amendment, however it should be proposed and ratified, would have its intended effect. All of the proposals which have been taken seriously include prudent provisions allowing Congress, by three-fifths or some other “super-majority,” to override any balanced-budget restriction. Even more serious, this general approach assumes that there exists a thing readily identifiable as a budget and that it is reasonably evident when it is balanced (or when expenditures are matched by receipts).

Does not the balanced-budget amendment approach exhibit a naive political sense, one which depends much more upon words alone than sound politics calls for? Such approaches can be little more than rhetorical exercises, which can have the bad effects not only of cluttering up the Constitution but also of misleading people as to what a constitution can and cannot do. The best critique I have seen recently of a balanced-budget amendment is by a conservative columnist who had this to say about the matter:
The Senate last week fell just one vote short of approving a constitutional amendment intended to compel a balanced federal budget. It would be pleasant to say good riddance to bad rubbish, but we have not heard the last of this folly.

This was the proposed amendment: "Outlays of the United States for any fiscal year shall not exceed receipts to the United States for that year, unless three-fifths of the whole number of both houses of Congress shall provide for a specific excess of outlays over receipts."

A second section would permit Congress to waive these restrictions in wartime. A third section would make the amendment effective in the second fiscal year after its ratification.

Gary Hart of Colorado made the best speech in the Senate against the proposed amendment.

Hart made four points: (1) The resolution lacks constitutional feel. (2) From a parliamentary standpoint it is plainly grotesque. (3) Its terms could easily be evaded. (4) It is unenforceable by any acceptable means.

The amendment, he said, "would wage war on the Constitution's majestic simplicity."

Indeed it would. Constitutional amendments ought to address either the rights of the people or the structure of government.130

This column ends with observations which apply to much more than the current controversy:

A balanced federal budget ought not to be constitutionally mandated, whether by an amendment that originates in Congress or by an amendment that originates in a constitutional convention. It is a bad idea in either event.

The way to get a balanced budget is to elect responsible men and women to Congress. It is a humiliating confession of irresponsibility that this amendment should ever have been considered.131

Of course, if a balanced-budget amendment should work, we might then resort to an amendment absolutely forbidding crime in the streets and still another insuring that only the most virtuous should serve in public office. We could even adapt to this latter amendment the provision in the 1776 Maryland Constitution that "a person of wisdom, experience, and virtue, shall be chosen Governor, on the second Monday of November, seventeen hundred and seventy seven, and on the second Monday in every year forever thereafter, by the joint ballot of both Houses [of the General Assembly]." We can thus usher in the age of voodoo constitutionalism—or, as Madison Avenue (but not James Madison) would put it, better living through sophistry.
The balanced-budget-amendment proposals do have the merit of stimulating us to think about just what a constitution is and is not. Similarly, the equal-rights-amendment proposal and the abortion controversy stimulate us to consider first principles and even the very nature of things.

The provision of a workable amendment process presupposes, as we have noticed, that the American people retain their ultimate authority—and that standards exist by which they may examine and modify constitutional arrangements as the need arises. Even the concern expressed from time to time by the Framers of the Constitution about guarding against the tyranny of the majority reflects both the people's authority and the existence of enduring standards. To speak of "tyranny" means that a distinction is recognized between good government and bad. There is not likely to be much concern about any tyranny of the majority except in a regime where the people are powerful.

It is evident throughout the Constitution of 1787, and especially in the Article V provisions for amendments, that efforts have been made to permit the considered opinion of the people to have its effect. It is the whole people, not just the majority of the moment, which is to have its way.

It is also evident throughout the Constitution that it is taken for granted that standards exist in the light of which the General Government, the people, and the State Governments are to conduct themselves. Such standards are, of course, to be brought to bear in determining what amendments are to be proposed and what amendments are to be ratified. Since the very word "amendment" presupposes the good, Article V looks to changes for the better.

It is implied by Article V of the Constitution of 1787 (just as it is implied by the provision in Article VII for the ratification of the Constitution) that there are standards by which the Constitution itself may be judged. This implication goes back to at least the Declaration of Independence, where it is recognized that peoples are entitled to choose constitutional arrangements to serve the enduring ends of government, several of which ends are reaffirmed in the Preamble to the Constitution.

And so Article V can anticipate that the Congress may sometimes "deem it necessary" to propose amendments. This, too, is consistent with the Declaration of Independence in that it recognizes that the people of the United States may (and should) ex-
amine their Constitution and its effects in order to test them by some set of principles.

Where do such standards come from? Do they always exist? How are the people to be made and to be kept good, at least to the extent of permitting them to make proper use of their Constitution? One thing at least is certain: the standards to be employed by the people, however much they may be reflected in and reinforced by the Constitution and the way it is put together, are not themselves either created or established by the Constitution. They are the standards ultimately seen in the recourse a people always has to the right of revolution, a doctrine which can be offensive to the ears of the fearful, the thoughtless and the tyrannically-minded.

We might wonder whether certain kinds of amendments would be inappropriate in that they would go against the spirit of the Constitution as a whole. Is not freedom of speech implied by the amendment process itself, to say nothing of the way the entire constitutional system is supposed to work? Would not those amendments be improper which deny the ultimate power of the people? And yet the Constitution does recognize, again and again, that there are better and worse ways of arranging for that people's ultimate power to exert itself.

In any event, the amending power (like any other political power) is hedged in, whether or not people are aware of it, by natural-right considerations bearing upon justice and the common good.

VI.

Congress applies enduring standards, and especially (it is to be hoped) the dictates of prudence, not only in considering what amendments are to be proposed to the States, but also in determining what the mode of ratification is to be in the States. In all but one instance since 1789, the Congress has provided that proposed amendments were to be considered for ratification by the State legislatures, not by State conventions chosen for that purpose.\textsuperscript{132}

It can make a difference, of course, which ratification mode is used, just as it can make a difference when an amendment is proposed or how long a time is allowed for its consideration by the States. The Federal Convention in 1787 made it clear that it believed that ratification of its proposed constitution should be done by State conventions called for that purpose, not by State legislatures. And that Federal Convention had the prestige to be able to
get its way with the Continental Congress which sent out the Constitution to the States for their consideration.

It is evident from the Constitution, as well as from our constitutional practice, that it is completely up to Congress to determine (if it should choose to do so) how proposed amendments are to be handled in the States. The State power to ratify amendments is not inherent in the States, but rather is granted them by the Constitution.

Congress can determine how long an amendment-proposal remains alive. It could probably even provide that all State legislative decisions on such matters should be by majority vote. Congress can also provide guides to States resorting to applications for a call for a Federal Convention to propose amendments. Some, however, may consider it prudent for Congress to say as little as possible on this subject, leaving it free to maneuver.

The formal amendment provisions of Article V have been criticized as "undemocratic": "One-fourth of the states plus one, which could reflect the will of much less than one-fourth of the people, could block amendments desired by a large majority [of the country]." These arguments are very much like those we have considered in Lecture No. 8 with respect to the mode of selecting Presidents. Is it not likely that the differences between States, on the question of a constitutional amendment, will be on other than a population basis?

Do we not see again and again in the amendment arrangements both the ultimate authority of the people and the restraints the people place upon themselves so as to be able to make the best use of their authority?

VII.

It has been generally recognized that it is up to Congress to determine when an amendment has been ratified. Here, as elsewhere, someone must have the last word. The National Courts have generally stayed out of this, properly so, since it is evident that constitution-writing, and constitution-amending, is more like what a legislature does than what a court or an executive does.

It is sometimes said, however (as Woodrow Wilson once said), that the Supreme Court is "a constitutional convention in continuous session." And so it can be explained,

Chief Justice Marshall characterized the constitution-amending machinery as "unwieldly and cumbrous." Undoubtedly it is, and the fact has had an important influence upon our institu-
tions. Especially has it favored the growth of judicial review, since it has forced us to rely on the Court to keep the Constitution adapted to changing conditions.\(^3\)

Do not such observations expose judicial review, if used thus, as indeed an unconstitutional usurpation by the courts of the amendment-power provided exclusively for the Congress and the States to exercise? Have not such innovations been justified in large part only because of a general failure to appreciate how well the original Constitution of 1787 is “adapted to changing conditions”?

Of course, constitutional customs can gradually change without any explicit amendments—and that can be expected. This has been seen in the emergence of political parties and in the way Presidential electors are expected to vote. Also to be expected are the rules and precedents developed over centuries by Congress and the States with respect to various aspects of the amendment-process, such as the effect of any State’s attempt to rescind its ratification before three-fourths of the States have ratified a proposed amendment. Is not the important thing here that there be a fairly clear understanding, preferably well ahead of time, as to what the rules are? Much may depend upon how Congress happens to write the rules or what customs have happened to develop.

All this is related to the rule of law. Certainly, it is important, if the spirit of fair play is to prevail, that the people be assured that there is a plausible, and known, way for everyone to follow. Congress (subject to supervision by an alert people) is the only branch of government able to provide “traffic control” here, just as the Articles of Confederation Congress did in 1786-1789 with respect to the development of a new constitution. Things don’t just happen: there is a route to be followed if the proposing and the ratifying of amendments are to be done in a manner apparent to all.

Justice Hugo L. Black, himself a legislative veteran, summed up the authority of Congress in this fashion:

The Constitution grants Congress exclusive power to control submission of constitutional amendments. Final determination by Congress that ratification by three-fourths of the States has taken place “is conclusive upon the courts.” In the exercise of that power, Congress, of course, is governed by the Constitution. However, whether submission, intervening procedure or Congressional determination of ratification conforms to the commands of the Constitution, call for decisions by a “political department” of questions of a type which this Court has frequently designated “political.” And decision of a “political question” by the “political department” to which the Constitution
The Constitution of 1787

has committed it "conclusively binds the judges, as well as all other officers, citizens and subjects of... government." Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn assurance by the Congress that ratification has taken place as the Constitution commands. Upon this assurance a proclaimed amendment must be accepted as a part of the Constitution, leaving to the judiciary its traditional authority of interpretation.136

Is not this quite different in spirit from Marbury v. Madison—and properly so?

VIII.

We have considered the limitations placed upon the amending power by the very nature of the Constitution, if not by the nature of nature. There remains only, on this occasion, to consider the restrictions placed in Article V itself upon the amending power, the restrictions which take the form of the proviso 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 it's equal Suffrage in the Senate."

Some have wondered whether a two-stage amendment process might not be resorted to, first to eliminate this proviso in Article V which protects certain arrangements from ordinary amendment and thereafter to amend those arrangements. But would not such a devious way of proceeding be against the spirit of the Constitution? If Congress and the States are willing to do this, then they admit that they consider themselves bound only by the form of the Constitution.

No matter how many "back-ups" there may be in the Constitution to protect any arrangement from ordinary amendment, they could be circumvented by those who do not recognize that the Constitution relies on both good sense and good faith (which, indeed, may be related to one another).

The references in the Article V proviso to "the first and fourth Clauses in the Ninth Section of the first Article" are to the two following provisions:

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.
No Capitation or other direct, Tax shall be laid, unless in Pro-portion to the Census or Enumeration herein before directed to be taken.

These two clauses are connected in the Article V proviso as being beyond any amendment whatsoever before 1808. The first of these clauses protects the power of any original State (and particularly, in practice, South Carolina and Georgia) to continue to import slaves from abroad until 1808. The inclusion here of the second clause, with respect to capitation or other direct taxes, fits in with the provision in the first clause protected here, “but a Tax or duty may be imposed on such importation, not exceeding ten dollars for each Person.” It was recognized by the Framers that taxes might be used (properly or otherwise?) to accomplish social-political purposes—and these provisions are intended to guard against the use of the tax power to discourage (if not even to abolish) the international slave-trade before 1808.

We can thus see how the Framers anticipated possible evasions of the restrictions that had been laid down. The fact that such evasions had to be anticipated reflects an awareness at that time of the peculiar vulnerability both of the international slave-trade protection and of the Senate-equality provision. But, it might be wondered, if the slave trade is vulnerable, why not the institution of slavery itself? Why is not the Fugitive-Slave provision in Article IV also protected against amendment, as well as the provision in Article I whereby slaves are counted toward representation?

The domestic institutions of slavery were evidently believed to be already secure enough from interference through Constitutional amendments because there were enough Southern States to prevent unfriendly amendments. South Carolina and Georgia must have recognized in 1787 that they were alone in the demand for international slave-trade protection until 1808 and that the other States (Southern and Free States alike) might try to stop the slave trade by amendments as soon as the Constitution was ratified and everyone was “in.” This provision exposes, therefore, the unpopularity of the international slave-trade. This is unlikely to be recognized by those who fail to appreciate how uncomfortable the Framers were with the compromises they had felt obliged to make with slavery in 1787.

We see, once again, that the parts of the Constitution have to be thought about, and fitted together with care, if the overall sense of the document is to be appreciated.
Also vulnerable from the outset, of course, was the constitutional compromise which permitted even the smallest States the same representation in the Senate as the largest. The disparity among the States in 1787 is reflected in the fact that each of the three largest States (Virginia, Pennsylvania and Massachusetts) had as much representation allocated to it in the House of Representatives, where population determines numbers, as the four smallest States combined (New Hampshire, Rhode Island, Delaware and Georgia). It did not seem either fair or workable to the larger States, therefore, that the small States should be treated equally in the Senate. The smallest States were aware of this opinion, and so insisted upon appropriate protection in Article V against any use of the amendment power to change their standing in the Senate. We are reminded, once again, that if something is not obviously fair, it is vulnerable.

Fortunately, the Senate equality irrevocably assured by the Constitution is far less of a concern today than it once was, especially now that we have national parties which cut across State lines. In fact, we now see perhaps unanticipated merits of the original Senatorial arrangement, since it does lead to two Houses in the Congress which are apt to be significantly different in composition and experience, thereby making it more likely that legislative proposals will receive thorough consideration.

The two sets of guarantees against amendments in Article V do suggest that the States ratifying the Constitution in 1787-1788 recognized the likelihood that once they ratified it they would not be able to leave the Union on their own. Is not this recognition reflected in the fact that Georgia and South Carolina required the slave-trade assurance against amendments and that the smallest States required the Senate-equality assurance against amendments? Does not the amendment process laid down in Article V itself imply, as we have noticed, that there may be no way to secede unilaterally, short of an exercise of the natural right of revolution? If three-fourths of the States have to agree to effect any explicit change in the constitutional arrangement, however minor, should a smaller proportion of the States be able to make a major change (such as withdrawal from the Union) on their own?

The requirement, in effect, of unanimous consent before there can be a change in the Senatorial arrangement in the Constitution also contributes to the expectation that those who are "in" are fully (and irrevocably) in. Senate equality goes back, as we have
noticed, to the equality of the States in the one-house legislature under the Articles of Confederation.

These and other elements in the Constitution of 1787 remind us that a people cannot easily (if ever) get altogether away from their origins, even when those origins are somewhat accidental in character. They remind us as well of the practical limits placed upon constitutional amendments because of what is deeply engrained in a way of life, a way of life which is better or worse depending upon the deference paid therein to standards grounded in justice and the common good.

15. **ARTICLE VI**

I.

