A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM

MARK A. GRABER

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For Howard and Keith:
For all the obvious and some less obvious reasons

PREFACE

"You remember each other," the elderly hostess in the first scene of the romantic comedy declares. Miriam and Daniel are temporarily speechless. Daniel remembers a scrawny tomboy who regularly pelted her brother's friends with snowballs. Before him is a shapely premedical student at a major state university. Miriam remembers a gawky nerd whose conversation was exhausted by the latest video games. Before her is a dashing political science major. Sparks will fly as Miriam and David are reintroduced.

Americans need a similar reintroduction to their constitutional order. American constitutionalism is more complex and interesting than the fragments citizens are exposed to in their youth. The Constitution most students remember from high school civics consists entirely of limits on government action enforced by the Supreme Court. Constitutional debate is restricted to whether states may ban abortion (updated to whether same-sex couples have a constitutional right to marry), when the president may constitutionally send troops into foreign combat, and other matters of constitutional law. Some students learn the constitutional facts of life from a legalist who insists that constitutional adjudication must be separated from ordinary politics. Others are taught by behaviorally oriented social scientists who repeatedly describe this distinction between law and politics as a childlike fairy tale. Neither perspective fully encompasses crucial elements of the American constitutional order.

Proper introductions to a mature American constitutionalism begin by exploring different theories about the nature and purposes of constitutions, with particular emphasis on the nature and purpose of the Constitution of the United States. Students then become acquainted with different approaches for determining the meaning of constitutional provisions, allocating constitutional authority, and bringing about legitimate constitutional change. Educated citizens acquire a global perspective on the American constitutional order by familiarizing themselves with the distinctive constitutional issues raised by foreign

policy, foreign constitutions, and international law. Finally, a basic course in constitutionalism should highlight that constitutions work more by constructing and constituting politics than by compelling government officials to do what they might not want to do. Sparks may fly when teachers and pupils engaging in this course of study explore such questions as:

- What means for interpreting the Constitution and allocating constitutional authority best balance American constitutional commitments to popular sovereignty and fundamental law?
- What forms of constitutional change best secure and preserve essential constitutional purposes?
- Are the powers and limits on American governing officials derived solely from the Constitution of the United States, or are some legal powers and limits essential aspects of sovereignty rooted in international law?
- What sorts of people are presupposed by American constitutional commitments and purposes, and do Americans remain that sort of people?
- Might some other constitutional arrangements better suit contemporary Americans?

Americans whose constitutional education is limited to a series of Supreme Court decisions that focus on only a few constitutional provisions are not trained to ask much less answer these vital constitutional questions.

The study of the American constitutional order should encompass the entirety of American constitutionalism, not just the traces that appear on the pages of the *United States Reports*. Persons who have not thought seriously about the nature and purposes of constitutions, the methods for interpreting constitutional provisions, alternative schemes for allocating constitutional authority, the legitimate means of constitutional change, and how constitutions work cannot have an intelligent opinion on the merits of judicial protection for abortion rights. Citizens are unlikely to have well-informed answers to the constitutional questions raised during the war on terrorism absent some knowledge of the relationship between constitutional and international law as well as the geographic scope of constitutional authority. More important, the obsession with judicial decisions enforcing constitutional limits obscures numerous dimensions of constitutional life. Elected officials and political movements have historically had a far greater influence on official constitutional practices than nine justices sitting in Washington, D.C. The Civil Rights Act of 1964 played as important a role as *Brown v. Board of Education* (1954) securing the equal protection rights of African Americans. Constitutional provisions influence politics even when they are not the subject of political debate. Consider how candidates during presidential elections focus their attention on a few "swing states," often foregoing

appeals to the large number of voters who live in major metropolitan areas. The Constitution of the United States both constrains and constitutes fundamental American commitments, influencing as well as being influenced by the interests Americans pursue and the values they hold. The ways Americans think about policies toward political dissenters and the best method for staffing a national legislature are better understood as consequences of constitutional socialization than as naked preferences that must be disciplined by some external body that rises above the political fray.

