Celebrating the Constitution: The Virtues of Its Vices and Vice Versa

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The lavish prose marking our celebration of the Constitution would be more convincing if it were tempered by more realism and by public recognition that the Constitution has faults, as well as virtues. The Constitution is not the Statue of Liberty; it was crafted by politicians, not artists, and hence its faults are more evident. Those faults are, in part, a result of timing. The sparsely written 18th century document was conceived during a torridly hot Philadelphia summer by men who did not foresee the Industrial Revolution, the internal combustion engine, or progressive income taxation. No one seriously expected the nation to extend soon to the Pacific Ocean. The constitutional framers wrote a document for a small government in a small society. The year 1787 was an inauspicious time to frame a government for what would become the most powerful nation on earth.

Realists, therefore, smile as others in this 200th anniversary of the Constitution invoke rhetoric of the sort which has flourished from our beginnings. For example, Justice William Johnson observed in 1823 that the Constitution of the United States was "the most wonderful instrument ever drawn by the hand of man."1 It has, he said, "a comprehension and precision of language that is unparalleled."2

Justice Johnson's words are echoed by the British Prime Minister and rhetorician William Gladstone, who in 1878 compared the constitutions of Great Britain and the United States and contrasted the long gestation of the British system with the American Constitution which was the product of a single episode. Surely admirers of Mozart, Shakespeare and

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* Professor of Law, University of Wisconsin-Madison.
2. Elkinson, 8 F. Cas. at 493.
Michelangelo will not agree that the Constitution of the
United States is “the most wonderful work ever struck off at a
given time by the brain and purpose of man.” Gladstone’s
words taken out of their context are silly.

The hyperbole of the English philosopher-mathematician
Alfred North Whitehead is more specific: “I know of only
two occasions in history when the people in power did what
needed to be done about as well as you can imagine its being
possible. One was the framing of your American Constitu-
tion.” (The other example was the reign of Augustus
Caesar).

The vision of the Constitution as a holy writ is common-
place. The first Justice, John Marshall Harlan, is depicted as
going to bed “every night with one hand on the Constitution
and the other on the Bible,” an awkward sleeping posture
which perhaps contributed to some curious, but still viable,
decisions enforcing Biblical injunctions regarding the keeping
of the Sabbath. The Constitution does not guarantee wisdom
in the Supreme Court.

The constitutional defects we see today differ only in part
from those seen by contemporaries, although one must be sen-
sitive to the fact that one who picks faults in the Constitution
identifies his own preconceptions: “[W]here one comes out on
a case depends on where one goes in.” The faults I cite may
be virtues to others, and vice versa.

For nearly 150 years there has been a debate as to whether
the Constitution allowed national legislation over economic
matters. Reasonable men, such as Jefferson, thought the Con-
stitution did not authorize the national government to create a
bank. Hamilton, and more importantly Chief Justice John

3. Gladstone, Kin Beyond Sea, 127 N. AM. REV. 179, 185 (1878). Gladstone’s
remarks are put in their proper context in M. KAMMEN, A MACHINE THAT WOULD
Go OF ITSELF 162-63 (1986).
5. P. FREUND, CASES ON CONSTITUTIONAL LAW xxxix (4th ed. 1977) (described
by Justice Brewer).
6. Justice Harlan wrote for the Court in upholding a state law forbidding freight
trains from running on Sunday in Hennington v. Georgia, 163 U.S. 299 (1896). That
decision has not been overruled and was cited as upholding a secular regulation in Mc-
Marshall, disagreed. Madison, who had as much responsibility as any for the Constitution's text, concluded when he was president that it did not authorize the federal government to build roads or bridges. Not until 1942 did the Supreme Court assure us finally that the Constitution enabled the national government to legislate on national economic problems.

The vices Thomas Jefferson perceived in the 1787 Constitution reflected his republican biases. In addition to the failure to include a bill of rights, several faults he identified remain troublesome issues today. Jefferson feared that presidents might be reelected for life, a concern that in due course inspired the twenty-second amendment. Jefferson's fear of a monarchical presidency was deeply rooted in his philosophy, as well as in his observations about contemporary monarchs who for the most part, he said, were incompetents, fools or "really crazy"—all qualities he claimed were accentuated by excessive inbreeding. Whatever the faults of modern presidents, there is no evidence that they are attributable to inbreeding.