The Constitution of 1787 is, in a manner of speaking, completed by the end of Article V: the Legislative, Executive and Judicial branches of the General Government are provided for in Articles I, II and III, respectively; the States, which are dealt with and relied upon throughout the Constitution, are systematically addressed in Article IV; and amendments to the Constitution are provided for in Article V.

Now, in Article VI, the Constitution must be put in its constitutional context. This article turns to how the new constitution fits into the general scheme of things, a scheme which includes both a recognition of the undertakings entered into prior to this Constitution and a specification of the demands to be made of all officers, National and State, subsequent to the ratification of this Constitution. Central to Article VI is the celebrated Supremacy Clause—the designation of the Constitution and certain laws and treaties as "the supreme Law of the Land."

There are three paragraphs in Article VI. Let us consider each in turn.

II.

It is provided in the first paragraph of Article VI, "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." It is of course taken for granted here that the United States existed before the Constitution of 1787.

When did the United States come into being? The language,
"under the Confederation," refers to the United States under the Articles of Confederation. We know that Congress acted pursuant to the Articles long before they were ratified in 1781, perhaps before they were proposed to the States by Congress in 1777—and, in effect, ever since July 4, 1776, when the United States was first announced as such to the world, if not earlier. It may even be said that the Constitution of 1787 merely reconstituted the political order of the United States, something which the Declaration of Independence recognized that a people is always entitled to do in attempting to better its lot.

There have been those (such as many in the South, before the Civil War) who have argued that the present United States came into being only in 1789 upon the inauguration of the first new government under the Constitution. It was further argued that that Constitution was made by the States, not by the People of the United States (notwithstanding the language of the Preamble to the Constitution of 1787). This has been taken to mean that the States which made the Constitution could (without majority consent) unmake it—and go their separate ways.

Abraham Lincoln presented, in its most poetic form, the argument in opposition to this when he said, "Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal." His mode of dating goes back, of course, to 1776 and the Declaration of Independence. Does not his use of "fathers" point to ancestors and hence to the people, and not to the States, as the makers of the Country, something which is further emphasized by the use of "nation" and of "conceived," terms which imply birth (or, again, a people)?

The Civil War was fought, in part, over how the origins of the Country were to be understood, from which understanding follow various powers both of the States and of the General Government of the United States.

III.

Assurance is given by the first paragraph of Article VI of the Constitution of 1787 that the United States will consider itself bound under the Constitution by those debts and engagements of the United States which were valid under the Confederation. The claimants thus assured no doubt included Americans as well as foreigners and other nations. The distinction between "Debts contracted" and "Engagements entered into" may be the distinction
between commercial and financial obligations on the one hand, and
treaty and other such obligations on the other hand.

It is taken for granted that the Country's word is to be kept, something which constitutional government itself very much de-
pends upon. It was several times indicated in the Federal Conven-
tion of 1787 that any prospective general government under a new
constitution should honor the undertakings of its predecessor gov-
ernments under the Articles of Confederation. One such undertak-
ing, several times referred to in the Federal Convention, was with
respect to the Northwest Territory and the understanding (pursu-
ant to the Northwest Ordinance) that the people of that Territory
could expect one day to be able to form States which would be
accepted in the Union as full partners of the original thirteen
States.

No doubt, it was considered both expedient and just to honor
the debts and engagements of the United States. Property and
promises are to be respected. Questions may remain, of course, as
to precisely what debts and engagements had been "valid . . . under
the Confederation." Would not that depend upon the law at the
time of the transactions being referred to as well as upon a general
sense of right and wrong?

We can thus see that the common law, which is itself critical to
the constitutional context which the Federal Convention took for
granted, would probably be looked to for some guidance as to what
the valid debts might be that the United States owed. Here and
elsewhere, in any event, enduring standards outside the Constitu-
tion must be looked to if the General Government established by
the Constitution of 1787 is properly to serve justice and the com-
mon good.

IV.

It is provided in the second paragraph of Article VI, "This Con-
istitution, 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."

Only the laws made pursuant to this Constitution are to be part
of "the Supreme Law of the Land," which seems to exclude the
laws made by the Congress under the Articles of Confederation.
But, of course, the new Congress can reenact, or otherwise ratify, whatever laws made by its predecessors that it wishes to retain.

Treaties, however, are a different matter. Other countries are entitled to treat the United States as continuous, since from the "outside" they must deal with this country as it presents itself (whatever may be happening to its constitutional organization at home). An agreement made "under the Authority of the United States" can bind the Country indefinitely, unless perhaps there is something so obviously questionable about the treaty arrangement entered into that the other contracting parties should have recognized that the treaty might well be repudiated by a successor government.

But, assuming a proper treaty has been duly ratified, there is not likely to be with respect to a treaty the kind of concern about "validity" that there may be about supposed debts and engagements. It is unusual to bring to bear upon an assessment of treaties and their effect the kinds of considerations of right and wrong which common-law issues raise.

We again see in this paragraph an acceptance of the past even as the future is being prepared for. It should be noticed, however, that the treaties referred to here do not take precedence over the laws of the United States, but only over the constitutions and laws of the States. The General Government of the United States should be able to determine what, if any, effect a treaty is to have in the domestic life of the Country. Here, as elsewhere, the Congress must have the decisive voice.

V.

It is important to notice that the Supremacy Clause in the second paragraph of Article VI seems to be primarily concerned to direct the States, and particularly "the Judges in every State," in the way they are to conduct themselves. State judges have particularly to be addressed thus since they may be moved primarily by local loyalties (that is, by "the Constitution or the Laws of [their] State"). The important requirement seems to be that the judges, as well as the other officers, of a State not presume to sit in judgment upon the Constitution, laws and treaties of the United States. It was prudent to insist upon this since it seemed that much of the judicial business of the United States might be conducted in State courts for some years to come. It remained to be seen, that is, how soon the National Courts would be developed by Congress and how extensive they would be.
The National Courts do not have to be addressed by the Supremacy Clause, if only because they are much more immediately under the control of Congress (and not only through its impeachment power). Besides, it was evidently expected that judges in the National Courts would routinely defer to the Constitution, laws and treaties of the United States.

The Constitution, laws, and treaties of the United States are all to be regarded as authoritative by State judges. If these instruments should seem to contradict each other, then State judges must look to the General Government for guidance, with presumably the most recent action of Congress or of the National Courts serving as their most reliable guide. The critical power of passing judgment upon laws and treaties of the United States is left to the General Government, not to the States.

The language, “the Laws of the United States which shall be made in Pursuance [of the Constitution],” seems to refer, most obviously, to the laws that are made by the Congress established by the Constitution. This language looks to the laws that will be made, in contradistinction to the treaties “made, or which shall be made.” It is hardly likely that State judges are hereby being empowered to do something that the National Courts are never said by the Constitution to be empowered to do. That is, State judges are not being licensed to examine acts of Congress for their constitutionality. All that the judges are required to do is to determine whether, in fact, something which is submitted to them as a relevant law of the United States has indeed been made (and is still in force) pursuant to the legislative mode prescribed in Article I of the Constitution.

Thus, the Supremacy Clause, which is sometimes looked to as providing some basis for the power of judicial review of acts of Congress says little if anything about the prerogatives of National Courts. Rather, it assumes much about the powers of the Congress of the United States when it makes laws and of the powers of the President when he acts in cooperation with the Senate in the making of treaties.

VI.

The “in Pursuance thereof” language, therefore, looks more to the formal adequacy of a purported law of the United States than to its “constitutionality.” The “in Pursuance” language is more likely to mean “following upon” or “made after this Constitution is
adopted” than it is to mean “in conformity to the Constitution” (in the sense of “constitutionality” used today).

And so, once again, I have touched upon that question of judicial review already examined at some length in these lectures. It is a question which does bear upon one’s understanding of the principles of the Constitution. It should be noticed here, since the status of State constitutions and laws has been referred to, that the Judiciary Act of 1789 anticipated that State laws might be challenged for their constitutionality under the Constitution of the United States, but not any laws of Congress. This is consistent, of course, with the arrangement laid out in the Supremacy Clause.

It is sometimes said, however, that judicial review of acts of Congress is to be expected under a written constitution. But, as I have already noticed in this lecture series, parts of the English Constitution (such as Magna Carta and the Habeas Corpus Act) are written. Yet, I dare say, no English judge would presume to use a written part of the British constitution to set aside an act of Parliament. On the other hand, he might try to interpret such an act to make it consistent with the constitution as it is generally understood.

This is not to suggest that a State government may never encounter an act of Congress which it regards as unconstitutional. If it does, it should certainly say so—and should at least urge the members of Congress from that State to try to do something about it. Indeed, it was in the Congress (with echoes in the State legislatures) that the great public debates about constitutionality were to be found in the early decades of the Republic. This could be seen, for example, in the Alien and Sedition Acts controversy, in the Embargo Acts controversy, and in the Tariff Acts controversy. In the United States Supreme Court, we have noticed, only two acts of Congress were generally recognized to have been declared unconstitutional before the Civil War, one in 1803, the other in 1857—and of these, I have suggested, the second (Dred Scott) was clearly wrongly decided, and the first (Marbury v. Madison) was probably wrongly decided.

Nor is all this to suggest that the courts, both National and State, should not use the Constitution in interpreting acts of Congress. The courts are entitled (perhaps even obliged) to assume (at least until Congress indicates otherwise) that Congress intended to proceed in accordance with the obvious meaning of the Constitution. In addition, the courts have to look to the Constitution for guidance in those circumstances where Congress has not yet spo-
ken. Especially should this be so in those controversies between the States that the United States Supreme Court is expected to decide.

Would it not be salutary as well to consider looking to the National Courts to secure compliance with the various restraints upon the States found in Section 2 of Article IV, at least in those instances in which Congress has not yet acted? In some instances, of course, a sensible Congress would recognize that such a controversy is more judicial than legislative in character and hence best left to the United States Supreme Court to deal with.

VII.

It is provided in the third paragraph of Article VI, "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."

It is consistent with the precedence seen again and again in the Constitution that here, too, legislators, both National and State, should be mentioned first. The order seen here—the Legislative, the Executive, and the Judicial—is that found in the ordering of the first three articles of the Constitution (as well as, thereafter, in the ordering of the elements in the Bill of Rights). The "history" of the General Government under the Constitution is also relevant here: Congress was the first branch to come into being (in 1789); it then determined who had been chosen President and arranged for his inauguration; later, the President nominated Supreme Court judges for the Senate to confirm.138

The references here to the legislators and executives of the States remind us that only the judges of the States were referred to in the Supremacy Clause (in the second paragraph of Article VI). By and large, it seems, it was expected that securing the States' respect for the Constitution, laws and treaties of the United States would depend upon State judges: perhaps State legislators and executives would be largely guided by their judges here, especially if State judges should have been implicitly empowered by the Constitution to decide whether State enactments have been superseded by the Constitution, laws and treaties of the United States. It might have been thought that the State legislators and executives could be in
effect checked in the courts when they strayed from proper support of the Constitution.\textsuperscript{139}

Thus, when State officers happen to step out of line, measures may be taken by State judges and ultimately by the General Government to protect the interests of the United States.

VIII.

It is evident throughout the Constitution that officers of government are to be kept in line partly because of their competing interests, partly because of their rectitude, and partly because of the people's supervision. The rectitude of officers of government, both National and State, is looked to in the requirement for the oaths prescribed by the Constitution.

Presumably Congress can supply the text of the required oaths for General Government officers and, if the State legislatures do not do so adequately, for State officers as well. Presumably, also, the oath required need not be as elaborate as (even though it may be modeled upon) the oath laid down for the President in Article II.

We can once again see, in this provision for oaths, that there are standards drawn upon which exist independent of the law. Certainly, belief in the efficacy of an oath depends upon the habits, opinions and character of the people from whom the officers of government are drawn. Thus, as we have seen, both the Country and a body of standards exist independent of the Constitution, however important the Constitution may become for both the Country and its standards.

The oath required, however much elaborated by Congress, need only include the promise that one will support the Constitution. It is hardly likely that such an oath, required as it is of every National and State official in the Country, presupposes that each such official understands the Constitution, but rather only that he is able to say that it takes precedence over all other political arrangements and allegiances in the Country. This means a recognition of the superior authority of the General Government, at least in its proper sphere. Among the implications of such an oath would certainly be the disavowal of any continued authority here of the British government, something which did not need to be made explicit after the end of the Revolutionary War and the ratification of a peace treaty.

A sampling of oaths drawn from the State constitutions in force at the time the Constitution of 1787 was drafted should suggest
what an oath to support the Constitution was intended to deal with. We can be reminded as well of the important (if not even dominant) political opinions of the day.

The Maryland Constitution, completed in November 1776, provided:

That every person, appointed to any office of profit or trust, shall, before he enters on the execution thereof, take the following oath; to wit: 'I, A. B., do swear, that I do not hold myself bound in allegiance to the King of Great Britain, and that I will be faithful, and bear true allegiance to the State of Maryland.'

Eighteen months later into the war, such an oath could become more elaborate, as may be seen in the March 1778 South Carolina Constitution:

That all persons who shall be chosen and appointed to any office or to any place of trust, civil or military, before entering upon the execution of office, shall take the following oath: 'I, A. B., do acknowledge the State of South Carolina to be a free, sovereign, and independent State, and that the people thereof owe no allegiance or obedience to George the Third, King of Great Britain, and I do renounce, refuse, and abjure any allegiance or obedience to him. And I do swear [or affirm, as the case may be] that I will, to the utmost of my power, support, maintain, and defend the said State against the said King George the Third, and his heirs and successors, and his or their abettors, assistants, and adherents, and will serve the said State, in the office of ———, with fidelity and honor, according to the best of my skill and understanding: So help me God.'

Two years still further into the war, the oath of allegiance could become even more elaborate, as may be seen in the March 1780 Massachusetts Constitution:

And every person chosen to either of the places or offices aforesaid, as also any person appointed or commissioned to any judicial, executive, military, or other office under the government, shall, before he enters on the discharge of the business of his place or office, take and subscribe the following declaration and oaths or affirmations, viz:

"I, A. B., do truly and sincerely acknowledge, profess, testify, and declare that the commonwealth of Massachusetts is, and of right ought to be, a free, sovereign, and independent State, and I do swear that I will bear true faith and allegiance to the said commonwealth, and I will defend the same against traitorous conspiracies and all hostile attempts whatsoever; and that I do renounce and abjure all allegiance, subjection, and obedience to the King, Queen, or government of Great Britain, (as the case
may be,) and every other foreign power whatsoever; and that no foreign prince, person, prelate, state, or potentate hath, or ought to have, any jurisdiction, superiority, preeminence, authority, dispensing or other power, in any matter, civil, ecclesiastical, or spiritual, within this commonwealth; except the authority and power which is or may be vested by their constituents in the Congress of the United States; and I do further testify and declare that no man, or body of men, hath, or can have, any right to absolve or discharge me from the obligation of this oath, declaration, or affirmation; and that I do make this acknowledgment, profession, testimony, declaration, denial, renunciation, and abjuration heartily and truly, according to the common meaning and acceptance of the foregoing words, without any equivocation, mental evasion, or secret reservation whatsoever: So help me God."

