
THE YEAR OF PRIDE AND PRAISE

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This is the year for pride and for praise. Gladstone said it was "the most wonderful work ever struck off at a given time by the brain and purpose of man."¹ When one is young, one smiles indulgently at such hyperbole; what an old windbag that Gladstone was! I got a little older, and one wise day I asked myself, "Alright, if not the American Constitution, then what *is* the most wonderful work ever struck off at a given time by the human mind and will?" I'm still asking. I haven't been sleeping with the Constitution at my bedside; it's just across the room. But I may move it closer, where I can stir and touch it during the night, just to remind myself, in these of all times, that fifty-five American people, in about a hundred days, could create such a thing, without even hurrying.

What was their secret? I'll tell you what I think. I think they could do it because they thought they could do it. They thought that four or five dozen people, pretty well-educated, talented, and experienced in politics, could meet in Philadelphia one summer and draw up a Constitution that would last a great nation—destined, as they knew, to grow greater—for an indefinite time. I don't think anybody nowadays would believe in a crazy thing like that. Think of the inadequacy of the database! Should we not let out a contract for loading up a computer or two? Feed into it "models," to predict the functioning of this or that governmental device, as computers predicted the outcome of the Vietnam war? And how could just fifty-five people give adequate hearing, not to the few simple though grand interests considered in the 1787 compromises, but to the desires of every religious sect, every used-car dealers' association, every ethnic group, every industry clamoring for subsidy, that would be pounding at the door for a little bit better deal? Would not either a bowing to the "people's right to know," or inevitable leakage, make impossible that effective and absolutely vital secrecy in deliberation that the fifty-five 1787 people maintained? I cannot think that you could now get together fifty-five people who would believe of themselves, or of whom it would be believed by others, that they could do it.

What did they do? They created a flexible but resilient structure, and the possibility—more, the likelihood—of benign, even vital, developments

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¹ Gladstone, *Kin Beyond Sea*, 127 N. AM. REV. 179, 185 (1878).

within that structure. In such combination resides the art of constitution-making.

One ought to beware of judging a constitution by what it settles. It is not the prime function of a constitution to settle everything—not even everything important—but to provide usable paths toward later wise settlement. Nor is it often easy to say what expectation, if any, existed, at the opening of these paths, as to the ends toward which they would be traveled. It may be that, under the wisest of constitutions, it is hardest to say whether some grand feature of the government, achieved within the firm constitutional structure, by the use of its prudent leeways, was foreseen by those who ordained the structure. Credit for the achievements of our own Constitution may therefore have to be awarded jointly but indivisibly to those of 1787 and to the American people since. I rather guess that this would have seemed obvious to those who, after deliberations secret in their time and largely kept secret for decades to come, gave out this 6,000 word document, about the length of one solid academic lecture, for public acceptance, in its own spare and carefully weighed terms, as that which was to “constitute” the United States of America.

Let us then consider some wonderful things that have grown in direct descent from the 1787 text, within its restraints and using its provident leeways.

The only thinkable start is with the system of states, practically and in sound theory indestructible, that have been bound into the Union. This system is the creation of the American people before 1787, in 1787, and in consequence of 1787. Nothing about this system is surprising except maybe the facts.

In 1889, Montana was admitted to the Union, becoming thereby entitled to at least one Congressman, and two Senators, just like New York, and to the same degree and kind of internal power as was enjoyed by New York—the latter-named being in 1889 a political unit with an unmistakable identity back a good deal more than two hundred years, and with an 1889 population about forty-two times that of Montana. In the United States Senate with its immense general and special powers, and in all local power appertaining to the States, these two entities thenceforth stood equal. If Montana got one Congressman and Delaware—settled by the British in 1664, a signer of the Declaration of Independence, and the first state to ratify the Constitution—got two, that would have been strictly because neutral principles of arithmetic found the dividing line to lie between their populations, as counted in 1890.

Now these facts may not be surprising. But they certainly are astounding. I don't think any other country in 1787 (or for that matter in 1889 or now) had or has any such system so combining simplicity and bold imagination for consolidating both physical and moral authority over territories and populations as these vastly expand. You develop as the goal an exact equality of status with Massachusetts. With some variations in timing, you grant that equality. There is in this the grandeur of magnanimity, rising far above any small and temporary concerns.