A New Introduction to American Constitutionalism offers a historical–institutionalist perspective on American constitutionalism, but hardly *the* historical–institutionalist perspective. Such leading historical–institutionalist scholars as Rogers Smith, Howard Gillman, and Keith Whittington have pointed out for many years how the academic obsession in both law and political science with whether judges are making decisions based on legal or political factors too narrowly understands the judicial function and far too narrowly construes the central problems of a constitutional order.[1] Notions of law and legality influence judicial understandings of good policy, just as conceptions of good policy influence how justices interpreted the law. Moreover, explaining how justices decide cases in the last week of June typically requires some understanding of the dynamics of party competition that determine which justices sit on the bench, the structure of legal thought in a particular era that determines the various concepts justices bring to their work, and the broader constitutional culture that determines what constitutional issues are thought particularly salient at a particular time. This study of partisan dynamics, general currents of jurisprudence, and constitutional culture, in turn, reveals that important developments in American constitutionalism take place either entirely outside of courts or with limited judicial participation. A central theme of this work and of historical–institutionalism in general is to bring these nonjudicial, often nonlegal features of American constitutionalism into clear view, whether they be presidential influence on American constitutional development,[2] the way various racial orders structure the constitutional practice of equal protection,[3] or, as Sandy Levinson insists we consider, the influences of constitutional structures that are never litigated, such as the presidential veto power, on the capacity of the Constitution of the United States to deliver vital constitutional goods.[4]

A New Introduction to American Constitutionalism both is and is more than a general text. In the manner of a traditional text, this book offers a comprehensive introduction to American constitutionalism. Unlike a general text on chemistry or the standard reader on constitutional law, however, my goal is not merely to describe in accessible form matters well-known to experts in the field. Important constitutional questions are too often slighted in constitutional scholarship and

pedagogy. The following pages aim to teach the teachers of American constitutionalism as well as their pupils.

The Vigeland Sculpture Park in Oslo features a Monolith Tower carved out of a single block of granite, which features 121 human beings in a cooperative effort to seek salvation. This book is the product of a similar, if less divine, experience working as a historical–institutionalist on the borders of law, political science, history, and no doubt a few other disciplines. For the past thirty years, I have received nothing but encouragement, boosts, and inspiration from numerous persons whose names can be found in the footnotes that follow but to whom the footnotes do not do true justice. Sandy Levinson, Mark Tushnet, Rogers Smith, Ran Hirschl, and Howard Schweber deserve particular mention for reading various drafts and making very helpful comments.

Members of two other associations also deserve special thanks. The rest are the people at Oxford University Press, most notably David McBride, the editor of this manuscript, Jennifer Carpenter, John Haber, Maegan Sherlock, and Erin Brown, for their commitment to the American constitutionalism project. The others, of course, my wonderful family, who have supported my obsessions throughout the years, Dr. Julia Frank, star of stage and psychiatry, newly minted Dr. Naomi Graber, soon to be Abigail Graber, Esq, Director Rebecca Graber, and my mother, Anita Graber, social worker, professor, Gourmet Cook and everything else.

A New Introduction to American Constitutionalism is dedicated to Howard Gillman and Keith Whittington. As is obvious, this manuscript originally began as part of our American Constitutionalism project. I am grateful to Howard and Keith for letting me hive this off on my own and more important for their incredibly important suggestions and friendship through the years. To truly acknowledge their contribution would require a full book. Instead, I hope the reader recognizes their extraordinary influence (including many language choices) throughout this manuscript as well as the powerful influence of many other historical–institutionalists. I am truly standing on the shoulders of giants, even if I can make no claim to see farther than anyone else.

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Introduction to American Constitutionalism

1. Basic Constitutional Questions

On May 10, 1776, the Second Continental Congress passed a resolution recommending that each colony draft and ratify a state constitution. Citizens were requested to "adopt such government as shall, in the opinions of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."[1] Reaction was overwhelming. Local citizens paraded in joy on the streets of Philadelphia, eager to get on with the work of self-government. John Adams described this call to establish fundamental law as "the most important resolution that was ever taken in America."[2] Within a year, every state but Rhode Island had established a new constitution.

This enthusiasm highlights the fundamental American commitment to constitutionalism. Government in the United States is constitutional government. Written constitutions, citizens of all political persuasions agree, are fundamental law, higher than ordinary law made by legislatures or common law announced by justices. Federal, state, and local authorities exercise power legitimately only when they have constitutional authorization. The power of government officials to perform tasks as diverse as sending troops on a peacekeeping mission to the Middle East and correcting grammar in the second grade of a public school must be derived ultimately from the Constitution of the United States or from the relevant state constitution. Consider a simple traffic stop. A state police officer is constitutionally authorized to pull a motorist over for speeding only if (1) the state constitution empowers the state legislature to set speed limits on state highways, (2) the relevant provisions of the state constitution and state law are consistent with the Constitution of the United States and all constitutionally valid federal laws, (3) the police officer was appointed consistently with the procedures set out in the state constitution or laws passed under the state constitution, and (4) the stop does not violate any federal or state constitutional rights.