"I, A. B., do solemnly swear and affirm that I will faithfully and impartially discharge and perform all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution and the laws of the commonwealth: So help me God."

One can imagine from the tenor of such oaths the plight of Empire Loyalists, or Tories, among the Americans. A move into calmer times is evident in the June 1784 New Hampshire Constitution, which was prepared during the last year of the Revolutionary War, where it is said:

Any person chosen president, counsellor, senator, or representative, military or civil officer, (town officers excepted,) accepting the trust, shall, before he proceeds to execute the duties of his office, make and subscribe the following declaration, viz.

"I, A. B. do truly and sincerely acknowledge, profess, testify and declare, that the state of New-Hampshire is, and of right ought to be, a free, sovereign and independent state; and do swear that I will bear faith and true allegiance to the same, and that I will endeavor to defend it against all treacherous conspiracies and hostile attempts whatever: and I do further testify and declare, that no man or body of men, hath or can have, a right to absolve me from the obligation of this oath, declaration or affirmation; and that I do make this acknowledgement, profession, testimony, and declaration, honestly and truly, according to the common acceptation of the foregoing words, without any equivocation, mental evasion or secret reservation whatever. So help me God."

"I, A. B. do solemnly and sincerely swear and affirm, that I will faithfully and impartially discharge and perform all the duties incumbent on me as ——— according to the best of my abili-
ties, agreeably to the rules and regulations of this constitution, and the laws of the state of New-Hampshire. So help me God."

It should be evident from this sampling of oaths that such solemn undertakings were regarded as significant acts, perhaps even as a summary (especially in trying times) of one's constitutional principles.

IX.

The United States Constitution of 1787 evidently empowers Congress to determine, in varying circumstances, the appropriate oath to be required of National and State officials. The Constitution is quite firm, however, in providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." It is important, if we are to understand the constitutional thought of the Framers of 1787, to be clear about what this provision does not mean. Certainly, it does not mean what it is often taken to mean, that the Framers expressed their disapproval here of religious tests, thereby teaching us that religion and politics (or, as we would say, church and state) should be rigorously separated.

Their deference to religious sensibilities is reflected in their allowance of an affirmation in place of an oath, a substitution routinely permitted as well by various State constitutions of the day. This substitution defers (as we shall see) to the religious scruples of people such as the Quakers. On the other hand, the Framers' reliance upon religious sensibilities may be seen in their very recourse to oaths.

The prohibition in Article VI of a religious test seems to have been shaped not by abhorrence of these tests (although, no doubt, some members of the Federal Convention may have had their doubts about such things), but rather by an awareness of the problem (and hence the danger) of any effort by the General Government to prescribe a religious test for the Country at large, especially considering the known diversity in religious sentiments from State to State.

How the religious-test prohibition and the no-establishment provision in the First Amendment are to be interpreted depends, then, upon what is known about the constitutional context in which these provisions were prepared. This is related to what I have several times said in these lectures about the need to have a reliable notion about British constitutional history and the common law if
one is to appreciate the craftsmanship, and hence the sensibleness, of the Constitution of 1787.

It should be useful to look once again at the State constitutions in force at the time the Constitution of 1787 was drafted. It is evident from these constitutions, most of which were themselves drafted during the decade preceding the Federal Convention, that the general opinion of the community with respect to "the separation of church and state" was not what it has since been taken to have been.

We can see in those State constitutions that a reliance upon religious tests was often believed to be consistent with religious toleration (which was generally approved of) and even with a prohibition of the establishment of a religion (which prohibition can be found here and there in the earliest State constitutions).

It is instructive to review seven of the eleven State constitutions prepared shortly before the Federal Convention met. I present them in the order of ratification in their respective States. There may be seen here how religion was made use of politically even as a considerable (perhaps unprecedented) degree of religious liberty was insisted upon.\textsuperscript{140}

The 1776 New Jersey Constitution provides for religious toleration, even as it requires one to be a Protestant in order to hold various public offices:

That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor, under any pretence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.

That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.
The 1776 Delaware Constitution provides that every person who
serves in the State legislature or who is appointed to any office or
place of trust must "subscribe the following declaration":

I, A. B., do profess faith in God the Father, and in Jesus Christ
His only Son, and in the Holy Ghost, one God, blessed for ever-
more; and I do acknowledge the holy scriptures of the Old and
New Testament to be given by divine inspiration.

And yet this Delaware constitution can also provide this
assurance:

There shall be no establishment of any one religious sect in this
State in preference to another . . .

The 1776 Pennsylvania Constitution (of Benjamin Franklin?) ac-
knowledges in its preamble "the goodness of the great Governor of
the universe." It then provides, in its Declaration of Rights:

That all men have a natural and unalienable right to worship
Almighty God according to the dictates of their own consciences
and understanding: And that no man ought or of right can be
compelled to attend any religious worship, or erect or support
any place of worship, or maintain any ministry, contrary to, or
against, his own free will and consent: Nor can any man, who
acknowledges the being of a God, be justly deprived or abridged
of any civil right as a citizen, on account of his religious senti-
ments or peculiar mode of religious worship: And that no au-
thority can or ought to be vested in, or assumed by any power
whatever, that shall in any case interfere with, or in any manner
controil, the right of conscience in the free exercise of religious
worship.

Yet this Pennsylvania Constitution can go on to lay down this
requirement:

And each member [of the legislature], before he takes his seat,
shall make and subscribe the following declaration, viz: "I do
believe in one God, the creator and governor of the universe, the
rewarder of the good and the punisher of the wicked. And I do
acknowledge the Scriptures of the Old and New Testament to be
given by Divine inspiration."

And no further or other religious test shall ever hereafter be
required of any civil officer or magistrate in this State.

Thus, it is made explicit here that the required declaration is in-
deed a "religious test."

The 1776 Maryland Constitution combines, in one article, a con-
cern for "religious liberty" and a power in the legislature to secure
revenues "for the support of the Christian religion." It can then
add:
That no other test or qualification ought to be required, on ad-
mission to any office of trust or profit, than such oath of support
and fidelity to this State, and such oath of office, as shall be di-
rected by this Convention, or the Legislature of this State, and a
declaration of a belief in the Christian religion.

Immediately thereafter provision is made in the Maryland Constitu-
tion for those who find themselves unable to *swear* an oath:

That the manner of administering an oath to any person, ought
to be such, as those of the religious persuasion, profession, or
denomination, of which such person is one, generally esteem the
most effectual confirmation, by the attestation of the Divine Be-
ing. And that the people called Quakers, those called Dunkers,
and those called Menonists, holding it unlawful to take an oath
on any occasion, ought to be allowed to make their solemn affir-
manation, in the manner that Quakers have been heretofore al-
lowed to affirm; and to be of the same avail as an oath, in all such
cases, as the affirmation of Quakers hath been allowed and ac-
tioned within this State, instead of an oath.

The 1776 North Carolina Constitution deals much more tersely
with these matters (in two separate articles):

That all men have a natural and unalienable right to worship
Almighty God according to the dictates of their own consciences.

That no person, who shall deny the being of God or the truth
of the Protestant religion, or the divine authority either of the
Old or New Testaments, or who shall hold religious principles
incompatible with the freedom and safety of the State, shall be
capable of holding any office or place of trust or profit in the civil
department within this State.

The 1780 Massachusetts Constitution continues in the same tra-
dition, substituting "Christian religion" for "Protestant religion":

Any person chosen governor, lieutenant-governor, councillor,
senator, or representative, and accepting the trust, shall, before
he proceed to execute the duties of his place or office, make and
subscribe the following declaration, viz:

"I, A. B., do declare that I believe the Christian religion, and
have a firm persuasion of its truth; and that I am seized and pos-
sessed, in my own right, of the property required by the constitu-
tion, as one qualification for the office or place to which I am
elected."

Finally, we have an extended treatment of the dependence of
public morality upon institutional piety in the 1784 New Hamp-
shire Constitution, the last State constitution prepared before the
Federal Convention met in 1787:

As morality and piety, rightly grounded on evangelical princi-
pies, will give the best and greatest security to government, and
will lay in the hearts of men the strongest obligations to due sub-
jection; and as the knowledge of these, is most likely to be propa-
gated through a society by the institution of the public worship of
the DEITY, and of public instruction in morality and religion;
therefore, to promote those important purposes, the people of
this state have a right to impower, and do hereby fully impower
the legislature to authorize from time to time, the several towns,
parishes, bodies-corporate, or religious societies within this state,
to make adequate provision at their own expense, for the support
and maintenance of public protestant teachers of piety, religion
and morality:

Provided notwithstanding, That the several towns, parishes,
bodies-corporate, or religious societies, shall at all times have the
exclusive right of electing their own public teachers, and of con-
tracting with them for their support and maintenance. And no
person of any one particular religious sect or denomination, shall
ever be compelled to pay towards the support of the teacher or
teachers of another persuasion, sect or denomination.

And every denomination of christians demeaning themselves
quietly, and as good subjects of the state, shall be equally under
the protection of the law: and no subordination of any one sect
or denomination to another, shall ever be established by law.

This New Hampshire constitution goes on to provide that the
legislative and executive officers of the State must be of the Prote-
tant religion.

It is well to recognize, if one is to think properly about this gen-
erous sampling of State constitutions, that the Framers of the Con-
stitution of 1787 (and their counterparts in various States) were
politically sophisticated men, many of them no doubt of a relaxed
attitude personally about revealed religion. They seem, however,
to have appreciated the political usefulness of religion, if only in
the form of an outward conformity to local orthodoxy. The most
exalted manifestations of such usefulness may be seen in what
President Lincoln was able to do in his Gettysburg Address and in
his Second Inaugural Address.

Is it likely, therefore, considering the various religious tests
which had been so recently provided for in State constitutions, that
the Framers of the Constitution of 1787 considered religious tests
simply bad or improper? The samples I have collected here sug-
gest otherwise.

All this is not to deny, however, that the “no religious Test”
provision in the Constitution of 1787 eventually had the effect,
once the circumstances of its original development had been for-
gotten, of contributing to the now general opinion among Americans that government should never make use of religious tests. And so State constitutions began to imitate the Constitution of 1787 here as in many other ways.

No doubt there are sound arguments in support of this liberalizing development, but surely not the argument that this is what the Founding Fathers intended, however salutary the restraint they exhibited. All this is well to keep in mind as a reminder of how the Constitution may be misunderstood, especially if either the political astuteness or the legal craftsmanship devoted to it should be underestimated. Certainly, there is in the Constitution of 1787 far less of that indulgence in passion evident in various of the early State constitutions, which passion may be seen in the samplings I have drawn upon on this occasion.

We have seen in Article VI a determination that the past be respected and that the future be provided for. This article opens (in its acceptance of old debts) with a confirmation of agreements previously relied upon and it closes (in its recourse to oaths) with a guarantee of still more agreements to be relied upon hereafter.

The Constitution of 1787 is now ready for ratification. Critical to the Ratification Campaign was the justified expectation that a well-wrought constitution so combines the past and the future as to make likely for centuries to come a vital present.

16. **Article VII**

I.

I have, in this series of lectures, examined the Constitution of 1787, article by article. Now that the first six articles are finished, our constitution is ready for adoption. It is in the seventh (and final) article that ratification is provided for.

Each of the first four articles deals with one of the four “branches” (or departments) of government in the United States. Article I deals with the Legislative department of the General Government; Article II deals with the Executive department of the General Government; Article III deals with the Judicial department of the General Government. Thereafter, Article IV deals with State government, which constitutes the fourth “branch” of government in this Country.

From the perspective of the Constitution of 1787, State government is unitary: that is, the primary concern of the Constitution is not with which department of State government does what; rather,
the primary concern is with what State governments generally do, especially as that bears upon the effective use by the General Government of its powers. We have seen that those State-government doings, which are touched upon in the first three articles of the Constitution, are addressed somewhat systemically in Article IV, as are the very existence of new States and the character of, and relations among, all States.

Once the four "branches" of government are accounted for—that is, once constitutional expectations are established for the three departments of the General Government and for the States—, provision can then be made in Article V for amendments which permit changes in constitutional relations and in what government may do for or with the people of the Country. The importance of the States, in the national constitutional scheme, is again evident here.

Article VI recognizes the past and looks to the future as both old and new agreements are provided for. In Article VII, the next step in the constitutional career of the Americans is anticipated with the provision, "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." Here, too, the prudence of the Framers of the Constitution may be seen.

II.

There is in this ratification arrangement considerable astuteness. The proposed Constitution, it is assumed, will not be vetoed by the already-existing Congress of the United States. The Articles of Confederation Congress is relied upon to transmit to the States the Constitution which has been drafted by the Federal Convention of 1787. It is also relied upon to accept (in doing so) both the use of State conventions and the significance of the nine State ratifications provided for in Article VII.

The existing Congress (which was all of the General Government that the United States had then) was counted upon to go along with what the Federal Convention proposed—and the Federal Convention knew, from the outset, that it had to produce something that the Continental Congress could indeed accept, if only for purposes of transmittal to the States. Although Congress had the advantage of a constitutional status (under the Articles of Confederation), it recognized that the proposals made by the extraordinary (or extra-constitutional) Federal Convention had to be treated with the utmost respect, partly because of the reputations
of many of the Convention delegates, partly because of what the Country had come to expect from that Convention.

The respect accorded the proposal made by the Federal Convention invested that body with the constitutional significance now associated in Article V of the Constitution of 1787 with any convention called "on the application of the Legislatures of two thirds of the several States . . . for proposing amendments." It is salutary to be reminded that whatever comes out of any Article V convention must in effect pass muster by the Congress before it is transmitted to the States for their consideration, just as was true in 1787 with the proposal which came out of the Federal Convention. Although a national convention speaks with some authority, as the voice of the people of the Country, it does not have the last word. The voice of the people must be expressed in more than one mode for that voice to be fully authoritative. The people, this time as organized in the several States, must again be heard from.

The Federal Convention proposed, and the Congress agreed, that the best way to determine, in the circumstances, the response of the people to the Constitution prepared for them at Philadelphia was through conventions convened in the various States for this purpose. Once Congress designated this mode of proceeding, it was left to the State legislatures to arrange for the organization of appropriate conventions in their respective States.

The State governments were thereby obliged to assist in the establishment of an arrangement designed, at least in part, to permit the people of the Country to register with a certain immediacy their opinion about the proposed Constitution. No doubt, local politicians knew that they were being circumvented—but they must have recognized as well that they had no practical choice but to arrange for the conventions being generally anticipated in the various States. No doubt, also, attempts were made so to provide for the composition and the procedures of those conventions as to favor one result over another.

We should be reminded again by this sequence of events that the effects of constitutional provisions can very much depend upon the circumstances in which they happen to be applied.

III.

A federal constitutional convention was not provided for by the Articles of Confederation—but that was not considered an insuperable obstacle to overcome in 1786-1787. The convention which did meet was considered, in effect, to have acted as a special committee
of the Congress, providing Congress a proposal which it could then share (if it wished) with the States. Such a mode of preparing a proposal for Congress to send out to the States was evidently considered not inconsistent with the prevailing constitutional arrangements.