The 1787 Constitution pointed the way, empowering Congress to do this. There was in the Convention some major hesitation: a proposal to put in the Constitution a rule that the anticipated new western states be treated as equal in all respects to the old was, I believe, twice defeated, and never passed. On the other hand, no *inequality* was constitutionalized. The provision of article V, that equality of representation in the Senate is to be shielded from change even by amendment, would have made it a close-hauled thing to attempt admission of new states, called "states" but not enjoying this right in full. Probably, too, the affirmative provision of article I might have made it seem prohibited to call anything a "state" and not accord it the right to send two Senators, and the number of Congressmen established in article I. One could imagine textual quibbles about this, but the 1787 Constitution at least pushed in the direction of full-measured generosity. My opinion would be that equality in these centrally strategic features must have reinforced, at least, those impulses toward general equality that did in the event prevail.

That is what this whole system has exhibited—generosity. There is no better name for it. The older states made the decision—in the constitutional passages pushing that way, in the leeway they left, and then in their actions—not to set up intricate, and for each case specially calculated, grades of dependency in the lands to the west, but to give a full share in government, under the same rules as those applying to Virginia, to each of these communities as it came into being, with only minor and short hesitations, as in the case of Utah—and, of course, saving always the terrible question of slavery, which was too huge for political solution.

Of course, generosity was the best policy, an inspired policy. How better to insure total loyalty than to do exactly what was done? The 1787 Constitution did the best a constitution could do. It may have suggested, it surely allowed, and in no way discouraged, this astounding generosity—this succession of deeds that were both solid deeds and at the same time gestures of fullest acceptance, of profound respect.

The American system of federalism—as to the new and old together—has another vast advantage, an advantage that is not often given its full due, because attention seems to be so riveted on attempts to detect some tiny spark of life in a delusion long brain-dead.

Let us focus thankful attention on what we really have. Institutions are never describable except by approximation, but the approximation here can be pretty close.

First, so approximating, we really have a national government that can deal by law with any subject which its political branches think it appropriate to deal with on a national basis. (Here and in what next follows I put to one side, for just now, the very serious limits on all government contained in the human-rights material textually in, or implied by, the Constitution.)

Secondly—and this is the unique thing that our federalism really gives us—the states are *also* generally empowered. In this respect they differ from all other *subordinate* governmental bodies that I know anything about. They may deal with any subject, so long as they do not do anything, in the exercise

of this omnicompetence, that transgresses something in national law, expressed or otherwise found.

The national omnicompetence has come about through the application—by nearly all courts and to nearly all problems—of canons of interpretation suitable to expounding the powers of a great nation.

But it is the *state* omnicompetence that is the more interesting. It has not been reasoned about or teased so much. It rather surely comes from the idea—dominantly a myth, since about two-thirds of the states were national territories before they were admitted to the Union—that the states were originally sovereign, and that they therefore had—and still have—the omnicompetence of sovereign states, though they cannot of course have sovereign independence of control by national law.

So, when my old friend Bob Eckhardt was in Congress, he and I drafted a Public Beaches Bill. Its aim was to use the federal power to slow down or stop private appropriation of public beaches—beaches, and they were very many over which a public easement existed, but might be extinguished by prescription if action were not taken to end encroachment. This bill did not win its way to committee hearing; Congress is always too busy for something, and that year Congress was too busy for that bill—and indeed for several others we drafted. (But it was a lot of fun.)

In most if not all other countries—and I think it's probably all—that would be the end, for now, of action to protect public beaches, unless it just so happened that some local or administrative authority were already chartered to deal with this rather new subject. The charter grant of the needed power must *precede* local actions. It must therefore often be impossible for subordinate governmental units to move without the national government's considering whether, and in what terms, it wishes to empower the local entities. In such a case—and it is the general case—national failure to act is total failure to act.

But with us the situation is utterly different, turned inside out. Without any special chartering, without anyone's even thinking about the jurisdictional question, Oregon, Texas, New York—all the littoral states—are competent authorities as to their beaches, just as they are competent authorities as to all other matters not forbidden them by national law.

The consequence is—and in this very field it has borne good fruit—that these littoral states are right there to handle the public beach problem, when the national power cannot get to it, or does not wish to get to it for now. The time may come when this state-by-state treatment of beaches develops such inefficiencies as to move Congress; but meanwhile Congress can consult its own priorities in calm, knowing that the problem need not be utterly neglected, as it would be neglected if there stood in readiness no second-tier but omnicompetent authority to deal with it.

