by Akhil Reed Amar and Douglas W. Kmiec

Note:

Every year NCC publishes and distributes more than 200,000 of its trademark pocket-sized Constitutions. Every participant in NCC's "I Signed the Constitution" annual events across the country receive a copy. In addition, pocket-sized Constitutions are provided to individuals and schools throughout the year. In the 2000 Edition of the publication, NCC's Visiting Scholars, Akhil Reed Amar and Douglas W. Kmiec, have written a thought-provoking introduction. We are pleased to publish their essay in this edition of Signature, *which we believe will enhance your appreciation of the Constitution. If you do not already have a copy of NCC's pocket-sized Constitution, please call us at 215-923-0004 and we will be happy to send one to you.*

It is especially fitting that your copy of the Constitution originates with the National Constitution Center in Philadelphia. Signed in Independence Hall on September 17, 1787, the Constitution is a truly remarkable means to advance the premises of the American Republic stated eloquently in 1776 in the Declaration of Independence. A great Chief Justice once said, "the Declaration is the promise, the Constitution, its fulfillment," and nothing could be more true. To fairly apply the Constitution and its structure to contemporary problems, one must never travel very far from the "self-evident truths" that men and women are "created equal;" that unalienable human rights flow from the "Laws of Nature and Nature's God;" and that the purpose of any government, including the one established under the American Constitution, is "to secure these rights."

In the Constitution as originally drafted, our "life, liberty, and the pursuit of happiness" were secured in two essential, but structural ways: first, by the careful division and enumeration of power, and second, by the reservation of authority to the governmental entities closest to us—the States. As reflected below, the Declaration's triad of unalienable guarantees would later be made explicit by amendment in a "Bill of Rights" affirming among other matters that the federal government lacks power to abridge particularly sensitive matters of religion, speech, due process, and the capacity to own property and engage in related economic activity. The very important Fourteenth Amendment following the Civil War resolves to protect "privileges or immunities" and the equality of all persons under the law.

But before our "rights" were listed, the Constitution enumerated or allocated power among those that make policy judgment (the legislative), those that implement and propose new initiatives (the executive), and those that resolve dispute and render interpretation (the judicial). Aided by the best of ancient and modern philosophy, the Founders understood that tyranny can only be avoided if no one person or group comes to possess the power to make, enforce, and interpret the law. Even more insightfully, the powers separated by the Constitution are predisposed to remain separate. Political abuse is avoided because to a carefully limited degree, governmental power is "blended" or made overlapping. A foolish law enacted by Congress can be vetoed by the President, but an obstinate President can be overcome by a two-thirds majority of both Houses of Congress.

We are a nation of "dual sovereigns"— the federal government is given specific responsibilities to coin money, raise armies, and regulate interstate and foreign commerce, for example, but as Madison reflected, these powers are ". . .few and defined. Those which remain in the State governments are numerous and indefinite." This vertical division of authority reflects the healthy variation and diversity of the American people. Coming from many lands, races, ethnicities, and perspectives, our dreams and aspirations can be differently stated. One single, uniform view is seldom enough for all of us, and "federalism"—or the reservation of power in the States—allows these different approaches to be tried with less imposition of view on others. The federal Constitution envisions unity where it is necessary as a people to speak with one voice—for example, where our national security or trade interests are jeopardized by a foreign power, but it allows countless voices to be heard on matters pertaining to the day-to-day general welfare. And lest it be overlooked, dividing power between federal and State governments also protects liberty by giving States an incentive to check federal abuses, and vice versa.

As important as the structural aspects of the Constitution are, when Americans are asked what the Constitution means to them, they will likely invoke some of the phrases and ideas inscribed in the celebrated Bill of Rights—freedom of speech and of the press, religious liberty, freedom from unreasonable searches, jury trials, and due process, to name a few. But as noted above, this Bill of Rights did not appear in the original Constitution that emerged from the 1787 Philadelphia Convention. The original document did not think these "rights" unimportant—far from it. Rather, as Hamilton wrote, "the Constitution is itself, in every rational sense, and to every useful purpose, a bill of rights." Nevertheless, skeptics wanted something more explicit. Americans may sometimes do business on a handshake, but more often than not, they believe that good governments, like good personal relationships, can also be assisted by "putting it in writing." Thus, soon after the Philadelphia Constitution went into effect in 1789, its friends composed what became the first ten amendments—America's "Bill of Rights" (though this phrase itself does not appear in the document).

