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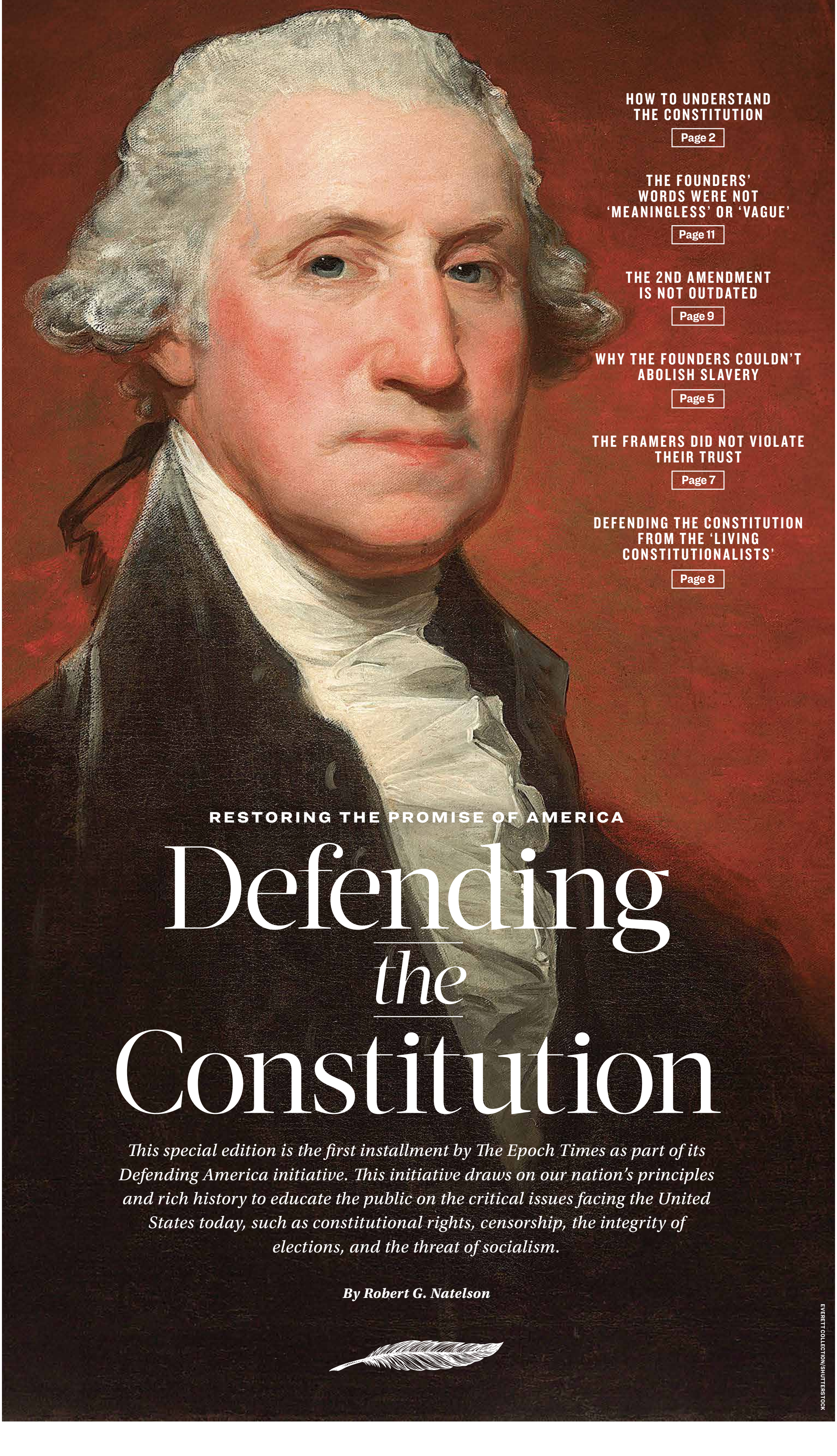
THE EPOCH TIMES



RESTORING THE PROMISE OF AMERICA

Defending *the* Constitution

This special edition is the first installment by The Epoch Times as part of its Defending America initiative. This initiative draws on our nation's principles and rich history to educate the public on the critical issues facing the United States today, such as constitutional rights, censorship, the integrity of elections, and the threat of socialism.

By Robert G. Natelson

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HOW TO UNDERSTAND *THE* CONSTITUTION

Many people characterize the U.S. Constitution as vague or filled with broad generalities. Others identify it as the source of our basic rights.

It's neither of those things.

Key to understanding the Constitution is to know that it's a very well-drafted, fairly precise document granting fiduciary powers, and that it follows 18th-century customs for such documents. It was designed to put into practice the broad principles of the Declaration of Independence, to the extent politically feasible.

Much of the Constitution is made up of lists of powers granted by the people to persons and groups. Other components are analogous to terms you might find in complex 18th-century documents creating fiduciary relationships—statutes conferring authority, instruments creating trusts or agency relationships, and charters erecting corporations.

The first thing most people notice when they pick up the Constitution is its majestic preamble. It explains why "We the People" do "ordain and establish this Constitution." Preambles were common in 18th-century legal instruments. Preambles did't have the force of law. They were for background information only. Preambles remain common in legal documents today. We often call them "whereas clauses."

Any power-granting document must explain who is receiving authority and the conditions under which they may exercise it. Hence, the Constitution outlines the structure of the new federal government: Congress, the president, and the courts.

A power-granting document also limits its authority.

Limits come in three forms: First, those receiving power receive only the power the document lists. If I authorize my broker to sell stock, it follows that I'm not authorizing him or her to sell my house. Second, a document may flatly prohibit certain actions, and put conditions on others. The same agreement that authorizes my stockbroker to sell stock may prohibit him or her from selling below a certain price. Third, the law of fiduciary (trust) relationships imposes additional restrictions on anyone exercising power on behalf of another.

The Constitution contains many specific limits. For example, it bans ex post facto laws and taxes on exports, even when they might seem warranted. The Constitution bans restrictions on free speech, freedom of religion, and the right to keep and bear arms. Some of these limits are designed to ensure good and responsive government. Others are included to further justice; still others to protect natural rights.

During the 18th century, a complex power-granting document might include terms telling the reader how to interpret it. Such terms are called rules of construction. Rules of construction don't change the document's meaning. They are guides to understanding. For example, the necessary and proper clause tells us to read Congress's enumerated powers to include lesser authority of the kind that lawyers call "incidental." Other rules of construction include the supremacy clause and the Ninth and 10th Amendments.

SASCHA BURKARD/SHUTTERSTOCK

If the Constitution doesn't grant an enumerated power to an officer or agency, then the officer or agency doesn't have it.

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Power-granting documents sometimes alter pre-existing arrangements to make the overall system work better. If I give my broker authority to sell stock on certain terms, I might have to revoke authority I have given to others. The Constitution similarly adjusts some preexisting relationships. It requires each state to have a "republican Form of Government." It requires states to respect the official proceedings of other states. It requires them to honor certain "Privileges and Immunities" of Americans who live in other states. And so forth.

The core of the document consists of the Constitution's listed (enumerated) powers. Some people with superficial knowledge of the Constitution claim all the enumerated powers are in the congressional list in Article 1, Section 8. This is wrong. Other congressional powers are scattered throughout the document. In addition, Article 2 lists enumerated powers for the president, Article 3 for the courts, and Article 5 those exercised in the amendment process.

The Constitution doesn't always use obvious language to confer authority. Some grants are latent in other kinds of phrasing. When the Constitution obligates the United States to pay preexisting debts or guarantee to each state a republican form of government, it thereby grants authority to the U.S. government to do those things. When the Constitution obligates the president to enforce the laws, it thereby gives him the ability to do so.

The powers granted by the Constitution are extensive. But as stated earlier, they are also limited. If the Constitution doesn't grant an enumerated power to an officer or agency, then the officer or agency doesn't have it. I have found that many people find this difficult to grasp. But the fact is that the Constitution doesn't authorize the federal government to be a national health agency, a school board, or a police department.

Here's an important, but widely overlooked, feature: The document doesn't grant power only to federal officials. It also confers power on persons and entities who aren't part of the U.S. government at all.

Thus, the Constitution entrusts states with regulating congressional elections and choosing presidential electors. It empowers those electors to select the president and vice president. It authorizes governors to call elections to fill congressional vacancies and, in some cases, to fill those vacancies temporarily. It prescribes roles in the amendment process for state legislatures, state conventions, and a federal proposing convention. All of these entities and persons receive authority in such matters from the Constitution.

Moreover, when individuals serve on federal juries or vote in federal elections, they aren't exercising natural rights. They are executing powers given to them by the Constitution. Of course, those powers often are crucial for protecting natural rights.

The courts say when people exercise authority by virtue of the Constitution, they are performing federal functions.

Knowing that the Constitution is basically an 18th-century document granting fiduciary powers doesn't minimize its significance or the inspiration of those who wrote it. But it's a very good first step toward a real understanding of the document.

THE CONSTITUTION NEVER DISCRIMINATED AGAINST WOMEN

One way some writers try to discredit the U.S. Constitution is to assert that the document's original meaning discriminated against women.

Thus, a 2011 Time Magazine cover story claimed that "the [Constitution's] framers ... gave us the idea ... that women were not allowed to vote." An Oct. 13, 2020, article in The Hill added: "The very fact that [Amy Coney] Barrett accepted the president's nomination means that there are limits to her originalism. She clearly doesn't believe that being a woman disqualifies her from sitting on the Supreme Court."

The author of the Time article formerly headed the National Constitution Center, while the author of The Hill piece sports a "Ph.D. in Political Science from Indiana University, with a focus on comparative constitutional law."

Both of them should have known better.

It has been more than a century since the state legislatures ratified the 19th Amendment, which guaranteed female suffrage nationwide. The amendment is worded in a way that readily provokes two questions: 1. Taken in context with previous amendments, it implies that women already voted in some states; is this true? and 2. Why didn't the amendment add the right to hold federal office?

The answers are: 1. Yes, before the amendment was ratified, women voted in many states. Where they were blocked from the polls, it resulted from a decision by state authorities. It wasn't dictated by the Constitution. 2. The original Constitution permitted women to hold federal office, as the case of Rep. Jeanette Rankin of Montana demonstrated.