What was clearly inconsistent with prevailing arrangements was the proposal made by the Federal Convention, and not repudiated by the Congress, that ratification by nine States would suffice for the establishment of the Constitution between the States so ratifying. There was about this proposal the character of a revolutionary act, since any alteration of the then-authoritative Articles of Confederation did require the unanimous consent of the thirteen States.

Of course, there would be no constitutional problem if all thirteen States agreed—and therefore little was said about what would happen if there should be less than unanimous agreement by the States. Besides, irregularity in such matters was something the Americans of that day had learned to accommodate themselves to—as we have seen in their willingness to have Congress exercise its powers under the Articles of Confederation for several years before the Articles themselves were ratified. Eighteenth-Century Americans can be seen to have acted (on more than one occasion) pursuant to what the Constitution could reasonably be expected to become. Reliance upon nine States for a comprehensive amendment of the existing constitution anticipated, in effect, the reliance in Article V of the Constitution of 1787 upon three-fourths of the States for the ratification of amendments. (Since Rhode Island had refused to participate at all in the Federal Convention, nine did amount to three-fourths of the active States there.) The eventual ratification of the Constitution of 1787 by all thirteen of the original States meant, in effect, that the radical changes proposed by the Federal Convention were eventually authorized in substantial compliance with the mode of alteration laid down in the Articles of Confederation.

IV.

Another way of putting all this is to say that the delegates to the Federal Convention knew, and knew that it was generally believed, that they were expressing the considered sentiments of the Country at large. They were both bold and cautious in the way they proceeded—bold in the scope of the changes they wrote into the Con-
The Constitution of 1787, cautious in the manner in which they presented their doings.

An intriguing manifestation of caution may be seen in how the Convention delegates went about signing the final draft of the Constitution on September 17, 1787. The thirty-nine signers are collected according to States—with the arrangement of the States being that used theretofore in similar listings (as in Section 2 of Article I of the Constitution or earlier in the Declaration of Independence): the States are set forth in accordance with their geographical relations on the Atlantic Coast, starting from the North and East with New Hampshire and working their way South to Georgia. This particular arrangement may have to it more the "feel" of something natural than one which relies only upon an alphabetical sequence or upon some chronological sequence.

The delegates are not listed as endorsing the proposed Constitution. Rather, they are listed as witnessing to the fact that the Constitution had been "done" (that is, made) "by the Unanimous Consent of the States present." We are told by James Madison that this "ambiguous form" had been drawn up by Gouverneur Morris "in order to gain the dissenting members."¹⁴²

One could thereby sign as a "witness" even if one did not endorse the Constitution in its entirety. Elbridge Gerry of Massachusetts and Edmund Randolph and George Mason of Virginia held out against signing even on these terms.¹⁴³ Still, this mode of signing may have helped permit the Federal Convention to close on a harmonious note, in that those who refused to sign were shown that it mattered to the others whether or not they did sign.

An appearance of unanimity was given although, strictly speaking, it was the unanimity of "the States present," not the unanimity of all delegates present. Nor was it the unanimity of all the States which had been present at one time or another that summer. Although New York's delegation had not been voting for some weeks, since only Alexander Hamilton was present, the arrangement resorted to did permit Hamilton to sign as a witness under the name of New York. The general impression may even have (inadvertently?) been left that the New York delegation too had agreed to this Constitution.

It seems to have been recognized in 1787 that it mattered immediately, for the fate of the Constitution, whose names were attached to it in whatever capacity. Once the Constitution had been ratified and had proved successful, however, the name of the Constitution itself came to be more esteemed than the names of most of
the delegates who had originally signed it, names which have since become fairly obscure for the most part.

Or, as James Madison put it in the Federal Convention on July 5, 1787:

It should be considered that altho’ at first many may judge of the system recommended by their opinion of the Convention, yet finally all will judge of the Convention by the System.  

V.

It was hoped by the delegates that the apparent unanimity of the Federal Convention in proposing the Constitution would become the genuine unanimity of the States in ratifying it. The delegates knew that they would be likely to get all of the States to ratify only if it was understood that all of the States were not required to get this Constitution working. “Holdouts” were thereby discouraged.

Whether nine States could suffice for an effective establishment of the Constitution depended, in part, upon which nine States these were. Even so, there would have remained the ticklish problem of what the relations would have been between the nine States which had ratified and, say, the four States which had not.

Conceivably, accommodations might have been reached whereby all thirteen States remained associated with each other pursuant to the Articles of Confederation, while (at the same time) that association had a special relation with the General Government for nine or more States under the Constitution of 1787. No doubt, this would have been irregular; but then, as we have seen, the Continental Congress had itself been somewhat irregular for almost a decade.

Furthermore, it should be noticed, Americans have long been accustomed to living under more than one “sovereign” constitution at a time. This may be seen down to our day in the way the United States and the State Constitutions are relied upon concur rently by us.

It was evidently believed by the Framers of the Constitution of 1787 that the less said in advance about the problem of the non-ratifying States, the better. Also too sensitive to have been dealt with explicitly in the Federal Convention was the problem of whether a State could ever leave the Union on its own once the Constitution of 1787 was ratified.

An often practical approach to complicated affairs is suggested by the Biblical reminder, “Sufficient unto the day is the evil
The Constitution of 1787 thereof. This is something which the Framers were no doubt aware of, even though they themselves were not likely to make explicit use of the Bible in their deliberations.

VI.

It is only here and there in the Constitution of 1787 that we get glimpses of the religious sentiments of the American people in 1787. I noticed in my last lecture the reliance upon oaths and the concern about religious tests.

Consider again the exception of Sundays from the computation of the ten days that the President has to review a bill passed by Congress. Also, consider again how the mode of dating the Constitution draws upon both the “universal” (that is, Christian) calendar and the particular American calendar (keyed to the Declaration of Independence): “the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States the Twelfth.” Both the temporal order and the spiritual order are looked to for placing properly the doings of the Federal Convention, however ambiguous may have been the response in that Convention, at a critical moment, to Benjamin Franklin’s suggestion that each meeting thenceforth be opened with a prayer.

I have suggested in Lectures No. 1 and No. 2 that there is recourse in the Declaration of Independence to a natural constitutionalism. Such recourse would take due account, for an enduring political order, of both the sacred and the profane in ministering to human affairs.

Something of a reliance upon the sacred may even be seen in the status assigned among us, for two centuries now, to the doings of the Framers at Philadelphia. Consider, for example, the prophetic note upon which the Federal Convention is reported by Madison to have ended:

Whilst the last members were signing [the Constitution], Doctor Franklin looking towards the Presidents Chair, at the back of which a rising sun happened to be painted, observed to a few members near him, that Painters had found it difficult to distinguish in their art a rising from a setting sun. I have, said he, often and often in the course of the Session [of the Convention], and the vicissitudes of my hopes and fears as to its issue, looked at [the sun] behind the President without being able to tell whether it was rising or setting. But now at length I have the happiness to know that it is a rising and not a setting Sun.
VII.

We make much more, in our celebration of the Constitution, of the year it was signed by its Framers than we do of the date it was ratified by the States. Are we not right to do so? The decisive step (it turned out) seems to have been the work done at Philadelphia in 1787, not what happened to have been done thereafter in the various State Ratifying Conventions.

Certainly, it is in the Federal Convention that one can see the mind of the American people at work. Statesmen as diverse as John Calhoun and Abraham Lincoln could agree that the Framers of the Constitution were exceptionally wise and good.148

It must be a rare student of the Constitution of 1787 who does not come away from it impressed by its efficiency. Consider how Calhoun could, in 1831, sum up (albeit with a States’ Rights emphasis) the majestic symmetry of the document:

The majority of the States elect the majority of the Senate; [the majority] of the people of the States [elect the majority] of the House of Representatives; the two united [elect] the President; and the President and a majority of the Senate appoint the judges: a majority of whom, and a majority of the Senate and the House, with the President, really exercise all the powers of the Government, with the exception of the cases where the Constitution requires a greater number than a majority.149

Consider, also, how another student of the Constitution could speak, a century and a half later, of the “coordinated electorates” upon which our form of government relies:

The advantages of both Union and popular control are assured, or at least made more likely to be enjoyed, by an arrangement whereby those best equipped to select the men to fill each post under the Constitution are given the power to make such selections. Those best equipped are presumed to be those who are most likely to know the candidates best: the original Constitution provides, that is, for the coordination of the decisions of relatively small “electorates.” Thus, the State legislatures (made up of members chosen in small legislative districts in each State) select the Senators; the members of the House of Representatives are chosen, in effect, by electoral districts within the States (even when the voting is at large rather than, as is now common, by congressional districts); the President is chosen by a body of electors (whom we call the Electoral College: they are chosen as the State legislatures prescribe); the other officers of the General Government, including the judges, are nominated by the President and consented to by the Senate or are selected by the President alone or by one of his lieutenants.
The largest "electorate" under the Constitution of 1787—the largest body of men who have to pass on the qualifications of "candidates" for any office in the General Government—is likely to be that of the Congressional district. The "candidate" can be known, and known well, by those who must select him: one is never obliged to choose among complete strangers. The people retain ultimate control—but they are a people so organized as to bring out the best in them.\textsuperscript{150}

I have suggested that it is in the Declaration of Independence and in the Constitution of 1787 that one can see the mind of the American people truly at work. I further suggest that it is in the Constitution itself that one can see master draftsmanship at work, just as statesmanship of the highest order can be seen in the Declaration.

We have already noticed that the sequence of and within the seven Articles in the Constitution makes considerable sense. It is not the order in which constitutional provisions were worked on or adopted in the Federal Convention. That is, these provisions had to be arranged by a single mind with a comprehensive view of the implications of the things which had indeed been said and done by the Convention. This means that one does not fully understand the Constitution unless one understands why the parts are what and where they are.

I have attempted, in these lectures, to suggest how the Constitution is put together and why it is made the way it is. We should be reminded of the Gladstonian observation to the effect that the British constitution excelled all those which have emerged from the womb of time, whereas the American constitution is the most outstanding of those constitutions brought forth at a given moment out of the mind of man.\textsuperscript{151}

\section*{17. The Americans of the Constitution}

\textbf{I.}

The Federal Convention of 1787 sent to the Continental Congress, over the name of George Washington (its presiding officer), a September 17th letter of transmittal accompanying the proposed Constitution. The letter includes this instructive summary of the powers provided for by the Constitution:

The friends of our country have long seen and desired, that the power of making war, peace and treaties, that of levying money and regulating commerce, and the correspondent executive and
judicial authorities should be fully and effectually vested in the general government of the Union: but the impropriety of delegating such extensive trust to one body of men is evident—Hence results the necessity of a different organization.\textsuperscript{152}

The next stage in the development of this Constitution was its transmittal by Congress to the States for them to ratify. It was then that Congress adopted the recommendation of the Federal Convention that the States call conventions in each State to pass upon the proposed Constitution. This the States proceeded to do.

The extended debates in various of the State Conventions remain a useful source for any investigation into the meaning of the Constitution, however partisan and hence distorted those debates may have often been. Much the same can be said about the public debates of the day, especially as recorded in the highly polemical press. (Among such public debates are the contributions made by the \textit{Federalist Papers} issued in the New York State ratification contest.) In the final analysis, however, a sound interpretation of the Constitution depends primarily upon a careful reading of the document itself, to which this series of lectures has been devoted.

Nine States had been designated in Article VII as required “for the establishment of this Constitution between the States so ratifying the Same.” The first State to ratify was Delaware, on December 7, 1787 (less than three months after the drafting of the Constitution was completed); the ninth State to ratify was New Hampshire, on June 21, 1788 (less than a year after the Constitution was drafted). Technically, it could be said, the Constitution was then “established” or “adopted.” Congress could properly begin providing for a transition once it learned that the ninth State had signed on. It was probably always recognized, however, that New York and Virginia would have to agree to the Constitution for it to stand a good chance of success—and these two States were not among the first nine.

It was only when Virginia and New York did ratify (in the Summer of 1788) that the Constitution could truly be considered a going concern. North Carolina and Rhode Island were to hold out until November 1789 and May 1790, respectively—the former until a Bill of Rights was proposed by the First Congress for the Constitution of 1787, the latter until it became all too evident that things were going to go on without it.\textsuperscript{153}

II.

The Continental Congress, once it found that the Constitution
had been sufficiently ratified, could guide the State governments in what they had to do to select Members of Congress and Presidential electors. The new Congress thus selected assembled in March 1789, pursuant to the directions of the new Constitution and of the old Congress. The new Congress then determined who had been chosen President by electors in the States. George Washington was inaugurated on April 30, 1789.

The new Congress had to sketch out the new General Government. It began to provide for several Executive departments and for the National Courts. Appropriate nominations to these offices were made by the President and confirmed by the Senate. Critical to the operations of the Courts for many years to come was the Judiciary Act of 1789. (The first term of the Supreme Court began in February 1790.)

Congress was also obliged to begin reviewing the laws enacted by its predecessor Congresses under the Articles of Confederation, in order to determine which of those laws should be retained. Among them (as we have seen) was the Northwest Ordinance, which had been enacted in 1787, and which the First Congress was to reaffirm in its First Session, thereby establishing a pattern for developing new States from the Territories.

And, of course, the First Congress had to provide ways and means to finance the activities of the General Government. Particularly important in those early years were import taxes, some of which were provided for in the First Session of Congress (in 1789).

III.

It was in the First Session of the First Congress as well that the Bill of Rights was prepared. Twelve amendments were proposed by Congress in 1789; ten of these were ratified by the States, with Virginia completing on December 15, 1791 the three-fourths of the States required for amendments. (The ratification date seems more critical here than the date of composition.)

Amendments Two through Eight set forth, for the most part, guarantees which had long been considered to be part of the great common-law heritage of the American people. And, as I have suggested from time to time, the First Amendment, especially with its assurances about freedom of speech and of the press, confirmed the understanding of Americans as to what was required for effective self-governance by a people. The Ninth Amendment was added out of caution, to make certain that the enumeration of certain
rights did not implicitly negate others which had been claimed theretofore.

The prompt addition of the Bill of Rights is considered by many to have been a condition for ratification of the Constitution in various States. It can properly be regarded as virtually a part of the original Constitution—and hence perfectly consistent with what had been done in the Federal Convention of 1787. The Eleventh and Twelfth Amendments, as we have seen, can also be considered part of the original arrangement, in that they merely clarified what had been attempted in the original judicial-power and President-selection provisions.

It is well to be reminded once again, especially in a skeptical age, that recourse to amendments—indeed, the very recognition that amendments would be necessary from time to time—may be seen to reflect an awareness that there are enduring standards in the light of which the Constitution, as well as the laws, of the day should be judged. The Constitution assumes and reinforces an established moral position, thereby shaping generations of Americans under the new dispensation.

IV.

The Framers of the Constitution, I have suggested, were both principled and practical. And this means, among other things, that they were not doctrinaire—and hence they could be truly virtuous.

Perhaps the most talented man in the history of the Country to devote himself to a political doctrine, at the expense of that combination of principle and practicality which we recognize as prudence, was John C. Calhoun of South Carolina. He died in 1850, on the eve of the Civil War which his doctrinaire approach to politics and the Constitution helped bring on.

