We the People

The Constitution
Nobody Knows

As interpreted by the Supreme Court of the United States

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Despite the hoopla surrounding the bicentennial of the writing of the United States Constitution, Americans are woefully ignorant of the nation's fundamental law. A recent survey commissioned by the Hearst Corporation revealed these facts about public understanding of the Constitution:

- Only 54 percent know that the purpose of the document was to create federal government and define its powers;
- Twenty-six percent believe the Constitution's purpose was to declare independence from England;
- Only 41 percent know that the Bill of Rights is the first 10 amendments;
- Sixty-four percent of the public wrongly believes that English is established as the national language;
- A stunning 45 percent of the American people think that the phrase, "from each according to his ability, to each according to his need" is found in the Constitution. The statement is, of course, a tenet of Marxist-Leninist philosophy.

A higher percentage of the people seems to understand at least one of the processes by which the Constitution can be amended. Some three-quarters of the survey respondents knew that the Constitution can be altered by a two-thirds vote of both houses of Congress, provided that three-quarters of the states approve.

But that statistic tells nothing of the fascinating process by which American people — through their elected and unelected government — have altered (some say tinkered with) the shape of our most basic law. School children may be able to recite the nature and purpose of some of the formal amendments, such as the one which freed the slaves, or extended the vote to women or established a national voting age of 18 years. And a number of Americans recall not only the process by which the 25th Amendment — dealing with succession in the office of President — was carried out in the aftermath of the assassina-

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The power of the courts to void acts of the coordinate branches of government and of the states and their subdivisions has generated raging debate throughout the nation's history. In one famous encounter between two titans,
President Andrew Jackson and Chief Justice Marshall, the President is reported to have said: "Mr. Marshall has made his decision; now let him enforce it."

Judicial review or a product of it has been implicated in the greatest controversies confronting the land. It was the Supreme Court's decision in the infamous Dred Scott against Sanford case in 1857 which was one of the causes of the Civil War. The eminent legal scholar Laurence Tribe of Harvard has written of that decision, "Heedless of the Constitution's tacitual silence, and evidently unpersuaded by the Bill of Rights' implicit distinction," the highest court in the land ruled that citizenship "could not extend to a freed slave."

Since that time, the Supreme Court has struck down as unconstitutional compulsory prayers in public schools, the use of physical evidence and confessions obtained in violation of the Fourth, Fifth, and Sixth Amendments, and state limitations on the right of a woman to obtain an abortion where no compelling state interest exists to prevent that procedure.

The doctrine of judicial review appears nowhere in the original Constitution. No constitutional amendment has ever been submitted to the states or passed upon by Congress authorizing the courts to strike down Acts of Congress or ordinances of the city council. Yet, the doctrine has become nothing less than the soul of the living Constitution, as essential to its vitality as the flesh and bones, that is, the structure of the government, and the heart, that is, the ever vibrant Bill of Rights.

Judicial review linked as it is with the notion that the courts — and ultimately the Supreme Court — are the final arbiters of the Constitution, binds this nation to the rule of law. It wards off temporary hysteria and partisan zeal. It places a brake on majoritarianism, no matter how wise or seemingly necessary.

In the early days of the New Deal, President Franklin D. Roosevelt's economic legislation faced an intractable Supreme Court which viewed the so-called "social engineering" as violative of due process of law. A man, the Court reasoned in case after case, has an inalienable right to economic freedom, unfettered by government interference. Roosevelt's angry reaction was his proposal to "pack the court," an act which would have added several new justices to the tribunal, thus tipping the balance in favor of his economic agenda.

The plan was defeated but the Supreme Court formulated a new method for judging economic legislation and the power of Congress over commercial matters, thus averting a constitutional gridlock. At the same time, it began to shape a set of rules under which some government assaults on individual rights would be subjected to the strictest scrutiny. As a consequence, freedom of expression and religion, individual equality and fairness of trials were to be raised to new heights of constitutional protection, perhaps far beyond that contemplated by the framers.

During the otherwise tranquil Eisenhower years, the constitutional revolution flourished, not because of formal amendment but through judicial activism.