In fact, the Constitution never barred women either from voting or from holding federal office. On the contrary, the document's framers carefully avoided sex-based tests for voting or office-holding, just as they avoided tests based on race, property, or religion. Here's the background:

When the Constitutional Convention met in 1787, most state constitutions contemplated that voters and officeholders would be male. Some expressly limited voting to "male inhabitants" (New York, Massachusetts) or "freemen" (New Hampshire, Pennsylvania). The Virginia Constitution provided for election to the state Senate of "the man who shall have the greatest number of votes in the whole district," and the New York Constitution described the state legislature as consisting of "two separate and distinct bodies of men."

Although at the time people often employed the word "man" generically to signify a human being, these documents probably meant "man" in the narrower, male sense. For example, the Virginia Constitution's use of "man" was interpreted in practice to limit voting and office-holding to males.

But not all state charters were written that way. The New Jersey Constitution was gender-neutral. It nowhere contained the words "man" or "men." Rather, it granted both suffrage and the right to hold office to "all inhabitants" who met certain property requirements. It uniformly referred to officeholders as "persons."

The New Jersey Constitution did use the pronoun "he" and its variants. But, of course, before the PC language-manipulation project of recent years, standard English used "he" and its variants to designate either men or women. Women had their own pronouns; men had to share theirs.

Contemporaries fully recognized the New Jersey Constitution as gender-neutral. That's why women could vote in that state. They voted in such numbers that New Jersey political operatives routinely included appeals for the female vote.

The spirit of the time favored female political involvement in other states as well. Massachusetts saw sporadic female voting. During the public debates over the Constitution, women participated actively on both sides of the issue. In addition to voting for ratification convention delegates in New Jersey and perhaps elsewhere, women organized public events, mostly in favor of the Constitution. Mercy Otis Warren of Massachusetts (later a distinguished historian) contributed essays against the Constitution.

And both sides apparently made written appeals to women for political support.

The delegates to the 1787 Constitutional Convention were consciously writing for the ages. They surely realized that female suffrage could spread beyond New Jersey. Politics being what it is, the power to vote would encourage women to run for political office as well. The framers, therefore, made the document agnostic on the subject of gender. Any restrictions based on sex would have to be imposed at the state level, because the Constitution didn't impose them.

The records of the convention show that gender neutrality was the dominant assumption from its early days. The Virginia Plan, the outline used to kick off the debates, was gender-neutral. Judge William Paterson's competing New Jersey Plan followed his state's basic law by referring to participants in public affairs as "citizens," "inhabitants," and "persons." Only once in the New Jersey Plan did "man" or "men" appear, and that was in the phrase "body of men" to describe a presumably armed band of men defying federal law.

From the beginning, moreover, the framers accepted that representation in the lower house of the national legislature would be based on state population or wealth, rather than according to the number of males, as in states such as New Hampshire and New York.

Later in the convention, the framers did consider some gender qualifications—only to reject them. For example, in late July and early August 1787, a Committee of Detail fashioned the convention's resolutions into a first draft of the Constitution. Committee member James Wilson suggested that electors be limited to "freemen," as in his own state of Pennsylvania. And his colleague Edmund Randolph's initial outline listed "manhood" as a possible suffrage qualification.

But the committee rejected both proposals as "not justified by the [convention's] resolutions." When the committee draft emerged, it avoided the singular word "man" and referred to the president as a "person."

In the interim, though, some gender specificity crept in. The Committee of Detail draft described the national legislature as consisting of "two separate and distinct Bodies of Men." It also granted the president the title of "His Excellency," with no provision for any "Her Excellency." And later in the convention, Pierce Butler of South Carolina proposed, and the convention adopted, a clause with a one-time appearance of the phrase "He or She." Of course, such a phrase might suggest that where the Constitution employed only "he" (as everywhere else in the document), it meant only males.

Later in the convention, however, the delegates dropped "He or She," thereby clarifying that "he" encompassed persons of both sexes. The convention also delegated final drafting to a Committee of Style. Committee member Gouverneur Morris did most of the actual writing. With respect to gender, he followed the New Jersey model. The final version of the Constitution made the following changes from earlier drafts and resolutions:

- It omitted the phrase "Bodies of Men" in describing the national legislature.
- It avoided all use of "man" and "men."
- It employed only gender-neutral terms such as "person," "citizen," "inhabitant," and titles such as "officer" and "elector."
- It deleted the power of Congress to override state laws on voter qualifications, thereby fully empowering states to enfranchise women for federal as well as state elections.

This gender neutrality wasn't lost on the wider public, and may have been one reason that more women worked for the Constitution than against it. But gender neutrality also came under fire from the Constitution's opponents. One essayist writing under the pseudonym "Cato" objected to the document's allocation of representatives by "inhabitants" rather than by male freemen. Another writer, satirizing opposition arguments, criticized the Constitution because it didn't limit the president to a person "of the male gender." The satirist pointed out that "without [such an] exclusion" Americans might "come to have an old woman at the head of our affairs." Of course, those sexist arguments didn't prevail.

Sex-based restrictions were left to the states, and over time, states gradually abolished them—a development made possible by the Constitution's gender neutrality.

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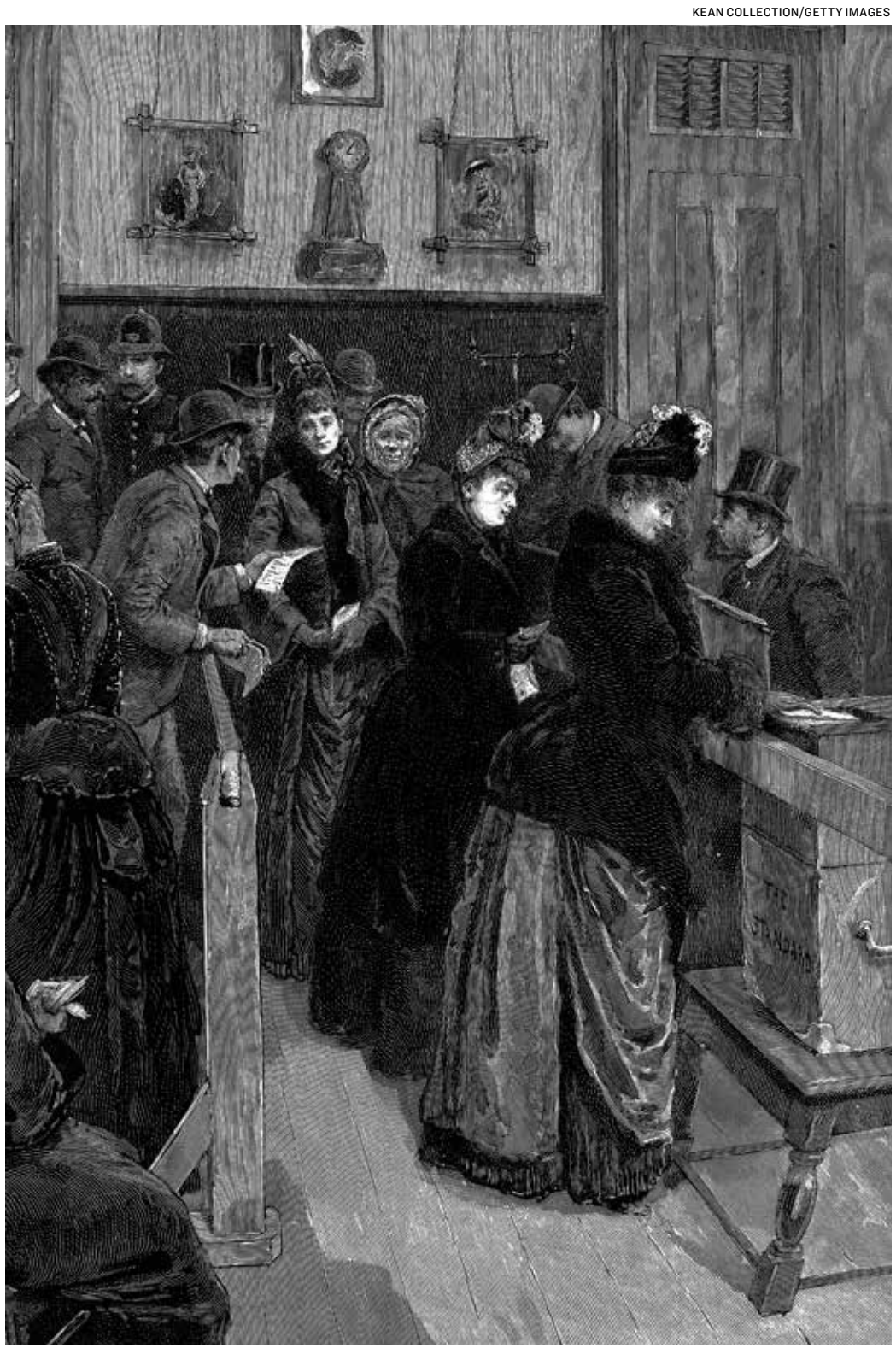

Women line up to vote in a municipal election in Boston on Dec. 11, 1888. Prior to the 19th Amendment, some cities extended to women the right to vote in local elections.

Sex-based restrictions were left to the states, and over time, states gradually abolished them.

THE 'THREE-FIFTHS COMPROMISE' WAS NOT BASED *ON* RACISM

A false charge against the Constitution is that it stems from, and continues to reflect, "systemic racism." Critics point to Article I, Section 2, Clause 3—the "three-fifths compromise" explained below—even though that provision was amended out of the document more than 150 years ago.

MPI/GETTY IMAGES

Independence Hall in Philadelphia. To its left is the Old City Hall, where the Supreme Court sat from 1791 until 1800, and to its right is Congress Hall, where Congress sat from 1790 until 1800, while the city was the capital of the United States.