This is not a matter just of public beaches. For “public beaches” read “virtually any problem that time can engender.” This wonderful federalism covers every subject as to which no convincing special case can be made for a contrary provision in national law.

This system of authority-allocation exhibits something like beauty. The allocation is mediated by politics, and by exactly the right kind of politics. When the need for national action is registered strongly enough, in the national body that alone is competent to register the strength of that need, then national action can be taken. Until that point is reached, there stand at the ready *generally* empowered entities—the states—to deal with the problem.

This is genius material—a very high point in constitutionalism. The “principles of federalism” are more often talked about as though, if they exist at all, they must exist as fixed limits dividing state from national power. Aside from the fact that two hundred years have not sufficed to produce the least settling on any such limits, the projected system is hugely awkward, and if it worked it would likely work ill. A perusal of the constitutional arithmetic of the United States shows that, to get concurrent majorities in Senate and House, you need a quite large consensus; on top of that, you must either get Presidential acquiescence or truly enormous consensus in Congress. To assert that there exist, and should be applied, some delphically preordained rules as to “proper function” of nation or state, is to envisage the frustration of conclusions reached at the national level by that kind of consensus—not on the basis of convenience, nor on the basis of ethically and morally charged human-rights material binding both state and national governments, but of so-called “principled limits” between these two governments, having little more shape or validation than the yearning that they may somehow, someday, be discerned and agreed upon. To what good, I cannot imagine.

Before 1787, how many governments were there with this kind of self-regulating division of function between the general and the local, with the local fully empowered to take care of problems that cannot now win their way to national attention? How many such governments are there now? I don't believe that Britain, Germany or Italy have such a system. The *Laender* and the *regioni* are not the same thing at all; the last thing I heard about this in Britain was a plaint, near the verge of tears, to the effect that regionalization of Britain was pressingly necessary, because the burden of decision and action on the Westminster government had become unbearable. I question whether anything like our federalism can be improvised, because I don't think any of those countries would go for omnicompetence—*no ultra vires plea*—as to local authorities. For that, you need immemorial commitment to the myth of state sovereignty. When you place state sovereignty face-to-face with national supremacy and national omnicompetence, you get this marvelously self-tuning system of federalism that we really do have. The reality is much more admirable than wistful imaginings. And the reality makes you understand why the states, after two hundred years of disappointment with the wistful imaginings, are still so important. Without their omnicompetence, the whole thing might have fallen to pieces.

I was rhapsodizing thus in class the other day, and afterwards a young woman asked me whether maybe this whole system had not come into being

through luck. This was a more than sensible question. I told her that of course it did, in primal and chiefest part. The myth of state sovereignty, and, depending on definitions, perhaps some of the reality of state sovereignty, came into the 1787 Convention. But one of the wisest forms of planning is not to monkey with your luck. Whether by choice or by superadded luck, the Convention did not play around with this piece of luck. From the very beginning they were concerned with the division of authority between nation and state, but nobody suggested one obvious device that I believe to have been used elsewhere—the enumeration of powers of the states. When one gets to the subject of new states, as to which sovereignty becomes pure myth, there is no suggestion of any wish to take advantage of this, by drawing cautious barriers around the powers of the new states. Was this a creative letting-be? What we have to say is that, as to doing, the 1787 people did all they could to leave the myth alone. From then on, new generations have done the same; even the Civil War did not stimulate any essential change. Here as elsewhere, the Constitution is the work of the 1787 people *and* of the American people since. There is plenty of credit to go around. The 1787 achievement is no less wonderful for its having been molded into reality during the whole time of the American people.

There was a man once who said he couldn't understand why people so admired the play *Hamlet*, since it was nothing but a bunch of quotations. Our Constitution is like that.

Take the constituency-basis of the House of Representatives. With minor and necessary adjustments, the size of a state's congressional delegation is proportioned to the state's population. That seems like an obvious thing to do; even the British got around to starting toward it in 1832. But what national government in the history of the world embodies any such idea before 1787? This is one of those questions I used to nail on my door in the Yale Law School, hoping to be enlightened. I'm nailing it up again, on my Columbia office door, just as soon as I can find the Dean and get permission.