To fill the vacancy left by the death of Chief Justice Fred Vinson, President Eisenhower named the governor of California, Earl Warren, the man who had shared the Republican ticket with Thomas E. Dewey in 1948. Warren, a tough prosecutor for two dozen years...
nation in *Cooper vs. Aaron* in 1958, "*Marbury vs. Madison* declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

That the Court has come to breathe life into the skeleton of individual rights should come as no surprise, then. If the First Amendment states, "Congress shall make no law respecting an establishment of religion..." who shall say what "establishment" or what "religion" means?

If the 14th Amendment, coming as it did on the heels of the Civil War, guaranteed "due process" of law to persons subject to the jurisdiction of the states, is it wholly illogical for a Supreme Court to evaluate whether lynching or trial without the assistance of a defense lawyer or a jury from which blacks or women have been systematically excluded is a denial of that right?

Some have feared and some have hoped that the Supreme Court under Chief Justice William Rehnquist would complete the process begun during the tenure of Warren Burger beginning in 1969 and return to "strict constructionism," and "original intent of the framers" in interpreting the Constitution. Yet, one school of thought has urged a return to judicial activism in economic matters, proposing a resurrection of substantive due process which marked the half century before the second New Deal. This school, ironically enough, is composed of some of the most conservative legal scholars at places like the University of Chicago and the Federalist Society of Washington!

Strict construction is often in the eyes of the beholder. Chief Justice Rehnquist, as an associate justice, never hesitated to fashion creative opinions with little basis in precedent or history. On the other hand, the Warren court was often accused of going too far, particularly in its decisions about the admissibility of confessions or physical evidence. Some of
the sharpest criticism has been reserved for the Burger court and particularity a Nixon appointee, Justice Harry Blackmun, the author of Roe vs. Wade, the abortion-rights decision. Critics claim that the Constitution never mentions a right to privacy. Therefore, they argue, any protection of such a “right” is misplaced.

No one should be surprised, however, that some of these critics join those who would like to see economic due process restored to constitutional dignity, even though there is no mention of that doctrine in the basic law, either!

The Supreme Court has been at the root of some of the most significant constitutional changes this nation has seen since the small group of intrepid dreamers met during that summer of 1787. Constitutional development is not the product of any single cast of actors, however. Courts do not hear cases unless real parties claim rights and privileges under law.

A large array of tribunals from the most humble justice of the peace court to the state appellate bodies to the federal district and circuit courts is constantly hearing and deciding constitutional claims. They mold the body of American law, allowing monumental matters to percolate up to the highest court in the land.

At the Supreme Court, the unwritten constitutional amendment process takes place in the cool, elegant halls of that magnificent structure overlooking our nation’s capital. There, the nine justices give shape and life to the Constitution, fulfilling the dream of a nation under law shared by the band of delegates gathered in Philadelphia 200 years ago.

Creighton University is producing a one-man play and videotape as part of the observance of the 200th anniversary of the signing of the U.S. Constitution. The play, titled “A More Perfect Union,” features Omaha actor Stephen Tipton, winner of the 1986 Omaha Metropolitan Actors Guild Best Actor Award, playing James Madison. The script, written by Creighton Media Relations Director Stephen Kline, was researched by Creighton history faculty members Bryan Le Beau, PhD, and Warren Kneer, PhD.

“A More Perfect Union” is based on the extensive notes made by Madison at the time of the drafting of the Constitution. His journals have been acclaimed as the most detailed account of the events and flavor of the days during which the document was written.

Creighton is making the hour-long videotape of the play available to educational institutions at a discount until Aug. 1. Until that time, the tape will cost $24.95, no matter what format (VHS or Beta ID) is chosen; after then, the cost will be $29.95. The tape can be ordered by sending checks to “A More Perfect Union,” Public Relations, Creighton University, California Street at 24th, Omaha, Neb. 68178. The videotape format must be specified. Checks should be made payable to Creighton University.

Creighton has already received hundreds of orders for the videotape from high schools across the nation.

The detailed notes of Madison, the fourth president of the United States, were not published until 1840, four years after his death.

In addition to the Madison journals, Drs. Le Beau and Kneer researched other documents pertaining to the constitutional convention and the biographies of the major delegates.

The play is set between May and September 1787 in Philadelphia, site of the convention. Madison, a delegate to the convention from Virginia, is credited with helping to steer the framers away from simply amending the Articles of Confederation (which was their charge) toward establishing the new and stronger three-branch national government that eventually was adopted.