Calhoun sought a political proposition which would be "universally true,—one which springs directly from the nature of man, and is independent of circumstances . . . ." He could never properly appreciate, for example, the significance of the fact that African slavery in this Country was due to unfortunate circumstances in which there was unleashed an indefensible self-interest. Rather, he was driven to insist that that institution, due to significant varieties in the nature of men, represented a positive good for both slave and master. It was the slavery issue, and what the South could do to protect its peculiar institution from dangerous Northern interference, which guided Calhoun’s reading of the Constitu-
tion, going back to the great debates on the Tariff in the late 1820s and the 1830s.

Critical to the Calhoun approach was his reading of the Tenth Amendment.\textsuperscript{155} Again and again he reads it as if it provides that Congress has only those powers \textit{expressly} delegated to it. We again notice that the House of Representatives, when the First Congress drafted in 1789 what later became the Tenth Amendment, resolutely refused to add “expressly” to the proposed amendment—and in doing so, it refused to continue to use that limiting adverb as it had been used in the Articles of Confederation.\textsuperscript{156}

The answer of the Federalists who controlled the First Congress, and who had (for the most part) written the Constitution in the Federal Convention only two years before—their answer to those who wanted “expressly” added to the Tenth Amendment was, in effect, “No, the Ratification Campaign is over. The American people have accepted the Constitution drafted by the Federal Convention. And we intend to keep, and to put to good use, the Constitution we now have.” Repeated efforts by Calhoun and others, down to our day, to read “expressly” into the Tenth Amendment point up the significance of the original determination of the Federalists to keep it out.

V.

I am not the first to have noticed that the Tenth Amendment in effect says, at least with respect to the powers of the General Government, that the Constitution provides what it provides. It therefore makes no change in the distribution of powers recognized in the Constitution of 1787. Thus, it can be said, the Tenth Amendment really makes no difference in this respect.

I now venture to add that what the Tenth Amendment did do was to permit the State Legislatures (as distinguished from the State Conventions relied upon during the Ratification Campaign)—it permitted the State Legislatures themselves also to make explicit their assent to the Constitution of 1787. All of the original thirteen States have ratified this amendment (albeit three of them, ceremonially, “in 1939)—which can be taken to mean, if one is so minded, that the Constitution of 1787 may be seen as a comprehensive alteration of the Articles of Confederation even pursuant to the precise provision in the Articles themselves for their alteration by State Legislatures.

Thus, the Tenth Amendment confirms the original constitu-
tional arrangement, an arrangement in which the prominent place of the States must of course be recognized.

VI.

"The question of the relation which the States and General Government bear to each other," Calhoun said in 1831, "is not one of recent origin. From the commencement of our system, it has divided public sentiment. Even in the Convention, while the Constitution was struggling into existence, there were two parties as to what this relation should be, whose different sentiments constituted no small impediment in forming that instrument."157

Critical to Calhoun's mode of answering his question about the relation of the States and the General Government is this suggestion:

The great and leading principle is, that the General Government emanated from the people of the several States, forming distinct political communities, and acting in their separate and sovereign capacity, and not from all of the people forming one aggregate political community; that the Constitution of the United States is, in fact, a compact, to which each State is a party, in the character already described; and that the several States, or parties, have a right to judge of its infractions...158

Three years before, Calhoun had insisted that our system "consists of two distinct and independent Governments."159 And so he could rely upon James Madison (the Madison of 1798, not the Madison of 1787-1789), "The Constitution of the United States was formed by the sanction of the States, given by each in its sovereign capacity."160 Calhoun saw the General Government as nothing but the "creature" of the compact which the States had formed in 1787-1789.161

Abraham Lincoln was to insist, as we have seen, that the Union was older than the States.162 Of course, a proper place was recognized by him for the States, just as Calhoun had recognized a proper place for the General Government. Lincoln made much more than Calhoun did, however, of the fact that the Preamble to the Constitution had announced that "We, the People" were ordaining and establishing the Constitution.163

So Lincoln could speak, as at Gettysburg, of the fathers who had brought forth a new nation (not a mere compact) in 1776. I have noticed that to speak thus of "fathers" is to look to a people who form a natural whole, not to those somewhat arbitrary subdivisions of a people known as States. The Civil War and its aftermath were
The Constitution of 1787

Lincoln knew that the States retained considerable authority under the Constitution, including the exclusive power of ratifying amendments to the Constitution. Indeed, as we have also seen, the States can always insist upon an Article V Convention of the States for proposing constitutional amendments, thereby being able to circumvent Congressional reluctance to propose certain amendments.

VII.

Calhoun's fundamental problem was such, however, that the ultimate power of amending the Constitution available to any combination of three-fourths of the States could neither quiet his fears nor satisfy his desires. He knew that his cause could not enlist the support of even a majority of the States, or of the Congress, to say nothing of the "super-majorities" required for constitutional amendments. A steady shift away from the South in population ratios, and hence in political power in the General Government, had become all too apparent by his time.

It is this development which probably led Calhoun to insist that a State should be able to "interpose" itself between the General Government and the people of a State when critical interests of that people were threatened. The venerable Madison could be looked to as authority, since he had said in the Virginia Resolutions of 1798 that "in case of a deliberate, palpable, and dangerous exercise [by the General Government] of power not delegated [to it], [the States affected] have the right . . . 'to interpose [themselves] for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them.'" 164 Only thus may the consolidating tendencies of the General Government be arrested in extreme circumstances. 165

Calhoun recognized that no State power of interposition is explicitly provided for in the Constitution of 1787. In response to any objection that such a power of interposition "rests on mere inference," Calhoun would ask "whether the power of the Supreme Court to declare a law unconstitutional is not among the very highest and most important that can be exercised by any department of the Government,—and [yet can] any express provision . . . be found to justify its exercise?" 166

Calhoun could then argue that the Supreme Court's power of
judicial review and the States’ power of interposition both rest on inferences so clear “that no express provision could render [them] more certain.” We need not reconsider here the basis, if any, for the power of judicial review in the Constitution of 1787. We need only notice that it, like Calhoun’s power of State interposition, can appeal to minorities as a check upon effective self-government by the people of the United States, especially when the people at large act through their Congress.

Calhoun’s approach meant that any States which felt strongly about any issue could always exercise an effective veto against the will of a majority of the people of the Country. However tyrannical any majority rule may be at times, is there any justification for what would be, in effect, permanent minority rule? We are reminded of the perils of minority rule when we notice that Calhoun’s demands are made ultimately on behalf of individual slaveholders who insisted upon their right to continue undisturbed in their enslavement of multitudes of their fellow humans. Calhoun himself repudiates, by implication, the very institutions he so desperately attempts to defend when he repeatedly condemns as slavery the effects upon certain States of the powers claimed and exercised by the General Government.

VIII.

The immediate causes of Calhoun’s agitation in 1828-1831 were the tariff laws enacted by Congress, laws which were no longer designed primarily for the collection of revenues but rather for the protection of American manufacturers. The South could, not without reason, criticize such an arrangement as benefitting the manufacturing interests (mostly in the North) at the expense of the staples-producing States (mostly in the South). Critical to this debate was (and still is) the question of whether the powers granted Congress may primarily be used for any purposes other than those naturally associated with such powers.

We should be reminded by such debates that the Constitution simply cannot guarantee that the powers provided for will always be exercised justly. Considerable discretion must be left with the public servants who (subject to our supervision) exercise these powers for us—and it is to misconceive the nature of a Constitution to expect various troublesome questions about justice to be answered there. Such an expectation is also likely to distort the provisions of the Constitution, thereby making it less useful (and ultimately less productive of justice) than it might otherwise be.
This is not to deny, of course, that an informed and disciplined respect for the Constitution should generally serve the ends of government set forth in the Preamble, including the establishment of justice.

There did remain one remedy for Calhoun (or anyone else) to consider once arguments from justice and common sense had been rejected—and that was recourse to that right of revolution recognized in, and acted upon by, the Declaration of Independence. That right may have been tacitly invoked when extraordinary means were used, however discreetly, to replace the Articles of Confederation by the Constitution of 1787.169

IX.

The Union efforts in the Civil War may be seen, then, as a response to a purported exercise by the South of the natural right of revolution. The ultimate result of this attempt was even more revolutionary than the South anticipated—for not only was the right of secession by any State forcefully repudiated, but also the existence of slavery in the United States was permanently forbidden. And as further results, the prerogatives of the States in the Union have had to be reconsidered, not only as the Civil War amendments have come to be applied, but also as still more amendments (guaranteeing various rights of women, of the young, and of others) have been added to the Constitution.

Precisely what the effects have been of the dozen most recent amendments to the Constitution must be left by us to consider at length on another occasion. It suffices to notice here that the American respect for both liberty and equality, as well as for a sensible and known rule of law, is reflected in the various constitutional amendments we now have.

We are reminded by these amendments that everything the Framers did is truly open to reconsideration. We, the people, are always in principle their equals, and hence we are always left free to change what was ordained and established two centuries ago.

But we, like the Framers, should be sensible enough to appreciate and to use properly what has gone before, respecting the experienced wisdom of predecessors who were our equals, not least in the prudent manner in which they, sometimes in the name of equality, exercised their and our liberty.
Section 8. The Congress shall have Power

I. 1) 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;

II. 3) To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

IV. 7) To establish Post Offices and post Roads;

V. 9) To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

VI. 11) To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

VII. 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

Necessary and 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.
APPENDIX B

BIBLIOGRAPHY

And although I judge this work unworthy of the presence of [His Magnificence], yet I very much trust that it should be accepted through his humanity, considering how there cannot be had a greater gift from me than to give to one the faculty of being able in a very short time to understand all that I, in so many years and in so many of my hardships and dangers, have come to know and to understand.

—Niccolo Machiavelli, The Prince
(L. P. de Alvarez translation)

I have learned much from teachers and others of noteworthy virtue with whom I have been fortunate enough to have been associated, one way or another, since I first came as a student to the University of Chicago in 1947 after my service in the United States Army Air Corps. (That tour of duty had begun with my enlistment as an Air Cadet in 1943.) I hoped to find, and did find, my life as a student as interesting as my life as a flying officer had been. Certainly, it soon became evident that I still had a lot to learn—and that I was at the right place to begin to discover what the enduring questions are.

Particularly to be noticed here, with a view to their influence upon the general opinions underlying this Commentary on the United States Constitution, are the following men I have known: Richard M. Weaver, Henry Rago, Alexander Meiklejohn, Malcolm P. Sharp, Harry Kalven, Jr., Martin Diamond, Maurice Pekarsky, William W. Crosskey, Robert M. Hutchins, Leo Strauss, Roscoe T. Steffen, Milton Mayer, Yves R. Simon, Paul H. Douglas, Jacob Klein, Hugo L. Black, and Willmoore Kendall. I have restricted myself in these acknowledgments to those no longer living, presenting them in the order I happened to come to know them.

Relatively little new research had to be done by me in preparing in 1985-1986 the lectures upon which this Commentary is based. Rather, I attempted to share with the thoughtful citizen what I had learned from decades of inquiry into how the Constitution is put together and why. (The work of William W. Crosskey is particularly instructive here.) The spirit of my efforts with the lectures and thereafter with this Commentary is suggested by the passage from Machiavelli that serves as an epigraph for this Bibliography. (The work of Leo Strauss is particularly instructive for the study of political philosophy.)
I have developed heretofore many of the points touched upon in this Commentary. Among the things already published (or about to be published) elsewhere by me are interpretations of a variety of constitutional provisions; studies of freedom of speech and of the press; discussions of "issues of the day," past and present; investigations into ancient and modern political philosophy; reports on constitutional and political developments around the world; introductions to the thought of other peoples and times; and accounts of my own encounters with troublesome governments (in the Cold Warriors' America, in the Commissars' Russia, and in the Colonels' Greece). All of these topics bear upon one or another aspect of this Commentary on the Constitution of 1787.

Few citations have been provided, however, to my own work in the course of this Commentary. Instead, I collect in this Bibliography a list of some of my publications (about one-fourth of the total) which either develop further many points barely noticed in the Commentary or suggest the perspective from which I speak. I hope thereby to reassure those readers who might be inclined to dismiss as naive and amateurish such an unencumbered approach to the Constitution in its entirety as this Commentary represents.

I have omitted from this Bibliography references to a number of relevant articles of mine reprinted in one or another of my already-published books. The contents of my books are indicated in this Bibliography as are the contents of some of my longer articles. There is in my publications an abundance of references to the work of others, as well as to my own. (Several prospective publications are included here, since they should soon be available for the use of readers who come upon this Commentary over the years. My complete bibliography is available upon request.)

I do not include in this Bibliography the series of long introductions to ancient non-Western texts I have been preparing in recent years for the annual volumes of The Great Ideas Today (an Encyclopedia Britannica publication). These introductions are to the Analects of Confucius (1984), to the Bhagavad Gita (1985), to the Gilgamesh (1986), and to the Koran (1988). (My article for the 1987 volume of Great Ideas Today is to be devoted to "We, the People: The Rulers and the Ruled.") When one learns what has been done and said over millennia in ordering the characters and lives of other great peoples, one may better see and hence more deeply appreciate what was said and done in this Country between 1776 and 1789.
Selected Bibliography of George Anastaplo

Public Papers and Books


peachment and Statesmanship, (15) Race, Law, and Civilization, (16) Citizen and Human Being: Thoreau, Socrates, and Civil Disobedience, (17) On Death: One by One, Yet All Together. (For corrections, see Anastaplo, The Artist as Thinker, p. 371, infra bibliographic entry no. 5.)


Articles and Book Reviews


15. Encyclopedia Britannica, 15th ed. S.v. "Greece," (with others). This article was revised for the 1986 printing.


29. "Jacob Klein of St. John's College." *Newsletter*, Politics Department, The University of Dallas, Spring 1979, pp. 1-8. (Some corrections are needed.)

30. Review of *Plato's Meno: A Philosophy of Man as Acquisitive*, by Robert Sternfeld and Harold Zyskind (Carbondale, Ill, 1978). *Review of Metaphysics* 32 (June 1979): 773-75. (At p. 775, line 7, "117b19 sq." should read, "1179b19 sq."; at p. 775, line 34, "It is not true" should read, "But is it not true").


32. "Human Nature and the First Amendment." *University of


42. *Encyclopedia Britannica*, 15th ed. S.v. “Censorship.” This article was revised for the 1986 printing.


NOTES

1. The constitutions of the Americans, as reviewed in this opening lecture, are the following:
   I. The Language of the English-Speaking Peoples
   II. The British Constitution
The reader is urged, as with my other publications, to begin by reading the text of this article without reference to its notes. I cite few of my own publications on the Constitution in these notes, reserving for Appendix B the listing of those publications of mine which illuminate further various points made in this Commentary.

2. On the other hand, some would argue that it is difficult to put serious philosophy into English. See infra note 12. See also Lecture No. 3, Section VI (end). John Milton repeatedly indicates in his Areopagitica that the language of the liberty-loving English is ill-fitted for repressive measures. See also infra text accompanying note 51.


4. "The common law is a system of principles and rules grounded in universal custom or natural law and developed, articulated, and applied by courts in a process designed for the resolution of individual controversies. In this general sense, the common law is the historic basis of all Anglo-American legal systems. It is also an important element in the origin and plan of the United States Constitution." Id. at 332. See also Lecture No. 2, Section V; Lecture No. 10; Lecture No. 11; Lecture No. 15, Sections III, IV.