This American commitment to constitutionalism extends far beyond traditional governing institutions. Many institutions in civil society, such as the local chess club and the local parent–teacher association (PTA), have a constitution that creates, empowers, and limits the leadership.

This passionate commitment to constitutionalism masks intense disputes over what a commitment to constitutionalism entails. Some controversies are very familiar. Contemporary candidates for the presidency are routinely asked whether they will appoint justices to the bench who are *strict constructionists* or who support *Roe v. Wade* (1973), which held that the Constitution protects abortion rights. When justices declare popular laws unconstitutional, some politicians and political movements cry "judicial imperialism." When justices sustain other controversial laws, as in the recent health-care case,[3] some politicians and political movements accuse them of bowing to political pressure. When elected officials seek to curb the power of courts to declare laws unconstitutional, some politicians and political movements accuse them of undermining an independent judiciary.

Other constitutional controversies lurk just beneath the surface of these common quarrels. Whether justices should be strict constructionists may depend on the extent to which the primary purpose of the Constitution is to secure rule by law or to establish justice. Common references to *the living Constitution* raise questions about the legitimate forms of constitutional change in the United States. Frequent assertions that constitutional rules and decision-making should be above politics require some understanding of the proper relationship between constitutional law and politics. Justice Robert Jackson, when declaring mandatory flag salutes unconstitutional, famously asserted:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[4]

Jackson was able to utter these inspiring words only because he was nominated to the Supreme Court by Franklin Roosevelt, who had been elected to the presidency, and confirmed by senators, all of whom had also won elections. Had different officials won elections, the Supreme Court might have sustained mandatory flag salutes in public schools. The flag salute cases and other episodes in American constitutional development suggest that we ought to think about what constitutes good or legitimate constitutional politics rather than about the distinction between law and politics.

What constitutes good or legitimate constitutional politics depends on the best answers to questions about what citizens hope to accomplish by constitution writing and constitutional government. Americans venerate constitutionalism but are consistently reminded that good constitutional law is not necessarily identical to good public policy. Justice Felix Frankfurter's dissent in the flag salute cases famously insisted that the "great enemy of liberalism" is making "constitutionality synonymous with wisdom."[5] Professor Laurence Tribe of Harvard Law School writes, "If the Constitution is law, and if we are trying to interpret that law, then the claim that a particular government practice . . . is efficacious, is consistent with democratic theory, and is in some popular sense 'legitimate' just doesn't cut much ice."[6] These conventional assertions that constitutionalism may sometimes entail support for stupid, undemocratic, illegitimate, and unjust policies raise normative and practical questions. The normative question is why political leaders should do what they believe is constitutional when they believe an alternative policy is superior. If effective gun control will save many lives, what reason is there for worrying about whether such policies are inconsistent with the right to bear arms protected by the Second Amendment? The practical question is why political leaders will do what they believe is constitutional when they believe an alternative policy is superior or more popular with most voters. If constitutional decision-makers or popular majorities are convinced that women have a constitutional right to a legal abortion or that the president has the power to send troops into combat without a Congressional declaration of war, why should anyone expect that they will worry very much about what a document ratified in the late eighteenth century prescribes?

A New Introduction to American Constitutionalism introduces readers to the basic questions of constitutional government. Constitutionalism is more than the study of constitutional law or constitutional interpretation. Students, teachers, citizens, and even legal practitioners must consider a broader range of questions when thinking about the actual and desirable impact of constitutionalism in the United States:

- What is a constitution?
- What purposes do constitutions serve?
- How should constitutions be interpreted?
- How should constitutional disputes be resolved?
- How are constitutions, ratified, changed, and repudiated?
- What are the universal and distinctive features of a constitution?
- How do constitutions work?
- What is the relationship between constitutional decision-making and ordinary politics?

The next eight chapters survey possible answers to each constitutional question.

An introduction to constitutionalism throughout the world would include a chapter on constitutional design. Political actors in emerging constitutional democracies are actively debating such issues as the relative merits of presidential and parliamentary governments, the best constitutional means for achieving their regime's distinctive constitutional purposes, and what governing institutions are necessary to prevent civil war from breaking out between the particular political factions of that society. The study of American constitutionalism, by comparison, focuses on the merits and consequences of constitutional design questions answered in the past. Constitutionalists in the United States rarely consider the merits of parliamentary government, ponder what constitutional arrangements will best promote Islamic teachings, or worry about the constitutional institutions necessary to prevent violence between different religious sects. Rather than debate the merits of having a life-tenured judiciary interpret the Constitution, Americans dispute how the life-tenured judiciary mandated by Article III should interpret the Constitution. Legitimate questions exist about whether the Constitution of the United States is well designed in light of either the goals that motivated the framers in the eighteenth century or the aspirations Americans deem worthy at the turn of the twenty-first century.[7] Some questions of constitutional design, as well as the possibility that Americans should adopt a new Constitution, are discussed in the chapters on constitutional purposes and constitutional change. Nevertheless, the study of American constitutionalism remains appropriately focused on the study of the Constitution of the United States as ratified in 1789 and subsequently amended.