Here's another such question: Before 1787, what national government in the history of the world put human-rights material right in its constitution, or in some other place where it had the very same authority as did the constitutive material that created the nation that was to be limited by the human-rights material? (I keep saying "national" government because I think some of this material was in some state constitutions before 1787—which in no way changes that the originality was of the American people, or detracts from the achievement of Philadelphia.)

The human-rights material in the Philadelphia Constitution was perhaps not much. As to the national government, it protected against the gross abuses of bills of attainder and *ex post facto* laws, set up some safeguards against the worst practices regarding treason, provided for jury trial in criminal cases, partially protected the writ of habeas corpus, and started toward religious freedom by outlawing religious tests for national office. The government could make your life pretty miserable with no more protection than that. *But the theory was complete*. The holdfast cell had gripped the

stone. Sometimes when my eye lights on the bill of attainder passage in article I, section 9, I get that tingling in the back of the neck; it's an apostolic glimpse to somebody who is still working, almost in the third century, on the very same process that started just right there.

Now let me slightly rephrase the question: In what national government, in the history of the world before 1787, was human-rights material part of the law that bound the regular law-giving authority, and the judicial courts? Procedurally, this is close to the question whether any other country, before 1787, had judicial review of national legislative acts. I don't know of any.

Some people, particularly academic people, like to say that the Constitution did not provide for judicial review.

It is worth saying again and again that the Constitution, on the face of it and in clearest text, ought to make this opinion impossible of being held, as to review of *state-law* material for federal constitutionality; just call up into your mind the supremacy clause of article VI. The teasing intellectual puzzle, and it is a fascinating one, is how there can exist, as psychological fact, any doubt whatever as to the legitimacy of this kind of judicial review—by far the more important kind, by far the kind that creates the more political turmoil. I have thought that maybe academic people dislike having any question settled so economically and completely as this one is settled in the supremacy clause. It doesn't leave you anything to do for the rest of the class period; coruscating speculations are quenched ere kindled; there is no room left for, "But couldn't you argue . . . ?" and all that. More radically, I think there are a lot of people, mostly not lawyers, but some lawyers too, who just don't like the idea that law itself, without recourse to any other materials than a good dictionary, can settle some questions. And then there are the journalists, whose calling it is to look at a perfectly plain text and ask, "Now what does that *really* mean?" (Don't get me wrong. I love the press. Especially a press that won't give up until the whole sorry story is dragged to light. Particularly these days.)

As to judicial review of Acts of Congress, the 1787 Constitution speaks of itself as law, the kind of law that binds judges in their courts, and generates law and equity cases. It is about equally plain, from the Constitution's own contents, that it is set up to be a law that binds even Congress. It is certain, from Section 25 of the 1789 Judiciary Act and from Federalist No. 78,² that people in those days generally drew the conclusion so forcefully indicated. *Marbury v. Madison*³ evoked protest, but on other grounds. That is why casebook editors have had to drag out Mr. Justice Gibson's 1825 dissenting opinion in (of all places) a Pennsylvania state case;⁴ that's the earliest and just about the only thing they have. You have to use it—even though you have to put in a footnote that even this lonely monadnock of opinion later

² THE FEDERALIST No. 78, at 521 (A. Hamilton) (J. Cooke ed. 1961).

³ 5 U.S. (1 Cranch) 137 (1803).

⁴ *Eakin v. Raub*, 12 Serg. & Rawle 330, 344 (Pa. 1825) (Gibson, J., dissenting).

changed his mind. How else can you get a class discussion going? Beyond serious doubt, judicial review even of Acts of Congress was known, in and after the Convention, to be a part of the Constitution. If I may coin an expression, this question is, happily, not of an intricacy proportioned to its interest.

What a noble creation that was! The nations of the world have thought passing well of it; we now hear of a *Corte Costituzionale*, of a *Verfassungsgericht*, even of a European Court for Human Rights. Everybody's doing it now. But those are just quotations; *Hamlet* itself was brought forth into history uniquely by the American people, politically the most gifted people so far seen. Before you stabilize your reaction to that, think of what happened with me and Gladstone. Think of the gathering in of land and people by the utterly new device—new in its high ingenuity as well as in its generosity—of modeling new states on old, and associating all indistinguishably in one fabric and frame. Think of the federalism wherein tasks are divided between the whole and the parts as national need dictates from time to time, with the assurance that no problem has to lie unattended just because the national power is not yet interested, or is for the time being occupied up to its capacity with other things. Think of the placing of human rights themselves in the very Constitution, whose lawful authority is thus limited by the law of its own being—and think of the nearly unbelievable fact that the American people, through their national democratic branches, (and I speak of actions, not of vain fulminations), have never even seriously tried to break out of the authority of the courts that have interpreted and applied this limiting law.