5. See Lecture No. 12, Sections VII, VIII.

6. On nature and on natural right, see Lecture No. 2, Sections I, V, VII; Lecture No. 4, Sections III, IV; Lecture No. 5, Sections IV, VII; Lecture No. 7, Sections II(ix), II(xi), II(xiv), II(xv); Lecture No. 8, Sections VII, VIII; Lecture No. 10, Sections VI, VII, IX; Lecture No. 11, Section II; Lecture No. 12, Sections II, IX, XI; Lecture No. 14, Sections V, VIII, IX, Lecture No. 15, Section IX; Lecture No. 17, Sections IV, VIII, IX. See also 3 ENCY. AM. CONST., supra note 3, Natural Rights and the Constitution, at 1301-03; L. STRAUSS, NATURAL RIGHT AND HISTORY (1953); G. ANASTAPLO, HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM AND THE COMMON GOOD 46-60, 74-86 (1975).

7. See, e.g., Lecture No. 15, Section IX.

8. See also Lecture No. 2, Section VII; Lecture No. 16, Section VI.

9. On slavery, see Lecture No. 1, Section XII; Lecture No. 2, Sections IV, V, VII, VIII; Lecture No. 3, Sections III, V; Lecture No. 5, Section VI; Lecture No. 6, Sections II, III, VI, VII; Lecture No. 7, Sections II(x), II(xi); Lecture No. 10, Section VI; Lecture No. 11, Sections V, IX; Lecture No. 12, Section X; Lecture No. 13, Sections III, V-IX; Lecture No. 14, Sections VIII, IX; Lecture No. 17, Sections IV-IX. See also 3 ENCY. AM. CONST., supra note 3, Lincoln, Abraham, at 1162-67; 4 id. Slavery and the Constitution, at 1688-95; 4 id. Slavery in the Territories, at 1695-98; H. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE LINCOLN-DOUGLAS DEBATES (2d ed. 1983). See also infra notes 14, 15 and 145.

10. On the Tenth Amendment, see Lecture No. 2, Section IX; Lecture No. 5, Sections II, VII; Lecture No. 6, Section IV; Lecture No. 17, Sections IV and V. See infra text accompanying note 20 for the text of the Tenth Amendment.

11. The Eleventh Amendment protects a State from being sued by citizens of other States if it does not choose to be. This amendment was developed in response to Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which had permitted a State to be sued.

On the Twelfth Amendment, see Lecture No. 8. See also 4 ENCY. AM. CONST., supra note 3, Twelfth Amendment, at 1927.

12. Martin Heidegger, whom I have had occasion to characterize as "the Macbeth of philosophy," argued that Greek, German and perhaps Sanskrit are best for thinking. See supra text accompanying note 2.


14. On liberty, see Lecture No. 1, Section VII; Lecture No. 2, Sections II, III, V; Lecture No. 3, Sections V, XII; Lecture No. 4, Sections I, V; Lecture No. 5, Sections VI, VII; Lecture No. 6, Sections IV, VII; Lecture No. 7, Sections II(iii), II(vii); Lecture No. 9, Section IV; Lecture No. 12, Section XI; Lecture No. 13, Sections V, VII, VIII; Lecture No. 14, Section V; Lecture No. 15, Sections II, IX; Lecture No. 17, Sections III, VII, IX. See also infra note 111.

I speak of the six ends set forth in the Preamble. A seventh end is evident in the Preamble as a whole—the ordaining and establishing of the Constitution itself.

15. On equality, see Lecture No. 1, Section XII; Lecture No. 3, Sections V, VI, VII, VIII, IX; Lecture No. 4, Section V; Lecture No. 6, Sections VI, VII; Lecture No. 8, Section VI; Lecture No. 11, Section IX; Lecture No. 13, Sections VII, VIII; Lecture No. 14, Section VIII; Lecture No. 15, Section II; and Lecture No. 17, Section IX. See also supra note 9, and infra note 111.

16. On a republican form of government, see Lecture No. 1, Section VII; Lecture No. 3, Section IV; Lecture No. 6, Section IV; and Lecture No. 13, Sections V, VII. See also 3 ENCY. AM. CONST., supra note 3, Republican Form of Government, at 1558-60.

On the people required for a republican form of government, see Lecture 1, Sections VII, IX; Lecture No. 2, Sections II, IV, VII, IX; Lecture No. 3; Lecture No. 4, Sections I, II, III; Lecture No. 5, Sections III, VII; Lecture No. 6, Sections II, IV, VI, VII; Lecture No. 7, Section II(xi); Lecture No. 8, Section VII; Lecture No. 9, Section VIII; Lecture No. 11, Section IX; Lecture No. 12, Sections X, XI, XII; Lecture No. 13, Section VIII; Lecture No. 14, Sections V, IX; Lecture No. 15, Sections II, VII; Lecture No. 16, Section II; Lecture No. 17, Sections VI, VII, IX.

17. See Lecture No. 17, Section I.


On the Preamble, see Lecture No. 1, Section VII; Lecture No. 2, Sections I-VI, IX; Lecture No. 3, Sections X, XIII; Lecture No. 4, Section VI; Lecture No. 5, Sections II, VI; Lecture No. 6, Section III; Lecture No. 9, Section V; Lecture No. 11, Section IX; Lecture No. 12, Sections III, VII, X; Lecture No. 13, Section IX; Lecture No. 14, Section V; Lecture No. 17, Sections VI, VIII. Compare 3 ENCY. AM. CONST., supra note 3, Preamble, at 1435-36. See also infra note 30.

On the enumeration of powers, see Lecture No. 5, Section IV, and Appendix A.

19. 2 J. ELLIOT, ed., THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (2d ed. 1836). These materials also may be found, with the original capitalization, spelling, punctuation, etc. in THE COMPLETE ANTI-FEDERALIST (H. Storing & M. Dry eds. 1981). I continue to cite texts such as ELLIOT and FARRAND (infra note 31) because so much of my work is already keyed to them.


21. On freedom of speech and of the press, see Lecture No. 1, Section III; Lecture No. 2, Section VII; Lecture No. 3, Sections X, XII; Lecture No. 4, Sections I, IV; Lecture
James Madison said in the Virginia Ratifying Convention, on June 24, 1788, “Mr. Chairman, nothing has excited more admiration in the world than the manner in which free governments have been established in America; for it was the first instance, from the creation of the world to the American revolution, that free inhabitants have been seen deliberating on a form of government, and selecting such of their citizens as possessed their confidence, to determine upon and give effect to it.” 3 J. ELLIOT, supra note 19, at 616. See also the opening page of the Federalist Papers.


23. Cannot it be said that the Union permitted the emergence of the States, even though it does not account for their existence? See infra text accompanying note 163.

24. 3 J. ELLIOT, supra note 19, at 22. See also id. at 23. Compare infra text accompanying note 163. See as well 2 id. at 99; 3 id. at 28-29, 42-44, 98, 143; 4 id. at 15-16, 23-25.

25. The State constitutions referred to and quoted from in these lectures may be found in, among other places, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (B. Poore 2d ed. 1878) [hereinafter cited as THE FEDERAL AND STATE CONSTITUTIONS]. More precise citations are not needed in these lectures either to these State constitutions or to such documents as the Declaration of Independence, the Articles of Confederation, the Northwest Ordinance, and the United States Constitution.

26. In the House of Representatives, for which the Constitution originally provided 65 members, 44 votes were needed instead of 33; in the Senate, with 26 Senators planned from 13 States, 18 votes were needed instead of 14. (I assume in each case that every eligible State supplied all its members. I disregard here the tie-breaking vote in the Senate available to the Vice-President.) See also Lecture No. 9, Section III; Lecture No. 14, Section I. See also infra note 107.

27. On judicial review, see Lecture No. 6, Section IV; Lecture No. 10, Sections I, IX; Lecture No. 11, Sections IV-VII; Lecture No. 12, Section XI; Lecture No. 14, Section VII; Lecture No. 15, Sections V, VI, VII; Lecture No. 17, Section VII. See also infra notes 111 and 139.

28. See supra note 18. It should be noticed, however, that the student of the Constitution today is apt to have available to work with (because of the many volumes of records and other sources recently collected and annotated by zealous scholars) far more Seventeenth and Eighteenth Century materials bearing on constitutional issues than any public man in this Country would have had available to him in the 1776-1789 period. There may be something deeply misleading, as well as much that is useful, about such abundance. See infra note 71. See also Lecture No. 3, Section XIII; Lecture No. 4, Section II (end); Lecture No. 4, Section IX; Lecture No. 6, Section I; Lecture No. 17, Section I.

29. Interpreters of the Constitution have long assumed that much more can be done for the common defense by the General Government than can be done by it for the general welfare, although the constitutional authority for the two ends seems much the same in scope. See infra notes 44 and 168.

30. “Expressly” had been used in comparable circumstances in the Articles of Confederation, with its considerably weaker powers for the Legislature. See supra note 10, and Lecture No. 17, Section IV. See infra text accompanying note 20 for the text of the Tenth Amendment.

On the Preamble and its purposes, see 1 W. CROSSKEY, supra note 13, at 374, 376. On rules of interpretation, see id. at 24. See also 3 W. CROSSKEY & W. JEFFREY, JR., POLITICS AND THE CONSTITUTION 16-23 (1980). See as well infra note 18.
31. 1 M. FARRAND, ed., THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 469 (1937). A paperback edition of James Madison's Notes of Debates in the Federal Convention of 1787 (which is found in the first two volumes of M. FARRAND) is available from the Ohio University Press. The text is also available in 5 J. ELLIOT, supra note 19, and (along with many other materials) throughout THE FOUNDERS' CONSTITUTION (P.B. Kurland & R. Lerner eds., forthcoming 1987). See supra note 19.

32. The chart is appended to these lectures as Appendix A. See also supra note 18.

33. Of the seventeen sets of powers, the central one is that of constituting tribunals inferior to the Supreme Court. See also infra text accompanying note 41.

34. The five groupings are suggested in the right-hand margin of the Appendix A chart. The considerable overlapping among them reflects the disputed character of these powers. Perhaps even more overlapping is called for. I again emphasize the tentative character of speculations which are designed to elicit comparable (and perhaps much better informed) speculation by others.

35. I restate what I have just been saying by observing that the symmetry is such that the first and last groups of powers here were formerly regarded by some as "legislative," the next and the next-to-last groups of powers were formerly regarded by some as "executive," and the central group of powers was formally regarded by some as "judicial." Under the Articles of Confederation, the Continental Congress exercised almost all of the powers exercised by the General Government—but this was early recognized as not a happy state of affairs.

Still another reason for listing some of the powers in Section 8 of Article I is suggested in Section VIII of this lecture (Lecture No. 5). The narrowing of the crime of treason in Section III of Article III also called for enumeration of certain powers in Section 8 of Article I (such as with respect to counterfeiting).


37. See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824). It is said at the end of the Declaration of Independence that the United States were now claiming they had "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." The first three powers listed here are related to the foreign affairs of the Country, while the commerce power referred to here is related primarily to the economy of the Country. Thus, the commerce power of the United States is the great "domestic" power insisted upon here, and in a context which finds the representatives of the United States speaking "in the Name, and by the Authority of the good People of these Colonies." (In the opening lines of the Declaration they had spoken of "one People" and elsewhere of "their Country.") We are again reminded of why Abraham Lincoln and others could insist that the Union was older than the States. See infra note 162.

38. See 4 W. BLACKSTONE, COMMENTARIES *420-21, 424 (on the considerable extent of "branches of commerce," "commerce in general," and "a great commercial people"). On the continuing multiplicity of corporation codes in the United States, see A. CONARD, CORPORATIONS IN PERSPECTIVE 4-6 (1976). "Most similar to the United States' situation is that of Canada, where each of ten provinces has its own companies act. . . . [But] the federal government has adopted a Canada Corporations Act, under which most large, nationwide companies have chosen to be incorporated." Id. at 6.

39. 3 J. ELLIOT, supra note 19, at 171. "Southerners feared congressional regulation of interstate traffic in slaves, and consequently sought to interpret the commerce clause narrowly." 2 ENCY. AM. CONST., supra note 3, at 529. See 3 J. ELLIOT, supra note 19, at 598.

40. On the Bill of Rights, see Lecture No. 1, Section XII; Lecture No. 6, Section IV; Lecture No. 17, Section III. See also infra note 113. Two of the amendments proposed for the Bill of Rights by the First Congress in 1789 were not ratified by the States:

After the first enumeration, required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated
by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

No law varying the compensation to the members of Congress, shall take effect, until an election of Representatives shall have intervened.

E. DUMBAULD, THE BILL OF RIGHTS 213 (1979). See Lecture No. 3, Section III; Lecture No. 17, Section III.

41. J. PELTASON, CORWIN AND PELTASON'S UNDERSTANDING THE CONSTITUTION 84 (10th ed. 1982).

It is salutary to keep in mind throughout this Commentary the reservations expressed by one of my readers, reservations which take as their point of departure the Congressional control of appropriations:

I think you are wrong in your praise of the American Congress. It is a spending machine that won't stop. It is pacifistic and obstructionist in foreign policy. It has been unable either to reform itself or its policies, or to give leadership in any direction. While it may provide some constituent service and a forum for popular expression, it has maintained no reasonable oversight of the executive bureaucracy. I am not optimistic about its leadership in the future. Therefore, I think prudence would suggest that the Executive should be strengthened further, especially in foreign policy and in its control over spending.

Consider, in this connection, the implications of the opening paragraphs of the New Republic lead editorial in its December 22, 1986 issue:

What is the essence of the scandal gripping the Reagan White House? Is it the apparent collapse of the Reagan administration's foreign policy? Is it a larger concern about the governability of America, raised by the sight of yet another presidency in shambles?

Only in part. Abstract considerations of foreign policy and presidential power are not the main reasons to be concerned about Lt. Col. Oliver North's siphoning of money from the Iranian arms deal. If they were, we would join the chorus for a quick conclusion, a clearing of the air, a prompt return to business as usual. We would agree that all Americans have an overriding interest in restoring public confidence in Ronald Reagan's leadership. We would join in the task of shoring up his ability to be a strong, effective leader for the next two years.

This scandal is about the basic attitudes the president and his men have held toward the law and toward democratic institutions. Restoring respect for these values not only takes priority over setting foreign policy back on track, or shoring up the institution of the presidency. It is a necessary precondition of those other goals.


It is also salutary to notice that a "conservative" administration has been obliged to acknowledge that patriots can properly invoke the Fifth Amendment self-incrimination plea. See Pleading the Fifth Is No Crime, N.Y. Times, Dec. 5, 1986, § 1, at 30, col. 1.

It is instructive as well to be reminded by all this that when a grand accounting is required within the General Government, it is to the Congress that such an accounting is made. See infra note 109.

43. Id. at 59.

44. 2 M. Farrand, supra note 31, at 445. See also id. at 276-77. Are not the common defense, the general welfare, etc., the ends to which the considerable powers with respect to war, commerce and revenue should be devoted? See supra note 29, and infra text accompanying note 152.