By way of illustration, a 2011 Time magazine cover story asserted, "The framers ... gave us the idea that a black person was three-fifths of a human being." Last year, Time doubled down with a column stating that "the Constitution defined African-Americans as only three-fifths of a person." Similarly, a Teen Vogue item misinformed its young readers with these words:

"White supremacy is systemic. ... It thrives in politics with systems ... like the electoral college, a process originally designed to protect the influence of white slave owners, which is still used today to determine presidential elections [because] ... [e]nslaved black people ... were declared three fifths of a person in order to strengthen the power of the white men who kept them in bondage."

The internet is littered with such drivel.

The truth is that the Constitution's text was racially neutral. The framers employed the same word—"person"—to refer to humans of all races. They rejected the racial qualifications for voting and office-holding that marred some state constitutions. For all purposes, they treated Indians who paid taxes and the significant number of free African-Americans exactly as they treated white people.

So what was the three-fifths compromise? And what is the basis of the charge that it was racist?

The three-fifths compromise addressed two issues: (1) the size of each state's delegation in the House of Representatives and (2) each state's contribution of federal direct taxes. Direct taxes were levies imposed on individual persons ("capitations") and on a wide range of items, such as property, income, wealth, and professions. Direct taxes were distinguished from "indirect taxes" or "duties," which were primarily levies on consumption and on transportation of goods across political boundaries.

The Constitution provided that every state would have at least one representative in the House of Representatives. The three-fifths compromise added that both the additional representatives and direct taxes would be split among the states according to their population. But for these purposes only, each state's population figure would be reduced (1) to exclude "Indians not taxed" and (2) to rate each slave as three-fifths of a free person.

If you assume that counting persons is the proper basis for congressional representation, it's easy to see how one could misread the reduction for slaves and the exclusion of non-tax-paying Indians as expressions of racism. However, many, probably most, of the framers did not think counting persons was the proper basis for representation. They believed representation should follow ability to contribute federal tax revenue. This view was inherited from English history, and was reflected in the Revolutionary War slogan, "No taxation without representation!"

> The three-fifths compromise was not a statement about race. It was a statement about the economic inefficiency of slavery.

But when the framers tried to find a formula for calculating each state's ability to contribute tax revenue, they ran into practical difficulties. After rejecting several proposed formulas as unworkable, they conceded that, at least over the long run, a state's tax capacity would correlate with its population.

As James Wilson of Pennsylvania said: "In districts as large as the States, the number of people was the best measure of their comparative wealth. Whether therefore wealth or numbers were to form the ratio it would be the same."

There were two exceptions to the rule that tax capacity followed population. First, some states contained substantial numbers of Indians who were governed exclusively by their tribes. They did not pay state taxes and would not pay federal taxes. Second, the framers recognized that, on average, slaves produced far less than free people.

This recognition had nothing to do with race. It was because slaves—of any race—could not sell their labor and talents in the free market. They were stuck in a centralized system of command and control, rather like communism.

Thus, the framers had to find a way to reduce a state's representation according to the proportion of its population held in bondage.

Fortunately, the Confederation Congress already had done the work for them. In 1783, Congress studied the relative productivity of slave and free workers. Among the factors it considered were

- the differing incentives of enslaved and free people;
- the value of their respective output, which was much less among slaves because of poor incentives;
- the respective costs of feeding and clothing free and slave labor;
- the ages at which young free people and slaves began working (found to be lower for free children than for slave children);
- the differing climates in free and slave states;
- the value of imports and exports in free and slave states; and
- that slaves were disproportionately confined to agriculture as opposed to manufacturing and other activities.

Race wasn't even on Congress's list!

One is reminded of Thomas Jefferson's quotation of the Greek poet Homer: "Jove fix'd it certain, that whatever day, Makes man a slave, takes half his worth away." As Jefferson knew, Homer was speaking of white slaves.

In other words, the three-fifths compromise was not a statement about race at all. It was a statement about the economic inefficiency of slavery.

Critics contend that the three-fifths compromise rewarded slave states. Actually, it punished them with reduced congressional representation. Here's how it worked: Suppose a state had a population of 300,000. Suppose this population included 210,000 whites, 10,000 free blacks, 50,000 slaves, 20,000 citizen-Indians who paid taxes, and 10,000 tribal Indians who did not pay taxes. Only the tax-producing Indians would be counted, and the count of slaves would be reduced to reflect their relatively poor productivity. Thus, for purposes of allocating representatives and direct taxes, the state's population would be credited as only 270,000 rather than 300,000. That is: 210,000 + 10,000 + [3/5 x 50,000] + 20,000 + 0 = 270,000.

It's true that the compromise also reduced a slave state's direct taxes. But that was not a particularly good deal for the slave states, because except in wartime Congress was expected to resort only to indirect taxes—a prediction that proved true for many years.

Nearly all the framers understood that slavery was evil. But as I shall explain in a later essay, they needed to come to terms with it if they hoped to hold the union together. Failure would have led to a fractured continent and European-style internecine warfare.

But let's not make more of the framers' concession than the facts dictate: The three-fifths compromise was not an endorsement of, or subsidy for, slavery. It was based on a finding that slavery was economically stupid as well as unjust.

WHY *THE* FOUNDERS COULDN'T ABOLISH SLAVERY

This essay responds to incessant efforts to link the Constitution with slavery.

"Progressives" base some of their case on the fact that perhaps 25 of the Constitution's 55 framers (drafters) were slaveholders.

But this statistic is deceptive. The constitutional convention also included influential opponents of slavery. John Dickinson had inherited bondsmen, but freed them all. Benjamin Franklin, James Wilson, and Gouverneur Morris, among others, were abolitionists. Even among the minority who held slaves, some, such as James Madison, favored gradual emancipation. There was much criticism of slavery at the Constitutional Convention, and only the South Carolina delegates offered even a tepid defense.

Another reason the statistic is deceptive is that the framers composed only a tiny slice among the 2,000-or-so Founders. The Founders also included leading participants in the constitutional debates, such as Noah Webster of Connecticut and Tench Coxe of Pennsylvania, as well as the elected delegates to the state conventions that ratified the Constitution. Relatively few of these people owned slaves.

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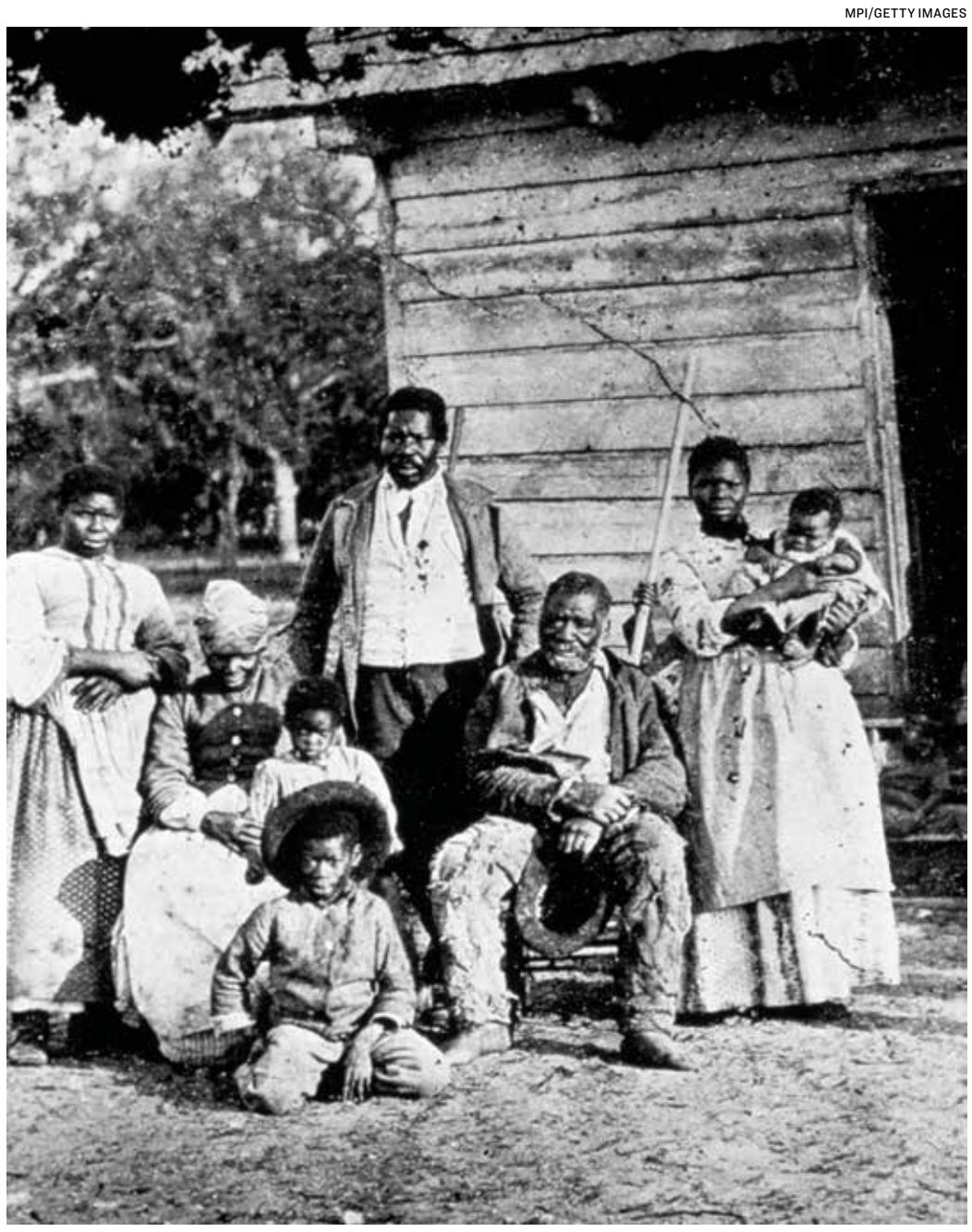


A slave family in South Carolina in 1862.

Slavery Seemed Headed for Extinction

Why then, didn't the Constitution abolish or curb slavery?

One reason is that issues of "property" were seen as matters of state law rather than federal. A more important reason was that slavery seemed to be on the path to early extinction.