Well, some things went wrong in 1787. The Presidency gave the Convention buck fever—the presented problem being that of the method of choosing the President. They marched up and down on this, and ended up with a solution as to which a becoming reverence is hard to put on.

For some odd reason, people call it the “Electoral College,” and maybe we stand in some awe of it because of what that name suggests—an august collegial group, collected together to canvass the names of worthies, until shared wisdom of the *major pars* alights at last on one name—or, like the College of Cardinals, balloting in a room together, until trends appear and candidates having serious support are made known, so that future ballotings can be sensibly directed. I don't know why people applied the phrase “College of Electors” to the magnates who chose the Holy Roman Emperor. But we ought to discard the word “college,” which does not occur in our Constitution, and consider what, in that document, falls to the “electors.”

The dismally anti-collegial fact is that the “electors” for each state are bound by law to meet *in that state, on the same day throughout the Union*—Georgia to New Hampshire as it was then, Maine to Hawaii as it is now—and they are to “give their Votes” on that same day. If you have any old sailing-packet or stage-coach time-table lying about, you will be able to satisfy yourself that, under these strict orderings of time and place, not only

would general and responsive discussion be impossible, but it would be exceedingly difficult for an elector in, say, Pennsylvania to form a serviceable idea of what was likely to be happening in other states. Serious candidates could not reliably be identified; this always makes sensible (as opposed to sentimental) voting impossible. This system was sure to produce a winner as long as George Washington was available; that it would ever do so after then was speculative to say the very best. If a winner did not emerge from this constitutionally ordained chaos, the election went into the House of Representatives. But whether that House was voting on the highest five or on the highest three, it was quite likely that the House, a majority of the whole number of states being required for election, would itself not produce a winner. Thus this whole system, first to last, might not even pick a President—and you'd have to start in with the Vice-President. But the quorum in the Senate, for choosing him, was three-fourths, even under the twelfth amendment, while a majority of all Senators was necessary to a choice. So here, too, there might not be a winner.

That was a nightmare. What was needed was some way of identifying in advance a small number of serious candidates, and a limitation of the agenda, thenceforward, to voting on those candidates. The American people worked that out—through congressional caucus, through national parties with their conventions, through the primaries we now have, and through a powerful custom that the electors would ballot as they had pledged themselves to ballot. This set of extra-constitutional institutions has not solved the problem perfectly, but well enough, or at least tolerably.

These days we are developing another kind of crisis as to the Presidency—a crisis of power.

The legitimacy of any exercise of claimed inherent power by the President is not settled in law review articles, or by the esteem these severally may enjoy. The substantive law on this is “secreted in the interstices of [a] procedure.”⁵ The constitutional procedure is very heavily tilted in the President's favor—so much so that the futility of following it to the end may (and often does) cause congressional opponents of the President, like chessplayers, to resign early from a game the unfavorable end of which is clearly seen. Let's look at this procedure in all its stages, though we know the whole road may not be followed every time.

The first person to decide whether the President has power to take some action is the President. If Congress disapproves, the only action of which Congress is constitutionally—which is to say *procedurally*—capable is the passage of a bill or resolution purporting to condemn, disaffirm, or nullify the action, and perhaps to prohibit it in the future. This measure, under the very clear terms of article I, section 7, must be presented to the President for his signature. In the nature of the case, he will veto it. Override will require a two-thirds vote in each House—a forbiddingly difficult thing to attain, where

⁵ H. MAINE, EARLY LAW AND CUSTOM 389 (1883).

the President has done something that is supported by a good many people in the country or in Congress, though not by a majority in either. There the game ends.

An ever-growing substantive power of the Presidency is absolutely fated to be secreted in the interstices of this procedure, unless something can be done.

I have an idea as to what could be done. I have no illusions that acceptance of my idea is likely right now. But things may get a lot worse, and action of some kind may come to strike more and more people as necessary. If some action is not resolved upon, then the President is always going to be able to do pretty much what he wants to do, as long as he is supported by only one-third-plus-one of only one House, and never mind about the other House. Thirty-four Senators, who (in the limiting case of a smooth continuum) could represent states containing some five percent of the national population, can prevent override.

