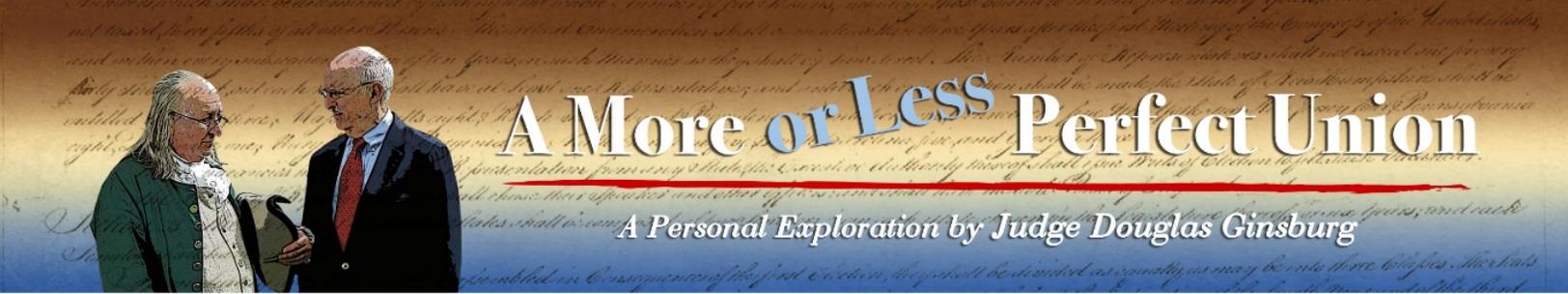




## Discussion Questions

### A Written Constitution, Episode 1

1. Professor Jonathan Turley and Professor Joseph Ellis said of the founding era (4:13): “Most people didn’t think of themselves as American; asked ‘who are you?’ They’d respond, ‘I’m Georgian’ or ‘Virginian.’”
  - a. Do people in your state still identify this way? Is this a good thing or a bad thing?
  - b. How does it show the changing nature of federalism?
2. Professor Randy Barnett says (9:49): “A constitution is important because it provides the law that governs those who govern us,” and Judge Ginsburg adds (9:54): “The Constitution doesn’t govern us, it protects us against the government overstepping its bounds.” Thus, the Constitution is like a fence around the federal government, constraining their powers except in enumerated exceptions.
  - a. Do you think the federal government today feels constrained by the Constitution?
  - b. Do you think the federal government exercises *only* their enumerated powers?
3. James Madison, the principal architect of the Constitution, wrote to Thomas Jefferson in Paris, begging for books on political theory. Madison focused on books on the topic of *causes of republics failing*. Madison wanted to build in the fairness of a democracy and the stability of a monarchy.
  - a. Madison’s approach was to use history as a guide to what has worked in the past in governments. Do you think this approach still holds in a modern society, or should we be more imaginative, trying things that



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- may not have worked well in the past but perhaps could? Justify your position.
- b. From your knowledge of history and human nature, what would you say are some of the causes of societies unraveling?
4. Historian Niya Bates argued Jefferson's view that (19:20) "Slavery is like having a wolf by the ears, where you see the danger of either holding or letting him go." Randy Barnett says (19:55), "The consensus among the founders was that slavery was a) wrong, but b) going to die out."
    - a. Do you think it was realistic for them to believe that slavery was going to die out, or do you think that (of those who were slaveholders) they were preserving the system for self-benefit?
    - b. What historical evidence is there for either viewpoint?
  5. Democracy, simply defined, is majority rules. Republics were designed to prevent oppression of a minority by a majority, and the smallest minority is the individual person. Thus, individual rights must be protected. Professor Michael Greve asks (22:48)." "What were they afraid of? The accumulation of powers in one hand. And one hand could be a singular dictator. It could be a very, very powerful majority that tramples on people's rights."
    - a. What are some historical examples of groups in the United States trampling on other people's individual rights?
  6. Clark Neily (27:57) says, "Governments either acknowledge those rights or they fail to acknowledge those rights, but they *never*, never confer rights."
    - a. Neily makes the point that our rights are natural rights, coming from God or nature. What would you argue are natural rights?
  7. George Washington stepped down from the presidency, one of the few in human history to voluntarily give up power. King George said: "If he would do that, he would be the greatest man of the age." (42:35)