The English-speaking peoples were the first major demographic group in history to abolish slavery—a fact the "woke" crowd always overlooks. This process was well underway when the Constitution was written. In 1772, the English Court of King's Bench had decided Somerset v. Stewart, which banished slavery from the English homeland. Soon after American Independence, 10 of the 13 states abolished the slave trade and one (North Carolina) imposed steep taxes upon it. Several states also began general emancipation. Five granted the vote to free African Americans.

That's why Constitutional Convention delegate Roger Sherman of Connecticut remarked that "the abolition of slavery seem[s] to be going on in the U.S. & that the good sense of the several States would probably by degrees compleat it." His Connecticut colleague, Oliver Ellsworth—later chief justice of the United States—predicted that "Slavery in time will not be a speck in our Country." Tragically, they didn't foresee the invention of the cotton gin.

Compromise Was Necessary for Unity

Still, it was clear that the elite in a few states were clinging to slavery and wouldn't approve a Constitution that curbed it. South Carolina delegate Charles Cotesworth Pinckney said: "If himself & all his colleagues were to sign the Constitution & use their personal influence, it would be of no avail towards obtaining the assent of their Constituents. S. Carolina & Georgia cannot do without slaves."

The framers were forced to conclude that a Constitution curbing slavery couldn't unify the country and might even fail the nine-state ratification threshold.

> The framers were forced to conclude that a Constitution curbing slavery couldn't unify the country.

Only Unity Would Prevent War

Why was unity so important? Because the probable result of disunion would be never-ending war on the American continent.

The common cause against Great Britain tied together colonies that never had much to do with each other—but by 1787, this connection was unraveling. The Confederation Congress was widely ignored. Rhode Island and Connecticut were in a creditor-debtor spat that threatened resort to arms. Many spoke of dividing the country into several confederations, with some states remaining entirely independent.

On the costs of disunity, European history was instructive. The previous 150 years had witnessed about 70 European wars (in addition to rebellions), and the results were horrific. The Thirty Years' War, which ended in 1648, may have killed, directly or indirectly, as many as 8 million people. The War of the Austrian Succession (1740–48) resulted in perhaps half a million casualties; the Seven Years' War (1756–63) caused perhaps a million.

That was why Gov. Edmund Randolph introduced his Virginia Plan by emphasizing that the current system couldn't protect against foreign invasion, couldn't prevent states from provoking foreign powers, and couldn't prevent interstate conflict. To do that, a stronger government was necessary.

The Constitutional Debates Emphasized Unity

During the public debates on the Constitution, an important part of the advocates' successful argument was the need for unity to avoid war. Although I believe modern writers rely too heavily on "The Federalist Papers" when searching for constitutional meaning, those essays do offer a good sample of the arguments for unity.

John Jay, who had served as the Confederation's foreign secretary, wrote in Federalist No. 4:

"But the safety of the people of America against dangers from foreign force depends not only on their forbearing to give just causes of war to other nations, but also on their placing and continuing themselves in such a situation as not to invite hostility or insult; for it need not be observed that there are pretended as well as just causes of war."

"One government can collect and avail itself of the talents and experience of the ablest men, in whatever part of the Union they may be found. It can move on uniform principles of policy. ... In the formation of treaties, it will regard the interest of the whole."

It can apply the resources and power of the whole to the defense of any particular part, and that more easily and expeditiously than State governments or separate confederacies can possibly do, for want of concert and unity of system. It can place the militia under one plan of discipline, and, by putting their officers in a proper line of subordination to the Chief Magistrate, will, as it were, consolidate them into one corps, and thereby render them more efficient than if divided into thirteen or into three or four distinct independent companies."

But ...

"Leave America divided into thirteen or, if you please, into three or four independent governments—what armies could they raise and pay—what fleets could they ever hope to have? If one was attacked, would the others fly to its succor, and spend their blood and money in its defense?"

In Federalist No. 5, Jay outlined the danger of warfare among the American states themselves, and in Federalist No. 6, Alexander Hamilton carried the argument further:

"If these States should either be wholly disunited, or only united in partial confederacies, the subdivisions into which they might be thrown would have frequent and violent contests with each other. ... To look for a continuation of harmony between a number of independent, unconnected sovereignties in the same neighborhood, would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages."

In Federalist No. 41, Madison pointed out that European nations would intervene to turn American states against each other:

"The fortunes of disunited America will be even more disastrous than those of Europe. The sources of evil in the latter are confined to her own limits. No superior powers of another quarter of the globe intrigue among her rival nations, inflame their mutual animosities, and render them the instruments of foreign ambition, jealousy, and revenge."

Madison summarized in Federalist No. 45:

"The union ... [is] essential to the security of the people of America against foreign danger [and] essential to their security against contentions among the different states."

So before criticizing the Founders for permitting the states to allow slavery, we must understand the choice they faced: tolerating a vile institution that was (then) dying anyway or consigning the American continent to perpetual warfare at a cost of millions of lives and incalculable misery.

Parting Shots

The "progressive" crowd attacks the Constitution in part because some slaveholders advocated it. But slaveholders were at least as prominent among the Constitution's active opponents. By the "woke" crowd's own reasoning, their criticism is tarred by antifederalist slaveholders such as Virginia's Richard Henry Lee and North Carolina's Willie Jones.

Finally: The claim that the Founders should have abolished slavery at all costs—no matter how horrible the results—ill becomes those who accept, or even promote, evils such as street violence, government attacks on freedom, and infanticide. Such people should reassess their own conduct before railing against the Founders.

WHY STATE EQUALITY *IN THE* SENATE MAKES SENSE

Political "progressives" have intensified their attack on the U.S. Constitution. The more extreme critics, such as the author of a 2018 GQ article, argue that we should abolish the Senate entirely and reduce Congress to a single chamber.

SAMUEL CORUM/GETTY IMAGES

The rising sun illuminates the U.S. Capitol in Washington on Sept. 19, 2019.

But the dangers of unicameralism are too widely understood for this idea to have much traction. What James Madison wrote in 1788 remains true today: "[H]istory informs us of no long-lived republic which had not a senate." That is, without a senior legislative body to moderate volatility and prevent hasty mistakes, a fully sovereign republic doesn't last long.

There's another problem with abolishing the Senate. The Constitution assigns that chamber specific tasks, such as approving presidential appointments, trying impeachments, and ratifying treaties. If the Senate were abolished, all those functions would have to be re-assigned. The political wrangling over reassignment could go on for decades.

More superficially persuasive is the view that we should allocate senators by population (or by a similar formula) rather than assign two of them to each state. A flippant version of this view appeared in a 2011 Time Magazine editorial: "[T]he idea that ... South Dakota should have the same number of Senators as California ... is kind of crazy."

But is it?

Let's start with some background:

Underlying the Constitution's text are political principles that guided the drafting of the document. One of these principles, borrowed from the law of fiduciary trusts, is impartiality. In the Constitution this includes (1) impartiality toward persons and (2) impartiality toward states. When impartiality toward persons and states conflicted, the framers chose one or the other (depending on the issue) or they balanced the two.

A goal behind impartiality toward states is fair treatment of all regions, which in turn helps keep the country together. That we are still united 230 years later is testimony to the framers' success. Tellingly, the most important incident of disunion—the Civil War—arose because one region did not think it was being treated fairly.

The allocation of members of Congress is the product of the framers balancing impartiality toward persons and impartiality toward states. The House of Representatives is allocated (primarily) by population and the Senate by states.

Suppose we abandoned impartiality toward states and instead allocated senators by population. What would be the results?

For one thing, regional coalitions more readily could oppress other parts of the country. For example, a coalition of legislators from populous northeastern and Pacific coast states could inflict almost anything on the rest of us.

> Equal representation in the Senate helps keep the union together by maximizing fair treatment of all regions and by improving the quality of national decision making.

> The most important incident of disunion—the Civil War—arose because one region did not think it was being treated fairly.

Moreover, the dominant coalition would be motivated to upset the state–federal balance by concentrating power in the Congress they controlled.

Another result of allocating both the House and Senate by population would be to impair the quality of congressional decision making even below its currently low level.

The framers had experience with bicameral systems in which upper and lower chambers differed from each other in many ways—mode of selection, terms of office, qualifications to serve, districts represented, and so forth. They had learned that when a proposal is examined from diverse viewpoints you get better results. As Alexander Hamilton wrote in the context of the presidential veto (Federalist No. 73):

"The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest."

It's remarkable that the modern social justice warriors so fixated on "diversity" profess not to understand this.

Social justice warriors also may be offended by my outlining another way the Senate improves decision making. Here it is:

Although big cities are sources of creativity, culture, and technical progress, they do some other things less well. One thing they don't do very well is popular government.

The young and talented flock to (or remain in) big cities. But so also do hucksters, the dependent, the irresponsible, and the criminal. They rely on the anonymity, atomism, pockets of wealth, and density of urban life to enable them to carry out their plans. So it's not surprising that big cities can be notoriously corrupt and difficult to govern, and that their levels of crime and other social dysfunction are generally higher than elsewhere.

In less populated places, people are more likely to know each other, or of each other. They are more likely to own their own homes and commit to their locality for a lifetime, often near lifelong friends and family. They may not be (in Clark Kent's words) "Metropolis sophisticates." But outside of some university towns, they usually have more stake in the community, a wider sense of civic responsibility, and are more sober about public affairs. They also are far more likely to know, and be able to assess, their politicians personally.

Skeptical? Just compare the reckless governance of places like New York City and Detroit with the relatively sober management of small towns and counties throughout America.

Large cities' poor political decision making has an outsize influence on those of us who live elsewhere. The national and regional media are based in big cities. The national capital is in a big city, and so are many state capitals. Most big cities have wealthy elites eager to buy political influence. Urban population density makes political organizing easier, as does the presence of a large, relatively idle, and often aggrieved underclass. A person living in, say, Boston or Phoenix, has far more opportunities for political influence than most inhabitants of Lewistown, Montana, or Rifle, Colorado.

Equal representation in the Senate helps keep the union together by maximizing fair treatment of all regions and by improving the quality of national decision making. It also promotes fairness by offsetting, in some degree, dysfunctional urban control over the rest of us.