45. J. Peltason, supra note 41, at 80.

46. See Lecture 10, Section I. See also 2 Ency. Am. Const., supra note 3, Habeas Corpus, at 879-87.

47. See 2 Ency. Am. Const., supra note 3, Contract Clause, at 493-99. Compare W. Crosskey, supra note 13, at 352-60. In support of the Crosskey interpretation of the Contracts Clause is the fact that whatever the States are forbidden to do is not something so inherently questionable that the General Government should also be forbidden to do it. On sleeping giants, see infra note 121.


50. 1 M. Farrand, supra note 31, at 405.


52. Id. at 2, 4.

53. Id. at 2. The population of the United States, at the time of the Declaration of Independence in 1776 and at the time of the Federal Convention in 1787, was between three and four million people. Great Britain had, by then, a population of about ten million people, with perhaps eight million in England alone. On American population figures in 1787, State-by-State, see 4 J. Elliot, supra note 19, at 282.


55. 2 M. Farrand, supra note 31, at 541.


57. The lessons I have culled from Shakespeare's History Plays which bear on constitutionalism are with respect to the following matters:

I. On constitutional government being taken for granted
II. The primacy of the political
III. Liberty and the republican tradition
IV. The rights of Englishmen
V. Legislative supremacy
VI. Judicial prerogatives
VII. The allure and attributes of a monarch
VIII. The mode of selection of the chief executive
IX. The relation of legitimacy to merit
X. Heredity and honor
XI. The character of the people
XII. The importance of oaths
XIII. The evils of usurpation
XIV. The relation of the moral and spiritual virtues to political virtue
XV. The common good as a standard
XVI. The rule of law
XVII. On the human things served by political life.

58. In many ways, indeed, the President resembles the colorful tail tied to a high flying kite: for the most part, the tail (which may be useful for balance) seems to be along only for the ride and for show (which, too, can be useful). Difficulties develop, however,
when the tail decides it can and should go off on its own. See supra note 41, and infra note 85.

59. 2 M. FARRAND, supra note 31, at 501.

60. There is still another curious place left for chance in the system here: if there should ever be a tie within a State in the popular vote for Presidential electors, that highly unlikely tie can be broken (as in Illinois) by lot, with all of that State’s electoral votes going to the candidate thus singled out by Providence. See ILL. REV. STAT. ch. 46, para. 23-27 (1985). On chance, see Lecture No. 1, Section IX; Lecture No. 2, Section V; Lecture No. 5, Section I; Lecture No. 8, Sections I, II, VII, IX; Lecture No. 9, Sections VII, VIII; Lecture No. 10, Section VII; Lecture No. 11, Section I; Lecture No. 13, Section VII; Lecture No. 14, Section IX.

61. 123 CONG. REC. 319-20 (Jan. 6, 1977). Capital letters are used in the Congressional Record for the names of current members of Congress. (I use bold letters instead in my quotations here from the Record.) The Vice-President on this occasion was Nelson Rockefeller.

62. Id.
63. Id. at 320. See id. at 319 for State-by-State totals.
64. 3 J. ELLIOT, supra note 19, at 58.

67. I have been told that the only State which seems to have done this in recent decades is Maine. See ME. REV. STAT. ANN. tit. 21-A, § 805(2) (Supp. 1986).

68. The States could thereafter so vote as States, in the House of Representatives, as both to satisfy the constitutional requirement and to produce a choice in accordance with the results of the previously-announced mode of voting by Members. On similar arrangements for popular elections of Senators before the Seventeenth Amendment, see 4 ENCY. AM. CONST., supra note 3, at 1665.


71. Thus, the authors of the Federalist Papers, in attempting to explain what the new Constitution meant, needed to devote only a small part of their analyses to the Presidency. In the State Ratifying Conventions, as well, the principal discussions were usually of the Legislative Article of the proposed Constitution. Systematic commentaries upon the entire document are not recorded in the materials available to us from the Ratification Campaign period. See supra note 28.

73. Silber, Presidential Handcuffs, NEW REPUBLIC, Feb. 18, 1985, at 14, 15.
74. Id. at 15.
75. Id.
76. Id. See infra note 85 (end).
78. Silber, supra note 72, at 16.
80. Id.

81. Another “jarring” condition laid down by the prospective Secretary of Agriculture was that “he could fire most of the top officials of the Agriculture Department.” Id. at col. 2.
82. Ever since the First Congress in 1789, there has been the question of whether the
President can remove unilaterally an officer whose nomination had been consented to by the Senate. A similar question has been asked with respect to treaties. See 1 ENCY. AM. CONST., supra note 3, Appointing and Removal Power, Presidential, at 66-68; 4 id. Treaty Power, at 1910-11. See also infra notes 85 and 137.

83. Would the use of "The executive Power of the United States" have suggested that there may be executive power that does not depend upon the Constitution? Does "The executive Power," standing thus alone in the Constitution, oblige us to consider what that executive power is keyed to? What else can it be keyed to but the scope of the General Government indicated in the Preamble and developed primarily in the Legislative Article? See Lecture No. 3, Section II; Lecture No. 5, Section II; Lecture No. 9, Section I.

84. The Vice President is the presiding officer, in a different and much more limited way, over the Senate.

85. Even the President's conduct of foreign policy, which is often made so much of, can always be decisively shaped by Congressional directives. Consider, for example, Congress's critical intervention in foreign affairs, despite a Presidential veto, by the imposition of sanctions upon South Africa in 1986. See also supra text accompanying note 41. See as well Congress Can ControlArms, Too, N.Y. Times, Aug. 14, 1986, § 1, at 22, col. 1.

Consider, further, the following report on dubious efforts by the Executive to deal with political and legal limitations upon its conduct of foreign relations:

Impatient with the federal bureaucracy and a recalcitrant Congress, President Reagan has been running covert military and intelligence operations directly out of the White House for more than two years, administration sources acknowledge.

His aides have secretly assisted forces trying to overthrow the Nicaraguan government to keep fighting after Congress refused to continue aid, plotted a detailed disinformation campaign against Libyan leader Moammar Gadhafi and operated the recently disclosed 18 months of contacts with the Iranian regime of Ayatollah Ruhollah Khomeini, the sources said.

This is the most aggressive operational use of the National Security Council staff in that body's 40-year history.

As the story of the shipments of military supplies to Iran unfolded last week, new questions have been raised about whether the President has been breaking the law.

The White House has painstakingly tried to establish that it has not violated federal laws requiring a president to notify Congress of covert foreign activities or violated laws against weapons smuggling and [in support of] neutrality. But well-placed sources said only a portion of the NSC's activities have come to light and no public determination of legality could be formed on what is known.

One senior intelligence adviser said the NSC operation has been so "helter-skelter, so ad hoc" that it was not clear even to those involved whether some of their actions may have violated the law or could embarrass Reagan.

The penchant for secrecy and the confining of complex operations to the NSC, many veteran intelligence experts agree, has deprived the President of the vast information available in the various agencies and the careful planning that might have lent balance to the schemes. Another [expert] suggests that like Richard Nixon, Reagan now has opened himself to an investigation of his staff's activities that may damage his historic presidency and result in an effort to curtail the use of White House aides by future presidents.

Horrock & de Lama, Covert Tactics Show Reagan Hand, Chi. Tribune, Nov. 16, 1986, § 1, at 1, col 3.

Among the many comments upon the November 1986 Iranian-arms revelations have
been those of a vigorous supporter of the current administration who was moved to con-
clude his column on the subject with these observations:

Ronald Reagan brought all this on himself by taking charge of this White
House opening to Iran, obviating all plausible deniability; we will soon see if he
closed his eyes to the means of payoff. This end run around the checks and
balances of our system should bring about the requirement for congressional
confirmation of the president's national security adviser and a Senate select na-
tional security committee for oversight of that official's operations.

Safire, Reagan is Telling Terrorists: Crime Pays, Chi. Tribune, Nov. 15, 1986, § 1, at 11,
col. 1. See supra text accompanying notes 79-81. See also Podhoretz, Iran Policy: the
'Perfect Failure', Chi. Sun-Times, Nov. 19, 1986, at 41, col. 4. See as well supra note 41.

Underlying this controversy may be fundamental differences between Legislative and
Executive under the Constitution. Consider, for still another consideration of these differ-
cences, the concluding paragraph of Willmoore Kendall's noteworthy essay, The Two
Majorities:

If the foregoing analysis is correct, the tension between Executive and Legis-
lative has a deeper meaning—one which, however, begins to emerge only when
we challenge the notion that the "high principle" represented by the President
and the bureaucracy is indeed high principle, and that the long run task is to
somehow "educate" the congressmen, and out beyond the congressmen the
electorate, to acceptance of it. That meaning has to do with the dangerous gap
that yawns between high principle as it is understood in the intellectual commu-
nity (which makes its influence felt through the President and the bureaucracy)
and high principle as it is understood by the remainder of the population (which
makes its influence felt through the Congress). To put it differently: the deeper
meaning emerges when we abandon the fiction (which I have employed above
for purposes of exposition) that we have on the one hand an Executive devoted
to high principle, and a Legislature whose majority simply refuse to live up to it,
and confront the possibility that what we have is in fact two conceptions of high
principle about which reasonable men may legitimately differ. Whilst we main-
tain the fiction, the task we must perform is indeed that of "educating" the
congressmen, and off beyond them, the electorate, "up" to acceptance of high
principle; once we abandon it, the task might become that of helping the con-
gressmen to "educate" the intellectual community "up" to acceptance of the
principles that underlie congressional resistance to executive proposals. In the
one case (whilst we maintain the fiction), discussion is unnecessary; in the other
case (where we recognize that what we stand over against is two sharply differ-
ing conceptions of the destiny and perfection of America and of mankind, each
of which conceivably has something to be said for it), discussion is indispensa-
bile; and in order to decide, as individuals, whom to support when executive-
legislative tension arises, we must reopen (that is, cease to treat as closed), re-
open in a context of mutual good faith and respect, the deepest issues between
American conservatism and American liberalism. Reopen them, and, I repeat,
discuss them; which we are much out of the habit of doing.

WILLMOORE KENDALL CONTRA MUNDUM 226-27 (N. Kendall ed. 1971). Mr. Kendall
also observed that "the American system," as "its Framers intended it to be," is "one in
which the final decisions upon at least the important determinations of policy are ham-
ered out, in accordance with the republican principle, in a deliberative assembly made
up of uninstructed representatives, chosen by their neighbors because they are the 'virtu-
ous' men . . ." Id. at 206. (Have not the Reagan Administration and its partisans shown
us that American conservatism, too, is apt, when "in power," to side with the Executive
against the Legislative? See, e.g., Podhoretz, Spare Us from an Imperial Congress, Chi.
Sun-Times, Dec. 19, 1986, at 43, col. 2.)

Consider, also, the insistence by Abraham Lincoln, in his 1838 Lyceum Speech, upon
the necessity of law-abidingness if our political institutions are to be perpetuated. See
infra note 169. "A federal judge recommended that a man he [had] sentenced to prison for conspiring to ship arms to Iran be released because [he has learned that] the U.S. government [had been] doing the same thing, it was reported Monday." Judge Trying to Free Dealer He Sentenced, Chi. Tribune, Dec. 16, 1986, § 1, at 4, col. 1.

Another disturbing feature of the recent Iranian-arms and contra-aid activities is that they can help undermine the moral standing (as well as the reputation and hence the capacity for statesmanship) of the United States around the world. "After years of being described by the Reagan administration as dishonest, evil, and untrustworthy, Moscow takes some pleasure in seeing the administration embroiled in accusations of lies, illegal activities, and cynicism." Quinn-Judge, Superpower Concerns Temper Soviet Glee Over Washington Woes, Christian Sci. Monitor, Dec. 10, 1986, at 13, col. 1. Compare Anastaplo, What Is Still Wrong With George Anastaplo?, 35 DePaul L. Rev. n. 41 (issue no. 3, 1986, forthcoming) I quote there from the talk on Clausewitz's treatise on war I gave at a Defense Intelligence College seminar in Washington, D.C., August 28, 1986. The passage quoted from my talk begins, "We should be on guard against that cleverness which can be easily mistaken for prudence, thereby lulling us into a general thoughtlessness... Thoughtlessness may be seen in the temptation to try to imitate the Russians in the conduct of our own efforts at home as well as abroad." See Lecture No. 7, Section II(vii).

88. Id.
89. Id.
90. Id.
91. Id. Mr. Pfaff concluded this column with these observations:

What has changed in American life that we should pay such servile, even obscene, attention, then, to the presidential incumbent, his wife, his entourage? Ronald Reagan, Jimmy Carter, Gerald Ford—these are ordinary and decent men whom we put at the top of the insecure pile of American politics for a few years. Why are they treated like gods? Who is being flattered or appeased? Ourselves? Is that what it’s all about? Is it national ego, self-adoration, self-aggrandizement? I don't know, but I think it is time that it stops.

Id. On the assassination of a remarkably unprotected Swedish Prime Minister (Olof Palme), see Pfaff, Burying a Certain Idea of Sweden, Chi. Tribune, March 18, 1986, § 1, at 11, col. 1.
93. These two terms seem to have been used interchangeably, since something which is referred to as a "Controversy" is shortly thereafter referred to as a "Case": that is, references are made to those controversies, or cases, "in which a State shall be a Party."
94. See, e.g., Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). Common-law adjudications by the National Courts are taken for granted in, among other places, Article III, Section 1, Paragraph 2 of the Constitution and the Seventh Amendment. On the common law, see supra note 4.
96. Id. at 77-80.

The argument of The Constitutionalist has been summed up by me in this way:

The First Amendment to the Constitution prohibits Congress, in its law-making capacity, from cutting down in any way or for any reason freedom of speech.
and of the press. The extent of this freedom is to be measured not merely by the
common-law treatises and cases available on December 15, 1791—the date of
the ratification of the First Amendment—but also by the general understanding
and practice of the people of the United States who insisted upon, had written
for them, and ratified (through their State legislatures) the First Amendment.
An important indication of the extent of this freedom is to be seen in the teach-
ings of the Declaration of Independence and in the events leading up to the
Revolution.

Although the prohibition in the First Amendment is absolute—we see here a
restraint upon Congress that is unqualified, among restraints that are qual-
ified—the absolute prohibition does not relate to all forms of expression but only
to that which the terms, "freedom of speech, or of the press" were then taken to
encompass, political speech, speech having to do with the duties and concerns
of self-governing citizens. Thus, for example, this constitutional provision is not
primarily or directly concerned with what we now call artistic expression or
with the problems of obscenity. Rather, the First Amendment acknowledges
that the sovereign citizen has the right freely to discuss the public business, a
privilege theretofore claimed only for members of legislative bodies.

Absolute as the constitutional prohibition may be with respect to Congress, it
does not touch directly the great State power to affect freedom of speech and of
the press. In fact, I shall argue, one condition for effective negation of congres-
sional power over this subject (which negation is important for the political
freedom of the American people) is that the States should retain some power to
regulate political expression. It seems to me, however, that the General Gov-
ernment has the duty to police or restrain the power of the States in this respect,
a duty dictated by such commands in the Constitution of 1787 as that which
provides that the "United States shall guarantee to every State in this Union a
Republican Form of Government. . . ."