Jefferson was also troubled by the failure of the Constitution to guarantee the writ of habeas corpus. The scope of the writ is defined by Congress and not by the Constitution as Jefferson wished. He warned that Congress could limit the scope of the writ, although it evidently did not occur to Jefferson that the Supreme Court might also confine the great writ. The framers' debated decision not to emphasize guarantees of personal liberty conformed to their chief goal, which was only to create the outline of a national government. Their decision not to include a bill of rights was soon repaired. Their decision not to impose more detailed substantive limits

9. 1 J. Richardson, Messages and Papers of the Presidents 584-85 (1908) (Madison's Veto of Internal Improvement Bill (1817)).
12. See Ex parte Bollman, 8 U.S. (4 Cranch) 23, 30 (1807).
15. The Convention briefly debated including a guarantee of the writ of habeas corpus on August 28, 1787. See 2 The Records of the Federal Convention of 1787, at 438 (M. Farrand ed. 1937) [hereinafter RECORDS].
on state governments was not repaired until after a bloody civil war.

Jefferson wisely saw that the Constitution's grant of effective life tenure to federal judges created an awkward problem. While he approved giving the judiciary independence from the executive branches, he worried that it would be nearly impossible to remove a truly bad judge because of the difficulty in impeaching and convicting. The recent difficulty and delay in removing Judge Claiborne of Nevada confirms those fears. At present, there is no fair and effective method for removing inadequate federal judges.

Jefferson's other fears, such as his misgiving about granting the Supreme Court appellate jurisdiction in both "law and fact," and his objection to requiring all state and federal officials to bind themselves by oath or affirmation to support the Constitution, proved groundless or trivial.

After Jefferson's death, more fundamental criticism of the Constitution was voiced by abolitionist critics, such as William Lloyd Garrison, who referred to the Constitution as "a covenant with death and an agreement with Hell." To punctuate his distaste, Garrison publicly burned a copy in 1854. The abolitionist critics were justified in viewing the Constitution as imperfect, but if the framers had not placated the South by tolerating slavery, no Constitution could have been drafted or ratified. For several generations slavery "divided the American nation into two distinctive halves." The Supreme Court, in the infamous Dred Scott case, aggravated our agonies by holding that the fifth amendment forbade Congress from eliminating slavery from the territories. It took a war and three amendments to begin repairing the framers' failure to address race problems. The vices in the original Constitution were surely as unavoidable as they were inevita-

18. U.S. CONST. art. VI, § 3.
19. M. KAMMEN, supra note 3, at 98.
20. 1 RECORDS, supra note 15, at 593-96 (discussions of July 12, 1787, recorded in Madison's notes).
ple. Far-reaching limits on state powers such as the fourteenth amendment would have been anathema to the nation in 1787.

Although the framers undoubtedly anticipated a growing union, few of our early leaders expected the United States to become a global leader with worldwide interests and responsibilities. Hence, it is not surprising that the 1787 document ill equips us to be a world power. George Kennan observed:

The sharp division of powers, which represented in the eyes of the founding fathers the very cornerstone of the American governmental system, already goes far to rule out the privacy, flexibility, promptness and incisiveness of decision and action, which have marked the great imperial powers of the past and which are generally considered necessary to the conduct of an effective world policy by the rulers of a great state.23

Kennan's comments mirror those of Lord Macaulay, who, seeing the instability and fickleness of American policies in 1857, told an American friend, "your Constitution, sir, is all sail and no anchor."24 Lord Macaulay's point was sharpened twenty-five years ago by Senator Fulbright, who wrote that "for the existing requirements of American foreign policy we have hobbled the President by too niggardly a grant of power."25

Kennan's opinion drew a sharp response from Eugene Rostow,26 but whether either is correct is not what is pertinent to this essay. It is demonstrable that a successful United States foreign policy requires cooperation between the President and Congress, as well as the understanding, if not wholehearted support, of the heterogeneous electorate. Presidents forgetting this fail in their constitutional duties and can find no solace in the fact that no other nation requires so much and so widespread support in foreign affairs. No nation imposes a barrier as formidable as requiring a two-thirds vote of an in-

dependent senate, a requirement that means bipartisan support is essential for treaties, and which generates pressure for alternative means of making international agreements.27