THE FRAMERS DID NOT VIOLATE THEIR TRUST

This essay examines the claim that the framers–the Constitution's drafters–staged a coup d'état by proposing a new Constitution. As usually stated, the allegation is that:

The Confederation Congress adopted a resolution calling a convention limited only to proposing amendments to the Articles of Confederation. But the convention disregarded limits on its authority and instead drafted an entirely new document. Moreover, the Articles could be amended only by approval of Congress and unanimous consent of the states. But the convention unilaterally changed the rule to allow ratification by nine states.

This charge is very old: It first arose during the ratification debates of 1787–1790. Although modern scholars have debunked it, the Constitution's critics continue to peddle it.

In doing so, they overlook critical events leading up to the convention; fail to read Congress's resolution carefully; are unaware of the real source of the framers' powers; are unaware that Congress actually approved the convention's product; and overlook important historical sources.

Let's review each of these.

"The Signing of the United States Constitution" (1987) by Louis S. Glanzman.

Events Leading to the Convention

In 1787, the states were bound by a loose agreement called the Articles of Confederation. Under the Articles, the states delegated to the Confederation narrow responsibilities, mostly over defense and foreign affairs.

Although some refer to the Articles as "our first constitution," this is a misnomer. During the founding era, a "confederation" meant a treaty or alliance. The Articles were analogous to NATO and Congress was analogous to NATO's administering body, the North Atlantic Council.

Like other treaties, the Articles left individual states free to address most issues themselves. Even when issues were common to several states, the states often didn't present them to Congress. Instead, they entered bilateral negotiations or they negotiated multilaterally through "conventions of the states."

A convention of states met in Annapolis, Maryland, in September 1786. It recommended to the state legislatures that they send commissioners (delegates) to a new convention in Philadelphia the following May with the power to propose a stronger central authority.

The New Jersey Legislature responded in November 1786 by appointing commissioners to the new convention. The Legislature granted its commissioners extensive powers to discuss and propose any change in the political system they deemed appropriate for the benefit of the union.

The following month, the Virginia Legislature issued a formal convention "call" (invitation) to the other states. Virginia appointed commissioners and granted them powers similar to those the New Jersey Legislature granted its commissioners:

> "devising and discussing all such Alterations and farther Provisions as may be necessary to render the Foederal [sic] Constitution adequate to the Exigencies of the Union and in reporting such an Act for that purpose to the United States in Congress as when agreed to by them and duly confirmed by the several States will effectually provide for the same."

Note that the phrase "Foederal constitution" means, in accordance with then-prevailing usage, the entire political system. It doesn't refer solely to the Articles of Confederation, as some critics assume.

The powers listed in the Virginia "call"—to propose any "Provisions as may be necessary" to render the political system "adequate"—became the basis on which five additional states agreed to participate in the weeks leading up to Feb. 21, 1787.

Congress's Resolution Wasn't the Convention Call

In February, a committee headed by John Dickinson of Delaware (who had chaired the Annapolis Convention) moved that Congress endorse the pending Philadelphia conclave. Dickinson believed a recommendation, although nonbinding, would build public support.

The congressional proceedings make it clear everyone understood that unless something changed, the convention would be able to propose reform of the entire political system. But New York didn't want that. New York congressional delegates moved that Congress recommend that the convention reduce its scope to proposing amendments to the Articles.

New York's motion failed. But on Feb. 21, 1787, the Massachusetts congressional delegation obtained a compromise resolution. This resolution merely expressed Congress's "opinion" that the convention focus on amendments to the Articles. As I wrote in a 2013 research study:

> "The successful resolution neither 'called' a convention nor made a recommendation. In fact, it omitted the language of recommendation in the committee proposal and in the New York motion. The adopted resolution merely asserted that 'in the opinion of Congress it is expedient' that a convention be 'held at Philadelphia for the sole and express purpose of revising the Articles of Confederation' ...

"It is, perhaps, truly extraordinary that so many writers have repeated the claim that Congress called the Constitutional Convention and legally limited its scope. First, the Confederation Congress had no power to issue a legally-binding call. If the states decided to convene, as a matter of law they—not Congress—fixed the scope of their delegates' authority. Second, the Articles gave Congress no power to limit that scope. To be sure, Congress, like any agent, could recommend to its principals a course of action outside congressional authority. But this is not the same as legally restricting the scope of a convention. Third, by its specific wording the congressional resolution was not even a recommendatory call or restriction. As shown above, Congress dropped the formal term 'recommend' in favor of expressing 'the opinion of Congress.'"

Congress could express its "opinion," but within their own sphere, the states could do what they deemed best. After Feb. 21, five additional states voted to send commissioners to Philadelphia—but only Massachusetts and New York limited them to amending the Articles. And none of the first seven states to commit narrowed the scope of their commissioners' powers.

It was only later that critics re-fabricated Congress's "opinion" into a claim that Congress had called the convention and limited its scope.

The Framers' Real Source of Authority

Eighteenth-century law and convention practice tell us that the convention's authority was defined by the broad commissions or credentials issued by a majority of states. Other documents, including a letter written in early 1787 by John Jay to George Washington, confirm this.

Critics point out that some commissioners, particularly those from Massachusetts and New York, questioned the source and extent of their authority. But the majority's credentials were clear. They even adopted a resolution that, as South Carolina's Charles C. Pinckney noted, effectively "declar[ed] that the convention does not act under the authority of the recommendation of Congress."

Hugh H. Brackenridge, a distinguished Pennsylvania lawyer (and later a justice of the state Supreme Court), summarized the legal situation shortly after the Convention adjourned:

> "The calling the late convention did not originate with Congress; it began with the state of Virginia which was followed by this state, without any hint of the necessity of this measure from Congress whatever; it was a proceeding altogether out of the confederation, and with which Congress had nothing to do."

Approval by Congress and Ratification by All States

Critics complain that Congress didn't pass a formal resolution of approval. But that wasn't the framers' fault: They sent the Constitution to Congress for approval, but Congress doubted its power to formally endorse it. Congress did vote unanimously to send the document to the states for ratification, and this action was understood to constitute informal approval.

What of the claim that the Articles of Confederation required all 13 states to approve any amendment? One response is that all 13 states did, in fact, eventually ratify the Constitution. But a more fundamental response is that the Constitution wasn't an amendment to the Articles. It was a decision by signatories to a treaty to replace that treaty with a new arrangement.

Treaty signatories always have this power. That was doubly so in this instance, because several states had breached the terms of the Articles by, for example, failing to pay required financial assessments. Breach of a treaty by one party releases other parties from their obligations.

Relying on Too Few Sources

The charge that the framers staged a coup is, like many other slanders against the Constitution, based on misreading a small handful of sources. Some people seem to think they are constitutional "experts" because they have scanned James Madison's convention notes and the Federalist Papers. But those sources comprise only a tiny fraction of the historical record.

For example, some of the Constitution's enemies seem to think Madison's tepid defense of convention authority in Federalist No. 40 was all that was said on the subject. But the delegates' commissions show that Madison understated his case, probably because he didn't have copies of the commissions when he wrote No. 40. (He, after all, was far from home at the time.)

In my experience, most of the Constitution's enemies would rather attack than seek the truth.

In sum: The claim that the Constitution was a "coup" is a slander against the framers. The vast majority of convention delegates had full authority to act as they did. And of the small minority who didn't, most didn't sign the Constitution.

DEFENDING *THE* CONSTITUTION *FROM THE* 'LIVING CONSTITUTIONALISTS'

"Originalism" means applying the Constitution as the Founders understood it. Originalism is just a modern name for how English and American judges and lawyers have read most legal documents for at least 500 years.

By respecting the understanding behind a document, originalism keeps the document alive.

By contrast, there's no simple definition of "living constitutionalism" because "living constitutionalists" differ greatly among themselves. They're united by dislike of many of the Constitution's rules and standards, and they all want to adjust the Constitution to serve their political goals. But beyond that, their unity ends: They sometimes have different goals, and they propose different ways of justifying constitutional manipulation.

"Living constitutionalism" is a misnomer, because when we abandon a document's rules and standards, the document dies. In practice, "living constitutionalism" converts our Constitution into a parchment loincloth to cover political pudenda.

Among the inconsistencies of living constitutionalists are claims that our Basic Law is both "too rigid" and "too vague." One who thinks it's too rigid is David A. Strauss, a law professor on President Joe Biden's Supreme Court commission. He wants constitutional law to evolve much as the common law evolves. Such "common law constitutionalists" underappreciate the fact that our decision to adopt a written document was a clear rejection of the British-style "evolving" constitution.