Let me put the matter not as a proposal but as a hope. I hope that someday, perhaps after one more administration of disastrous excess, many Senators and Representatives may begin to feel that the fated aggrandizement of the Presidency—through the operation of the procedure I have just outlined—bodes worse evil to the country than could any occasional loss on any one substantive issue.

If that ever comes about then—without any constitutional change—the way out of this Catch-22 could be opened, through the formation of a consensus, or convention, to the effect that certain kinds of presidential vetoes are to be overridden. Such a convention might conceivably grow up, for example, around presidential acts of war. As now, Congress might simply pass a bill or resolution, dealing negatively with the presidential act. The President would veto. Then, if the new convention prevailed, an override could easily be arranged, usually by the members who do not want to vote for override absenting themselves.

Now you say that's impossible, that such a convention could never form. You may be right. But if you're right we must face up to a very considerable paradox. In the War Powers Joint Resolution of 1973,⁶ both Houses of Congress voted by overwhelming majorities for a provision that would produce just exactly the same result as would be produced by the convention or consensus I have suggested. According to the Joint Resolutions, the Houses of Congress were to be able to pull the President out of a warlike situation by passing a *concurrent* resolution, not subject to veto. I repeat, that is *exactly* the situation which we would be in if a convention were to take shape and prevail in Congress that presidential vetoes of congressional measures directing an end to warlike actions ought always to be overridden.

That part of the War Powers Resolution pretty clearly set up an unconstitutional procedure. In any case, the War Powers Resolution has proven to be a disappointment—most fundamentally, I think, because it attempted too

⁶ War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982).

much and too exact *definition*, thus making it easy for a President to sidestep it—for it to become his perch and not his terror. But it remains true that the Houses of Congress of that day voted, by overwhelming majorities, to take certain measures out of the veto power. How can you be so sure that things will not get bad enough for Congress to form a similar judgment, and to implement it this time in a constitutionally impeccable way? (Consider, too, that any Senator or Congressman, however he voted on the original vote, might think it most unwise for the country to be committed to a warlike action that has been disapproved by majorities in both Houses, and so might vote for override.)

Such a convention of automatic override would give Congress enormously greater flexibility than did the 1973 War Powers Resolution. First in importance here is that *Congress would devise its own definitions* and from time to time make its own decisions as to when these definitions were applicable, instead of being inevitably trapped in a pattern of mere response to the President's decisions on these points. This convention, moreover, could be cautiously extended, *as Congress and not the President saw fit*. For example, Congress might extend it to vetoes of legislation forbidding in advance warlike actions the President was planning or was suspected of planning. Or to the veto of bills revoking or narrowing earlier delegation of some power to the President, or to any part of the executive branch.

You may say that the President, as he is acting under a claim of *constitutional* power, might simply disregard any congressional actions of the sort I am talking about. Well, for a while maybe, and in some cases. But acting in clear defiance of a command of Congress, his own veto having been overridden, is something I doubt a President would want to keep doing, or do often. For one thing, the mist around the concept of "impeachable offenses" might seem to clear up a little when a serious warning has been given, in the constitutional forms. For another, whatever immunities the President may be thought to have from civil liabilities, it is unlikely that all his subordinates could successfully rely on the excuse that they were "acting according to orders" that were issued in defiance of a duly enacted law.

This may be a less than inspirational note on which to end. We do still get buck fever about the Presidency. But it may in the long run turn out to be one of the greatest excellences of our Constitution that it puts in the hands of Congress, once Congress is sufficiently aroused, the means of saving us from any excess of executive power.

Did the people of 1787 anticipate this? Well, it is very plain that they did not anticipate anything like such free-wheeling use of the veto as has developed. Maybe they would not be displeased to find that Congress as an institution can have the final power in the government, when enough of its members have the necessary will. However that may be, their very text makes this possible.

In any event, let us not forget that so eminent a person as Gladstone thought that the 1787 Constitution was "the most wonderful work ever

struck off at a given time by the brain and purpose of man."⁷ That work is ours to use. All it could do, as to some of our problems today, was to clear a path. But what a path it cleared!

⁷ Gladstone, *supra* note 1, at 185.