The framers deliberately chose to harness presidential initiatives, and we may honestly debate their wisdom. The Convention rejected Roger Sherman's argument that the President simply be the embodiment of legislative will,28 but it is by no means clear from either the text or from Madison's notes exactly how much power in diplomatic matters the Constitution actually allocates to the President. Plainly the Convention decided to enlarge presidential powers only after it had struck a balance between the interests of large and small states. The senate was chosen to review treaties and presidential appointments because the small states were equally represented there. The scope of presidential powers, however, remained vague. The best summary of what the framers intended is offered by one of the participants, Abraham Baldwin, of Georgia, who wrote later that some foreign relations issues were deliberately left unsettled in the hope that they would be resolved "by practice or by amendments in the progress of the Government."29 One of the virtues, or vices, of the Constitution is that the shifting balance between congressional and presidential authority is attributable more to the personality and philosophy of current leaders, and to the issues of the moment, than to authoritative doctrine. It would be tragic if the constitutional balance were established at a time when the President was weak, and Congress strong, or vice versa. That balance cannot be achieved by judicial rule-making.

Nevertheless, the Supreme Court has seized substantial power to umpire presidential disputes with Congress. Despite the textual uncertainty, some tendencies are clear in a handful of decisions. The more an issue involves military strategy, weapons deployment or defense plans, the more easily it is argued that the President's exclusive power under article II as "Commander-in-Chief" should prevail over the competing legislative claims of Congress. However, when the issues in-

27. It remains debatable whether executive agreements can displace prior statutes. See Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860 (1986) (wherein the issue is cleverly avoided).
28. 1 RECORDS, supra note 15, at 65.
29. 3 RECORDS, supra note 15, at 370.
volve money which must be appropriated by Congress, or regulations of foreign trade, the balance is less favorable to the President. More often than not, the balance is struck by a process of conciliation, accommodation and compromise, without which the nation could not long endure. Judicial review of the polar claims of the President and Congress in matters of foreign affairs is relatively, and happily, rare. A judicial decision firmly and finally settling presidential or congressional claims could have disastrous future consequences. It is understandable that the decisions of the Supreme Court in separation of powers claims involving foreign affairs are delphic, ambiguous, and seldom supply predictable doctrine.  

The basic constitutional vice, however, is that separation of powers issues are frequently found justiciable. Fortunately, by and large the courts rule in favor of the President in critical instances.

A favorite source for advocates of strong presidential power is the Prize Cases of 1862. 31 The Prize Cases involved Lincoln’s action to preserve federal rule in the South. Blockading ports and selling violating-vessels as prizes was considered a rational method of carrying on a war designed to coerce the South. The holding of the case was expressed in alternatives, and the strongest ground was surely the alternative ruling of Justice Grier that Congress had subsequently ratified the President’s order to seize vessels under the law of war. 32 Commentators still debate whether the decision supports a presidential power to send forces into foreign combat without congressional approval. Justice Douglas questioned their application to justify military orders in the Vietnam conflict. 33

The Constitution’s inadequate guidance is underlined in a recent decision sustaining presidential powers, Dames & Moore v. Regan. 34 The Court, in an admittedly ad hoc decision, upheld an executive order suspending attachment orders of federal courts. 35 The Court declined to find any conflict

32. Id. at 698.
35. Id.
between the President and Congress.\textsuperscript{36} Instead, the Court ruled that Congress had granted discretionary authority to the President by implication.\textsuperscript{37} Except for the obvious foreign affairs implications, it is hard to reconcile \textit{Dames & Moore} with the steel seizure dispute of \textit{Youngstown Sheet & Tube Co. v. Sawyer}.\textsuperscript{38}

Besides possessing discretionary power, the Court recognizes that the President has an uncertain amount of absolute power. One example lies in the executive privilege, a right not specified in the Constitution but found by the Court as a necessary implication. In \textit{United States v. Nixon},\textsuperscript{39} the Supreme Court stressed seven times that it was not ruling on an executive privilege claim involving foreign affairs, clearly indicating that executive privilege exists for some purposes. However, the contours of that privilege are unclear. Presumably, an executive privilege, if found, is absolute and on a par with the President's powers as Commander-in-Chief. All the Supreme Court has said supports the argument that it is unlikely to find courts supplying definitive answers to critical and enduring constitutional questions involving foreign affairs.