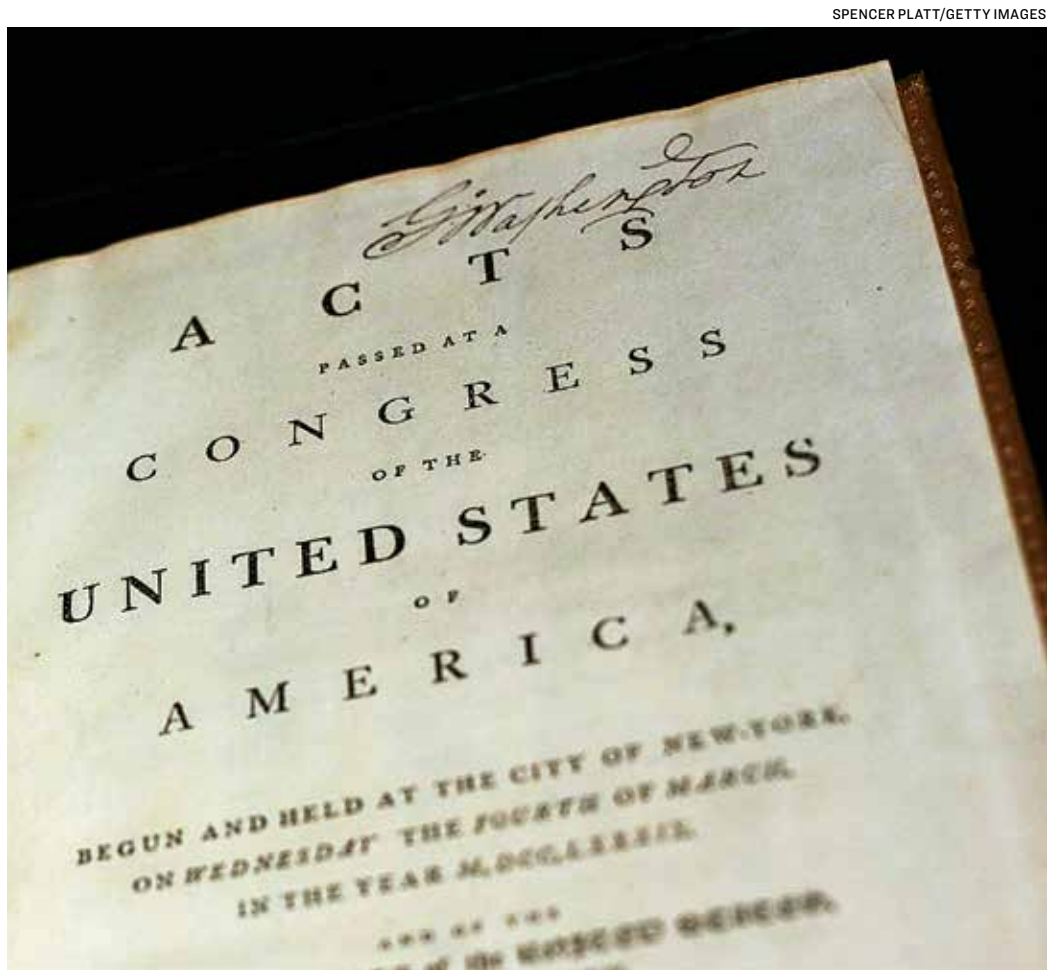
By contrast, William Brennan, a living constitutionalist who afflicted the Supreme Court from 1956 to 1990, thought that much of the Constitution was so vague as to be virtually meaningless. He referred to constitutional provisions as "luminous and obscure." He wanted judges to replace the shimmering fog with structures of their own making.

The "too vague" and "too rigid" accusations are not only inconsistent with each other, they also are incorrect.

Let's apply a dash of common sense to a serving of history. The Constitution's framers weren't the kind of people who write overly rigid or meaningless terms. They included Oliver Ellsworth of Connecticut, John Dickinson of Delaware, and John Rutledge of South Carolina, each the leading attorney in his respective state. Eight framers had been educated in London's Inns of Court, the schools for training English barristers. The framers included other celebrated lawyers as well, such as James Wilson of Pennsylvania and Alexander Hamilton of New York.

Even most of the non-lawyers, such as James Madison and Nathaniel Gorham, had been immersed in legal subjects throughout their careers. The framers had composed written legal documents in business, in law practice, in the state legislatures, and in Congress.

SPENCER PLATT/GETTY IMAGES



President George Washington's personal copy of the Constitution and Bill of Rights, at Christie's auction house in New York on June 15, 2012. The artifact sold for a record $9.8 million.

> Most of the parts of the Constitution previously pronounced as rigid, vague, or meaningless are flexible enough to accommodate modern political activity consistent with the Constitution's underlying principles.

They were, moreover, deeply familiar with the 600-plus-year Anglo-American tradition of composing constitutional-style documents.

They drafted the Constitution as a legal document should be drafted: tuning each provision to the level of rigidity or flexibility necessary to its purpose.

As a result, some constitutional phrases are rigid—but properly so. For example:

- The president "shall hold his Office during the Term of four Years."
- "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

Few of us would want to live under the "living constitutionalist" versions, which might read:

- "The president shall hold [insert politically correct pronoun here] office as long as the judges, balancing all factors, decide it promotes good social policy," and
- "A person may be convicted of treason if the judges find the evidence persuasive after they have balanced its reliability and quantity with the needs of social justice."

But when rigidity wasn't appropriate, the framers could write terms flexible enough to satisfy any living constitutionalist. For example:

- "Each House shall keep a Journal ... and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy," and
- "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

And as explained below, the Constitution also has many provisions that are neither particularly rigid nor overly flexible.

One reason some people think the Constitution is too vague or too rigid is that they don't understand what many of its clauses actually mean.

For 25 years, I've been working to cure that by writing a series of research articles exploring sections of the Constitution. My research has demonstrated that many charges of rigidity or vagueness are wrong.

For example, some law professors used to laugh at how "rigid" the coinage clause is. The coinage clause (Article I, Section 8, Clause 5) grants Congress power "To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures." The scoffers assumed that "To coin Money" meant only to strike metallic coin. They said that in modern society, this is impractical: We need paper and electronic money as well.

But if they'd read the clause carefully, they might have noticed that interpreting "coin" as only metal made no sense. When the Constitution says "regulate the Value ... of foreign Coin," it means setting foreign exchange rates. If "Coin" meant only metal, then Congress could set exchange rates for foreign metal tokens but not for foreign paper money. Surely the Founders couldn't have intended such an absurd interpretation.

And they didn't. As I documented in a 2008 article published by one of the Harvard journals, the Founders understood the Constitution's word "coin" to include money in any medium, including paper. The scoffers were flat wrong: The coinage clause wasn't rigid at all.

I also have disproved the once-common charge that the Constitution permits only male presidents, and other scholars have rebutted the charge that its original meaning permits segregation of schools.

The living-Constitution crowd leveled the opposite accusation against the necessary and proper clause (Article I, Section 8, Clause 18). They claimed it was so open-ended that they branded it the elastic clause.

The necessary and proper clause grants Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

"What in the world does 'necessary and proper' mean?" the scoffers asked. "And what about these powers 'in the Government of the United States'? Is that a drafting mistake? The Constitution grants powers to government departments and officers, but not to 'the Government of the United States.'" Some living constitutionalists have even claimed it refers to federal authority not otherwise mentioned in the Constitution.

Most constitutional commentators have had little experience practicing law. But I have, and to me, the necessary and proper clause looked like a phrase I'd seen in agency and trust documents. I suspected "necessary and proper" was a common term in 18th-century documents and had a specific meaning.

Investigation proved my hunch. During the Founding Era, "necessary and proper" and variants of that phrase were exceedingly common in legal documents. In this context, "necessary" was a technical term for "incidental," and "proper" meant "in compliance with fiduciary duty." I don't have space here to explain all of these legal expressions, but I can assure you they're not "vague."

The necessary and proper clause authorized Congress to undertake a limited number of subordinate activities the Constitution doesn't list explicitly. My investigation also showed that the Supreme Court had misapplied the clause in some very important cases.

I also found—contrary to what the scoffers were saying—that the part of the clause referring to powers granted to "the Government of the United States" wasn't a drafting error or a reference to mysterious extra-constitutional authority. The Constitution explicitly grants some powers to the federal government as an entity. This last point became clear from examining colonial documents familiar to the framers but unknown to most commentators.

My necessary and proper clause findings were published in a book issued by Cambridge University Press and in other outlets.

Over the past quarter-century, I have examined many other parts of the Constitution previously pronounced rigid, vague, or meaningless. I have found that all have fairly well-defined meanings. Moreover, most are flexible enough to accommodate modern political activity consistent with the Constitution's underlying principles of freedom, federalism, and limited government. Admittedly, they're inconsistent with the goals of many of the "living constitutionalists"—regimentation, centralization, and cultural destruction.

Of course, altered conditions occasionally do require constitutional change. To respond, we can use the amendment process. We don't need to kill the Constitution on the pretense of letting it live.

THE 2ND AMENDMENT IS NOT OUTDATED

A lawyer in Boulder, Colorado, has been buying billboard space attacking the Second Amendment right to keep and bear arms.

SPENCER PLATT/GETTY IMAGES

A woman looks at weapons at a gun show in Fort Worth, Texas, on July 10, 2016.

One billboard reads: "Imagine highways using traffic laws written in 1791. Imagine radio, television, and internet run by 1791 regulations. Imagine limiting yourself to medical care available in 1791. The Second Amendment was written in 1791. Thoughts and prayers are not enough.

"This ad paid for by Lindasue Smollen."

If you get angry reading Lindasue Smollen's billboard message, please leave her alone. She has a right to freedom of speech and of the press. They are guaranteed to her by the First Amendment—also adopted in 1791. (Because she's using a medium, a billboard, to communicate her message, her conduct is more properly an expression of freedom of the press than freedom of speech.)

My first reaction to this billboard was that Smollen was wasting her money: A key to effective billboard advertising is brevity. Drivers don't have time to read lengthy messages.

But it turned out that she didn't waste her money, because the liberal media megaphone did her work for her. It dutifully reproduced her billboard and its messages to the wider American public.

Have you ever seen mainstream media repeating any of the conservative, patriotic, pro-life, or religious billboards appearing on our highways? Of course not.

My second, probably sounder, reaction was that maybe Smollen should sue for a law school tuition refund. Obviously she was never taught the difference between ordinary legislation (such as traffic laws) and a general constitutional standard. Law professors traditionally employ Chief Justice John Marshall's famous opinion in McCulloch v. Maryland (1819) to explain the distinction. But apparently, at her law school, they neglected to do so.

For those of you who didn't attend a competent law school, here's the distinction: Ordinary legislation (such traffic laws) are detailed to respond to specific conditions. The legislature readily alters them when necessary. But while constitutions often contain detailed provisions, they also feature many terms (such as the Second Amendment) written in broader, more enduring language. As Marshall explained in the McCulloch case, we interpret broad constitutional standards somewhat differently from ordinary laws. "We must never forget," he wrote, "that it is a constitution we are expounding."

Unlike traffic rules, the Constitution's expansive provisions are crafted to accommodate changing conditions. For example, the Commerce Clause (Article I, Section 8, Clause 3) doesn't lay out detailed rules for trade by horse, ship, and barge. Rather, it grants Congress power to regulate commerce. The word "commerce" enables Congress to regulate trade by methods that didn't exist when the Constitution was adopted, such as railroads, motor vehicles, aircraft, and telecommunications.

> The Second Amendment was adopted to enable citizens to protect themselves against criminals, foreign invaders, and domestic tyrants.

> The Second Amendment protects the right to 'keep and bear Arms.' In modern days, 'arms' means 'bearable' (portable) weapons, such as semi-automatic AR-15-style rifles.