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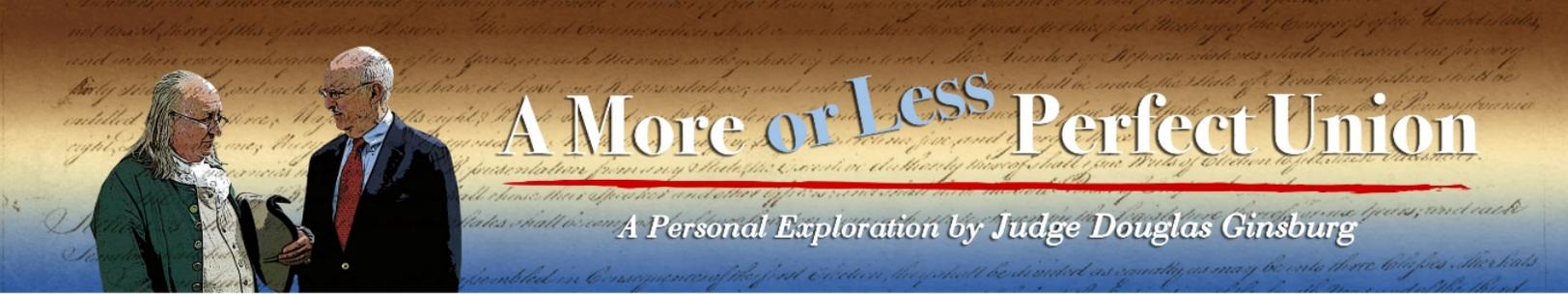
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- a. How did this set the model for the American presidency?
  - b. Do you think the model is honored today? Why or why not?
8. Professor David Strauss (51:55) says, “The problem is that the Article V amendment process is extremely difficult, it’s very, very hard.”
- a. Why did the founders make the amendment process so difficult? (Hint: 10<sup>th</sup> Amendment)

## A Constitution for All -- Ep. 2

1. Professor Strossen (4:38) says, “We do not have a pure democracy where the majority always controls – deliberately. And that’s why the Bill of Rights was added to make expressly clear that some rights are so fundamental that no majority no matter how large may take them away from any minority or individual no matter how despised that person or group is.”
  - a. Do you think most Americans agree with that view, or do you think they believe the majority should decide things?
  
2. In his *Letters from the English Nation*, (6:49) Voltaire wrote: “If there were one religion in England there would be tyranny; if there were two, they would cut each other’s throats, but there are thirty so they live happily and in peace.”
  - a. Why does such diversity lead to peace?
  - b. What are examples of diversity in the U.S. today that may help stabilize peace?
  
3. Jonathan Rauch states in regards to hate speech being included in free speech (8:45) “This is the single most counter-intuitive idea in human history: the idea that its good for us as a society and good for us as individuals to encounter offensive speech and hate speech. That idea has always been under siege and always will be.”





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- a. Do you think free speech should protect hateful or irritating speech? Why or why not? Give any examples.
  - b. Who should decide what speech is allowable?
4. Professor David Strauss (17:09), in regards to the 2<sup>nd</sup> Amendment and the right to bear arms, says: “Maybe they did mean that individuals should be able to keep firearms. But they meant that for an agrarian society in which firearms were barrel-loaded muskets and were made by artisans....”
- a. Another interpretation is that they meant there was a right to bear weapons common of the day, which would change over time. Which interpretation do you find more convincing and why?
5. In the 2008 Supreme Court case *District of Columbia v. Heller* (18:10), all Justices agreed to the individual’s right to bear arms, but also that the right was subject to reasonable regulation.
- a. What do you think are “reasonable” regulations to this right?
6. The 26<sup>th</sup> Amendment made it legal for 18-year olds to vote in all states. This was done because soldiers could be drafted for war, but could not vote. There has recently been some talk about changing the voting age to 16.
- a. Do you agree or disagree with lowering the age?
  - b. If it weren’t for the draft, do you think 18 is the right age, i.e. should it be raised?
7. In 1857, Wisconsin was ‘free soil.’ Dred & Harriet Scott were free, living there for several years. The Supreme Court ruled 7-2 against Scott, inventing a constitutional right to own slaves. Judge Kavanaugh argues that this is a classic example of judges not adhering to the text of the Constitution.
- a. How does this case emphasize the importance of judges not “legislating from the bench,” i.e., creating a law, which is the role of Congress, rather than interpreting a law?



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- b. Can you think of other examples in which judges have legislated from the bench?
8. Black codes (51:21) effectively nullified the power of post-Civil War Reconstruction Amendments. These codes undermined equal status and attempted to effectively reinstitute slavery. One common law was disarming black men, which endangered lives and made blacks susceptible to vigilante groups.
    - a. How would the 2<sup>nd</sup> Amendment’s right to bear arms have changed things for black Americans in the Reconstruction South?