The reluctance of courts to rule against the President on foreign affairs issues is not as apparent when the issues are domestic.\textsuperscript{40} In this sphere, judicial power is less restrained. Indeed, the most apparent vice, or virtue, of our Constitution is in the ambiguities which invite interpretation, and, in a proper case, judicial review. Although the framers are criticized for failing to specify the reach of judicial power, some judicial interpretations were expected.\textsuperscript{41} Thomas Jefferson predicted a judicial role in construing the Bill of Rights.\textsuperscript{42} He recognized that constitutional debate is legal debate, and

\begin{tabular}{ll}
36. & \textit{Id.} at 687-88. \\
37. & \textit{Id.} at 680, 686. \\
38. & 343 U.S. 579 (1952). \\
40. & The prime example is \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579 (1952). \\
41. & 2 RECORDS, \textit{supra} note 15, at 76 (almost casual observation by Luther Martin, a fervent advocate of state claims, on July 21, 1787). \\
42. & On March 15, 1789, Jefferson wrote James Madison to urge drafting a "declaration of rights," and said, "in the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary." \textit{T. JEFFERSON}, \textit{supra} note 11, at 943. \\
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therein lies the distinctive quality of American constitutional law.

It is clear, however, that deep and fundamental political issues are not, and cannot be, decided by the Supreme Court. Our civil war is evidence of one constitutional debate fought in part over an unresolved constitutional question, namely, whether states were free to withdraw from the covenant. On four occasions controversial decisions of the Supreme Court have been displaced by constitutional amendments,43 and others have been proposed from time to time to overturn other decisions. Feverish debate centering on the role of the Supreme Court interpreting the Constitution continues. The British journal The Economist observed thirty years ago when the Supreme Court decided to review President Truman's seizure of the steel mills:

At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start.44

That fascination with constitutional debate is costly because it tends to focus attention on the courts. Litigation with its winner-take-all rules is a dangerous way of deciding close and value-laden issues. Therein lies a vice in the Constitution. However, reliance on the courts can also be a virtue because courts do decide issues, and they function best when those issues are truly put to rest. Professor Neal Komesar makes a valuable contribution to constitutional discourse in pointing out the institutional forces operating upon courts.45 The lesson is plain — courts should perform only the jobs for which they are fit and should abstain in other matters. The complex


doctrines of standing, political questions and justiciability can and should help delineate the proper judicial sphere.

**DOES THE CONSTITUTION MAKE IT IMPOSSIBLE TO GOVERN?**

A constitution need not make it impossible to govern, as the Emperor Frederick the Great found with the Prussian Constitution. The Prussian document was quite satisfactory for him. "My people and I," he said, "have come to an agreement which satisfies us both. They are to say what they please, and I am to do what I please."46 The President of the United States marches to a different tune. American presidents have unique problems governing because of the separation of powers articulated in the Constitution.

"A particular shortcoming," says Lloyd Cutler, a principal aide to President Carter, "is the structural inability of our government to propose, legislate and administer a balanced program for governing."47 Demonstrably, the Constitution makes it more difficult to govern efficiently. A parliamentary system does not distribute national power among three branches so sharply as does our system.

Separation of powers encourages stalemates. The President is elected on the basis of a legislative program, but cannot carry it out. The President is hobbled, says Cutler, because of limited leverage over members of Congress to entice their support, the need for a two-thirds confirmation by the Senate of treaties and for ambassadors, the significant need of bipartisan support for essential legislation, and the difficulty in acting quickly unless Congress has previously delegated broad powers.48 Moreover, Congress is likely to impose statutory conditions that hobble presidential policies such as, for example, banning military assistance to the Contras of Nicaragua or to Turkey, opposing forces in Angola, and foreclosing foreign aid because of human rights violations. Onerous conditions placed on those receiving United States assistance is traditional.

48. Id.
Cutler vigorously proclaims that the virtues of the 1787 Constitution are vices two hundred years later. He notes that different kinds of choices are now required. Today's choices are more difficult because resources are no longer adequate. A choice today leaves losers. In 1787, the nation enjoyed abundant lands and the promise of an expanding economy. Losers could migrate; they cannot today. Cutler further notes that the world is interdependent in ways never anticipated. Economic problems in Brazil, Japan and elsewhere affect the United States too. Finally, changes in the relationship between the legislative and executive branches are aggravated by size and quality. Congress is no longer led by a few leaders. Rather, legislative power is shared, the seniority system is weak, and several committees are involved in nearly every bill. There are public markup sessions, and huge staffs must be coordinated. The decline in party discipline and importance of interest groups make today's leadership infinitely more difficult than in 1787.