Similarly, the Second Amendment doesn't protect "the right of the people to keep and bear muskets and swords." It protects the right to "keep and bear Arms." That's why the Second Amendment protects the right to own and use modern "bearable" (portable) weapons, such as semi-automatic AR-15 style rifles.

In short, by comparing traffic laws to the Second Amendment, Smollen's billboard compares apples to edibles.

The billboard message also suffers from the false assumption that changes in conditions necessarily require changes in the Constitution. Because of the breadth of constitutional language, this simply isn't true.

In 2011, Time Magazine ran a front-page editorial that remains one of my favorite samples of constitutional illiteracy. The editorial sought to discredit the Constitution by pointing out that the Founders didn't know about:

"World War II. DNA. Sexting. Airplanes. The atom. Television. Medicare. Collateralized debt obligations. The germ theory of disease. Miniskirts. The internal combustion engine. Computers. Antibiotics. Lady Gaga."

The author was right that the Founders didn't know about those things. But sexting, miniskirts, and Lady Gaga (as important as they may seem to a trendy magazine editor) aren't the sort of things that justify constitutional change.

A change in conditions merits a change in a constitutional phrase only if—

- The change is relevant to the constitutional phrase; and
- Knowledge acquired since the Constitution was adopted (including knowledge of the change) has destroyed the phrase's value.

Consider relevance first: The Second Amendment was adopted partly to protect state militias. But it also was adopted to enable citizens to protect themselves against criminals, foreign invaders, and domestic tyrants. Traffic laws, radio, television, the internet, and modern medicine don't undercut any of the reasons behind the Second Amendment.

On the contrary, you can argue that social changes call for strengthening the Second Amendment. Modern American cities probably suffer more violent crime than in 1791, rendering self-defense and arms training for law-abiding citizens more vital. Modern medicine makes it easier to remedy accidents arising from the legitimate use of weapons.

What about knowledge acquired since 1791?

We know that criminals sometimes use weapons to attack others and that armed citizens can stymie those attacks. But the Founders knew those facts, too. Recent international experience tells us that an armed citizenry can help resist foreign invasions and domestic tyrants. But the Founders knew that as well.

However, we have learned two lessons outside the Founders' immediate experience. One is that even governments in "civilized" countries may slaughter their own people, and that they can do so only when the targeted portion of the citizenry is disarmed. The 20th-century history of Germany is a case in point. The other recent lesson, as my Independence Institute colleague Dave Kopel has documented, is that the United States isn't immune to terrorism against unarmed populations. The history of the Ku Klux Klan is a case in point.

So it's clear that the Founders were right to adopt the Second Amendment. It's even clearer that we need its protection today.

LIMITS *ON* FEDERAL AUTHORITY

One of the Constitution's most important features–limits on the central government–has been the target of a propaganda campaign for many decades.

SAMIRA BOUAOU/THE EPOCH TIMES

"Genius of America Pediment" featuring the figures of America, Justice, and Hope, on the U.S. Capitol in Washington on Jan. 2, 2020.

"Progressive" commentators in politics, academia, and the media claim these limits impede creative and effective solutions to social problems. Over the years, they've enlisted many issues to promote their cause:

> "We can end poverty only through bold federal initiatives!"
>
> "To save the planet, we need more federal regulation!"
>
> "The path to college affordability is for the federal government to pay full tuition!"
>
> "The way to jump-start the economy is through massive federal stimulus spending!"

Other issues on the list have included civil rights, consumer protection, inequality, K-12 education, climate change, racism, and "crumbling infrastructure." Whatever the malady, the prescription—federal action beyond what the Constitution authorizes—is always the same.

Just for once, I'd like to hear one of the propagandists admit that, in retrospect, too much federal intervention made a problem worse. They would have a lot of examples to choose from, but I don't ever expect to hear it.

Unfortunately, the campaign to persuade Americans that the federal government is and should be omnipotent has enjoyed great success. One reason is that public school civics education often misrepresents the Constitution's meaning and the reasons behind that meaning. This essay helps fill the gap by explaining how the Constitution confines federal power and why it does so.

The Constitution limits the federal government in four general ways:

First: The Constitution is the legal document by which the American people granted authority to certain public officials, mostly (but not exclusively) federal officials. The Constitution specifically enumerates (lists) all powers granted. The list is long but finite. The items enumerated include, among others, national defense, coining money, creating and operating the post office, building and maintaining post roads (intercity highways), regulating foreign and interstate trade and some activities associated with trade, and control of immigration.

A longstanding legal rule tells us that because the Constitution lists the federal government's powers, any power not on the list is denied.

Second: The Constitution specifically prohibits some federal activities. The prohibitions appear mostly, but not entirely, in the first eight amendments of the Bill of Rights. For example, the government is barred from discriminating among religions, restricting freedom of speech, infringing the right to keep and bear arms, or adopting those retroactive measures called ex post facto laws. We often refer to prohibitions on government action as creating or recognizing "rights."

Third: The 10th Amendment reinforces the rule that the only powers granted to the federal government are those the Constitution enumerates.

Fourth: The enumeration of exceptions to federal power ("rights") might suggest that the government has authority over everything outside the exceptions. So the Ninth Amendment rules out any such suggestion. It reinforces the rule that federal powers stop when enumerated powers stop. As one of my law students once remarked, the Ninth Amendment is an exclamation point.

All these constitutional restrictions are anathema to "progressives." So they alternate frontal attacks on the Constitution with claims that the document doesn't mean what the document clearly says. They also launched the decades-long propaganda campaign to convince us that all power should flow from the center.

But why shouldn't it? Why didn't the Founders establish an omnipotent central authority?

History provides part of the answer. Before 1763, the founding generation lived happily within the British Empire. The empire was governed as an informal federation, leaving individual colonies with a great deal of local control. But when British political functionaries decided to centralize power in London, the founding generation rebelled. Once independence was achieved, Americans were disinclined to adopt a constitution granting the national government the omnipotence they had denied to the imperial government.

On a broader level, the Founders understood that limits on the federal government, especially when checked by potent states, would help preserve human freedom. In New York v. United States (1992) the Supreme Court explained it this way:

> "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' ... 'Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in anyone branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'"

Moreover, the Founders understood that decentralization usually improves governance. A decentralized system allows states to tailor local policies to local preferences, local culture, and local needs. For example, one reason the COVID-19/CCP virus response should be executed at the state and local levels is that health restrictions that make sense in densely populated New York City would be ridiculous in the wide-open spaces of Montana or South Dakota.

A final reason for decentralization is much less widely understood: Political decentralization promotes human progress.

Recall some of the greatest moments in the advance of civilization: The awakening of human intellect in ancient Greece. The quickening of trade and culture, rule of law, and rise in living standards in the early Roman Empire. The flowering of arts and commerce in Renaissance Italy and Germany, the beginnings of the Industrial Revolution in England, and the economic and technological takeoffs in 19th-century Europe and America.

You may have been taught about these events in school, but you almost certainly weren't taught what they all have in common: They all occurred in environments of political decentralization. Sometimes, the decentralization was so extreme that the central authorities (if, indeed, there were any) couldn't even keep the peace. Yet society leaped ahead anyway.

Decentralization permitted the Aristotles and Galileos to move to neighboring jurisdictions more hospitable to their work. It permitted ethnic and religious groups, such as the Jews and Huguenots, to escape persecution and continue productive lives in relatively tolerant Holland and England. It allowed the Ptolemies, Bacons, and Edisons to carry out scientific and technological research in comparative freedom.

Decentralization also encouraged competition among sovereignties and semi-sovereignties for people and for talent. The most welcoming places were rewarded with the most progress.

Political centralizers call themselves "progressives." But the name embodies a falsehood. Decentralization, not centralization, is more consistent with rapid human progress.

Americans built modern society in an explosion of progress during the period when the Constitution's constraints on federal authority were still honored. During that period, Americans, along with those living in a politically fragmented Europe, tamed electricity, developed modern medicine, and invented the telegraph, telephone, radio, television, railroad, automobile, and airplane. We still depend heavily on basic technology created during the era of decentralization.

Certainly, progress has continued since that time, but the rate is slower. If you doubt it, ask yourself this: If two bicycle shop owners tried to invent the airplane in the current regulatory state, how far do you think they would get?

Or weigh the issue from another perspective: Automobiles, then called "road locomotives," were invented more than 200 years ago. They were first mass-produced more than a century ago. Why are we still driving them instead of using more exotic modes of personal transportation—such as household flying vehicles? Why have so many of the advances predicted by 20th-century science authors failed to come true? In 1940, speculative writers thought we'd have colonies on the moon by now. Based on the pace of progress over the preceding 150 years, they had every reason to think so. But under government pressure, progress slows.

Centralized power, not the Constitution, impedes creative and effective solutions to social problems. The propagandists are wrong. The Founders were right.

THE FOUNDERS' WORDS WERE NOT 'MEANINGLESS' *OR* 'VAGUE'

A common accusation, especially from liberal academics and judges, is that many constitutional phrases are vague or meaningless. Or, as stated by former Supreme Court Justice William J. Brennan, they're "luminous and obscure."

DREW ANGERER/GETTY IMAGES

The Supreme Court in Washington on May 17, 2021.

Advocates of an all-powerful central government draw two conclusions from their belief that constitutional clauses are vague. The first is that the document doesn't deserve great respect because it isn't well drafted. The second is that vagueness justifies a very wide scope for the exercise of federal and judicial power.

But the charge of "vagueness" is based on ignorance. The usual reason critics think constitutional phrases are vague or meaningless is that they don't know that those phrases had specialized meanings in 18th-century law. The Constitution is a legal document, and most of the framers and leading ratifiers were top-flight lawyers. In the founding era, even the general public was unusually knowledgeable about the law. Hence, many of the Constitution's ordinary-sounding expressions are packed with legal content.

Here are some illustrations: "regulate ... Commerce," "establish Post Offices," "post Roads," "natural born Citizen," "Corruption of Blood," "Privileges and Immunities," and "necessary and proper."

Several years ago, I wrote a book explaining these and other terms. Behind that book were many individual investigations into the true meaning of constitutional words and phrases. Following is the story of one investigation.