2. Identifying Basic Constitutional Questions

Many commentators think *McCulloch v. Maryland*[8] is the most important constitutional decision in American history. The case arose when James McCulloch, an employee of the Bank of the United States, refused to pay a state tax on all bank notes issued by banks not incorporated by the Maryland legislature. McCulloch claimed that Maryland had no power to tax an institution incorporated by Congress. Lawyers for Maryland insisted that the Constitution did not permit Congress to incorporate a national bank. The Supreme Court unanimously ruled in favor of McCulloch on both issues. The justices decided that the national government had the constitutional power to incorporate a national bank and that the Constitution forbade state governments from taxing any federal agency or instrument of the federal government. Chief Justice John Marshall's unanimous opinion is frequently thought to have established the principle that the constitutional powers of the federal government should be broadly construed and

that states may not interfere in any way with the exercise of legitimate national powers. As important for our purposes, the *McCulloch* opinion identified and provided some possible answers to the fundamental questions of American constitutionalism.

2.1 Constitutional Interpretation

John Marshall began his opinion in *McCulloch* by introducing traditional questions of constitutional interpretation. "The constitution of our country," he wrote, "in its most interesting and vital parts, is to be considered, the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed."[9] Much of Marshall's opinion interpreted the provisions in Article I, Section 8, which enumerate the powers of Congress. Interpretation was necessary because, as Marshall admitted, the Constitution does not explicitly empower Congress to incorporate a national bank. One crucial interpretive question was whether the constitutional provision that authorized Congress "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" expanded or restricted the powers of the national government. The disputants in *McCulloch* also contested the correct interpretation of the provision in Article VI, asserting, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the Supreme Law of the Land." Marshall insisted that this clause was best interpreted as forbidding states from taxing the national bank or any other national institution. The lawyers for Maryland insisted that neither Article VI nor any other constitutional provision should be interpreted as withdrawing from state legislatures their longstanding power to tax all corporations that did business in the state.

2.2 The Nature of the Constitution

When considering how to interpret the "necessary and proper" clause and other constitutional provisions, Marshall stated, "We must never forget, that it is *a constitution* we are expounding."[10] The rules for interpreting a constitution, this passage maintains, are different from the rules for interpreting other texts. *McCulloch* emphasized that a constitution is not a legal code. How the words *necessary and proper* are interpreted depends on whether they are found in a constitution, a legal code, a novel, or a love letter. "It is necessary and proper that we marry" in a romance novel may have a different meaning from the same phrase in Article I, Section 8.

McCulloch interpreted the Constitution in light of Marshall's belief that constitutions are fundamental law. His opinion insisted that persons interpreting the fundamental law of a nation should not expect the minute details they would find in

an ordinary law regulating the sale of chickens. From this understanding of constitutionalism, Marshall deduced the claim that specific constitutional powers, such as the power to incorporate a national bank, need not be explicitly enumerated. "Its nature," he declared, "requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[11] Another justice might have deduced a different conclusion in *McCulloch* from a different understanding of constitutionalism. If constitutions by nature seek to limit government, then perhaps all government powers should be interpreted narrowly.

2.3 Universal and Distinctive Constitutional Norms

Marshall's claim that "we must never forget, that it is *a constitution* we are expounding" suggests that the Constitution of the United States has certain universal features. All constitutions, his *McCulloch* opinion declared, are "intended to endure for ages to come" and, for that reason, cannot be interpreted as legal codes.[12] The second most famous quotation from *McCulloch,* "the power to tax involves the power to destroy,"[13] invokes a second universal norm. Any institution with the power to tax an enterprise, Marshall maintained, controls the fate of that enterprise. This truth transcends the American constitutional regime. Governments in England, India, or China with the power to tax also have the power to destroy.

Marshall derived other conclusions in *McCulloch* from distinctive features of the American constitutional regime. His justification for national supremacy relied on the particular processes by which the Constitution of the United States was ratified. Marshall wrote:

> The convention which framed the Constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation or pretensions to it. It was reported to the then existing Congress of the United States with a request that it might be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification. This mode of proceeding was adopted, and by the convention, by Congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject—by assembling in convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they