Examples of constitutional constructions making the business of government more difficult are legion. The Supreme Court's decision in Buckley v. Valeo, holding that Congress lacked authority to designate officials to enforce the federal elections law, wiped out a hard-bargained political compromise. That decision rests on a rigid line between the functions of the Executive and Congress. The Court, rightly or wrongly, made political compromises difficult and cast doubt on the power of Congress to insist that members serve on executive department trade delegations negotiating agreements with foreign nations.

In July of 1983, citing the plain text of the Constitution, the Court forbade Congress from retaining sole power to veto executive agency rules. The Court struck down a useful political device that had been used for more than fifty years,

49. Id. at 132-33.
50. Id. at 133-35.
51. Id. at 135-36.
52. 424 U.S. 1 (1976).
and thereby generated a wealth of legal business because of its literal, if not mechanical, reading of the Constitution.\textsuperscript{54}

Using a similar definitional method, the Court in 1986 struck down another bargained compromise between the President and Congress which had been worked out in the Gramm-Rudman Act.\textsuperscript{55} The Constitution requires that executive officers be appointed and removed by the President.\textsuperscript{56} The Comptroller General, concluded the Court, was too much a creature of Congress to allow him to exercise executive budget functions. The Court, therefore, rejected the claim that when the Constitution assigned Congress the power to appropriate money it also gave Congress a choice of means.

The Court is doubtless correct in reading the Constitution as establishing tension between the President and Congress, but the methods employed in other separation of powers' decisions support a more flexible and accommodating constitutional interpretation. In \textit{Nixon v. Administrator of General Services},\textsuperscript{57} the Court described the argument that each of the government's departments are independent as "an archaic view."\textsuperscript{58} The Court adopted a balancing approach in upholding congressional power to regulate the disposition of President Nixon's papers because the complex system of regulations supplied adequate initial protection of the President's lawful authority.\textsuperscript{59} In \textit{United States v. Nixon}, the Court employed a functional analysis in determining whether or not the President was obliged to surrender materials required in a criminal trial.\textsuperscript{60}

The Court's failure to identify a single test in evaluating separation of powers' claims has merit. Decision-makers find it expedient to negotiate and compromise, because it is not known which of the three approaches is correct — defini-

\textsuperscript{54} It remains vexing to determine whether an invalid legislative veto provision is separable from the remaining portions of the statute, or is so linked to the other parts as to make the whole statute void. See Alaska Airlines v. Brock, 55 U.S.L.W. 4396 (Mar. 25, 1987).
\textsuperscript{55} Bowsher v. Synar, 106 S. Ct. 3181 (1986).
\textsuperscript{56} See also Buckley v. Valeo, 424 U.S. 1 (1976).
\textsuperscript{57} 433 U.S. 425 (1977).
\textsuperscript{58} \textit{Id.} at 443.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} 418 U.S. 683 (1974).
tional, functional or balancing. Whether this contributes to a workable government is uncertain.

Justice Jackson was correct in observing that an overriding purpose of the framers was to form a "workable government." For the most part the inescapable tension among the three branches has been managed through adoptions in the political arena, rather than through refined judicial interpretation of the boundaries between the President and Congress. Curiously, the Court is more reluctant now to rule on state claims of immunity from federal regulation than to umpire executive-legislative disputes.

Some issues susceptible to litigation remain deliberately unresolved. What is, for example, the power of Congress to require the executive branch to supply information necessary for legislators? Courts have not yet defined the contours of "executive privilege," nor is there a strong disposition to seek such rulings. Both branches have managed to avoid litigation since the confrontations involving the Nixon papers.

The value of this uncertainty in locating executive and congressional boundaries was recognized many years ago by Justice Brandeis, who observed:

The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

The price of friction is high, as are the hazards of compromise. Cutler, who had intensive experience as a presidential aide working with congressional leaders, points out that compromises are not always desirable. "When the President gets only half a loaf of his overall program, this half a loaf is not necessarily better than none, because it may lack the essential

61. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (Jackson, J., concurring).
63. For additional discussion, see Baldwin, Congressional Power to Demand Disclosure of Foreign Intelligence Agreements, 3 Brooklyn J. Int'l L. 1 (1976); Baldwin, The Foreign Affairs Advice Privilege, 1976 Wis. L. Rev. 16.
64. Myers v. United States, 272 U.S. 52, 293 (1926).
quality of balance. And half a loaf leaves both the President and the public in the worst of all possible worlds."\(^\text{65}\)