Critics leveling the "vagueness" charge long pointed to the necessary and proper clause as an example. Confused law professors and students scratched their heads over the clause and the most important Supreme Court case on the subject: Chief Justice John Marshall's famous opinion in McCulloch v. Maryland (1819). Some tagged it "the elastic clause" and claimed it could justify almost anything.

The necessary and proper clause (Article I, Section 8, Clause 18) ends a long list of powers the Constitution grants to Congress. It reads as follows:

> "The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Critics asked: "What makes a law 'necessary' to carry out another power? What does 'proper' mean? Moreover, the Constitution grants authority only to agencies and officials; 'Powers vested ... in the Government of the United States' must be a typo!"

No one seems to have consulted 18th-century legal materials about these questions—until I did so, beginning in 2003.

> Once you know the background of the necessary and proper clause, you see that it helps make the Constitution flexible—but not as flaccid as advocates of unlimited federal control would like it to be.

> It's not the Constitution that's vague or meaningless. Vagaries exist principally in the minds of the critics.

I labored under some disadvantages. I had no internet access to the materials I needed. The law school where I was a faculty member had only a small library and was 200 miles from any other law school. The administration was uninterested in—and even hostile toward—my research.

But I had one huge advantage that the overwhelming majority of other constitutional scholars didn't have: I had practiced law for many years. And although my law practice was in the 20th century rather than in the 18th, I had worked with many of the same kinds of legal documents the Founders used.

As I examined the necessary and proper clause, a little voice told me: "You've seen this kind of wording before! It looks like a phrase in a trust instrument or an agency agreement."

During my law practice, I'd frequently consulted form books. These are huge collections of sample documents lawyers traditionally used to draft legal instruments.

"I bet there were form books in the 18th century. And if there were, I probably can find language in them that looks a lot like 'necessary and proper,'" I thought to myself.

Shortly thereafter, I visited Philadelphia. The law librarian at the University of Pennsylvania—Ben Franklin's favorite school—gave me access to their rare book collection. It turned out that there were plenty of 18th-century form books. While thumbing through one of them, I found a form for a "letter of attorney"—a kind of agency agreement we now call a "power of attorney."

Further checking confirmed that letters of attorney and other documents listing powers often finished up the list with an additional grant of "necessary and proper" powers.

I soon found that phrases like "necessary and proper" were also exceptionally common in English and American statutes, trusts, leases, commissions, and charters. Study of 18th-century English court cases taught me that, in this context, the word "necessary" meant "incidental." I also learned that "necessary and proper" was a translation of an earlier Latin phrase, necessaria et opportuna. My knowledge of Latin—another skill rare among modern academics—confirmed that "necessary" meant "incidental."

Still more investigation showed that "proper" meant that the person exercising authority was governed by legal duties of trust. Investigation also demonstrated that the Constitution really did grant powers to "the Government of the United States." Those powers were implicit in clauses imposing obligations on the government, such as the Constitution's mandate that the federal government protect the states from invasion.

The most significant finding was that "necessary" meant "incidental." Here's why.

When a document grants a list of explicit powers, it quietly grants unmentioned powers as well. The unmentioned powers permit the agent to carry out his duties by some methods not listed explicitly in the document. For example, depending on local custom, a document authorizing a person to manage a store might include an unmentioned power to advertise. Unmentioned powers are called "incidental."

Eighteenth-century law imposed tight constraints on incidental powers. They could be exercised only to carry out listed powers. They had to be of lesser importance—"less worthy"—than listed powers. They had to be methods customary or reasonably required in the circumstances. Someone given authority to manage a business couldn't claim that he had "incidental power" to use his boss's money to take over an entirely unrelated business.

Let's consider a related example from the Constitution. It grants Congress explicit power to "regulate Commerce ... among the several States." Those adopting the Constitution understood "commerce" to be mercantile trade and some associated activities, such as navigation and marine insurance. A federal law requiring standardized labels on goods shipped across state lines would be incidental to the commerce power and therefore authorized by the necessary and proper clause.

By contrast, manufacturing and agriculture are major economic categories distinct from commerce, even though—as the Founders knew—these categories impact each other greatly. Manufacturing and agriculture aren't mere incidents of commerce, and a law governing them is not incidental to "regulat[ing] ... Commerce."

Thus, my research taught me that 20th-century Supreme Court decisions were wrong when they ruled that the necessary and proper clause gave Congress sweeping power over manufacturing and agriculture.

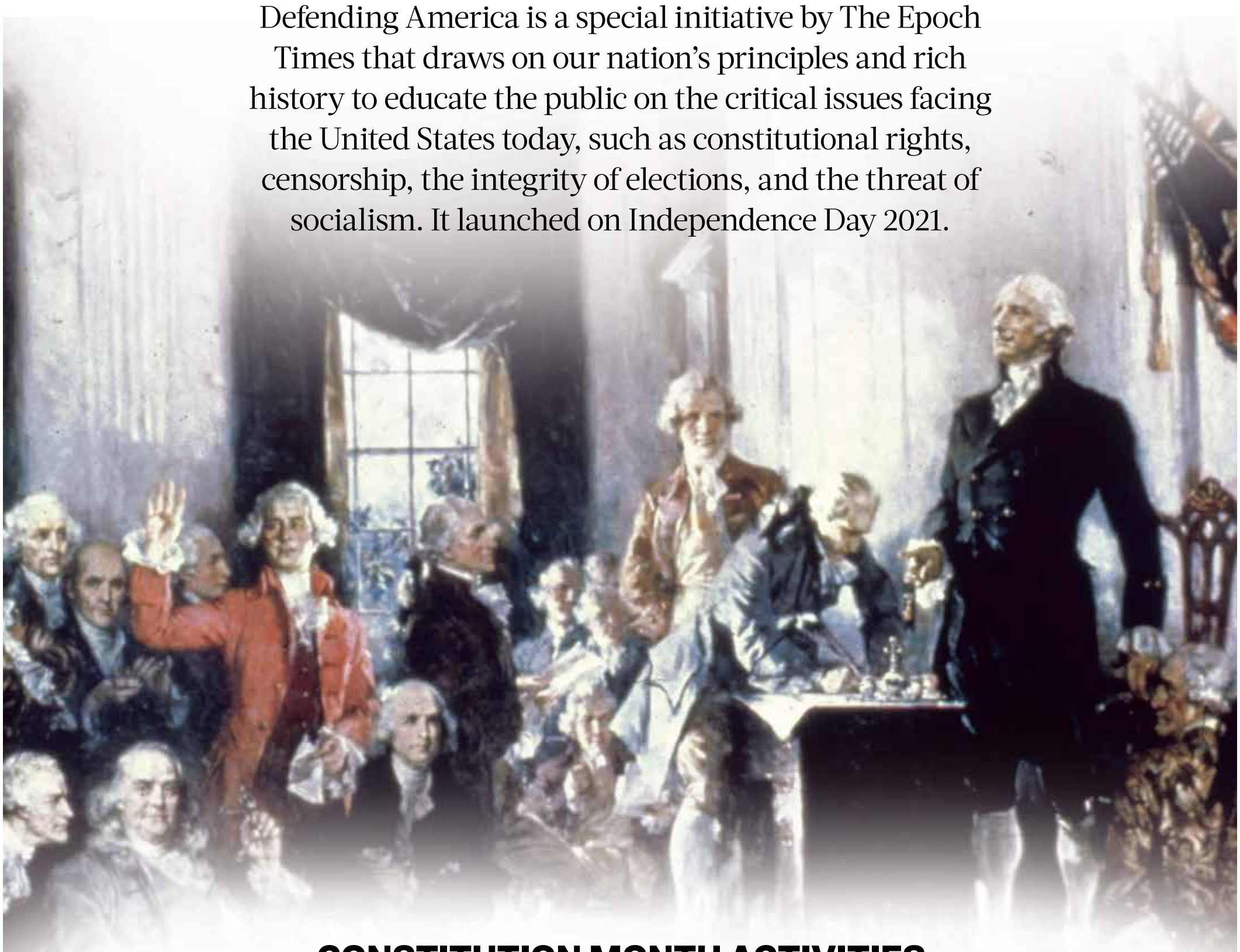
Once you know the background of the necessary and proper clause, you see that it helps make the Constitution flexible—but not as flaccid as advocates of unlimited federal control would like it to be. The background also helps you grasp the true meaning of Justice Marshall's opinion in McCulloch v. Maryland. I'm happy to report that, possibly based in part on my research, Chief Justice John Roberts recaptured some of this meaning in a case decided in 2012.

It's not the Constitution that's vague or meaningless. On this subject, vagaries exist principally in the minds of the critics.

RESTORING THE PROMISE OF AMERICA

Defending America

Defending America is a special initiative by The Epoch Times that draws on our nation's principles and rich history to educate the public on the critical issues facing the United States today, such as constitutional rights, censorship, the integrity of elections, and the threat of socialism. It launched on Independence Day 2021.



CONSTITUTION MONTH ACTIVITIES

As part of our Defending America initiative, we're focusing on a critical issue every month for our conversations. America is a nation governed by the consent of the governed. And so our first topic will focus on our great U.S. Constitution. A number of activities this month have been organized to educate the public on the significance of the Constitution, how current events are threatening our constitutional rights, and what the world would lose if the U.S. Constitution were lost.

DOCUMENTARY: 'AMERICA REWRITTEN'

In "America Rewritten," an exclusive special feature from The Epoch Times, Joshua Philipp, award-winning senior investigative reporter speaks with leading experts on how history is being falsified. The documentary premiered on July 6, 2021.

PANEL DISCUSSION: DEFENDING THE CONSTITUTION

Our first in-person panel discussion this year, Defending the Constitution: Why It Matters Now More Than Ever, will be held on July 19, 2021, in New York City. The event will also be live-streamed on Epoch TV.

SPECIAL EDITION: DEFENDING THE CONSTITUTION

A broadsheet special issue of The Epoch Times was published on July 7, 2021, containing a series of nine essays defending our Constitution against unfair accusations from political "progressives."

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In order to promote more education about the importance of the Constitution, The Epoch Times is also offering Certificates of Completion* and prizes for participating in and completing various quizzes and activities. It launched on July 1, 2021.

*For educational purposes only

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