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Two things about this "Bill" might surprise present-day Americans. First, these early amendments emphasized "States" rights and majority rights alongside those of the minority. The Bill limited the newly created federal government, but imposed no express restrictions on the States. Thus, the

First Amendment barred Congress from creating a national church, but many States at the Founding openly promoted particular religious belief. The Second Amendment protected local militias (like the Minutemen who had fought at Lexington and Concord), and several other amendments protected local juries. No phrase appeared in more amendments than the phrase, "the people"—echoing the Preamble's famous opening words, "We the People," and reaffirming the Constitution's basic idea of popular sovereignty. This emphasis on localism and populism becomes less surprising when we remember that Americans had recently fought a War of Independence against a British government seen as distant, undemocratic and oppressive. Local communities had mobilized citizens against central tyranny, and in 1789 many Americans still feared central authority and linked liberty with local direction.

The second surprise is that the Bill of Rights played little role in courts or in the lives of ordinary Americans before the Civil War. All that began to change when yet another amendment—the Fourteenth Amendment—was ratified in 1868. That Amendment reaffirmed the freedoms of the Bill of Rights, and made most of these rights and privileges applicable against State and local governments. This new birth of freedom responded to the abuses of the pro-slavery State governments before the Civil War: in order to support the slave system, these governments had censored anti-slavery newspapers, repressed abolitionist preachers, conducted unreasonable searches, and abridged other fundamental rights. The Fourteenth Amendment crystallized a more national vision of freedom that at its core has come to give considerable latitude to individual citizens. The Revolutionary War had reflected suspicion of the federal or central government, but the Civil War era proved that States, too, needed watching. Thus, the national government pledged to protect the fundamental freedoms of individual "citizens" and "persons," even if they were in the minority against local majority rule.

The Fourteenth Amendment helped pave the way for vigorous judicial protection of the Bill of Rights. Whereas the original Bill operated only against federal officials, today's judges invoke the Bill—as redefined by the Fourteenth Amendment—far more often against local ordinances and State laws than against Congressional statutes. In addition, the Amendment chiseled into our Constitution a phrase close to the hearts of modern Americans: it promises "equal protection of the laws" to all. Perhaps ashamed of their complicity with slavery, the Philadelphia Framers and the early amenders had omitted all mention of the "equality" referenced in the Declaration of Independence. Today the concept of equality—for all persons, regardless of race, sex, or religion—animates everything in the Constitution. Ours is a system of equal justice under law. The Bill of Rights is remarkably compact: the first ten amendments plus Section One of the Fourteenth Amendment are shorter than the introduction you have just read. Now would be a good time—any time would be a good time—to read or re-read the Bill of Rights itself.

So, then, does the Constitution as amended really advance human good—our "pursuit of happiness?" Are we capable of being better citizens, workers and business owners, neighbors, and fathers and mothers because of it? Yes, a well-structured federal government of enumerated power and explicit rights invites every voice to be heard in the political process, secures investments and the jobs they yield, defends us from foreign and domestic threats to peace, and most of all, because of these refined limits of governmental power, leaves to each citizen a great expanse of freedom.

Of course, it is up to each of us to employ that freedom wisely. Madison and others in the founding generation knew, for example, that free speech permits both the search for truth and wisdom as well as falsehood and libel. Property can lend economic security to family and human flourishing, but it can also be abused to magnify environmental harms or deny just wages and working conditions. In the final consideration, the Founders understood that only a virtuous people can be free, and if the American constitutional story has thus far unfolded well—and we believe it has—it is because "we the people" have largely resolved to be so.

We believe a visit to the National Constitution Center, when it opens in two years, will give you a better appreciation of the Constitution's significance to our lives. We know greater familiarity with the provisions of our wonderful charter does also, and we hope you will have occasion to make use of your "Pocket Copy" often.

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