Id. at 15-16. See also supra note 21.

99. 5 U.S. (1 Cranch) 137 (1803). On judicial review, see supra note 27.

100. The considerable literature on this subject includes a quite useful article, Van
Alstyne, A Critical Guide to Marbury v. Madison, 1969 DUKE L.J. 1. The most challeng-
ing study of the case remains that by William W. Crosskey in his POLITICS AND THE
CONSTITUTION, supra note 18.

101. It was the Judiciary Act of 1789 (1 Stat. 73 (1898)), which got the national
judicial system going. See 3 ENCY. AM. CONST., supra note 3, Judiciary Act of 1789, at
1075-77.

102. Other provisional arrangements include the designation in the Constitution of
1787 of the number of members in the House of Representatives from each State, pending
the first census, and the designation of the date Congress is to meet, which date is subject
to Congressional change. See Lecture No. 4, Section III.


104. 1 Stat. 50 (1789).

105. See, e.g., Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter

106. 1 M. FARRAND, supra note 31, at 21, 97-104, 138-40; 2 id. at 73-80, 298-301
(with means provided for the legislature to overcome judicial disapproval of a law). See
also 2 id. at 92-93, 376, 440; infra note 139; Lecture No. 6, Section IV (end).

107. See, e.g., 1 W. BLACKSTONE, supra note 38, at *182 (on "the vast authority" of
Parliament). See also id. at 49, 91, 138, 156-57, 178. Compare id. at 239 (actions by The
Crown "contrary to reason" are considered void). See as well id. at 42-62.

The power in Congress to make laws over the objections of the President is indicative
of where the ultimate power lies among the branches of the General Government of the
United States. When Blackstone said that "the power of making law constitutes the
supreme authority," he was not thinking of a Parliament in which the monarchy exer-
cised (at least in principle) an absolute veto? See 1 Blackstone, Commentaries *52; Lecture No. 4, Section VI.

108. Id. at *155, 158-59.

109. Id. at *9. Congress is bound by the Constitution in a way that Parliament is not. See 4 J. Elliot, supra note 19, at 64. Judicial review is hinted at here and there during the Ratification Campaign, but by and large a vigilant people is relied upon to keep the Congress in check. See, e.g., 4 id. at 71-72. See also supra note 41 (end).

It is salutary to notice here that it is the Congress alone (among the branches of the General Government) which is said to have the power to "ordain and establish" (this is in Section 1 of Article III), a power which the people exercise in the Preamble. The people, that is, do the ultimate legislating, subject of course to the "Laws of Nature and of Nature's God."

110. The Framers, many of whom had been condemned as traitors by the British, were sensitive about this crime, it seems. On the various species of treason, see 4 W. Blackstone, supra note 38, at *74-92, 203-4. See also 2 J. Elliot, supra note 19, at 469.

111. E. Dumbauld, supra note 40, at 9. A dedication to equality easily tends toward radical democracy—and a sensible people which has been "conceived in liberty" may be inclined, in order to correct excessive egalitarianism, to defer to an apparent aristocratic element in the regime (in the form of judicial review). Does not liberty naturally aspire to excellence? See Lecture No. 17, Section IX.

112. The documents drawn upon in Sections II and III of this Lecture (Lecture No. 12) may readily be found in S. Morison, Sources and Documents Illustrating the American Revolution 1764-1788 and the Formation of the Federal Constitution (2d. ed. 1929).

113. For the State constitutions drawn upon here, see supra note 25.

The Ninth Amendment attempts to protect against the dangerous consequences of an incomplete enumeration of rights in the Bill of Rights. That there are rights in addition to those enumerated may implicitly recognize one or more constitutions for Americans in addition to those which are written. See Lecture No. 1, Section XIII; Lecture No. 17, Section III.

114. Massachusetts had done the same, as a stop-gap measure, for a few years after 1776. See A. Nevins, The American States During and After the Revolution 1775-1787, at 127-28 (1924).

The power in the Congress to make laws despite the objection of the President is indicative of where the ultimate power lies among the branches of the General Government of the United States. When Blackstone said that "the power of making laws constitutes the supreme authority," was he not thinking of a Parliament in which the monarch exercised an absolute veto? See 1 W. Blackstone, supra note 38, at *52; Lecture No. 4, Section VI.

115. I W. Blackstone at *126-27.


117. Alexander Hamilton said on June 21, 1788, in the New York State Ratifying Convention, that "the true principle of a republic is, that the people should choose whom they please to govern them." 2 J. Elliot, supra note 19, at 257. See supra note 16.


119. See J. Peltason, supra note 41, at 124.

120. See, e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Pacific States Telephone and Telegraph v. Oregon, 223 U.S. 118 (1912). See also supra note 16.
121. Senator Charles Sumner called the Guarantee "a sleeping giant." J. Peltason, supra note 41, at 124.
123. Coleman v. Miller, 307 U.S. 433, 453 (1939). It is reported that the 1971 "[r]atification [of the Twenty-sixth Amendment] was completed in 107 days, the shortest time ever required to complete the amending process." 4 Ency. Am. Const., supra note 3, Twenty Sixth Amendment, at 1928-29.
124. E. Corwin, The Constitution and What It Means Today 219 (1973) (citing Article I, Section 5, Paragraph 1 of the Constitution). See also Lecture No. 4, Section VI; Lecture No. 9, Section III.
126. J. Peltason, supra note 41, at 125.
129. See J. Peltason, supra note 41, at 271. The prospect of two more Democratic Party members in the Senate has "naturally" stiffened Republican Party opposition to this change. Would the consent be required of any State which originally ceded territory for the District of Columbia? See Article I, Section 8, Paragraph 17 and Article IV, Section 3 of the Constitution.
130. Kilpatrick, Balanced Budget Amendment: Good Riddance (Let's Hope), Chi. Sun-Times, Apr. 3, 1986, at 52, col. 1. The column continues with these observations:

This resolution invites a hundred questions having to do with outlays, receipts, fiscal years, estimates of revenue and the like. The Treasury would live in constant uncertainty that the government's checks might unconstitutionally bounce.

Under this resolution, three-fifths of each house could provide for a "specific excess of outlays over receipts." This is bizarre. As [Senator Gary] Hart observed, it takes only a simple majority of those voting to take the nation to war. What sense does it make to require a three-fifths majority to raise the ante for soil conservation?

Proponents respond that such super majorities should be required to prevent endless exceptions that would defeat the purpose of the amendment. But the amendment, said Hart, "could easily be circumvented through at least six major loopholes, including phony economic forecasts."

Hart wondered how the amendment would be enforced. Suppose outlays did in fact exceed receipts? Would it be left to the federal courts to pass on the accuracy of budget estimates? Would the Supreme Court decree cuts in spending or increases in revenue? The resolution would virtually mandate judicial activism on federal taxing and spending.

Id.
132. The one exception was in the ratification of the Twenty-first Amendment repealing the Eighteenth Amendment. See 4 Ency. Am. Const., supra note 3, Twenty-first Amendment, at 1927-28.
133. J. Peltason, supra note 41, at 125. See also E. Corwin, supra note 124, at 221-22; Lecture No. 8, Section VII.
134. J. Peltason, supra note 41, at 129.
135. E. Corwin, supra note 124, at 221.


138. For a chronology of the origins and implementation of the Constitution of 1787, see 4 ENCY. AM. CONST., supra note 3, at 2114-17.

139. Is this a form of judicial review to be exercised by State courts? The acts of a State legislature would not be assessed in the light of the State constitution, however, but in the light of a clearly superior national system of Constitution, laws and treaties. Even so, the evident impropriety of any court's disregard of the dictates of its own constitution or of its own legislature may have been such as to require this explicit authorization in the United States Constitution for something so unusual. See supra note 27 and infra note 111.

140. I devote as much space as I do here to the "religious Test" problem, which is less than the space I devote to the Supremacy Clause problem, because supremacy is not seriously questioned today (especially when it is noticed that the Supremacy Clause is directed only to State government proceedings). But the meaning of religious liberty, including what government (State or National) may do in cooperation with religion, is very much a problem today.

What I say in these lectures about the Framers' public opinions about religion and the law seems congruent with John Locke's argument in his LETTER CONCERNING TOLERATION that a general belief in God is required for moral conduct and a responsible integrity. On the character of the American people, see Lecture No. 2, Section IX; Lecture No. 8, Section IX; Lecture No. 9, Section IV; Lecture No. 12, Section XII; Lecture No. 15, Section VIII; Lecture No. 17, Section III.

One can see in these early State constitutions that the legislation of morality was considered a proper concern, even a duty, of government. See infra note 169.

141. This article in the 1776 Maryland Constitution provides,

That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights; nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry; yet the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship, or any particular ministry; yet the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county: but the churches, chapels, glebes, and all other property now belonging to the church of England, ought to remain to the church of England forever. And all acts of Assembly, lately passed, for collecting monies for building or repairing particular churches or chapels of ease, shall continue in force, and be executed, unless the Legislature shall, by act, supersede or repeal the same: but no county court shall assess any quantity of tobacco, or sum of money, hereafter, on the application of any vestry-men or church-wardens; and every encumbent of the church of England, who hath remained in his parish, and performed his duty, shall be entitled to receive the provision and support established by the act, entitled "An act for the support of the clergy of the church of England, in this Province," till the November court of this present year, to be held for the county in which his parish shall lie, or partly lie, or for such time as he hath remained in his parish, and performed his duty.
142. 2 M. FARRAND, supra note 31, at 643.
143. Id. at 648-49.
144. 1 id. at 528.
But the Romans, seeing from afar the inconveniences, always remedied them; and they never let them follow in order to avoid a war, because they knew that war is not to be avoided, but is only deferred to the advantage of others . . . Nor did that which is ordinarily in the mouth of the wise of our times, 'to enjoy the benefit of time,' ever please them, but [they chose] rather [to take] such benefit [as came] from their virtue and prudence; for time drives forward everything, and can bring along with it the good as well as the bad, and the bad as well as the good.
Id. at 16. Compare Lecture No. 6, Section VII; Lecture No. 13, Section VI (on the merits of "abolitionists'" avoiding in 1787 an immediate confrontation with slavery).
146. 1 M. FARRAND, supra note 31, at 450-52.
147. 2 id. at 648.
148. See, e.g., AMERICAN POLITICAL THOUGHT: PHILOSOPHIC DIMENSION OF AMERICAN STATESMANSHIP 130, 141-42, 156 (M. Frisch & R. Stevens eds. 1973) [hereinafter cited as AMERICAN POLITICAL THOUGHT].
149. Id. at 152.
151. See Anastaplo, supra note 150, at 80.
152. 2 M. FARRAND, supra note 31, at 666. See supra note 44.
153. Nathaniel Gorham, a delegate to the Federal Convention from Massachusetts, asked on July 23, 1787, "But will any one say, that all the States are to suffer themselves to be ruined, if Rho. Island should persist in her opposition to general measures?" Id. at 90. Patrick Henry said in the Virginia Ratifying Convention, on June 12, 1788, "As to North Carolina, it is a poor, despaired place. Its dissent will not have influence to introduce any amendments." 3 J. ELLIOT, supra note 19, at 314.
154. AMERICAN POLITICAL THOUGHT, supra note 148, at 126.
155. See, e.g., id. at 121, 130. See also id. at 140, 143; Dred Scott v. Sandford, 60 U.S. (19 How.) at 435 (1857).
156. See 1 ANNALS OF CONG. 761 (J. Gales ed. 1789). See also Lecture No. 5, Section II; supra note 10.
157. AMERICAN POLITICAL THOUGHT, supra note 148, at 144.
158. Id. at 145.
159. Id. at 130.
160. Id. at 135.
161. Id. at 153. See also id. at 150, 154.
162. See Lecture No. 12, Section VI; Lecture No. 15, Section II; supra note 37; 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 434 (R. Basler ed. 1953). See also 1 M. FARRAND, supra note 31, at 467-68; 4 J. ELLIOT, supra note 19, at 301-2; Dred Scott v. Sandford, 60 U.S. (19 How.) at 434, 441, 502.
164. AMERICAN POLITICAL THOUGHT, supra note 148, at 145. See also id. at 134.
165. See, e.g., id. at 149, 150, 154.
166. Id. at 137.
167. Id. See also id. at 141.
168. See id. at 121, 157. "The same view is believed to be applicable to the power of
regulating commerce, as well as all the other powers."  *Id.* at 160.  *See also supra* note 137.  *Compare supra* note 29.

169.  *Compare* President Lincoln's discussion, upon his inauguration in 1861, of whether the South was entitled at that time to invoke the right of revolution:

That there are persons who seek to destroy the Union, at all events, and are glad of any pretext to do it, I will neither affirm or deny; but if there be such, I need address no word to them.  To those, however, who really love the Union, may I not speak?

Before entering upon so grave a matter as the destruction of our national Union, would it not be wise to ascertain precisely why we do it?  Will you hazard so desperate a step, while there is any possibility that any portion of the ills you fly from have no real existence?  Will you while the certain ills you fly to, are greater than all the real ones you fly from?  Will you risk the commission of so fearful a mistake?

All profess to be content in the Union, if all constitutional rights can be maintained.  Is it true, then, that any right, plainly written in the Constitution, has been denied?  I think not.  Happily the human mind is so constructed, that no party can reach to the audacity of doing this.  Think, if you can, of a single instance in which a plainly written provision of the Constitution has ever been denied.  If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would, if such right were a vital one,—but such is not our case.  All the vital rights of minorities, and of individuals, are so plainly assured to them, by affirmations and negations in the Constitution, that controversies never arise concerning them.  But no organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration.  No foresight can anticipate, nor any document of reasonable length contain express provisions for all possible questions.  . . .

4 *COLLECTED WORKS OF LINCOLN*, *supra* note 162, at 255-56.  *See also id.* at 432-37.  On the right of revolution, see 1 M. FARRAND, *supra* note 31, at 249, 282, 338; 2 *id.* at 468-69, 476-77; 366 U.S. 82, 95-96, 99-103 (1961); Lecture No. 1, Sections II, III; Lecture No. 7, Sections II(iv), II(ix); Lecture No. 12, Section XI; Lecture No. 13, Section IV; Lecture No. 14, Sections V, IX; Lecture No. 15, Section III; Lecture No. 17, Section IX.

It should be evident from the guidance provided us by men such as Lincoln that, legislative supremacy notwithstanding, the Constitution does depend upon (and provides ample scope for) gifted men, in and out of the Presidency.  *See Anastaplo, supra* note 150, at 165-68, n. 64.  *See also the concluding paragraph of Lecture No. 9, Section VI.*

Or as John Mercer, a delegate to the Federal Convention from Maryland, said on August 14, 1787, "It is a great mistake to suppose that the paper [the Constitution] we are to propose will govern the U. States.  It is the men whom it will bring into the Governt. and interest in maintaining it that is to govern them.  The paper will only mark out the mode & the form— Men are the substance and must do the business."  2 M. FARRAND, *supra* note 31, at 289.  On the character of the American people, *see supra* note 140.

*See supra* note 85.