The constitutional solutions Cutler offers to cure the vices he perceives may be worse than the disease he seeks to cure. He proposes nothing less than nearly total revision of the Constitution in seeking to bind presidents with Congress. He first urges that a vote for President be linked with one's vote for members of Congress. Voters would elect a team: President, Vice President, Member of the House of Representatives, and perhaps a Senator. Second, the President should be empowered to select half his cabinet from Congress. Thus, the Incompatibility of Office, and the Officers clauses would be deleted from the Constitution. Third, the President should be allowed to dissolve Congress and call for new congressional elections (i.e., as in the French Constitution). Fourth, the President's dissolving power should be equalized by a two-thirds vote of Congress to call for a new presidential election. Fifth, presidents should be elected to six-year terms.\(^\text{66}\)

The scheme is elaborate. A President could dissolve Congress once each term and call for new congressional elections for the remainder of the term; Congress could, by majority vote, call for simultaneous, new elections for President for the remainder of the six year term. State primaries for these mid-term elections would be held sixty days after the call, nominating conventions thirty days thereafter, and national elections sixty days after the state primaries. Thus, a new government could be formed within a 120-day cycle. Cutler would also reestablish a modified two-house legislative veto, which could be overturned by a presidential veto, but the Congress could reinstate its veto with a two-thirds override.

The Cutler proposals are, of course, farfetched and unrealistic. They are revealing only in emphasizing the frustrations the Constitution fosters. They remind us that the Constitution endures more because of the labor of its servants rather than because of the talent of eighteenth century gentlemen. Its servants apply and interpret the Constitution wisely, and foolishly. Statesmen, knaves, criminals, lawyers and professors are sustained by constitutional argument.

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66. \textit{Id.} at 139-43.
A constitutional virtue is its implicit call upon people to work together. Justice Holmes confirms the view that how we build upon the Constitution is more significant than the words of the document itself. In Missouri v. Holland, he observed:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.

Holmes' words challenge Americans today. The Constitution does not command or guarantee the rule of law. It only offers opportunities to work together in a common venture. The Constitution offers a framework for intelligent bargaining, it does not guarantee wisdom.

What we must honor is not a document, but a process. The nation flourishes as no other nation on the globe has, not because of the Constitution, but because we try to honor its premises and the procedures it establishes. The Constitution possesses qualities that deserve celebration and justify the oath we take to support it. Those qualities are its focus on procedure, its invitation to political compromises, and its use of basic common law language and forms. The Constitution is not a complete break with the past like the Napoleonic Code. Much of the document's language is copied from colonial charters and from British legal documents dating back to the thirteenth century Magna Carta.

A PROCEDURAL DOCUMENT

First and foremost, the Constitution is a procedural document. For the most part it establishes procedures stating how the national government is organized, how laws are enacted and how officials are chosen. In article I, the Constitution states what Congress can do, what it cannot do, and additionally lists some restrictions on state powers. The rough outlines of a criminal justice system are described by

67. 252 U.S. 416 (1920).
68. Id. at 433.
guaranteeing trials by jury; but only one crime, treason, is defined. The document says very little about substantive rights.

American focus on procedure suggests a limited judicial role, one that Justice Holmes fervently argued should permit legislatures broad freedom to choose. Holmes was ninety-three years old when he spoke sharply to Justice Stone. "Young man," said Holmes to Stone, who was then sixty-one, "about seventy-five years ago I learned that I was not God. And so, when the people of the various states want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, 'God-dammit, let 'em do it!'"\(^{69}\)

Holmes understood that allowing the President and Congress to "let 'em do it," unless expressly forbidden by the Constitution, was not a license for tyrants. Presidents and Congress are confined by Constitutional procedures. These procedures are the direct result of compromises, and like most compromises they are awkward. The President is selected in a curious manner. The Senate represents each state equally regardless of size and the number of inhabitants. The President and Congress share war powers. The scope of Congress' power to regulate the appellate jurisdiction of the Supreme Court may, or may not, be plenary. The nature of the treaty power is unclear. Both the state and national governments may legislate on the same subject matter. Indeed, the Constitution contains so many compromises that several of the most vocal and influential delegates refused, at the end, to sign the document.