## Our Constitution at Risk, Episode 3

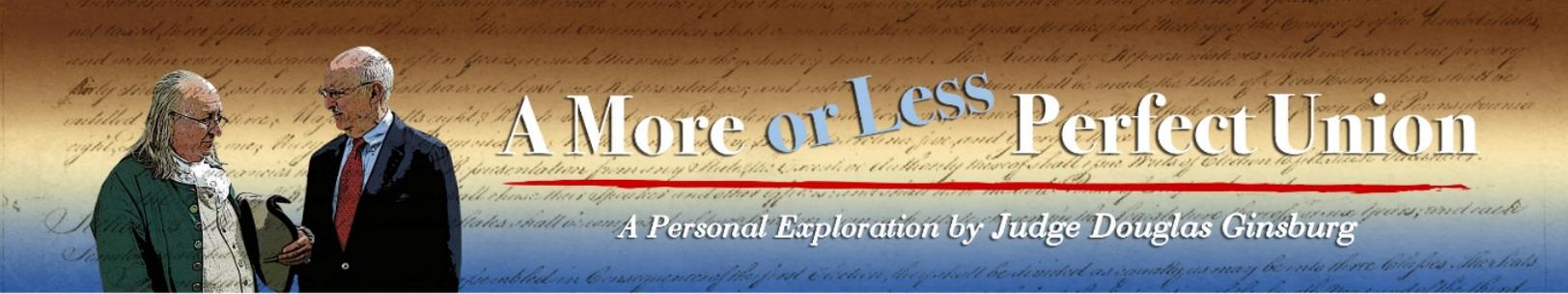
1. Judge Ginsburg (1:45) says, “the real threat to liberty isn’t some dictator taking over the country in the middle of the night like some Hollywood fantasy, it’s ‘We the People’ ceding our rights to the government so gradually we don’t even know it’s happening.”
  - a. Do you agree or disagree with Judge Ginsburg? Explain your reasoning.
  - b. Can you think of liberties that citizens once had that have been ceded to the government? Stated differently, can you think of things citizens used to be able to do without permission, but now require permission from government or can no longer be performed by private citizens?
2. The Espionage Act (4:40), passed in 1917, made it a crime to interfere with military recruiting for armed forces. This was ruled to be a 1<sup>st</sup> Amendment violation.
  - a. Do citizens have a right to protest government?
3. The Sedition Act (4:50), passed in 1918, made it illegal to say anything “disloyal, profane, scurrilous or abusive” about the government.



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- a. Should governments be given extra powers during wartime, or should your right to free speech hold up even then?
  - b. Have you ever uttered something about the government – even in jest – that could be considered “disloyal, profane, scurrilous or abusive”? What’s an example?
4. Eugene Debs was given 10 years in prison for comparing the draft to slavery.
- a. Should free speech be protected, even if it is unpopular?
  - b. Do you think comparing the draft to slavery is a fair comparison? Why or why not?
5. The Separate Car Act in New Orleans (1890) required separate train cars for blacks and whites. In a planned act of civil disobedience, Homer Plessy refused to move to a separate car and was arrested, ultimately resulting in the Supreme Court case *Plessy v. Ferguson* (1896). The Supreme Court all but ignored the 14<sup>th</sup> Amendment, arguing that laws must reflect the customs and traditions of society: “it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality.”
- a. Do you think that the 14<sup>th</sup> Amendment reflected the customs of society since it met the very high hurdle of becoming an amendment?
  - b. Do you think this is another example of judges legislating from the bench? Why or why not?
6. Lawyer Thurgood Marshall argued the 1954 Supreme Court case *Brown v. Board*, which challenged the “separate but equal” doctrine that *Plessy v. Ferguson* had established. Laws can change with the whims of the people, but the Constitution does not change when mores and customs change” (16:08). In *Plessy*, the Court followed whims; in *Brown*, the Constitution.



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- a. Can you think of any laws that seem to violate the rights of people because they are instead following mores and customs of a dominant group in that community?
7. Affirmative Action (18:00) attempts to redress past patterns of discrimination in hiring.
    - a. Do you think it is still necessary? Why or why not?
    - b. Supreme Court Justice Sandra Day O'Connor wrote in a 2003 case that "we expect that 25 years from now the use of racial preferences will no longer be necessary." Do you agree with her assessment that by 2028, it will no longer be necessary? Explain your position.
  8. The doctrine of eminent domain (28:49) allows private property to be taken for public *use* with *just* compensation. Public use traditionally has meant land for highways and other commonly used things. In the 2005 Supreme Court Case *Kelo v. New London*, the Court ruled that land could be taken for public *purpose*. This means that if a corporation was going to bring in more tax dollars to a city than a few dozen homeowners were, the government had the power to seize the properties and compensate the homeowners through eminent domain.
    - a. Do you agree with this new interpretation of eminent domain, or do you think that it should remain allowable only when the property seized is for public use?