**OUR CONSTITUTION INVITES PRAGMATIC SOLUTIONS**

The United States is lucky that in 1787 the Framers were practical men of affairs who knew business, banking and farming. They were wise, pragmatic, and seldom quarrelsome. The keynote of the Constitutional Convention was expressed by John Dickinson of Delaware: "Experience must be our only guide. Reason may mislead us."\(^{70}\) The pragmatism of the Framers liberated them from allegiance to Old World

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\(^{69}\) C. CURTIS, LIONS UNDER THE THRONE 281 (1947).

forms of government, but their knowledge of history and politics anchored them to reality. They knew, but did not reflect upon, the fact that their meeting was the first recorded instance of freely chosen representatives of a people deliberately and peacefully debating what form of government their country should adopt. As models to avoid and to emulate, the Framers considered Greek, Roman and Dutch Republics, and of course, the rich, instructive and bloody history of England.

**Beware of Ideologues**

Perhaps Americans were fortunate that the Convention did not include several renowned political thinkers. John Adams was in England; Thomas Jefferson, widely regarded as the most enlightened, if not the most self-assured American of the time, was in France. Neither played a role in shaping our fundamental law. One may muse that had Jefferson been in Philadelphia the forces of pragmatism might have been overwhelmed by Jefferson’s logic, or that he and Adams would have neutralized each other, and the Convention would have dissolved in failure. If either Jefferson or Adams had prevailed, we would have quite a different document today. It is also fortunate that several of the most fervid hotheads of the American Revolution were not in Philadelphia in 1787. The advocacy and eloquence of Patrick Henry and Samuel Adams might have produced a document establishing an even weaker central government. The composition of the Convention which resulted recalls the old quip, “God looks after fools, drunkards and the United States.”

Surely the fractious nation had done little in the previous decade to deserve the collection of talent assembled in 1787.

Luck must play some role in constitutional success. Many other nations have adopted constitutions copied from ours but have not managed to keep them working. Latin American countries drew on the United States Constitution as well as upon the rich experiences of Spain and Portugal, but no national constitution written in the nineteenth century survives as an operative working document. Several nations have copied our form, but with indifferent success. Iran, in 1906,

71. BARTLETT'S FAMILIAR QUOTATIONS 1102b (E. Beck 14th ed. 1968).
directed a system of judicial review by which selected clergy would review acts of the legislature and measure whether they were consistent with the Koran. 73 No clergy were selected to perform this task until 1980. Their judicial review rejects land reform and women’s civil rights, and restores divorce on the demand of the male spouse. Italy and Germany, following our example only in part, have special constitutional courts. The United States is unusual in bestowing on ordinary courts power to declare legislation unconstitutional. That we do confer this power testifies to our confidence in judges and lawyers — and to our belief that errors will be corrected promptly on appeal.

GREAT JUDICIAL POWER

The Constitution's emphasis on procedure enhances judicial power. Nothing in the Constitution or in the Framers' debates, however, suggests the major role federal courts have had in protecting civil liberties, umpiring separation of powers disputes, or protecting the national common market. Courts earned their distinctive role in two ways; first, by seizing it, and second, by persuading that this seizure of judicial power was justified. Whether or not the Supreme Court's decisions are the "supreme law of the land" on a par with the Constitution is, as the Court once said, beside the point. 74 We obey the Court because the alternatives are worse. Tradition is a more forceful teaching than the text of the Constitution, and our constitutional traditions begin with the Supreme Court.

Chief Justice Marshall leads the parade of creative Justices who have established that the Constitution allows courts to haul a presidential agent into court, 75 and to displace the judgment of legislators. 76 Marshall was the first to rule that the structure of the Constitution confers some immunity from state law on federal programs. 77 These seminal decisions have only tenuous links to the text of the Constitution, but have

73. Id. at 500.
76. Id.
been persuasive nonetheless. The result in these cases decisive- \ys shapes the constitutional law we struggle with today.

THE PERSUASIVE POWER OF THE COURT

The Supreme Court is, more often than not, persuasive. The great Marshall decisions have influenced constitutional government more sharply than the Constitution itself. We are also indebted to other phrasemakers: Justices Holmes, Brandeis and Jackson. Their prose captures attention, commands support and inspires our allegiance. As we observe the Constitution’s bicentennial, let us particularly mark the people who make representational government work — the lawyers, judges, politicians, statesmen and soldiers who have devoted themselves to it. Their work is our legacy, and their labors deserve our esteem.